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HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS AND COMPETITION POLICY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

SEPTEMBER 29, 2010

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COURTROOM USE: ACCESS TO JUSTICE, EFFECTIVE JUDICIAL ADMINISTRATION, AND COURTROOM SECURITY

WEDNESDAY, SEPTEMBER 29, 2010

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS AND
COMPETITION POLICY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 4:11 p.m., in room 2141, Rayburn House Office Building, the Honorable Henry C. "Hank" Johnson, Jr. (Chairman of the Subcommittee) presiding.

Present: Representatives Johnson, Gonzalez, Coble and Goodlatte.

Staff present: (Majority) Christal Sheppard, Subcommittee Chief Counsel; Elizabeth Stein, Counsel; Rosalind Jackson, Professional Staff Member; (Minority) Blaine Merritt, Counsel; and John Mautz, Counsel.

Mr. JOHNSON. This hearing will now come to order. Without objection, the Chair is authorized to declare a recess of the hearing.

In the—the integrity of our judicial system relies on the promise of access to justice for all Americans. A central tenet of that promise is that the public must have trust that whatever they need or whenever they need access to the judiciary, it will be available.

A recent GAO report—and I apologize for the disturbance behind me. I am a soft talker, and—yes, I got some competition. [Laughter.]

We are now—we have got the proceedings going on in the House, which, of course, are very important, but we have got some important concerns today about justice. There we go. Somebody took me off the air. I guess you get what you ask for.

All right. The integrity of our judicial system relies on the promise of access to justice for all Americans. A central tenet of that promise is that the public must have trust that whenever they need access to the judiciary, it will be available.

A recent GAO report on courthouse space found over 3.56 million square feet of excess space in recent courthouse construction, which has led some to conclude that less funding should be allocated to courthouses. Others have argued that the GAO methodology and resulting recommendations are seriously flawed.

However, today's hearing is not about the GAO report itself, a matter that I have discussed at length in other forums. Instead,

this hearing is about the threat to access to justice and the risk that the report will be used as justification to cut funding for critical pending courthouse construction, limit security for our judiciary, litigants, and the visiting public, or mandate courtroom sharing without consideration of the factors that go into how courthouses are used to deliver justice.

Access to justice is an issue that has concerned me for many years, through bills that I have introduced, including the Arbitration Fairness Act, and bills I have co-sponsored, such as the Open Access to Courts Act. I have consistently worked to open the courthouse doors. Congress—or to keep those doors open.

Congress has a vital role to play in the process, and I look forward to working with all the Members of this Committee to address increasing access to our courts. The GAO report findings and the resulting calls to cut courthouse funding based on the report threaten the very nature of our constitutionally created three coequal branches of government.

I emphasize that the three branches are intended to be coequal separate branches. This balance of power is disrupted when the legislative branch intrudes on how the judicial branch conducts its business, such as by dictating how much courtroom sharing there should be or how to calculate the number of judges needed to meet caseload demands.

My concern on this matter is well established. Yesterday, I sent a letter to President Obama asking him to continue funding courthouse construction projects without regard to the flawed GAO report findings. I am entering a copy of this letter into the record. I urge the Judiciary Committee to also strongly weigh in at this juncture.

[The information referred to follows:]

LETTER TO THE HONORABLE BARACK OBAMA, PRESIDENT OF THE UNITED STATES OF AMERICA, FROM THE HONORABLE HENRY C. "HANK" JOHNSON, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA, AND CHAIRMAN, SUBCOMMITTEE ON COURTS AND COMPETITION POLICY

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ONE HUNDRED ELEVENTH CONGRESS

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September 28, 2010

The Honorable Barack Obama
President of the United States of America
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear Mr. President:

I am writing in regard to the federal courthouse construction projects in the President's FY 2012 budget request to Congress. I am very concerned by a recent request by Representative Eleanor Holmes Norton and Mario Diaz-Balart that no new federal courthouse construction projects be included in the President's FY 2012 budget request to Congress. The Judiciary's workload and staff have increased substantially since the 1970s and 1980s, and federal courthouses that were built decades earlier have become functionally obsolete and in desperate need of replacement, expansion, and renovation. Although there have been programs set up to address those needs by building new courthouses and renovating old ones, many courthouses still have problems that remain unaddressed.

The Government Accountability Office (GAO) recently submitted a report entitled "Federal Courthouse Construction: Preliminary Results Show Better Planning, Oversight, and Courtroom Sharing Could Help Control Future Costs" as testimony to a Judiciary Courts and Competition Subcommittee hearing held on May 24, 2010. According to the GAO report, courthouse construction projects have resulted in many courthouses being overbuilt. However, the GAO report is seriously flawed.

I emphasize that the GAO report is flawed because it incorrectly calculates gross square footage in courthouses to include space that is actually open air space in multi-story atriums and double-height courtrooms. Inclusion of this square footage results in an overly high calculation of the costs of building, maintaining, and renting the courthouse.

Furthermore, although the GAO report raises concerns that construction costs have exceeded approved amounts, the increased costs can be attributed to heightened security (in response to increased terrorist attacks), inflation of construction costs, size limitations, constructing connections for annexes, and new requirements in design standards.

Sufficient and appropriate space is fundamental to the effective delivery of justice, a matter which is within the jurisdiction of the House Judiciary Committee, Subcommittee on Courts and Competition Policy, which I chair. The Judicial Conference of the United States and the House and Senate Judiciary Committees, tasked with oversight of court matters, are the appropriate bodies for determining the Judiciary's needs in terms of space allotment and coordination of courtroom space.

The Judicial Conference has already taken a number of steps to reduce costs such as imposing nationwide and circuit rent caps and encouraging courtroom sharing among judges. The GAO report does encourage courtroom sharing between judges as a method of saving space and money. However, while courtroom sharing is a plan that I generally embrace, I believe that the General Services Administration (GSA) and the GAO lack a comprehensive understanding of how the courts operate. Courtrooms must always be available to ensure efficient access to justice and keep costs to litigants down. While efficiency is important, justice is paramount and must not be subjugated to short-term, short sighted reform.

Additionally, I am concerned that the Judiciary must go through the GSA for matters related to courthouse construction. This runs contrary to our Constitution and infringes on the Judiciary's independence. I believe that the determination of how much space is needed and how courthouse space should be administered should not be left to the GSA. The GSA and Judiciary plan federal courthouses, and, for construction projects, the GSA usually submits the project plans for congressional authorization. During the last five years, only an average of 6.6% of the funds requested for GSA each year were for courthouses despite the reality that courts with projects on the Judiciary's five-year plan have been waiting for more than ten years for their funding.

Finally, I want to assure the White House that the Judiciary Committee recognizes the need for judgeships to be filled. Our last Comprehensive Judgeship bill was requested and approved in 1990, and I introduced H.R. 3662 in this Congress to create the additional judgeships required by the Judicial Branch.

The Honorable Barack Obama
September 28, 2010
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I will continue to work towards enactment of legislation to ensure that the Judiciary has the resources it needs.

I thank you for your attention to this matter.

Sincerely,

Henry C. "Hank" Johnson, Jr.
Chairman
Subcommittee on Courts and Competition Policy

cc: The Honorable Howard Coble, Ranking Member, Subcommittee on Courts and Competition Policy
The Honorable John G. Roberts, Chief Justice, U.S. Supreme Court
Mr. Jim Duff, Director, Administrative Office, U.S. Courts

While the GAO report applies a strict formulaic calculation to courthouse space, the Judicial Conference and Members of this Committee know that the use of courthouses is not merely about numbers. As a former magistrate judge, I am very cognizant of the many other factors that go into how courthouse space functions, including the security needs and impact on the delivery of justice that no numeric calculation can adequately capture.

In light of the concerns raised by the GAO report that I have just detailed, I want to announce today that I am planning to visit several courthouses next month in order to access or assess for myself the state of courthouses that the judiciary believes to be in desperate need of funding, as well as a courthouse that has been recently built according to the judiciary's stated needs.

I understand that Representative Eleanor Holmes Norton is very interested in courthouse funding, as well, and plan to work closely with her on this issue. I invite Representative Eleanor Holmes Norton and my colleagues on this Subcommittee and the Transportation and Infrastructure Subcommittee on Economic Development, Public Buildings, and Emergency Management to join me in this trip so we can fully appreciate and have a fruitful discussion on the needs of the judiciary, as well as why I believe the Judicial Conference so badly needs funding for continued courthouse construction.

I now recognize my colleague, Mr. Coble, the distinguished Ranking Member of this Subcommittee, for his opening remarks. Thank you.

Mr. COBLE. Thank you, Mr. Chairman. Appreciate you calling this hearing today. Good to have our colleague from Tennessee with us, as well.

During my inaugural run for Congress, Mr. Chairman, I held a press conference to announce my intentions. A reporter in attendance asked why I was doing this. It was a straightforward question, so I chose a straightforward answer. I said I wanted to bring a sharp pencil to the Congress. And what I meant was, I intended to pursue a policy, agenda premised on less spending and lower taxes.

Like it or not, that is still my philosophy. Some times it has worked out as intended; some times it did not.

But today's hearing, Mr. Chairman, compels us to examine the role of government in our lives and how much we are willing to pay for the services it provides. Our focus is on the judiciary, a critical component of our government. Without the rule of law and an independent judiciary to administer it, the biggest and meanest just get their way, but that is not the American way.

Because we are a civil society that values settling differences peaceably, providing adequate resources for the Federal courts should represent a policy priority for Congress and the American people, as well. But no one, Mr. Chairman, gets the proverbial blank check, and this is where we may need to break out the sharp pencils.

The Government Accountability Office released a study about 4 months ago that suggests that our national courthouse construction program is fraught with waste. GAO alleges that the General Services Administration has not exercised appropriate oversight in administering the program for much of the past 10 years.

GAO furthermore believes the Federal judiciary has contributed to these problems in two key respects: first, by not maintaining case law—caseload protection records, records that help in measuring future workloads, and the need for new judges; and, second, by failing to adopt more expansive courtroom sharing policies.

The results, if accurate, are alarmingly stark. GAO asserts that we have overbuilt Federal courthouses by more than 3 million square feet. This equates to $835 million in unnecessary space, with an additional cost of 51 million to rent, operate and maintain the space.

The GAO study has generated buzz, to put it mildly, but its methodologies and findings have been questioned by others, including some of the witnesses who will testify today.

To illustrate, the administrative office of the U.S. courts correctly notes, in my opinion, that is difficult to predict the judiciary's courthouse needs when the size of the judiciary is a function of congressional action or inaction. How accurate can such predictions be if Congress creates new judgeships piecemeal as it has for the past, I would say, 2 decades?

I am especially taken with the judiciary's robust defense of its role in our civic life. They emphasize that it is inappropriate for GAO to judge them by applying new standards, such as courthouse-sharing strategies after the fact. The judiciary also maintained that the whole point of our courts is to dispense justice as expeditiously and as fairly as possible. How does a one-size-fits-all courtroom-sharing plan further justice? How does it promote the quick resolution of legal disputes? Are the Federal judicial events knowable and, therefore, predictable or not?

So, Mr. Chairman, before we break out the sharp pencils, we need to delve into the facts and answer these and other questions. I don't want to promote the wasteful spending of tax revenue, but neither do I want to embrace a pennywise and pound-foolish approach to providing our Federal courts with the resources they need to do their respective jobs.

I look forward to participating in today's hearing, Mr. Chairman, and I thank you, and I thank the witnesses for their attendance, and yield back.

Mr. JOHNSON. I thank the gentleman for his statement.

Without objection, other Members' opening statements will be included in the record. I am now pleased to introduce the first panel witness for today's hearing.

Our first panel will be Representative Jim Cooper. Representative Cooper has represented Tennessee's Fifth Congressional District since 2003 and is chair of the Congressional Courthouse Coalition Caucus of which, in full disclosure, I am a member.

Representative Cooper sits on the Armed Services Committee and the Committee on Oversight and Government Reform. He is also an adjunct professor at the Owen School of Management at Vanderbilt University.

Welcome, Representative Cooper. And, Representative Cooper, please begin your testimony.

TESTIMONY OF THE HONORABLE JIM COOPER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE

Mr. COOPER. Thank you, Mr. Chairman.

Thank you to Ranking Member Coble, Mr. Gonzalez. I appreciate this opportunity to testify before your Subcommittee. It is a very important topic, to get the prioritization of Federal courthouses right, and I appreciate your interest in this important matter.

The reason we formed the Courthouse Caucus, my friend, Jo Bonner, a Republican from Alabama—and we are very grateful, Mr. Chairman, that you have joined the caucus—we wanted to get congressional support behind an objective, fair way of building new courthouses in America, instead of what sometimes characterizes

the old-fashioned pork-barrel process of just those who have the most political clout grabbing the Federal dollars and building whatever they want to build.

I think that the Federal judiciary has done a responsible job of trying to identify their needs and to have a rational plan for moving forward to construct new buildings. So the Courthouse Caucus is devoted to that task. We have 16 members. And in this last budget cycle, we succeeded on getting the top five priority courthouses on the list for construction, which was something of a novelty in this body.

Things like that shouldn't be news, but it is nice when the Federal judiciary's needs are actually identified and responded to by this coequal branch of government.

I have a selfish interest in this. I represent the Nashville area, and we have been identified as a needy courthouse area since the early 1990's. Current occupants of that building, not only the Federal judiciary, but also other Federal agencies, have had to put up with leaky windows and poor heating and air conditioning and, worse than that, security issues that include unreasonable delays and trials and unreasonable causes for new trials, because, for example, when we are unable to get defendants into the courtroom outside the view of jurors, and the jurors see the defendant shackled, manacled, that can prejudice the jury and cause a demand for new trials.

So it is very important that we have adequate facilities so that the rights of all parties can be protected, whether it is the prosecution or the plaintiff or the defendant. And to have a building in which jurors are notified that they have to wear overcoats because it is going to be so cold inside the building or so hot on a summer day that you have to put in back box fans, these are conditions that really are beneath the dignity of the Federal judiciary.

I think that the system of American law is the best in the world, and we need buildings that demonstrate the strength and stability of that system.

We in Nashville are not greedy. We have waited now 15, 20 years to have our chance. We understand according to some lists, we are now number two on the list. Other lists put us at number six. We are patient folks. We just want the decision to be made, whether it is for Nashville or anywhere else in America, on the merits, objectively, using real criteria for caseloads, other needs of the Federal judiciary.

So I am very grateful for your interest in this area. I would ask that my statement as written be put into the record. And I would be happy to help you and to dedicate the resources of the Courthouse Caucus to help the efforts of this Committee, because this is a very important thing that we get right and get right soon, because we all are aware of the need for jobs in our country. Building courthouses that are genuinely needed is the best way to help produce some of those jobs.

So thank you, Mr. Chairman, for your interest in this important topic.

[The prepared statement of Mr. Cooper follows:]

Prepared Statement of the Honorable Jim Cooper, a Representative in Congress from the State of Tennessee

Testimony of Rep. Jim Cooper

Subcommittee on Courts and Competition

Judiciary Committee, U.S. House of Representatives

Sept. 29, 2010

Chairman Johnson, Ranking Member Coble, thank you for the opportunity to discuss how Congress is prioritizing new federal courthouses.

Every weekday federal judges render hundreds of life-altering decisions in federal courthouses all across America. These courtrooms and courthouses are essential to our system of justice. They must be able to handle the caseload, ensure fair trials, protect judges, juries, plaintiffs and defendants, and symbolize to the general public the strength and stability of American law.

Today there are questions as to whether our nation's courtrooms are being planned, built, and run in the best way possible. On one side of the debate, we have some Members of Congress and the Government Accountability Office (GAO) complaining about over-building courthouses, wasting taxpayer dollars, and running courts in an inefficient manner. Some are even suggesting that the federal courthouse construction program be stopped altogether until these perceived problems are resolved.

On the other we have a Federal Judiciary that disputes these findings quite vehemently. The Judiciary tells us that they have a careful, objective procedure by which they determine the needs of our local communities based upon a "rigorous and cost-conscious space planning process." They suggest that the GAO's recommendations were based on bad data. Furthermore, a moratorium on courtroom construction would harm the Judiciary, increase costs in the long run, and significantly impact day-to-day operations in our nation's courtrooms.

I think the Federal Judiciary has the better argument. The Judiciary has made great improvements in planning in recent years and their process and is headed in the right direction. To halt all courthouse construction now would be a mistake with widespread repercussions.

Back in the mid-1990s, a new Middle District of Tennessee's Federal Courthouse first appeared on the Federal Judicial Conference's Five Year Plan for courtroom construction. My predecessor was told that the new courthouse would move up the list every year as 2-3 other problematic courthouses were replaced in states with even greater need. Nashville was willing to wait our turn.

Fifteen years later, Nashville should already have its new facility but instead we are still in the old building, the Kefauver Federal Building, a non-descript building built in the early

1950s. To say that the Kefauver Building has problems is an understatement. It is overcrowded, inadequate, unsound and unsafe. The building has serious water leakage and water damage problems: one judge must place towels on his windows every time it rains. The building also has serious heating and air conditioning issues: in the summer the courtrooms are filled with fans and in the winter the jurors wear coats. Of greater concern are the serious security issues that face everyone who uses the courthouse. Holding cells are inadequate and prisoners must be escorted in handcuffs and leg chains through multiple public corridors. This delays litigation and increases court costs. Jurors have sometimes seen these prisoners in the hallways, causing motions for new trials to be filed.

Despite all of these problems Nashville's situation is not the worst. Last year, the Judicial Conference determined that a new courthouse for Nashville was the sixth most pressing priority project. And that's last year, more than fifteen years since Middle Tennessee was first identified as a problem courthouse. Luckily, we are patient people, so we are happy to wait our turn. I only wish I could say the same for others.

Unfortunately, this is partly a legislative problem not a Judicial one, and we, the Congress, deserve plenty of the blame. Despite what the Judicial Conference tells us about communities with the greatest need, we legislators tend to have our own ideas about need. Members of Congress feel the pressure to deliver a new courthouse in their district, whether they really need one or not. That is not good government. In fact, it is government at its pork-barrelling worst.

After watching this same thing happen year after year, several Members decided to do something about it. Congressman Jo Bonner and I started the sixteen-Member Courthouse Caucus whose mission is to restore regularly scheduled funding for the construction of Federal Courthouses on the Judiciary's Five-Year Plan. If Courthouses are going to get funded, let's make sure it is those that are in the communities with greatest need.

The Courthouse Caucus has worked to educate Members about how the courtroom construction process should work, and I am pleased to report to that its efforts have so far made a difference. The omnibus appropriations bill signed into law in December 2009 contained funding for five courthouses that were on the Five-Year Plan. For the first time in over five years, courthouses that were of the most urgent need in their respective communities were awarded their badly needed funding. The Caucus spoke with one voice, and we finally got things right this year. That is good government.

Why halt a program that's finally on the right track? A moratorium is a short-sighted view that will harm the Judiciary and increase costs by delaying necessary construction. Especially at a time when we need more jobs, why not build courthouses where they are needed most?

# # #

Mr. JOHNSON. Thank you, Representative Cooper, for your work toward making sure that justice is not delayed so as to deny justice. Justice delayed is justice denied. And justice that comes under the conditions that you just spoke of is—I have to apologize for those conditions being in existence for the last 20 years. And I am not even responsible. But it is—that is sobering to hear of those kinds of conditions.

Now——

Mr. COOPER. Mr. Chairman, we would like to invite you to Nashville. You mentioned you would be visiting some Federal courthouses, but you have a welcome—strong welcome in our community if you would like to see firsthand the conditions in our current courthouse.

Mr. JOHNSON. I am going to take you up on that, and my wife will be happy to hear that. She is from Nashville. And that will cause us to have to leave a day early to get up there or stay a day later, either one. So we will do that. Thank you.

Mr. COBLE. Mr. Cooper, can we go to the Opry while we are there?

Mr. COOPER. Whatever you would like. You are both my good friends. We are going to invite Mr. Gonzalez, too. We will have the whole Subcommittee come down, because we want you to see firsthand the real conditions on the ground, because that is the best way to make policy.

Mr. JOHNSON. Thank you, Representative Cooper. And now we will begin our second panel.

And, Representative Cooper, let it not be said that you are not one of those very powerful Members of Congress. We know better than that. So thank you for waiting your turn in line, instead of bogarting.

Good afternoon, everyone. Our first witness on the second panel will be Mr. Mark Goldstein. Mr. Goldstein is the director of physical infrastructure issues for the Government Accountability Office. He is responsible for GAO's work in the areas of government, property and telecommunications.

Mr. Goldstein has held other public-sector positions, serving as deputy executive director and chief of staff to the District of Columbia Financial Control Board and as a senior staff member of the United States Senate Committee on Governmental Affairs.

Prior to government service, Mr. Goldstein was an investigative journalist and author. We welcome him here today.

Our second witness will be the Honorable Michael Ponsor. Judge Ponsor is a United States district judge for the district of Massachusetts and chairman of the Judicial Conference Committee on Space and Facilities. Judge Ponsor was nominated by President Clinton in 1993 and prior to that was a United States magistrate judge for the District of Massachusetts.

We welcome him here today.

Our next witness will be Commissioner Robert Peck. Commissioner Peck has served as the commissioner of the public buildings for the United States General Services Administration since 2009. He is responsible for the design, construction and building management for 362 million square feet of government-owned and-leased space.

Prior to serving in this position, he worked at the Office of Management and Budget, the National Endowment for the Arts, and the Federal Communications Commission. Commissioner Peck also served as an associate counsel to the Senate Committee on Environment and Public Works and was chief of staff to the late U.S. Senator Daniel Patrick Moynihan.

Welcome, Commissioner Peck.

Fourth witness will be the Honorable Robert J. Conrad. Judge Conrad is a U.S. district judge for the Western District of North Carolina. Judge Conrad served as a Federal prosecutor for over a decade and gained national attention when he was named chief of the U.S. Department of Justice Campaign Financing Task Force in 2000. Prior to becoming a Federal judge, Judge Conrad served as a U.S. attorney for the Western District of North Carolina.

We welcome Judge Conrad to our panel today.

And our final witness will be Professor Judith Resnik. Professor Resnik is the Arthur Liman Professor of Law at Yale Law School, where she teaches about federalism, procedure, feminism, and local and global interventions to diminish inequalities and subordination. Professor Resnik is the author of many articles on federalism and the Federal courts and recently argued before the Supreme Court. She is the founding director of Yale's Arthur Liman Public Interest Program and Fund. In 2008, she received the Fellows of the American Bar Association—excuse me—American Bar Foundation Outstanding Scholar of the Year Award. And we welcome her here today.

Thank all of you for your willingness to participate in today's hearing. And without objection, your written statements will be placed into the record.

And we would ask that you limit your oral remarks to 5 minutes. You will note that we have a lighting system that starts with a green light. At 4 minutes, it turns to yellow, then to red at 5. After each witness has presented his or her testimony, Subcommittee Members will be permitted to ask questions, subject to the 5-minute limit.

Mr. Goldstein, please proceed.

TESTIMONY OF MARK L. GOLDSTEIN, DIRECTOR, PHYSICAL INFRASTRUCTURE, U.S. GOVERNMENT ACCOUNTABILITY OFFICE, WASHINGTON, DC

Mr. GOLDSTEIN. Thank you, Mr. Chairman and Members of the Subcommittee. Thank you for inviting us here today to discuss the results of our report on the Federal courthouse construction program, which we issued June 21, 2010.

Since the early 1990's, GSA and the judiciary have undertaken a multi-billion-dollar courthouse construction initiative that has resulted in 66 new courthouses or annexes with 29 additional projects in various stages of development. However, rising costs and other Federal budget priorities threaten to stall this initiative.

This testimony, based on our report, discusses for 33 Federal courthouses completed since 2000, one, whether the courthouses contained extra space and any costs related to that space; two, how the actual sizes of the courthouses compare with congressionally authorized sizes; three, how courthouse space based on the judiciary's 10-year estimates of the number of judges compares with the actual number of judges; and, four, whether the level of courtroom-sharing supported by data from the judiciary's 2008 study of district courtroom-sharing could have changed the amount of space needed in these courthouses.

In general, our findings are as follows: 33 of the—32 of the 33 Federal courthouses completed since 2000 include extra square feet

of space, totaling 3.5 million square feet overall. This space represents about nine average-sized courthouses. The estimated cost to construct this extra space, when adjusted to 2010 dollars, is $835 million. And the annual cost to rent, operate and maintain it is $51 million.

The extra space and its causes are, first, 1.7 million square feet caused by construction in excess of congressional authorization; 887,000 square feet caused by the judiciary overestimating the number of judges that the courthouses would have in 10 years; and, three, 946,000 square feet caused by district and magistrate judges not sharing courtrooms.

In addition to higher construction costs, the extra square footage in these 32 courthouses results in higher annual operating and maintenance costs, which would largely pass on to the judiciary and others as rent. Based on our analysis of the judiciary's rent payment to GSA for these courthouses at fiscal year 2009 rental rates, the extra courtrooms and other judiciary space increases the annual rent payments by $40 million.

In addition, our analysis estimates that the extra space cost about $11 million in fiscal year 2009 to operation and maintain.

I should note that GSA cited concerns with our methodology. Our methodology applied GSA's policies and data directly from original documents and sources, and our cost estimation methodology balanced higher and lower cost construction spaces to create a conservative estimate of the costs associated with the extra space.

We believe that our findings are presented in a fair and accurate way and illustrate how past problems with the courthouse program could affect future courthouse programs and projects.

Our second major finding was that, of the 33 courthouses built since 2008, 28 have reached or passed their 10-year planning period, and 23 of those 28 courthouses have fewer judges than estimated. For these 28 courthouses, the judiciary has 119 or approximately 26 percent fewer judges than the 461 it estimated it would have, resulting in approximately 887,000 extra square feet. The extra square feet includes courtroom and chamber suites, as well proportional allocation of additional public, mechanical spaces, and sometimes secure inside parking spaces in new courthouses.

Our third major finding indicates that courtroom sharing could have reduced the number of courtrooms needed in 27 of 33 district courthouses built since 2000 by a total of 126 courtrooms, about 40 percent of the total number of district and magistrate courtrooms constructed since 2000.

In total, not building these courtrooms, as well as their associated support, building, common, and other spaces, would have reduced construction by approximately 940,000 square feet. According to the judiciary's data, courtrooms are used for case-related proceedings—accorded the available time or less than average. Using the judiciary's data, we applied generally accepted modeling techniques to develop a computer model for sharing courtrooms. The model ensures sufficient courtroom time for all case-related activities, all time allotted to non-case-related activities, such as preparation time, ceremonies, and educational purposes, and all events canceled or postponed within a week of the event.

The model shows the following courtroom-sharing possibilities: Three district judges could share two courtrooms; three senior judges could share on courtroom; and two magistrate judges could share one courtroom, with time to spare.

During our interviews and convening an expert panel on courtroom-sharing, some judges remain skeptical of sharing and raise potential challenges to courtroom-sharing, but other judges with sharing experience say they have overcome those challenges when necessary without postponing any trials.

The primary concern judges cited was the possibility that all courtrooms could be in use by other judges and a courtroom might not be available. To address this concern, we programmed the model to provide more courtroom time than necessary to conduct court business.

In our report, we recommended that the administrative GSA take the following three actions: one, establish sufficient internal control activities to ensure that regional GSA officials understand and follow GSA space measurement policies; two, to avoid requesting inefficient space for courtrooms—insufficient space for courtroom space on the any court model, to establish a process in cooperation with the AOUSC by which the planning for the space needed for courtrooms takes into account GSA's space measuring policies; three, report to congressional authorizing committees when the design of a courthouse exceeds the authorized size by more than 10 percent.

We also recommended that the AOUSC, on behalf of the Judicial Conference, take the following three actions: retain caseload projections for at least 10 years for use in analyzing the accuracy and incorporating additional factors into judiciary's 10-year judge estimates; two, expand nationwide courtroom-sharing policies to more fully reflect the actual scheduling and use of district courtrooms; and, three, to distribute information and judges on positive practices that judges have used to overcome challenges to courtroom-sharing.

This concludes my testimony, sir. I am pleased to answer any questions that you or other Members of the Subcommittee may have. Thank you.

[The prepared statement of Mr. Goldstein follows:]

PREPARED STATEMENT OF MARK L. GOLDSTEIN

United States Government Accountability Office

GAO

Testimony

Before the Subcommittee on Courts and Competition Policy, Committee on the Judiciary, House of Representatives

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FEDERAL COURTHOUSE CONSTRUCTION

Better Planning, Oversight, and Courtroom Sharing Needed to Address Future Costs

Statement of Mark L. Goldstein, Director
Physical Infrastructure Issues

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Accountability * Integrity * Reliability

GAO-10-1068T

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Highlights

Highlights of GAO-10-1068T, a testimony before the Subcommittee on Courts and Competition Policy, Committee on the Judiciary, House of Representatives.

Why GAO Did This Study

The federal judiciary (judiciary) and the General Services Administration (GSA) are in the midst of a multi-billion dollar courthouse construction initiative, which has faced rising construction costs. For 33 federal courthouses completed since 2000, GAO examined (1) whether they contained extra space and any costs related to it; (2) how their actual size compares with the congressionally authorized size; (3) how their space based on the judiciary's 10-year estimates of judges compares with the actual number of judges; and (4) whether the level of courtroom sharing supported by the judiciary's data could have changed the amount of space needed in these courthouses. This testimony is based on GAO's June 2010 report; for that report, GAO analyzed courthouse planning and use data, visited courthouses, modeled courtroom sharing scenarios, and interviewed judges, GSA officials, and others.

What GAO Recommends

The recommendations in GAO's related report include: GSA should (1) ensure courthouses are within their authorized size or provide notification when designed spaced exceeds authorized space (2) retain caseload projections to improve the accuracy of 10-year judge planning; and (3) establish and use courtroom sharing policies based on scheduling and use data. GSA and the judiciary agreed with most recommendations, but expressed concerns with GAO's methodology and key findings. GAO believes these to be sound, as explained in the report.

View GAO-10-1068T or key components. For more information, contact Mark L. Goldstein at (202) 512-2834 or goldsteinm@gao.gov.

September 2010

FEDERAL COURTHOUSE CONSTRUCTION

Better Planning, Oversight, and Courtroom Sharing Needed to Address Future Costs

What GAO Found

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

Twenty seven of the 33 courthouses completed since 2000 exceed their congressionally authorized size by a total of 1.7 million square feet. Fifteen exceed their congressionally authorized size by more than 10 percent, and 12 of these 15 also had total project costs that exceeded the estimates provided to congressional committees. However, there is no requirement to notify congressional committees about size overages. A lack of oversight by GSA, including not ensuring its space measurement policies were followed and a lack of focus on building courthouses within the congressionally authorized size, contributed to these size overages.

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

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

Mr. Chairman and Members of the Committee:

We are pleased to be here to discuss the results of our report on Federal Courthouse Construction issued June 21, 2010.[1] Since the early 1990s, the General Services Administration (GSA) and the federal judiciary (judiciary) have undertaken a multi-billion dollar courthouse construction initiative that has resulted in 66 new courthouses or annexes, with 29 additional projects in various stages of development. However, rising costs and other federal budget priorities threaten to stall the initiative. In 2008, for example, we found that increases in construction cost estimates for the Los Angeles, California courthouse had led to an impasse that has yet to be resolved.[2] Also, in fiscal year 2009, the judiciary's rent payments totaled over $970 million. The judiciary has sought to reduce the payments through requests for rent exemptions from GSA and Congress through internal policy changes, such as annually capping rent growth and validating rental rates.

This testimony, based on our report, discusses, for 33 federal courthouses completed since 2000, (1) whether the courthouses contain extra space and any costs related to that space, (2) how the actual sizes of the courthouses compare with the congressionally authorized sizes, (3) how courthouse space based on the judiciary's 10-year estimates of the number of judges compares with the actual number of judges; and (4) whether the level of courtroom sharing supported by data from the judiciary's 2008 study of district courtroom sharing could have changed the amount of space needed in these courthouses. To address these objectives, we analyzed planning, construction, and budget documents associated with all 33 federal courthouses or major annexes completed from 2000 through March 2010. In addition, we selected 7 of the federal courthouses in our scope to analyze more closely as case studies.[3] We conducted the courthouse construction performance audit on which I am testifying from

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

[2]GAO, *Federal Courthouse Construction: Estimated Costs to House the L.A. District Court Have Tripled and There Is No Consensus on How to Proceed*, GAO-08-889 (Washington, D.C.: Sept. 12, 2008).

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

September 2008 to June 2010 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. More detail on our scope and methodology is available in the full report.

Background

The Administrative Office of the U.S. Courts is an organization within the judicial branch which serves as the central support entity for federal courts, and is supervised by the Judicial Conference of the United States. The Judicial Conference serves as the judiciary's principal policy-making body and recommends national policies and legislation, including recommending additional judgeships to Congress. The U.S. Courts Design Guide (Design Guide) specifies the judiciary's criteria for designing new court facilities and sets the space and design standards for court-related elements of courthouse construction. In 1993, the judiciary also developed a space planning program called AnyCourt to determine the amount of court-related space the judiciary will request for a new courthouse based on Design Guide standards and estimated staffing levels. GSA and the judiciary plan new federal courthouses based on the judiciary's estimated 10-year judge and space requirements. For courthouses that are selected for construction, GSA typically submits two detailed project descriptions, or prospectuses, for congressional authorization: one for site and design and the other for construction. Prospectuses are submitted to the Senate Committee on Environment and Public Works and the House Committee on Transportation and Infrastructure for authorization and Congress appropriates funds for courthouse projects, often at both the design and construction phases. GSA manages the construction contract and oversees the work of the construction contractor. After courthouses are occupied, GSA charges the judiciary and any other tenants rent for the occupied space and for their respective share of common areas.

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

Thirty-two of the 33 federal courthouses completed since 2000 include extra square feet of space, totaling 3.56 million square feet—overall, this space represents about 9 average-sized courthouses. The estimated cost to construct this extra space, when adjusted to 2010 dollars, is $835 million,[4] and the annual cost to rent, operate, and maintain it is $51 million. The extra space and its causes are as follows:

- 1.7 million square feet caused by construction in excess of congressional authorizations;
- 887,000 extra square feet caused by the judiciary overestimating the number of judges the courthouses would have in 10 years; and
- 946,000 extra square feet caused by district and magistrate judges not sharing courtrooms.[5]

In addition to higher construction costs, the extra square footage in these 32 courthouses results in higher annual operations and maintenance costs, which are largely passed on to the judiciary and other tenants as rent. Based on our analysis of the judiciary's rent payments to GSA for these courthouses at fiscal year 2009 rental rates, the extra courtrooms and other judiciary space increase the judiciary's annual rent payments by $40 million. In addition, our analysis estimates that the extra space cost $11 million in fiscal year 2009 to operate and maintain.[6] Typically, operations and maintenance costs represent from 60 to 85 percent of the costs of a facility over its lifetime, while design and construction costs represent about 5 to 10 percent of these costs.[7] Therefore, the ongoing operations

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

[5]Note: these numbers do not add to 3.56 million due to rounding.

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

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

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

GSA cited concerns with our methodology. Our methodology applied GSA's policies and data directly from original documents and sources, and our cost estimation methodology balanced higher and lower cost construction spaces to create a conservative estimate of the costs associated with the extra space in courthouses. We believe that our findings are presented in a fair and accurate way and illustrate how past problems with the courthouse program could affect future courthouse projects.

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

Twenty-seven of the 33 federal courthouses constructed since 2000 exceed their congressionally authorized size,[8] resulting in about 1.7 million more square feet than authorized. Fifteen of the 33 courthouses exceed their congressionally authorized size by 10 percent or more. In all 7 of the case study courthouses, the increases in building common and other space were proportionally larger than the increases in tenant space, leading to a lower building efficiency than GSA's target of 67 percent.[9] Efficiency is important because, for a given amount of tenant space, meeting the efficiency target helps control a courthouse's gross square footage and therefore its costs.[10] According to GSA officials, controlling the gross square footage of a courthouse is the best way to control construction costs.

Twelve of the 15 courthouses that exceeded the congressionally authorized gross square footage by 10 percent or more also had total project costs that exceeded the total project cost estimate provided to congressional authorizing committees. Four of the 15 courthouses had

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

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

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

total project costs that exceeded the estimate provided to the congressional authorizing committees, at the construction phase, by about 10 percent or more. GSA's annual appropriations acts include a provision stating that GSA may increase spending for a project in an approved prospectus by more than 10 percent if GSA obtains advance approval from the Committee on Appropriations. While GSA sought approval from the appropriations committees for the cost increases incurred for these 4 courthouses, GSA did not explain to these committees that the courthouses were larger than authorized and therefore did not attribute any of the cost increase to this difference. However, there is no statutory requirement for GSA to notify congressional authorizing or appropriations committees if the size exceeds the congressionally authorized square footage.

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

According to a GSA official, at times, courthouses were designed to meet various design goals without an attempt to limit the size of the building common or other space to the square footage allotted in the plans provided to congressional authorizing committees – and these spaces may have become larger to serve a design goal as a result. Another element of GSA's lack of oversight in this area was that GSA relied on the architect to validate that the courthouse's design was within the authorized gross square footage without ensuring that the architect followed GSA's policies for how to measure certain commonly included spaces, such as atriums. Although GSA officials emphasized that open space for atriums would not cost as much as space completely built out with floors, these officials also agreed that there are costs associated with constructing and operating atrium space.

Though not a result of a lack of oversight, one additional contributor to the construction of more tenant space than planned is that the judiciary's automated space planning tool, AnyCourt, incorporates a standard square footage requirement for each district courtroom. However, according to

GSA's space measurement policy, the amount of a courtroom's square footage doubles if the courtroom spans two floors. Without a mechanism to adjust AnyCourt's calculation of a planned courthouse's square footage to reflect GSA's space measurement policy when the design includes two-story courtrooms, GSA may not request sufficient gross square footage for courthouses with two-story courtrooms.

Recently, GSA has taken some steps to improve its oversight of the courthouse construction process by clarifying its space measurement policies and increasing efforts to monitor the size of courthouse projects during the planning stages. In May 2009, GSA published a revised space assignment policy to clarify and emphasize its policies on counting square footage. In addition, according to GSA officials, GSA established a collaborative effort in 2008 between its Office of Design and Construction and its Real Estate Portfolio Management to establish policy and practices for avoiding inconsistencies. It is not yet clear whether these steps will establish sufficient oversight to ensure that courthouses are planned and constructed within the congressionally anthorized square footage.

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

Of the 33 courthouses built since 2000, 28 have reached or passed their 10-year planning period and 23 of those 28 courthouses have fewer judges than estimated. For these 28 courthouses, the judiciary has 119, or approximately 26 percent, fewer judges than the 461 it estimated it would have, resulting in approximately 887,000 extra square feet. The extra space includes courtroom and chamber suites as well as the proportional allocation of additional public, mechanical spaces, and sometimes secure, inside parking space in new courthouses. We identified a variety of factors that led the judiciary to overestimate the number of judges it would have after 10 years, which include:

- *Inaccurate caseload growth projections:* In a 1993 report, we questioned the reliability of the caseload projection process the judiciary used.[11] For this report, we were not able to determine the degree to which inaccurate caseload projections contributed to inaccurate judge estimates because the judiciary did not retain the historic caseload projections used in planning the courthouses. Judiciary officials at three of the courthouses we visited indicated that the estimates used in planning for these

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

courthouses inadvertently overstated the growth in district case filings and, hence, the need for additional judges.

- *Challenges predicting how many judges will be located in a courthouse in 10 years:* It is difficult to predict, for example, when a judge will take a reduced case-load through senior status or leave the bench entirely. It is also challenging to project how many requested judgeships will be authorized, how many vacancies will be filled, and where new judges will be seated.

The judiciary raised concerns that some extra space in courthouses exist because the judiciary did not receive all the new judge authorizations it requested. We recognize that some of the extra courtrooms reflect the historic trend that the judiciary has not received all the additional authorized judges it has requested.

Low Levels of Use Show That Judges Could Share Courtrooms, Reducing the Need for Future Courtrooms by More than One-Third

Our analysis indicates that courtroom sharing could have reduced the number of courtrooms needed in 27 of the 33 district courthouses built since 2000 by a total of 126 courtrooms—about 40 percent of the total number of district and magistrate courtrooms constructed since 2000.[12] In total, not building these courtrooms, as well as, their associated support, building common, and other spaces, would have reduced construction by approximately 946,000 square feet. Most courthouses constructed since 2000 have enough courtrooms for all of the district and magistrate judges to have their own courtrooms. According to the judiciary's data, courtrooms are used for case-related proceedings only a quarter of the available time or less, on average.[13] Using the judiciary's data, we applied generally accepted modeling techniques to develop a computer model for sharing courtrooms. The model ensures sufficient courtroom time for all case-related activities; all time allotted to noncase-related activities, such as preparation time, ceremonies, and educational purposes; and all events cancelled or postponed within a week of the event. The model shows the following courtroom sharing possibilities: 3 district judges could share 2

[12]Our analysis indicates that sharing would not reduce the number of courtrooms in six courthouses for the following reasons: four already had sharing between judges; one has only one district and one magistrate judge; and one courthouse has only bankruptcy judges and is out of our scope for district and magistrate sharing opportunities.

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

courtrooms, 3 senior judges could share 1 courtroom, and 2 magistrate judges could share 1 courtroom with time to spare.

During our interviews and convening of an expert panel on courtroom sharing, some judges remained skeptical of sharing and raised potential challenges to courtroom sharing, but other judges with sharing experience said they have overcome those challenges when necessary without postponing trials. The primary concern judges cited was the possibility that all courtrooms could be in use by other judges and a courtroom might not be available. To address this concern, we programmed our model to provide more courtroom time than necessary to conduct court business. Additionally, most judges with experience in sharing courtrooms agreed that court staff must work harder to coordinate with judges and all involved parties to ensure everyone is in the correct courtroom at the correct time. Judges who share courtrooms in one district also said that courtroom sharing coordination is easier when there is a great deal of collegiality among judges. Another concern about sharing courtrooms was how the court would manage when judges have long trials. However, when the number of total trials is averaged across the total number of judges, each judge has approximately 15 trials per year, with the median trial lasting 1 or 2 days.[14] Therefore, it is highly unlikely that all judges in a courthouse will simultaneously have long trials. Another concern stated was that sharing courtrooms between district and magistrate judges was difficult due to differences in responsibilities and courtroom size. To address this concern, our model separated district and magistrate judges for sharing purposes.

In 2008 and 2009, the Judicial Conference adopted sharing policies for future courthouses under which senior district and magistrate judges will share courtrooms at a rate of two judges per courtroom plus one additional duty courtroom for courthouses with more than two magistrate judges. Additionally, the conference recognized the greater efficiencies available in courthouses with many courtrooms and recommended that in courthouses with more than 10 district judges, district judges also share. Our model's application of the judiciary's data shows that more sharing opportunities are available.

[14]There are different definitions of what constitutes a trial. The median trial length reported here reflects Table C-8 from the Administrative Office of the United States Courts, *2008 Annual Report of the Director: Judicial Business of the United States Courts*. (Washington, D.C., U.S Government Printing Office, 2009).

The judiciary stated that at the time the 33 courthouses we reviewed were planned, the judiciary's policy was for judges not to share courtrooms and that it would be more appropriate for us to apply that policy. Our congressional requesters specifically asked that we consider how a courtroom sharing policy could have changed the amount of space needed in these courthouses. The judiciary also raised concerns with the assumptions and methodology used in developing the courtroom sharing model. We carefully documented the data and parameters throughout our report so that our model could be replicated by anyone with access to the judiciary's data and familiarity with discrete event simulation. Our model provides one option for developing a sharing policy based on actual time during which courtrooms are scheduled and used.

Conclusions and Prior Recommendations

It is important for the federal judiciary to have adequate, appropriate, modern facilities to carry out judicial functions. However, the current process for planning and constructing new courthouses has resulted in the 33 federal courthouses built since 2000 being overbuilt by more than 3.5 million square feet. This extra space not only cost about $835 million in constant 2010 dollars to construct, but has additional annual costs of about $51 million in operations and maintenance and rent that will continue to strain GSA's and the judiciary's resources for years to come. This extra space exists because the courthouses, as built, are larger than those congressionally authorized; contain space for more judges than are in the courthouses at least 10 years after the space was planued, aud, for the most part, were not planned with a view toward judges sharing courtrooms.

Thus, in our report we recommended that the Administrator of GSA take the following three actions:

- Establish sufficient internal control activities to ensure that regional GSA officials understand and follow GSA's space measurement policies throughout the planning and construction of courthouses. These control activities should allow for accurate comparisons of the size of a planned courthouse with the congressionally authorized gross square footage throughout the design and construction process.

- To avoid requesting insufficient space for courtrooms based on the AnyCourt model's identification of courtroom space needs, establish a process, in cooperation with the Director of the Administrative Office of the U.S. Courts, by which the planning for the space needed per courtroom

takes into account GSA's space measurement policy related to two-story courtrooms when relevant.

- Report to congressional authorizing committees when the design of a courthouse exceeds the authorized size by more than 10 percent, including the reasons for the increase in size.

We also recommend that the Director of the Administrative Office of the U.S. Courts, on behalf of the Judicial Conference of the United States take the following three actions:

- Retain caseload projections for at least 10 years for use in analyzing their accuracy and incorporate additional factors into the judiciary's 10-year judge estimates, such as past trends in obtaining judgeships.
- Expand nationwide courtroom sharing policies to more fully reflect the actual scheduling and use of district courtrooms.
- Distribute information to judges on positive practices judges have used to overcome challenges to courtroom sharing.

GSA and the judiciary agreed with most of the recommendations, but expressed concerns with GAO's methodology and key findings. GSA concurred with our recommendation to notify the appropriate Congressional committees when the square footage increase exceeds the maximum identified in the prospectus by 10 percent or more. GSA did not concur with our recommendation to establish internal controls to ensure that regional GSA officials understand and follow GSA's space measurement policies throughout the planning and construction of courthouses; stating that their current controls and oversight are sufficient. The judiciary concurred with our recommendation to expand sharing policies based on a thorough and considered analysis of the data but raised concerns related to the applicability of our model as guidance for its system. The judiciary did not comment directly on its plans to retain caseload projection but stated that it will continue to look for ways to improve its planning methodologies. Finally the judiciary did not provide comment on its intent to distribute information on the positive practices judges have used to overcome challenges to courtroom sharing.

Mr. Chairman, this concludes our testimony. We are pleased to answer any questions you might have.

Contact Information

For further information on this testimony, please contact Mark L. Goldstein, (202) 512-2834 or by e-mail at goldsteinm@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. Individuals making key contributions to this testimony include Keith Cunningham, Assistant Director; Susan Michal-Smith; and Jade Winfree.

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Mr. JOHNSON. Thank you, sir, for your testimony.

Judge Ponsor, please proceed.

TESTIMONY OF MICHAEL A. PONSOR, U.S. DISTRICT JUDGE, DISTRICT OF MASSACHUSETTS, AND CHAIRMAN OF THE JUDICIAL CONFERENCE'S COMMITTEE ON SPACE AND FACILITIES, SPRINGFIELD, MA

Judge PONSOR. Thank you.

My name is Michael Ponsor. I am the United States district court judge for the District of Massachusetts, Western Division. I have been a district court judge for 17 years and a magistrate judge for 10 years before that. I want to thank you, Mr. Chairman, Ranking Member Coble, and other Members of the Committee for having us here today to speak about these very important issues.

I also want to note that my colleague, Judge Conrad, from the Western District of North Carolina, will be picking up on some of the themes I will touch on.

I also want to thank particularly Congressman Jim Cooper for coming here today and, in his written comments and oral comments, articulating so eloquently the concerns that I will also try to address here today.

My message to this Committee is very simple: We need assistance from your Subcommittee in facing what I think is a very grave situation which threatens the shutdown of the national Federal courthouse construction project. This shutdown will threaten access to justice for millions of Americans, compromise judicial administration, jeopardize courtroom security, and waste potentially millions of dollars.

Let me give you some background on these comments. On May 25th, as Mr. Goldstein indicates, we both appeared before the Subcommittee on Economic Development, Public Buildings, Emergency Management to discuss the GAO report.

We had a vigorous debate about that, and I am pleased that the Committee Members are aware of our differences with the GAO report. I consider the report to be largely nonsense, and the three justifications supporting the supposed waste of public money to be very disturbing, unfair, and untrue.

I don't want to get into all the reasons why I think that report went so far astray, because I want to use my time for something more important, but I am happy to address in detail any questions you may have about that.

One point I will make is that, although we consider the GAO report to be terribly unfounded, poorly done, deeply unfair, we agreed with all of the concrete recommendations that were made in the GAO report. We agreed that we had either already implemented them or would implement them with one possible exception, which I may touch on now.

The GAO report discussed the possibility of courtroom-sharing and came up with models for courtroom-sharing that, frankly, had not only me, but the entire Federal judiciary aghast. The notion, as they suggested, that three active district court judges carrying caseloads of 400 to 500 civil cases, 100 to 200 criminal cases, three active district court judges could share two courtrooms and provide the sort of justice that Americans expect and deserve was shocking.

We asked for their backup, their modeling for this, and we waited 4 months to get it. They repeatedly said that they used our data, but we knew what our data was, but we wanted to know what—how did they cook it?

And we did on September 17th finally get a copy of their report from their modeling version. The man who was responsible for handling their modeling is a gentleman named Mr. Higgins, who is a lovely man. He has a B.S. in electrical engineering and his back-

ground includes modeling consumer soap production, construction of John Deere tractors, and the extraction of nickel from granite ore.

The particular group that they had run the modeling had virtually no experience in court-type procedures. They knew about conveyor belts, robotics, tractors, and various other things. These were the people that they trusted to develop these models for courtroom-sharing, to tinker with the heart of the American constitutional system and to come up with this notion that two courtrooms were sufficient for three active district court judges, six for nine, nine for 12, and to blame us by retroactively applying this supposed policy and accuse us of overbuilding 946,000 square feet of courtroom space since 2000 because we did not adopt this ridiculous notion of courtroom-sharing.

We looked into it further. And let me tell you how they went about deciding that we could have two courtrooms for every three district court judges. They simply took the 10-hour day—they said that Federal courts are in session from 8 a.m. in the morning until 6 p.m. That is right in their report. Ten hours a day, the average district court judge is in court for 6 hours. So multiple six times three, that is three judges, you get 18. Two courtrooms, 10 plus 10 equals 20, 18 goes into 20. Therefore, three district court judges can use two courtrooms.

No consideration of continuances. No consideration of emergencies. No consideration of issues such as border states. This is how they came up with their courtroom-sharing model.

Since then, things have gotten to be even more gray, because, as you know, there was a letter that went out on August 2nd from the Subcommittee on Economic Development, Public Buildings and Emergency Management saying that we should stop, shut down the entire Federal courthouse program nationally, until we engage in the sort of robust courtroom-sharing that was, frankly, absurdly suggested in the GAO report.

The impact would be devastating. This is the judiciary's 5-year plan. These are courthouses that have all been waiting at least 10 years. There is no debate that every single one of those courthouses is desperately needed. We are talking about Los Angeles, Mobile, Nashville, Savannah, San Jose, San Antonio, Charlotte, Greenville, Harrisburg, Norfolk, Virginia, Anderson, Alabama, Toledo, Ohio, Greenbelt, Maryland. Every single one of those communities is waiting for a courthouse, and now we are faced with the suggestion that we should stop everything and keep these communities from getting the judicial resources that they need, hold up this plan, shut everything down, make people wait.

This has an insidious effect on litigants. Imagine you have suffered a violation of your civil rights, you have suffered some affront to yourself. Are you going to ask yourself, can I go into court? Will I have to wait? Will I get a firm trial date?

You are an assistant U.S. attorney deciding to initiate prosecutions. Will you have the resources to bring them?

Security is threatened. Just a few months ago, we had an incident in Las Vegas that happened to be a courthouse that was secure, had a very courageous court security officer died defending

that courthouse. If that courthouse had not had—proper security, we would have had many more people dying.

Money is being wasted. Right now, we have a courthouse in Salt Lake City that the money has appropriated. They are not even on our 5-year list. We are ready to go with that courthouse plan. Because of the downturn in the economy, we can save $25 million if we begin that courthouse project now. The money is not being appropriated. We are losing that opportunity to save funds.

We ask—I will end where I started—we ask that we not allow these types of bricks and mortar issues to absorb and digest important values in our constitutional system, and we would appreciate any help this Subcommittee can give us. I would be happy to answer questions.

[The prepared statement of Judge Ponsor follows:]

PREPARED STATEMENT OF THE HONORABLE MICHAEL A. PONSOR

JUDICIAL CONFERENCE OF THE UNITED STATES

STATEMENT OF

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

BEFORE

THE SUBCOMMITTEE ON COURTS AND COMPETITION POLICY

COMMITTEE ON THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES

ON

"COURTROOM USE: ACCESS TO JUSTICE,
EFFECTIVE JUDICIAL ADMINISTRATION,
AND COURTROOM SECURITY"

SEPTEMBER 29, 2010

STATEMENT OF
HONORABLE MICHAEL A PONSOR, CHAIR
COMMITTEE ON SPACE AND FACILITIES OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
BEFORE THE SUBCOMMITTEE ON COURTS AND COMPETITION POLICY
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

September 29, 2010

Introduction

Good afternoon, Mr. Chairman, and members of the Subcommittee. I am Michael A. Ponsor, a District Judge of the United States District Court in Massachusetts, and Chair of the Judicial Conference's Committee on Space and Facilities. Accompanying me here today is Judge Robert Conrad, Jr, Chief District Judge of the United States District Court for the Western District of North Carolina. Judge Conrad is here to provide you with his experience of how inadequate courtroom space and significant security deficiencies adversely impact his court's operations at the aging federal courthouse in Charlotte, North Carolina. I appreciate the opportunity to appear before the Subcommittee today to discuss with you more broadly how the lack of adequate and appropriate courtroom space adversely impacts the judiciary's ability to provide access to justice, to effectively administer justice, and to ensure the safety and security of all participants in the judicial process.

Before addressing these issues, I also want to convey the Judiciary's gratitude for the Subcommittee's continued support of the Third Branch. Additionally, I want to express my personal gratitude for Chairman Johnson's remarks at the May 25, 2010 hearing before the House Subcommittee on Economic Development, Public Buildings and Emergency Management

regarding a draft Government Accountability Office (GAO) report. Chairman Johnson, I appreciated your strong defense of the importance of the independence of the Judiciary. As I explained in my testimony at that hearing, the GAO report was unfairly critical of the federal courthouse construction program and failed to recognize the carefully considered steps the Judiciary has taken to implement appropriate courtroom sharing policies as a component of efforts to minimize courthouse construction costs. In my capacity as a committee chair, judges tell me that all participants in the process – defendants, lawyers, jurors – comport themselves in a proper manner when an appropriate courtroom is provided. The courtroom is an essential tool for a judge. Just like a computer sitting on each employee's desk, it helps us get the job done.

The Courthouse Construction Program

Federal courthouse buildings are physical embodiments of the critical role the federal judiciary plays in the American constitutional system. The courthouse renovation and construction program exists to ensure the effective and efficient delivery of justice. Decisions involving whether a new courthouse needs to be built, what the design of that courthouse should include, and how many courtrooms need to be provided must take into account the dynamic and unique nature of the judicial process. These decisions are not ones that lend themselves to an assembly line approach to justice where judges and litigants are interchangeable.

Courthouses are also significant public investments that are designed and built to last for many years. A courthouse is a fixed resource – if it is not built with sufficient space to house the judges and staff necessary to dispense justice, it is difficult and costly to add space once the building is complete. Without precise knowledge of future events, planning can only be done based on the best information that exists during the planning period. Because of the inability of

real property to easily expand or contract as circumstances change, the capacity for future growth needs to be included in a new courthouse. Budgetary constraints are likely to preclude adding annexes to buildings that are too small within ten years from the time the design of the new buildings is started, which is the current planning assumption. When capacity is not provided in the building, costly leased space – the most expensive space alternative – must then be obtained, which poses security risks and results in significant operational inefficiencies.

Thus, in determining what the Judiciary's future space needs are, we must plan for adequate space to avoid building a courthouse that is too small to move into as soon as it is completed, and we must also plan for growth, including taking into account expected new judgeships, so as to avoid the costs incurred at the other end when facilities are underbuilt. None of this is simple, but the Judiciary thoroughly analyzes its proposed requirements for new courthouse space. These determinations are made after careful and thorough consideration based on a rigorous and cost-conscious planning process.

Interruptions in the courthouse construction and renovation program will have a devastating impact on the Judiciary's ability to provide access to justice and ensure its effective administration. The courthouses most urgently in need of being replaced are those listed on the Five-Year Courthouse Project Plan, which is a prioritized list of the Judiciary's courthouse construction needs. The courthouses on this list are there as a result of the application of the Judiciary's long-range facilities planning policies. These policies employ objective criteria to determine which courthouses have the most dire space needs and which courthouses have the most serious security deficiencies. The courthouses on this list are desperately needed and these

federal judicial districts have been waiting for many years for the facilities they need to ensure an adequate, appropriate, safe and secure courthouse in which to dispense justice.

The Judiciary's Courtroom Sharing Policies

One of my primary responsibilities as Chair of the Space and Facilities Committee is helping to determine where new courthouses need to be built and what size they need to be. In making these determinations, my committee coordinates closely with those in the Judiciary who determine how to operate our courts expeditiously and effectively. My colleague Judge Julie A. Robinson, a District Judge from the District of Kansas who is the Chair of the Judicial Conference's Committee on Court Administration and Case Management, oversees policies regarding court administration and the extent to which courtrooms can be shared. She is unfortunately unable to be with me here today to discuss these issues with you.

A critical component of deciding where new courthouses need to be built and what size they need to be is determining the number of courtrooms that are needed. The Judiciary has taken a number of carefully considered steps to implement appropriate courtroom sharing policies based on courtroom usage data and the Judiciary's expert knowledge of the judicial process. Beginning in 2008, the Judiciary developed courtroom sharing policies that we believe balance the Judiciary's duty to be good stewards of the taxpayers' money with our primary responsibility to provide access to justice and ensure that cases are handled in an expeditious and effective manner. The Judiciary has implemented courtroom sharing policies for senior judges (one courtroom for every two senior judges) and magistrate judges (one courtroom for every two magistrate judges in courthouses with three or more magistrate judges, plus one courtroom for magistrate judge criminal duty proceedings). Moreover, the Judiciary is in the process of

studying whether courtroom sharing is feasible in bankruptcy courts, and subsequently plans to determine the feasibility of sharing courtrooms by active district judges in courthouses with 10 or more active district judges.

In her testimony at the May 25, 2010, hearing before the House Subcommittee on Economic Development, Public Buildings and Emergency Management regarding the GAO report, Judge Robinson testified that her "Committee spent a great deal of time and effort in developing the appropriate balance of meaningful courtroom sharing policies with effective and efficient case management." With regard to the complicated issues surrounding courtroom sharing policies, Judge Robinson explained that:

> Judges – because they are in the courtroom day in and day out – uniquely understand the implications of sharing policies. They see how the efficient, or inefficient, delivery of justice affects every party and attorney involved in federal litigation – from a personal bankruptcy to a major criminal trial. They understand that the availability of a courtroom encourages parties to settle cases to avoid the risk and expense of a trial. They are acutely aware that for criminal trials, the uncertainty of access to a courtroom would hinder criminal prosecutions, run afoul of time limitations established under the Speedy Trial Act, raise security concerns, and possibly impact the resources of other agencies by making the transportation and delivery of defendants more complicated and uncertain. For these reasons many judges argue that the advantages of certainty, efficiency and cost savings gained far outweigh the cost of additional courtrooms.
>
> I should also note that cost and delay in litigation is also an important issue for Congress. For example, the Civil Justice Reform Act of 1990 required all district courts to implement plans to reduce civil litigation delays, and commissioned an independent and comprehensive study of civil litigation practices, which served as the basis for substantial changes in the civil litigation process in the federal courts. This high level of case management required by the CJRA has, however, imposed other costs that are borne by the Judiciary, including immediate and certain access to a courtroom.

As an active district court judge, I wholeheartedly agree with Judge Robinson's description of the complex and dynamic nature of the judicial process. As Judge Robinson stated, "we would love someone to write an algorithm that really works, that recognizes human variables that we all experience." The judicial process is not one that can be reduced to simple assumptions.

The Impact of GAO's Courtroom Simulation Model on Access to Justice

The courtroom is an essential tool for providing access to justice. As the Subcommittee is aware, the GAO issued its final report entitled "Federal Courthouse Construction: Better Planning, Oversight, and Courtroom Sharing Needed to Address Future Costs" on June 21, 2010. Director James Duff of the Administrative Office of the U.S. Courts has clearly articulated the inaccuracies in that report, and so I will not repeat them here.

Although the Judiciary strongly disagrees with the methodology of the report, there is not significant disagreement with the GAO's specific recommendations. They were as follows: (1) the Judiciary needs to improve the accuracy of the manner in which it estimates the number of new judgeships that need to be created by retaining caseload projections for more than 10 years, and incorporate additional factors into these estimates; (2) the Judiciary needs to expand nationwide courtroom sharing policies to reflect more fully the actual scheduling and use of district courtrooms; and (3) the Judiciary needs to distribute information to judges on positive practices judges have used to overcome challenges to courtroom sharing. The Judiciary responded to these recommendations, informing the GAO that: (1) we will retain caseload projections for 10 years as recommended, and will review the methodology for judgeship projections to determine if any changes are warranted; (2) courtroom sharing policies have

already been adopted for senior judges and magistrate judges, we are currently studying whether courtroom sharing is feasible in bankruptcy courts, and we subsequently plan to determine the feasibility of sharing courtrooms by active district judges in large courthouses; and (3) best practices are routinely shared throughout the Judiciary on issues of importance, and to the extent there are positive practices related to courtroom sharing, they would have been disseminated throughout the Judiciary.

The basis for the GAO's recommendation that courtroom sharing be expanded beyond current Judicial policy was a computer simulation model that analyzed courtroom usage data that had been collected by the Judiciary. According to the GAO, its simulation model indicated substantially more courtroom sharing than current judicial policy requires. Specifically, the GAO stated that two courtrooms should be shared by three active district judges and one courtroom should be provided for every three senior judges nationwide. (Current Judicial policy provides one courtroom for every active district judge and one courtroom for every two senior judges.)

On September 16, 2010, in response to the Judiciary's request, the GAO provided the report from the contractor who developed the courtroom simulation model. This report has provided the Judiciary with more detailed information about the model than was provided in the GAO report. The Judiciary has had little time to analyze this information. That said, a number of red flags in the report raise serious questions about the validity of the GAO's model and whether modeling can be appropriately applied to the judicial process.

As an initial matter, it is not clear that the company selected by the GAO to develop the model has the expertise necessary to develop a credible model that takes into account knowledge

of the judicial process. According to this company's website, it provides simulations for clients in "material handling" (e.g., conveyor belt and sorting systems), manufacturing, underground and surface mining operations, transportation, and service industries (e.g., repair and clean-up operations). The company's report does not describe the manner in which, if any, the nature of the judicial process was taken into consideration in designing the computer simulation model. It appears to us that the model treats the judicial process as being akin to an assembly line or the movement of passengers through an airport.

According to the report, the assumptions were kept simple. This simplicity has resulted in inaccuracies in the model that we can easily identify based on our expertise in the judicial process. For example, the model appears to assume that judges are fungible – that any available judge could be plugged into any available courtroom to hear any available case. The model also appears to assume that the participants in the process – the litigants, prisoners, jurors courtroom personnel – are also fungible because they are lined up and ready to appear at court at the moment a courtroom is freed up. And the model assumed that courtrooms would be used ten hours per day, reflecting a lack of understanding of reality in the courtroom and the judicial process. Jurors, litigants, witnesses, family members and other court participants would have great difficulty sitting in court for ten hours a day, due to work, child care and other responsibilities. Nor could we expect jurors to focus clearly on testimony for that long.

On a disturbing note, the model appears to have completely ignored the security issues that exist at courts. Courts are places where dangerous and violent individuals are brought on a daily basis. They are places where civil litigants have in the past expressed violent and deadly disagreement with the outcomes of their cases. The more moving around the courthouse that is

done as cases are shifted from one courtroom to another, the greater the potential for security problems.

I do not believe that computer simulation models can be used to determine the amount of courtroom space that the Judiciary needs to do its work. I do not believe that these models can ensure that someone's constitutional rights are being protected. This type of modeling may work for manufacturing lines, but it is not applicable to the judicial process and its constitutionally required guarantees.

The Judiciary, as well as other entities who have studied the issue, recognize that there are a number of complexities in the judicial process that must be taken into consideration when making a determination of the extent to which courtroom sharing can and should occur. For example, one independent expert concluded that the characteristics of the judicial system make it unsuited to data analysis alone to help make courtroom sharing policy determinations.[1]

Another independent expert explained that determining courtroom sharing ratios "cannot be met by only looking at system-wide statistics. First, these are known to conceal significant variation between districts; second, they lack the precision needed to conduct useful analysis into

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[1]*See* Ernst & Young, Independent Assessment of the Judiciary's Space and Facilities Program, at IV-7 - IV-9 (May 2000) (concluding that "[d]ata analysis alone cannot adequately assess the effect of courtroom availability on settlement rates, trial delays and delivering justice"); *see also* Congressional Budget Office, The One-Courtroom, One-Judge Policy: A Preliminary Review (Apr. 2000)(concluding that courtroom sharing could occur without causing major trial delays but acknowledging numerous limitations to the analysis including i) possible decline in the morale of judges; ii) security concerns; iii) lack of a cost-benefit analysis of the costs of courtrooms and the costs arising out of delays caused by courtroom sharing such as time impacts on witnesses and the "costs of justice delayed". The report also acknowledged that i) its simulation was based on data collected from one courthouse during a single year, ii)that it did not take into account courthouses that differ in size, location and local conditions/culture; and iii) that it did not take into account different types of trials and the availability of different types of courtrooms, but rather treated all trials and courtrooms as being of the same type and complexity. Although the Ernst and Young Assessment concluded that the Judiciary should retain its one courtroom per active trial judge approach, it did note that "[c]ourthouse size is critical to the court's ability to share courtrooms" and that sharing may be more feasible in larger courthouses." Independent Assessment of the Judiciary's Space and Facilities Program, at IV-26.

courtroom sharing questions."[2] This is precisely the type of data the GAO looked at. This expert concluded that in making these decisions, the core question is:

> How will courtroom sharing affect costs, case processing, case outcomes, and the delivery of justice[?] For example, changing the courtroom-per-judge ratio may save construction money, but what may be optimal from the construction cost viewpoint may or may not be detrimental when a broader viewpoint is taken. Would total costs – to the taxpaying public, to the courts, and to lawyers and litigants, be higher or lower? Would the procedural and case processing consequences be harmful or beneficial? Would judicial and staff productivity go up or down? Would the capacity of the federal court system to deliver justice be impaired or enhanced?[3]

The problem is that the model focuses on the courtroom space, and not the judicial case. In doing so, the GAO's model ignores the impact of their recommendations on providing access to justice, on the effective administration of justice, on the real human beings involved in the process, and the human concerns the process addresses.

Conclusion

Mr. Chairman and members of the Subcommittee, thank you again for the opportunity to address these critical issues. The Judiciary will continue to work collaboratively with GSA and with the Congress as we plan new facilities with an emphasis on both cost and function.

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[2]RAND Institute for Civil Justice, September 1996 Project Memorandum - Research on Courtroom Sharing at 25 (September 1996).

[3]*Id.* at 38

Mr. JOHNSON. Thank you, Judge Ponsor.
Next, Commissioner Peck, please begin.

TESTIMONY OF ROBERT A. PECK, COMMISSIONER OF PUBLIC BUILDINGS, U.S. GENERAL SERVICES ADMINISTRATION, WASHINGTON, DC

Mr. PECK. Thank you, Mr. Chairman, Ranking Member Coble, and Representative Gonzalez. I am Robert A. Peck. I am commissioner of the GSA Public Building Service.

As you—as you noted, Mr. Chairman, we—we own or lease 360-some-million square feet of space in communities all across this country, and we provide space for more than 100 Federal agencies, law enforcement agencies, the military, the social service agencies that help our citizens. And we are prouder of none of them than—than the judiciary and our role in providing space for them.

Federal courts play a critical role in the constitutional framework of our democracy. We are proud that for the past 15 years in particular we have been building courthouses worthy of that role, worthy of the American people, and worthy of the communities in which our courthouses are built.

Courthouses are traditional landmarks dating back way before the founding of our country. They have in our country, however, whether state, local or Federal, often been the center of gathering and the symbols of our democracy.

The Federal courthouses in particular must support the Federal judiciary's mission of ensuring fair and impartial administration of justice for all Americans while providing security for judges, jurors and others engaged in the judicial process. This makes for complicated buildings and, yes, higher costs than the ordinary commercial office building.

GSA has developed a strong partnership with the Federal judiciary. Since we began our design excellence program and Congress began funding a nationwide program of courthouse renovation and construction, we have compiled a solid track record of—of delivering high-quality buildings that support the court's unique needs while enhancing the building's surroundings. We do so within carefully considered design and budgetary guidelines and pursuant to congressional authorization and appropriation.

Thank you for having this hearing today and focusing on the importance of these buildings and the effective administration of justice. We support the judiciary in carrying out this mission by constructing courthouses that allow them expeditiously and impartially to adjudicate cases for the American people.

The courthouses that we construct are economic, given their mission, sound and prestigious. We work with the Federal judiciary to develop requirements to meet their needs. Since 1996, as Judge Ponsor alluded to, the judiciary has used a 5-year plan to set priorities on new courthouse construction projects, and we have followed it as best we can.

We use the plan to develop project requirements in size and in cost that meet the needs of the courts. These requirements result in requests to Congress for authorization and appropriations. Since the program's inception, 67 new courthouses or annexes have been constructed, and Congress has authorized and appropriated approximately $7.5 billion for this program.

We are continuing to improve our work on this program. In particular, we are improving the energy efficiency and resource use of the courthouses that we are building.

We have established multiple layers of management and control to make sure that the costs of our courthouses are within guidelines. We stay within the statutory threshold of 10 percent of appropriated and authorized funding levels, or we notify Congress accordingly.

We have maintained the—the space requirements that—that we have presented to the Congress to the best of our ability. We have agreed, in line with the GAO report, that we will notify the Congress when space exceeds 10 percent of the amount that we initially reported to Congress.

And I want to be clear: Sometimes there is a difference in the space that we initially provide to Congress as an estimate of courthouse needs because, as design becomes more detailed and we get closer to the point where we can construct and we have an actual site—which we often don't have when we first report to you—when we have an actual site, we can then tell exactly how much the space is going to be.

We are, in fact, reporting to Congress any deviation in that size. Whether it is 10 percent or not, we just want to err on the side of total transparency.

We give the courts a lot of credit for the fact that they have over the years agreed to share courtrooms among certain judges, senior judges and magistrates, and that has allowed us to build slightly smaller buildings.

We have made important strides in improving the courthouse program, and we believe that the GAO report ignores the strides we have made, and I won't repeat what Judge Ponsor said, other to say, if I can characterize it, the GAO report exhibits breathtaking ignorance of basic construction methods and construction cost methodologies, leading to ludicrous conclusions. And for an agency that was founded in accounting, I can tell you that basically they have double-counted in trying—in figuring out how much the so-called empty space in our buildings contains.

Our concerns with the report, to be more specific, are GAO used a space measure that assumes that upper space in building atriums is included in the gross square footage of an asset. That is simply not true. And no matter what measuring standards you use, take a look at this room. It has a certain volume. It only has one floor. We count the square footage of the floor.

GAO compounded this erroneous assumption by ascribing inflated operating and construction costs to the empty volumes and retroactively applied a methodology of "courtroom-sharing" to buildings designed in some cases more than a decade ago and predating the inclusion of courtroom-sharing in the design guide.

Most egregiously, the GAO report could be read to assert that GSA has neglected willfully congressional direction in the courthouse program. It is categorically not true. We have sought and followed regular authorizations and appropriations and reported regularly to the Congress on our programs.

We are always happy to consult with anyone on doing better in running this program, but we are proud of what we have done to

date and will hopefully be able to work with you and the Transportation and Infrastructure Committee in making this program even better. Thank you very much.

[The prepared statement of Mr. Peck follows:]

PREPARED STATEMENT OF ROBERT A. PECK

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

BEFORE THE

SUBCOMMITTEE ON COURTS AND COMPETITION POLICY

COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

"FEDERAL COURTHOUSE CONSTRUCTION"

SEPTEMBER 29, 2010

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

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

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

Today's hearing focuses on the importance of the effective administration of justice. GSA supports the Judiciary in carrying out this mission by constructing Courthouses to allow the Courts to expediently and impartially adjudicate cases on behalf of the American people. The courthouses GSA constructs are economic, sound, and prestigious, worthy of the American people they represent for years to come.

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

GSA continually works to improve the design and construction of our Federal buildings. We have taken a strong leadership role to improve the efficiency and sustainability of our inventory, including our Courthouses, and recently announced that all of our new construction projects will achieve Leadership in Energy and Environmental Design (LEED) Gold ratings.

Additionally, we have established multiple levels of management and system controls to ensure measurements and costs are carefully tracked and scrutinized. GSA stays within the statutory threshold of 10 percent of appropriated and authorized funding levels or notifies Congress accordingly. We have also improved our controls to measure space in our buildings and validate gross square footage (GSF) by using measurement experts during the project's design and construction. Through its Spatial Data Management program, GSA's space measurement experts are currently reviewing projects both in design and in construction to ensure void areas have been excluded from gross area calculations and to ensure that design has not exceeded authorized square footage by more than ten percent. GSA has agreed to notify both its authorizing and appropriating committees if the size of a courthouse exceeds the Congressionally authorized GSF by 10 percent or more.

Improving the design and construction of our Federal buildings also requires close coordination with customer agencies. GSA is committed to working with our customers to reduce their environmental footprint and their energy costs, which requires us to, among other things, minimize total square footage and optimize their utilization of space. In line with these goals, the Judiciary has developed and implemented policies that require courtrooms to be shared among judges, thereby reducing space needs. We commend the Courts for these recently developed policies and are happy to be a part of further efforts and further conversations in this regard.

While GSA and the Judiciary have made important strides to further improve the courthouse program, the Government Accountability Office (GAO) recently issued a report critical of its administration. GSA has taken strong exception to this report, which asserts that GSA has constructed unnecessary courthouse space and exceeded Congressional authorization of space. GSA disputes much of GAO's methodology and many of the report's conclusions. In brief, our concerns are that:

- GAO used a space measure that assumes upper space in building atriums is included in the GSF of an asset;
- GAO compounded this erroneous assumption by ascribing inflated operating and construction costs to these empty volumes; and
- GAO retroactively applied a methodology of "courtroom sharing" to buildings designed, in some cases, more than a decade ago and predating the inclusion of courtroom sharing in the design guide. GAO then claimed that these previously designed courthouses somehow violated this retroactive application of the standard.

Most egregiously, one reading the GAO report and reviewing their recommendations might assume that GSA has willfully neglected Congressional direction in the courthouse program. On the contrary, GSA has sought and followed regular Congressional authorizations and appropriations and has been subject to strict Congressional oversight of the program. GSA has been forthright and transparent in all of our documents, testimony, and briefings to Congress throughout the history of our courthouse program.

GSA is always happy to discuss ways to more effectively manage the courthouse program in the interests of the American people. It is important that decision-makers and the American people are provided with clear and accurate information to develop the most effective policies to assist the Judiciary in carrying out its critical mission.

This concludes my testimony. I appreciate the opportunity to discuss GSA's role in supporting the mission of the Judiciary. Thank you for inviting me to appear before you today and I am happy to answer any of your questions.

Mr. JOHNSON. Thank you, sir.

Judge Conrad, please.

And, yes, your microphone, and pull it closer.

TESTIMONY OF ROBERT JAMES CONRAD, JR., CHIEF U.S. DISTRICT JUDGE, WESTERN DISTRICT OF NORTH CAROLINA, CHARLOTTE, NC

Judge CONRAD. I speak to you with 5 years of experience as a Federal district court judge, Western District of North Carolina, lo-

cated in Charlotte, as well as 15 years of previous experience as an assistant U.S. attorney and as a U.S. attorney, 20 years combined practice in the Federal court in Charlotte, North Carolina.

And I come to you today not to whine, but to inform you about what it is like in the field in our Federal courts. We, like the court in Nashville, Tennessee, which Congressman Cooper addressed, are on the 5-year plan. We have been on the plan for nearly 20 years.

I am the third chief judge in our district during the time period that we have been on the 5-year plan. My predecessor, Chief Judge Rupoli, comments on that posture as being in the 12th year of a 3-year design program.

We have patiently waited in line, but the line never moved. And the lack of movement in the line affects the delivery of justice in the Western District of North Carolina in significant ways. And I am going to speak about three of those ways, the issue of courtroom-sharing, the issue of court security, and the issue of the deteriorating conditions in our buildings.

I believe that Congressman Coble knows that our courthouse is located—is an old historic building, built in 1915, renovated in the 1930's, and it contains only two courtrooms for a city the size of Charlotte, with a very complex civil docket and a very aggressive U.S. attorney's office.

We have applied the concept of courtroom-sharing. We have more judges than courtrooms in Charlotte. And I want to tell you about our experience.

Courtroom-sharing is an art, not a science. Our district court judges try to schedule around each other so that we don't intrude on each other's work. And one of the ways we have attempted to do that—we have more judges than courtrooms, and so we have on occasion commandeered our magistrate judges' courtrooms.

Chairman Johnson, you spoke about your past as a magistrate judge. One of our magistrate judge courtrooms has a jury box, but the design of that courtroom is such, it is an L-shaped design. It is a very small courtroom. It was not designed for district court work. But out of necessity, in an attempt to handle our docket, we sometimes use that courtroom.

Some of the attorneys cannot see all of the members of the jury. The jury has a hard time seeing the witness box on the other side of the courtroom. The witness box in this courtroom is several feet from the trial bench, which is not that elevated. It is 5 feet from the defense table. And it is inches away from an exit door. It is so woefully inadequate the security concerns coming out of that situation are obvious.

Many of the criminal cases that we pursue involve cooperating witnesses hoping to get a reduction in sentence as a result of their cooperation. They are testifying against defendants seated just feet away from them. I don't think this is the model of the confrontation clause our founders anticipated. It is a security concern.

We have trouble when we have had to handle civil cases in that courtroom, as well. We have had civil cases involving numerous attorneys—attorneys and trying to pack them into a very small courtroom has created difficulties in our administration of justice.

Another way in which we have tried to share space in a way that accomplishes justice is that we schedule—we schedule our court-

room usage, and within the last couple of years, I had a situation where I had the courtroom for a week, and another judge was scheduled to try a jury trial the next week.

And so what I tried to accomplish was to try two criminal trials in a 1-week period of time. The first trial involved about seven robberies and a shooting involving injury. It was a complex case. We kept the jury until 6 o'clock every night, dealt with trial motions, both after the jury left for the night and the morning before the trial.

But nonetheless, that trial took longer than expected. In order to handle my docket, on the fourth day of trial, we instructed the jury—and then I gathered the court reporter, the marshals, the probation officers, and we walked down the hall to the second courtroom that I previously spoke about, the L-shaped courtroom that is so problematic, and we began a second trial, an armed drug deal transaction and started selecting a jury and putting on the evidence in that—in that trial while the jury was deliberating in the first trial.

And the jury in the first trial had a series of questions. In order to answer their questions, I had to march back down the hall into the first courtroom, with all the assembled staff. The marshals had to escort the defendant from trial number two downstairs to a holding cell and bring the first two defendants up. We answered the questions, and the marshals had to reverse the process, bring two defendants in custody down in an elevator to a holding cell, pick up the defendant for the second trial, and escort him to that trial, all in order to get our work done, in order for a second judge to start a trial the following Monday.

That is extremely problematic for us. We exhausted our court reporter. The marshals were strained to capacity, while we were dealing—going back and forth, two different juries had to waste time waiting for us to resolve business in the other court, and the victims and their family members, defendants and their family members were all inconvenienced, not to mention the stress it put on the trial court attempting to administer justice in both those situations.

That has been my experience anecdotally. My colleagues have reported similar concerns. We sometimes double-booked the courtroom, anticipating that many trials will resolve without trial. When that hasn't happened, on one occasion, we had to assign court space in state county courthouse and try a case there.

Now, my conclusion from all of this is that we have tried courtroom-sharing, and it doesn't work.

I want to speak about security concerns. In our old historic building, we share everything. And I am not saying that in a positive light. The restrooms are shared. Our courthouse staff, the public, members of defendant families, victims, agents, lawyers, even grand jurors, even newspaper reporters all share the same restroom space.

We share an elevator. There is one elevator in our building used to transport incarcerated prisoners and witnesses. Our staff uses that elevator, as well.

Now, the only reason a defendant is in custody is either the judge has just sentenced that defendant to a time in prison or an-

other judge has found that that person is a flight risk or a danger to the community. Nonetheless, those who have been found to be such regularly use the same elevators as our courthouse staff.

Our corridors are probably are worst security concern. The people leave our courtroom at the end of a trial or a hearing. They go into a corridor that contains chambers, clerk's office, and other court personnel.

Oftentimes after a sentencing hearing, emotions run high, but agents, lawyers, members of defendant families all exit in the same way at the same time, and there have been numerous occasions where marshals have had to break up verbal arguments between competing parties.

I want to mention an experience I had as a sentencing judge in which I sentenced a gang member to a mandatory minimum sentence. And as I exit our courtroom, I exit—my exit is within feet of the door through which the marshals escort incarcerated defendants to the elevator for transport down to the holding cell.

It is not uncommon for me to be exiting the courtroom about the same time as a criminal defendant. And in this one situation after I had just sentenced a defendant, we both got into the hallway together, walked side by side, and I was glad that I reached the end of the hall and turned left, as the defendant asked the marshal how much of that 20 years he was going to have to serve. And I was glad that I got to the turning point before the marshal told him that there is no parole in the Federal system.

That kind of situation, where judges who have to sentence the people or conduct other very serious business, and then have to share corridor space, elevators, and other public facilities is untenable.

We have a sally port in our old building, where the defendants are brought in from local custody. It is open to public view. And the sally port is within a couple parking spaces of where the judges park their vehicles.

All of this to say that we have been on a list for a number of years, we have serious security concerns, and they are impacted by the failure to get the appropriate funding.

And then as time has passed, our very historic building has deteriorated. And this is not a criticism of GSA. They have been very responsive to us.

But years ago, thinking we were going to build a Federal courthouse, we swapped our courthouse with the city of Charlotte for prime upstate—or uptown real estate. We thought we would be constructing a courthouse soon. They thought they could use our existing courthouse for a law school.

But we are still in our building. Our land is an uptown parking lot. And we pay rent to the city of Charlotte to be in our building because we haven't been able to construct our new courthouse.

Not much incentive on GSA's part to pour—to pour money into an old money when you don't own it and you expect to move from it soon. And our old courthouse was never built with modern security concerns, with 21st-century technology development in mind, antiquated, deteriorating. At one particular sentencing hearing, the roof literally fell in on the defendant. There was a piece of ceiling

tile that fell on the defendant's table as I was conducting the sentencing hearing.

We have buckets strategically placed in our courtroom to catch the rain falling from the leaky roofs. I use a Mac Air laptop when I am in court. To my right is a computer monitor that allows me to get live transcripts. But beyond this technological facade are problems that we deal with in a very archaic way. Within 5 feet of my bench, we have buckets that catch the rain that leak through the roof when we have a storm. You know, and Mondays are interesting after a rainy weekend in our courtroom.

My conclusion is this. I serve on the Judiciary Committee's space and facilities committee, subcommittee. And I have learned that Charlotte is not unique. Everyone on our 5-year plan has been there for a decade or more.

Our tripartite form of government requires that before justice is done and the Federal criminal arena, the executive branch has to prosecute and the legislative branch has to appropriate. As your coequal branch, we ask you to fund the construction of badly needed courthouses and to do in a manner that permits maximum flexibility to our use of and access to the courtroom.

Thank you.

[The prepared statement of Judge Conrad follows:]

PREPARED STATEMENT OF THE HONORABLE ROBERT JAMES CONRAD

JUDICIAL CONFERENCE OF THE UNITED STATES

STATEMENT OF

JUDGE ROBERT JAMES CONRAD
CHIEF DISTRICT JUDGE
WESTERN DISTRICT OF NORTH CAROLINA

BEFORE

THE SUBCOMMITTEE ON COURTS AND COMPETITION POLICY

COMMITTEE ON THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES

ON

"COURTROOM USE: ACCESS TO JUSTICE,
EFFECTIVE JUDICIAL ADMINISTRATION,
AND COURTROOM SECURITY"

SEPTEMBER 29, 2010

STATEMENT OF
HONORABLE ROBERT J. CONRAD, JR.
CHIEF DISTRICT JUDGE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
BEFORE THE SUBCOMMITTEE ON COURTS AND COMPETITION POLICY
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

September 29, 2010

Introduction

Good afternoon, Mr. Chairman, and members of the Subcommittee. I am Bob Conrad, Chief District Judge of the United States District Court for the Western District of North Carolina. As Chief Judge, I have been responsible for the day-to-day management of my district court for the past four years. Both in this administrative capacity and in my work as an active district court judge, I have had to tackle the many challenges posed by the lack of space, deteriorating condition, and security deficiencies at our courthouse in Charlotte. I appreciate the opportunity to appear before the Subcommittee today to discuss with you how these critical issues adversely impact our ability to administer justice effectively and to ensure the safety and security of all of the participants in the judicial process. I would like to thank the Subcommittee for holding this hearing today on this very important issue.

I am here today to talk about the impact of a lack of adequate courtrooms in the Charlotte courthouse and the difficulties this causes for the judges of our court, the litigants, attorneys, and most importantly, the public in the Western District of North Carolina. My district has been on the Judiciary's Five-Year Courthouse Project Plan (Plan) for a new courthouse for almost twenty years. This Plan is a prioritized list of the Judiciary's courthouse construction needs, as determined by long-range facilities planning policies. However, because of delays in funding

and authorizing projects ahead of Charlotte on the Plan, construction of the new Charlotte courthouse has been delayed. This has affected access to justice for the citizens in our district in several ways that I will outline later in my statement.

Federal Courts Are Places of Dignity and Deliberation

A federal courthouse should be a place where matters of importance are handled with professionalism and propriety – where justice is pursued for those who are affected by the Court's actions. It is a place where criminal defendants and victims of crimes should be treated with the respect and dignity that is inherent in their status as fellow human beings. It is a place where the courtroom surroundings can assist the court in delivering the message that actions have consequences and that serious matters are resolved here (much like the hearing room we are in today). A defendant, in particular, ought to receive the message that he is not just a statistic, but that he will be given time for him or his representative to argue his case in a safe and secure facility. In a federal courthouse, an otherwise powerless pro se litigant will receive a fair hearing before a neutral judge. It is a place where jurors are called to perform a vital yet often challenging task in our constitutional democracy. All of the participants in the judicial process are human beings – not widgets on a conveyor belt – who are entitled to gather in a dignified manner in a safe facility with adequate and appropriate space.

The Courtroom is an Essential Tool in the Judicial Process

The federal judges of the Judicial Branch are responsible for the effective operation of the federal courts. But adequate access to justice requires that the Judiciary have the tools it needs to operate effectively. These tools include the intellectual capital of experienced judges and their staffs, as well as the dedication of prosecutors and defense and other attorneys who argue before

the court. They include the indispensable services of the U.S. Marshals Service, probation officers, and members of the Clerk of Court's Office. One of the most important tools is the availability of a courtroom.

As you know, district court judges have broad judicial responsibility to conduct a wide range of judicial proceedings, including hearings, bench trials, and jury trials. Proceedings occur in both civil and criminal cases. In my experience, maximum flexibility in the ability to use courtrooms is essential for effective judicial administration. Rescheduling one hearing to allow another event to occur in a courtroom (such as a trial that lasted longer than expected) creates inefficiency and extra costs for all, often with lengthy delays because of the need to accommodate the schedules of multiple parties. And many civil cases are finally settled only because a date certain has been set for the trial with the assurance that the courtroom will, in fact, be available on that date. Any experienced attorney will tell you that access to a courtroom for trial hastens resolution of disputed matters more than any other single factor.

Courthouses Must Also Be Safe and Secure

In addition to having sufficient and accessible courtroom space, a safe and secure courthouse is another tool essential to a judge's functioning. In this era of heightened security threats, courthouse design must take into account the safety of judges, court staff, and the public. Where the physical space forces judges and the public to share hallways with sometimes violent criminal defendants, as is the case in Charlotte, security is a concern. Where a victim testifying for the government is forced to sit on a witness stand only five feet from the criminal defendant, as is currently the case in Charlotte, security is worrisome.

Because the Charlotte courthouse is an older building, its deterioration also affects the safety of those in the building and the dignity of the proceedings. I sit most often in our special proceedings courtroom. Beside me, five feet to my right, are two buckets to catch the leaking rain water from our ceiling. Problems relating to the courthouse's deterioration are upsetting to court participants, particularly in light of the understandable tension inherent in just being involved in federal court proceedings.

The Charlotte, North Carolina Courthouse

Let me tell you more about our courthouse, which is located in the Charles R. Jonas Federal Building in Charlotte, North Carolina. This historic building was originally constructed in 1915 to house the Charlotte Post Office. In 1934, the building was expanded, and it currently houses the United States District Court for the Western District of North Carolina, its Bankruptcy Court, the Clerk's Office, part of the United States Marshals Service, and small on-site working offices for the United States Attorney's Office and Federal Defender's Office. Our district currently has three active district judges and one senior district judge, with one district judge vacancy. We also have two magistrate judges and two bankruptcy judges in Charlotte. Because of our heavy docket and because this year one of our Article III judges will be deployed in a reserve capacity at Guantanamo Bay, we frequently have visiting judges assist us. In 2009, due to increases in bankruptcy caseloads, the Judiciary requested one additional bankruptcy judgeship that is expected to be located in Charlotte.

Given the docket demands, the growth in the number of judges requiring court space, and the seriousness and complexity of cases over which we preside, our courthouse is simply out of space, and has been for decades. Let me talk about some of the issues arising from this situation.

Courtroom 3 (Our "L" shaped Courtroom)

We have only two regular sized courtrooms (#1 and #2) usable for jury trials. Therefore, when both of these courtrooms are in use, our district court judges, for jury trial purposes, have had to commandeer our magistrate judges' "L" shaped courtroom. It is inadequate in several respects. Although it has a three-level jury box, the unique shape of this courtroom means that counsel and the parties sitting at one of the counsel tables cannot see all the jurors in the jury box. The witness box is within arm's reach of the only slightly elevated bench where the judge sits. Within arm's reach the other way is an exit door. The distance between the witness box and the defense table is a matter of feet. Because of the design of the courtroom, some jurors have trouble even seeing the witness, who sits on the other side of an oval bench.

It is difficult to put in words the logistic, security, and condition concerns that arise from having to conduct criminal and civil jury trials here. Oftentimes, criminal trials involve cooperating witnesses testifying against criminal defendants in the hope of receiving a lesser sentence. In these cases, you can imagine that great tension exists between the two. The witnesses are subject to defendant intimidation that the Court from its vantage point cannot always see. Sometimes these witnesses, as well as the defendant when he testifies, are dangerous people. Yet they testify almost on top of the judge, near the defense table, and nearer still to an exit door. Because the well of this courtroom is so small, electronic presentation of evidence must be conducted from a podium <u>behind</u> counsel tables, closer to the spectator section than the bench. Since we are a district that attempts to try cases in paperless fashion, this affects almost everything we do, and the presentation is far less persuasive when attorneys have to get up from their tables and walk <u>back</u> to their presentation podiums.

This courtroom is unsafe, inefficient, and lacking in the dignity that defendants, victims, and jurors ought to experience in a federal courtroom.

Courtrooms One and Two

The problems associated with the usage of these courtrooms is less about design and function and more about the difficulties inherent in courtroom sharing in busy districts. We attempt to schedule usage in a way that minimizes intrusion upon each other's dockets. But courtroom sharing is an art, not a science. It is simply impossible to anticipate the length of some trials and other matters; nor is it possible to plan ahead of time for emergency hearings, which at times can be quiet lengthy. There are many federal statutes that require "prompt" or "immediate" action, a Speedy Trial Act requiring courts to try criminal matters expeditiously, and many fact patterns which by their nature require access to immediate resolution.

Let me share a few examples of the scheduling and security problems that have occurred recently.

Within the last year I had scheduled Courtroom 2 for two jury trials in one week because a colleague was beginning a jury trial in the same courtroom the following Monday. I anticipated that I could begin the first of two trials scheduled that week on Monday and complete it in three-to-four days; then start the second trial and finish it before my colleague needed the courtroom the following Monday. It sounds (and is) hectic, but this is what we do on a regular basis. The first trial involved two defendants charged with seven bank and Hobbs Act robberies. It was a complex case involving two masked and gloved perpetrators with little or no forensic evidence, and at least one shooting with injuries. Although we worked late into the night each day of trial, it went longer than the time allotted. This caused me to start the second jury trial (involving an

armed drug dealer with a lengthy record) in the "L" shaped courtroom down the hall while the jury was deliberating on the first trial in Courtroom 2. The second trial involved the same judge, court personnel, probation officers, and marshals. We ran back and forth as the jury in the first case deliberated. In the course of their deliberations, they would send the Court a written note, posing various questions they needed answered. To do so, we would have to recess the second trial, gather court personnel, transport defendants in custody, and move between courtrooms. When the jury's question was answered, we would reverse the steps and return to the second trial. As the day proceeded, this activity reoccurred many times.

The toll such efforts impose cannot be underestimated. The court reporter and other court personnel were exhausted. The marshals were stretched too thin. For example, we have one elevator used to transport incarcerated defendants, witnesses, jurors and judges as well as other court personnel. Whenever the jury in the first trial had a question, the marshals had to transport the defendant in the second trial downstairs to the holding cell, then transport both defendants in the first trial from the downstairs holding cell upstairs to Courtroom 2.

As efficient as the marshals are, this took time. Juries in both trials were kept waiting. Family members of the defendants and the numerous victims attending the trial were inconvenienced. And quite frankly, the Court's ability to focus on the issues arising in two cases was tasked to the utmost.

My colleagues report similar compromises with the performance of their duties. One judge reports difficulties when a trial with a dangerous and belligerent defendant took too long, and because of a second trial scheduled in Courtroom 2, he was forced to finish his trial in the "L" shaped courtroom we've just discussed. This judge was anxious throughout the proceeding

with concern for the safety and security of the trial participants and public. Another colleague reports the difficulty of cramming numerous out-of-state lawyers into the "L" shaped courtroom for a complex civil matter.

Sharing courtrooms requires us to frequently "double schedule" a courtroom. This is where we schedule two trials for the same date and courtroom, assuming one of the trials will settle. When this assumption did not materialize on one occasion, the judge had to move his federal trial to a county courthouse.

Security Concerns

It is similarly difficult to describe our security concerns sufficiently. We have an old courthouse that was designed with postal needs in mind, rather than modern court security concerns. In the second floor courtroom where I most often sit, there are two ways to leave the building. The first way is out the main doors of the courtroom and down the stairs. There are court chambers to the left and right as you leave. Court personnel share the public restrooms with families of defendants, attorneys, and law-enforcement agents, as well as grand jurors and anyone else who might be in the courthouse at the time. Particularly during sentencing hearings, where emotions may run high, these logistics can create a recipe for disaster, and there have been numerous times where our marshals have had to break up shouting matches that have occurred.

But this doesn't begin to compare to the security exigencies that result from the other exit, which I most often must use. When I leave the bench to return to chambers, I exit into the public hallway behind the courtroom. The adjacent door is where the marshals escort incarcerated defendants and witnesses to the elevator leading to the first-floor holding cell. In one recent case, the gang-member defendant I had just sentenced and I emerged from our

respective doors at the same time. We walked together in the same direction down the hall. As I heard him ask the Marshal how much of the twenty-year sentence he would have to serve, I was relieved that I had reached the corridor corner, which went in another direction, before the Marshal could answer that there is no parole in the federal system. In a capital murder case involving a defendant who had attempted to smuggle a knife into court during jury selection, there were several instances of my near-simultaneous exit with the defendant. On another occasion, my son came to visit me one day during court proceedings. When he pressed the button for the elevator, it opened revealing an orange jumpsuit-clad defendant I was about to sentence – fortunately, escorted by a Marshal. Encountering at the elevator incarcerated defendants, whom a court has found to be a flight risk or a danger to the community, is a daily occurrence for our court staff.

Everyone who comes to the building – judges, staff, prisoners, jurors, victims, defendants' families, and other members of the public – use the same elevators and the same public corridors. There is no secured space. This results in the risk of victims, jurors, attorneys, agents, and other members of the public encountering sometimes dangerous defendants or members of their distressed families. As if this weren't bad enough, the prisoner van, which transports incarcerated defendants and witnesses to and from the courthouse, parks two spaces away from the judges' cars. There is no vehicle sallyport – a secure entry way for vehicles – for transporting prisoners to and from the courthouse.

Condition concerns

We are in an old building. Because decades ago it appeared we were headed toward construction of a new courthouse, the courthouse was swapped to the City of Charlotte for prime

real estate in uptown Charlotte, where we anticipated a new courthouse would be built. But a courthouse construction moratorium, lack of funding, and other delays have delayed our progress in moving up on the Judiciary's Five-Year Plan. In the meantime the building, which was not designed in the first instance with modern litigation concerns in mind, grows older still. The landlord is no longer the General Services Administration (GSA) and maintenance issues are compounded. Buckets to catch the newest leaks are strategically located. Plaster falls from different places regularly. Recently at a criminal sentencing hearing, the house came down on the defendant – literally: a piece of ceiling plaster fell on the defense table in front of the defendant. It is not unusual to come in after a rainy weekend and find pieces of plaster on the floor and the roof leaking.

Due to the lack of space at our courthouse, we have had to locate parts of the court family – which is comprised of critical participants in the judicial process – to leased space in other buildings. A part of the U.S. Marshals Service Office, most of the U.S. Probation/Pretrial Office, most of the U.S. Attorney's Office, and the Bankruptcy Administrator are currently in other facilities. A portion of our Clerk's Office will soon also be moved to leased space. This dispersion results in inefficiencies and increased costs to the government.

These examples illustrate our critical need for a new courthouse. As a result of the significant space shortages, deteriorating condition, and major security deficiencies I have described in the existing structure, my district was identified in 1992 as needing a new courthouse. As previously stated, the proposed Charlotte courthouse is currently on the Judiciary's Five-Year Plan. The design of the new courthouse is now underway, and

construction is scheduled to begin in fiscal year 2013, pending congressional funding and authorization.

Although I have described incidents that reveal the deteriorating condition of the courthouse, this testimony should not be taken as a criticism of GSA. In fact, GSA's regional administrator and his staff have been responsive and courteous throughout. Because of the process that has resulted in our court being near the front of the line for a new courthouse, the GSA has been understandably reluctant to invest scarce federal funds in repairs to the building at this time.

Conclusion

Chairman Johnson, and members of the Subcommittee, I am extremely grateful for the opportunity to appear before you and talk about these critical issues. The problems we have experienced in Charlotte are not unique – similar challenges no doubt occur every day in other courts around the nation where space is short. What I hope is that the examples I have provided will give the Subcommittee a better understanding of what could happen to the judicial process if rigid, inflexible standards regarding courtroom sharing among active district judges were imposed upon the Judiciary. And so, while we seek the authorization and funding from Congress to repair the sorry and aging state of our national courts and their infrastructure, we also plead that the courts be allowed to determine how to administer justice most effectively in terms of courtroom allocation.

The Constitution has charged the Judicial Branch with the administration of the nation's courts for over two hundred years, during which time this branch has developed unmatched expertise in how to faithfully, and efficiently, meet this calling. Yet while it is an independent,

co-equal branch of government, the Judiciary is unable to do its job without the Congress, which allows it to operate, and the Executive Branch, which enforces the nation's laws in the courts.

As Alexander Hamilton once stated, "Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit." Again, we ask that the Judiciary continue to have the flexibility we need to administer the judicial process efficiently and the tools we need to fulfill our core responsibility – providing those who come to the federal courts with timely and fair access to justice.

Mr. JOHNSON. Thank you, Judge Conrad. I believe your 5 minutes has expired. [Laughter.]

Next we will hear from Professor Resnik.

TESTIMONY OF JUDITH RESNIK, ARTHUR LIMAN PROFESSOR OF LAW, YALE LAW SCHOOL, NEW HAVEN, CT

Ms. RESNIK. Thank you, Mr. Chairman, Ranking Member, Members of the Committee. My name is Judith Resnik, and I am the Arthur Liman Professor of Law at Yale Law School.

I am very honored to participate in this hearing. I have been a guest at symposia convened by the GSA and by the GAO and by the administrative office, and I am happy to have a chance to participate and comment here. And I want to make three points in these 5 minutes.

First, in 1850, there was not a single Federal building owned by the United States government that had the name "U.S. Courthouse" on the front door. There were fewer than 40 judges at the trial of the lower levels around the United States, and there were about 50 Federal Government buildings, Marine hospitals, and customs houses.

Today there are more than 550 buildings that include the name "U.S. Courthouse." And why are there those new buildings? Because in a deep way, over the last 150 years, this country has been on the forefront of inventing adjudication as an important part of a functioning democracy.

We can take for granted the courts, but in some way, the courts as we inhabit them are new in some respects. We have had independent judges for the last 250 years through our Constitution. Our Constitution and state constitutions guarantee rights, r-i-g-h-t, of access, public access to the courts that have to be open, moving old rituals or rites—r-i-t-e-s—and spectacles of former governments into absolute obligations that we have a right to watch our government and our judicatory processes.

Fairness, as an independent idea of equal dignity among the litigants and between the court and the litigants, is a relatively new idea. And most startling of all—all of us who are in this room are now rights-holders, and 100 years ago we weren't rights-holders in the same way.

So we need to appreciate that we are the heirs to a new tradition. The buildings look big and stony, but they are actually the iconic emblem of a new commitment that this Congress has made to courts as central to American government.

The administrative office tells us that between 1960 and 1990's, this Congress created more than 400 new causes of action for people to bring rights and claims and cases to courts. You start at the beginning of the 20th century, there are about 30,000 filings; by the end of the 20th century, there are more than 300,000 filings.

So when we reflect on this achievement, we have to understand these are important sites of democratic practice, where we can call the governments to account, as well as debate with each other the rights and obligations we have.

It was that optimism and expectation that led the long-range planning committee of the Judicial Conference in 1995 to say, by 2010, there will be about 600,000 cases or more in the Federal district courts. So that is the first proposition, as a little reflection.

The second is that—the second point is, if the project of the 20th century was to get us all into court, the project of the 21st is what to do now that we are all there.

And the problem is a real one. For some people, it helps—calls of "civil Gideon," the chief judge of the state of New York has said we really need to provide rights—and help people who need to enforce their civil rights to be able to come to court with lawyers, the legal services corporation, creating more judgeships and more courthouses is a part of it. That is one package of solutions.

But others have resolved that, instead of that, they need to devolve or outsource our adjudication. So a vast amount of decision-making occurs in administrative agencies. The Social Security Administration has more filings in a year than the Federal district court, holding bankruptcy aside. The Veterans Administration, the employment, immigration, in 2001, there were more than 700,000 evidentiary hearings in those four Federal agencies, as contrasted to a lower number in the Federal district court.

And we are watching the privatization of adjudication. I brought my cell phone contract, like yours. It is likely to say—mine certainly does say—I can't file a lawsuit in Federal district court. I have to go to mandatory arbitration, and I have to not—I am not able to enforce my Federal statutory rights in Federal court or state court because of these limitations.

Further, the United States Supreme Court, many times 5-4, has imposed new hurdles through pleading requirements, through summary judgments that limit jury trials, through new immunities, through limiting implied causes of action. There are lots of factors.

But the end point is that, instead of those 600,000 cases in the U.S. Federal district court, civil and criminal, we have roughly seen over the last decade that filings are relatively flat, instead of rising, as had been expected.

So the idea and concern about underutilization may exist, which gets me to my third and final point. The answer, if there is a finding of underutilization, is not to stop building courthouses or funding judgeships or confirming judges. The answer is to find a way to help those people get to course and enforce their rights.

I know that the Chairman has introduced the Arbitration Fairness Act in order to create a possibility for consumers and then employees to be able to bring their cases to court and not have heaps of contracts be enforced. Additionally, I hope that Congress will return to the Equal Access to Justice Act, which is the provisions that enable a victorious plaintiff against the U.S. government to recoup fees.

The U.S. Supreme Court last spring interpreted that statute as providing that the fees go back to the claimant, rather than the claimant's lawyer, and so a man who had won against the Social Security Administration and had about $4,000 in attorney's fees, instead of it going to his lawyer, because it went to him and the government had a claim against him, his lawyer did get his $4,000 fee.

So there are many—looking at the legal services corporations and equal access to justice—and as I suggested in my written statement, that there is a great disparity across the United States in terms of density of use. This Congress in 1990 created the Civil Justice Reform Act. It asked each district court to convene individual committees to look at how the civil justice process was going on.

One could create such committees at the district court level to talk to the users, state court, Federal court, lawyers, public and private users, to say, how are we using this space and to find ways to populate the courts, rather than to close down the process and limit access to them.

So this is a very important topic about how to get people into court. And I commend the Chairman for initiating a conversation about the relationship between courthouse construction and literal access to courts. And I suggest that there are many ways to integrate the system and think about the state, Federal and administrative adjudicatory needs of the country and find ways to get us all able to use them.

Thank you.

[The prepared statement of Ms. Resnik follows:]

PREPARED STATEMENT OF JUDITH RESNIK

Courtroom Use: Access to Justice, Effective Judicial Administration and Courtroom Security

Hearing before the Subcommittee on Courts and Competition Policy
of the United States Committee on the Judiciary

U.S. House of Representatives
September 29, 2010
Rayburn House Office Building,

Statement of Judith Resnik

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Submitted, September 24, 2010

I appreciate the opportunity to provide information to the Subcommittee on Courts and Competition on questions of access to justice, judicial administration, and courthouse security. In addition to teaching about the federal courts, occasionally litigating within them,[1] and participating in many symposia about them, I have just completed a book that examines the history and development of courts in the United States and elsewhere.[2] Based on this work, I elaborate five points below.

First, while adjudication is an ancient practice, the essential attributes of what we today call "courts" are relatively new. Once, judges were told to be subservient to and loyal servants of the ruling powers. Today, they are required to be independent, with structural protections.

Further, while rulers regularly provided public displays of adjudication, the purpose of such rituals was to impress on local populations state power to maintain peace and security. Today, those "rites" have become "rights" of access to courts. Around the world, the mandate is for "open" and "public" courts. Moreover, "fair" procedures once meant only that procedures were those prescribed by law, rather than today's understanding that a "fair hearing" requires substantive protections such as impartial and independent judges obliged to accord each side equal respect. Finally, only during the last several decades has the idea come to be embraced that all persons—regardless of color, gender, age, ethnicity and the like—are eligible to be heard in court as litigants or witnesses and to serve as jurors, judges, lawyers, and staff.

Second, the purpose of underscoring the relative novelty of these attributes is to serve as a reminder of the remarkable commitment that all branches of the United States government have had to adjudication. The growth in the number of judges and courthouses and in the jurisdictional and remedial roles for courts is a tribute to the shared, constitutionally-based norms of respect and appreciation for judges and courts in the United States.

One way to clarify this point is through a few numbers. In 1850, the federal government owned about fifty buildings. None were labeled courthouses. Rather, before federal post offices and courthouses became familiar outposts of the national government, the first wave of buildings creating a "federal presence" across the country were custom houses and marine hospitals.[3] These buildings joined those dedicated in Washington, D.C. to the legislative and executive branches as the embodiments of the federal government.[4]

The fact that more than 550 federal courthouses now exist is a tribute to all three branches of the federal government, committed to the rule of law and federal norm enforcement. These buildings are a material testimonial to the importance of adjudication in democratic orders.

Public and open courts—to which all have access to bring claims before independent judges—represent a great and a recent achievement. As the phrase inscribed over the United States Supreme Court's front door puts it, the architecture and practices

aim to make good on commitments to "equal justice under law." Open courts are not only a product *of* democracy, they also make a significant contribution *to* democracies—providing lessons about citizen access and about government obligations of fair treatment, made plain when judges are required to explain publicly their exercise of power.

Third, during most of the twentieth century, federal filings grew. At the beginning of that century, just under 30,000 cases were pending. By century's end, more than 300,000 cases were pending, along with more than one million bankruptcy petitions. Yet, resources for litigants and for courts did not match the need, and both state and federal courts faced challenges. Some of the response came by way of more judgships and funding, but other responses were to cut back on access to courts. Some adjudication was devolved to administrative agencies, some outsourced to private providers, and some decisionmaking in courts become more private as judges refocused on settlement. Moreover, several decisions by the United States Supreme Court have imposed challenges to filing lawsuits and limitations on judicial remedies.

Fourth, the shifting contours of adjudication have had an impact on court filings. In 1995, the Long Range Plan of the Federal Courts had anticipated that by 2010, filings would exceed 600,000. But over the last ten years, filings in the federal courts have been basically flat—around the 325,000 to 350,000 of the 1990s. (Appendix A is a chart providing that information.)

Fifth, the response to this potentially puzzling under-usage of federal facilities is not to cut back on either access to courts or on equipping courts with the necessary resources but, rather, to help bring litigants back into courts. Congress is considering legislation to do so, such as to limit the imposition of mandatory arbitration in consumer and employee contracts.

In addition, I suggest that the Subcommittee support the judiciary in creating district-by-district committees, akin to those deployed under the Civil Justice Reform Act (CJRA) of 1990,[5] to address questions of courtroom usage in each district. Such "courtroom usage committees" should be asked to review the circumstances of each district so as to provide proposals based on the varying needs of districts about a) how to increase courtroom usage, b) whether to share courtrooms, and if so, with what sets of adjudicators, and c) whether courtrooms could be used by relevant local federal agency adjudicators or whether state court users would be appropriate.[6] Another model of reform that should serve as a guide comes from the history of bankruptcy courts. Before the 1980s, the bankruptcy system did not have the stature that it has gained by virtue of congressional authorization for bankruptcy judges, who moved before the public in courtrooms around the country. A similar intervention for immigration hearings could help to improve dramatically the problems that have beset those proceedings, benefitting the administration of justice and alleviating some of the burdens that these cases now impose on the appellate courts.

I. Building Adjudication, the Federal Judicial System, and Courthouses

While the number of filings of cases and of federal courthouses are important markers of recent commitments to justice, the many solid (and often stone) buildings may make it easy to forget that the pillars of adjudication, today taken for granted, are relatively new inventions. The rapid historical sketch provided below demonstrates that Congress has been central to the development of the federal judiciary—turning to courts for norm enforcement and providing the necessary resources by supporting judgeships and courthouse construction.

A. From "Rites" to "Rights"

Judges were once supposed to be loyal servants of the state, not independent actors, and when they displeased rulers, they lost their jobs. The English Act of Settlement of 1701 marks the beginning of legal protection of judges, followed by the Massachusetts Constitution in 1780 and Article III of the United States Constitution in 1787.

Similarly, the public aspects of adjudication were once ritualistic enactments of state power—offering spectacles like executions. The history of the United States lets one trace the shift from such "rites" to "rights." The 1676 Fundamental Laws of West New Jersey, an English colony, provided "[t]hat in all publick courts of justice for tryals of causes . . . any person or persons . . . may freely come into, and attend . . . that justice may not be done in a corner nor in any covert manner . . . ."[7]

A century later, state constitutions emphatically insisted that such customs of open processes were legal guarantees. The 1777 Vermont Constitution and the 1792 Constitutions of Delaware and Kentucky offer examples, proclaiming that "all courts shall be open." As of 2008, the words "all courts shall be open" can be found in the constitutions of nineteen states.

The federal Constitution includes the phrase "open court" in its (little-read) section on treason. In addition, the Constitution guarantees criminal defendants the right to a speedy and public trial, and authorizes civil juries. These provisions, coupled with First Amendment and Due Process principles and common law traditions, have protected public access to both civil and criminal trials and to pre-trial hearings and court records. Indeed, just last year, the United States Supreme Court held that a state court judge's exclusion of a single spectator at a voir dire for a criminal trial violated these principles.[8]

But it was not until the twentieth century that the Supreme Court insisted that "fair hearings" were obligations that required equal and dignified treatment of all persons, who gained rights to be *in* courts—as litigants, witnesses, jurors, lawyers, and most recently as judges. Formal principles of equal treatment entitled a host of claimants—regardless of race, class, ethnicity, and gender—to fair hearings. More than

that, democratic precepts of constrained and accountable governments entitled individuals to bring challenges against the state to courts.

B. Courthouses as Monuments to Adjudication's Promises

These four pillars of modern adjudication—independent judges, public courts, fairness in opportunity, and equal access for all—are what the many federal courthouses symbolize. The courthouses and the administrative infrastructure of the federal courts are artifacts of decades of cooperative work among all branches of government. At the urging of Chief Justice William Howard Taft, Congress created in 1922 the Conference of Senior Circuit Judges, the predecessor of what is now the Judicial Conference of the United States. Further, Congress financed the building of the Supreme Court, opened in 1935 and recently renovated. And, toward the end of the twentieth century, the Judicial Conference, chaired by Chief Justice Rehnquist, succeeded in obtaining congressional authority for the "largest public-building construction campaign since the New Deal: a 10-year, $10 billion effort to build more than 50 new Federal courthouses and significantly to alter or add to more than 60 others."[9]

The decision to commit public funds to courthouses represents deep political and social premises of American democracy—that private enforcement of the laws through public adjudication is a value; that individuals have a right to be heard in open proceedings; that judges should give reasons for their judgments; and that we, the public (who are neither litigants nor judges) should be able to watch our government in action.

C. From Ad Hoc Construction Projects to the Development of Federal Courthouses (1800s-1930s)

1. **Before the Civil War**: Paralleling the development of legal commitments to courts is the development of the federal infrastructure. As noted, buildings belonging to the federal government were once rarities.[10] Congressional legislation funding the various projects of the first half of the nineteenth century made minimal mention of courthouses. Some federal legislation authorizing construction of custom houses did make reference to paying for furnishings for judges[11]—thus revealing the assumption that a courtroom was to be tucked inside. In addition, Congress occasionally provided expressly for the construction of courts and jails in its territories.[12]

By the 1850s, the federal government owned eighteen marine hospitals and twenty-three custom houses, and fifteen more buildings were underway.[13] As noted, none bore the label "courthouse." The meager references to facilities for judges were appropriate when considered against the backdrop of the size of the federal courts of that era. In 1850, some thirty-seven federal trial judges were dispatched to the forty-five district courts in the states,[14] including two to California, which had gained statehood that year.[15]

Beginning around 1850, one finds government planners calling specifically for courthouse construction.[16] In 1852, the Treasury Department created a unit called the

Office of Supervising Architect, which affected the shape of structures for the nation even after, almost a century later, its work was folded into a different administrative structure in 1939.[17]

2. **New Jurisdictional Statutes, Chartering the Justice Department, and Authorizing More Judges and Courthouses (1860s-1939)**: Building ambitions had to be put on hold for a period, as the violence and financial stress of the Civil War required a hiatus in national construction. But in the War's aftermath, two creations of the first Congress of 1789—the lower federal courts and the Treasury Department—came into closer contact as Congress repeatedly turned to the federal courts as instruments for enforcement of federal norms.[18] In 1867 Congress gave federal courts authority to hear habeas corpus petitions from individuals held in state custody.[19] In 1871 Congress gave federal courts the power to hear cases alleging deprivations of civil rights;[20] and in 1875 Congress gave the federal courts "general federal question jurisdiction," enabling them to hear various kinds of claim alleging rights under federal law as long as a certain amount of money was in controversy.[21]

The implementation of federal rights required more organization of lawyers for the federal government. In 1870, Congress created the Department of Justice.[22] The 1870 legislation also centralized most of the court-related work in the Justice Department by transferring "supervisory powers . . . over the accounts of the district attorneys, marshals, clerks, and other officers of the courts of the United States" from the Secretary of the Interior to the Justice Department.[23] To gain efficacy in requesting funds from Congress on behalf of the judiciary, the Justice Department began to compile statistical information about the federal courts. Beginning in 1871, the Attorney General provided annual reports to Congress on cases pending as well as those terminated.[24]

The number of judges increased along with the docket. While several federal districts continued to have only one judge, between 1857 and 1886, Congress gave thirteen states a second judgeship,[25] resulting in some sixty-four judgeships by 1886. That expansion was part of the growth in the paid civilian employment of the federal government. In 1861, some 37,000 individuals were employed; by 1891, almost 160,000 were on the federal payroll.[26]

New construction was a complementary technique to materialize this new federal authority. "Between 1866 and 1897 . . . the federal government built nearly three hundred new buildings throughout the Union."[27] In those new buildings, spaces inside (and sometimes whole buildings) went to courts. In the early part of the twentieth century, Congress "opened the floodgates . . . by inventing . . . the 'omnibus' public building bill, which replaced for the most part the previous practice of enacting individual bills for each building."[28] In the 1902 act alone, Congress authorized more than 150 new buildings.

Federal building was a boon to members of Congress, able to return to their districts with new commercial resources. Through "wholesale authorization," members of

the House gained "the possibility of providing their district with a federal building, regardless of need."[29] (Not until 1926 did Congress authorize surveys for "needs" prior to appropriations.[30])

By 1892, the federal government had an inventory of almost three hundred buildings, with another ninety-five projects underway.[31] The rate of building in the pre–World War I era was impressive. In 1899, about 400 building projects were in process; by 1912, the number of projects had grown to 1,126, producing a "new building every fourth day in the year."[32] By the 1920s, enough architects were employed by the federal government to create their own "Association of Federal Architects" that aspired to improve the esprit de corps of civil service personnel involved in construction.[33]

As is familiar, in 1939, the Office of the Supervising Architect was folded into the Public Buildings Administration.[34] In 1949, that entity became part of the General Services Administration (GSA),[35] which continues to be the government unit charged with overseeing federal buildings, from land purchase to construction and maintenance.

D. New Principles of Federal Construction and New Commitments to Representing the National Government through its Courts (the 1960s to 2010)

1. The Architecture of Federal Buildings and Senator Moynihan's Guiding Principles: The last decades of federal courthouse construction need to be understood in the context of sixty years of concerns that federal construction in general had not been undertaken with sufficient attention to embodying social and political values. Over the decades, a series of initiatives sought to support federal buildings that were more inviting, more sociable, more accessible, more environmentally sustainable, and historically respectful spaces that would contribute to the neighborhoods in which they sat. In the last decade, sadly, security has come to the fore.

Most accounts identify the election of President John F. Kennedy in 1960 as the beginning of a new appreciation for the contributions that art and architecture could make to the civic life of the country. Prompted in part by concern about the "precarious financial underpinnings" of major cultural institutions and in part by the national government's own need for more space, in 1961 President Kennedy chartered the Ad Hoc Committee on Government Office Space.[36]

The result was "Guiding Principles for Federal Architecture"—"a new quality-conscious federal attitude toward architecture . . . that led directly to a mandate for fine art in public buildings,"[37] subsequently supported by the National Endowment for the Arts (NEA). The Ad Hoc Committee, chaired by Arthur Goldberg, then Secretary of Labor, is identified with its lead staffer, Daniel Patrick Moynihan, who later served in the Senate on behalf of New York. Moynihan is given credit for the vision represented by the report[38] as well as for drafting a one-page set of "Guiding Principles" that is regularly invoked in contemporary discussions of federal buildings.[39]

The Ad Hoc Committee concluded that government buildings were often undistinguished and sometimes mediocre. The Principles called for public architecture to "provide visual testimony to the dignity, enterprise, vigor, and stability of the American Government."[40] Further, the "Government should be willing to pay some additional cost to avoid excessive uniformity in design of Federal buildings."[41] To accomplish these goals, the Guiding Principles argued that the government should not be seen as a source of "standards" for quality building. Instead (and consistent with the premises of the 1893 Tarsney Act[42]), the private sector was the place to look: "Design must flow from the architectural profession to the Government and not vice versa."[43]

In 1974, a NEA Task Force report recommended that buildings have more inviting atmospheres so that federal workplaces could be both functional for and attractive to government employees, while also serving to improve the "human vitality" of many downtowns.[44] In response, in 1976 Congress enacted the Public Buildings Cooperative Use Act.[45] The "cooperative" in the act's title reflected the new authority given to the GSA to lease federal building space to tenants for "social and commercial uses"—to wit, shops and restaurants aiming to respond to the "perceived barrenness"[46] of federal offices. That 1976 legislation also picked up concerns from the 1966 National Historic Preservation Act, instructing that attention be paid to "acquiring and reusing historic and architecturally interesting buildings."[47] Therefore, before proposing new construction, the GSA was required to consider whether historic buildings could satisfy federal needs for space.

In addition to sociability and historicity, attention turned in the 1970s to the environment and to the challenges of persons with disabilities. In 1969 Congress had enacted the National Environmental Policy Act,[48] which required federal construction to address the impact of new building on natural resources and habitats. Within a few years, the GSA came to describe its buildings as incorporating "energy conservation technology,"[49] and developed performance goals and energy conservation standards, with a focus on "green" and "sustainable" buildings.[50]

The 1962 Guiding Principles had called for buildings to "be accessible to the handicapped."[51] In 1968 Congress took up the aspirational terms of the Principles and required (in the obliquely named Architectural Barriers Act of 1968) that any building constructed for or used by the United States had to meet standards to "insure that physically handicapped persons will have ready access to, and use of, such buildings."[52] Congress instructed the GSA and other federal agencies to prescribe guidelines for accessibility design that resulted in uniform federal accessibility standards.[53]

In 1990 federal law went further in the Americans with Disabilities Act (ADA), which mandated accessibility in state and private facilities.[54] But problems of compliance were pervasive. In 2004 the United States Supreme Court upheld a provision of the ADA that permitted individuals to seek monetary damages from states for failing to comply with the federal law requiring accommodations to enable disabled persons to use courts.[55] As the bare majority described the underlying facts of the case at bar (a term sadly apt),

the plaintiff, George Lane, who was wheelchair-bound because he was a paraplegic, had "crawled up two flights of stairs to get to the courtroom" in Tennessee where he was to answer to criminal charges.[56] Determining that states were not immune from damage actions, the Court explained that "affirmative obligations" flowed because access to courts was such a foundational constitutional value.

In addition to sociability for workers and users, environmental friendliness, preservation, and accessibility, the other factor that reformatted federal buildings during the last decades of the twentieth century was security. By the 1990s, the vulnerability of federal sites became painfully evident. In 1995, the bombing in Oklahoma City by Timothy McVeigh of a federal building, also housing a day care center, killed more than 160 people.[57] The GSA and the federal judiciary have since focused a good deal on barriers and fortification. The part of the federal judiciary's budget devoted to security grew from forty-two million dollars in 1989 to $185 million in 1999, representing a 335 percent increase, adjusted for inflation.[58]

Indeed, security became the "Objective No. 1" in a late 1990s GSA guide for architects and engineers competing to obtain commissions.[59] That guide emphasized the importance of physical barriers, surfaces that could withstand "ballistic or blast attacks," and it also insisted on the need to impose control over vehicle access, enclose parking for federal personnel, screen both persons and parcels, and install surveillance devices to monitor movements about buildings. In addition, designers were to provide "dedicated, separate, and restricted corridors" as well as elevators for the exclusive use of judges to provide "safe movement within the building."[60] The September 11, 2001, attack on the World Trade Center in New York and the Pentagon intensified these concerns.

2. **U.S. Court Design Guides:** As is familiar, in the late 1970s, the GSA, working with the Administrative Office of the U.S. Courts, had developed guidelines for court construction,[61] put forth first in 1979 and then in 1984. The GSA Guides had discussed two areas within a courtroom, the "activity zone" for formal proceedings and the "public zone" where observers could sit.[62] For courtroom sizes, the *1984 GSA Design Guide* relied on Judicial Conference decisions under Chief Justice Warren Burger who supported alternative dispute resolution and had proposed small ("Tom Thumb") courtrooms. While the 1946 Judicial Conference guidelines had called for 2,200 square foot courtrooms,[63] in the 1980s when Chief Justice Burger presided, the Judicial Conference downsized somewhat, by settling on four sizes of courtrooms ranging from 1,120 square feet to 2,400 square feet.[64] The 1984 *GSA Design Guide* incorporated those standards and also detailed the height for ceilings—twelve feet, except for the large courtroom, where heights of sixteen feet were recommended.[65]

As for the number of courtrooms, the 1979 *GSA Design Guide* had specified that, in accordance with Judicial Conference resolutions, "no judge of a multiple-judge court will have the exclusive use of any particular courtroom."[66] Although tacitly still the policy, that comment was not included in the 1984 version formally approved by the Judicial Conference.

By the late 1980s, the AO reported "excessive delays and costs related to the acquisition and management of space and facilities."[67] Enlisting the National Academy of Public Administration, the AO explored whether responsibility for "defining requirements, designing, leasing, constructing, managing, and performing other functions related to space and facilities" could be transferred from the GSA to the AO.[68] Thereafter, the judiciary sought to distance itself from the GSA by gaining authority to expand its own building stock and to take charge of courthouse design.[69]

In 1991, the Judicial Conference published its own *U.S. Courts Design Guide*, which has been revised several times since. That 1991 guide called for courthouses to "symbolize the Judiciary as a co-equal branch of Government. Courthouse design should reflect the seriousness of the judicial mandate and the dignity of the judicial system. The scale of a courthouse should be monumental, and the materials used on its exterior durable. The spirit of the architecture should be impressive and inspiring. . . . [70] The 1997 version modified those points, under its "General Design Guidelines," stating that "a courthouse facility must express solemnity, stability, integrity, rigor, and fairness. The facility must also provide a civic presence and contribute to the architecture of the local community."[71]

As is also familiar, the federal court design guides revisited the idea that judges could share courtrooms. Instead of the premises of the Burger years that courtrooms were to be "available on a case assignment basis to any judge" and that no judge on multi-judge courts had "the exclusive use of any particular courtroom,"[72] the Judicial Conference took the position that a courtroom had to be dedicated to each judge.[73] As recorded in the 2007 *U.S. Courts Design Guide*: "Recognizing how essential the availability of a courtroom is to the fulfillment of the judge's responsibility to serve the public by disposing of criminal trials, sentencing, and civil cases in a fair and expeditious manner, and presiding over the wide range of activities that take place in courtrooms requiring the presence of a judicial officer, the Judicial Conference adopts the following policy for determining the number of courtrooms needed at a facility: With regard to all authorized active judges, one courtroom must be provided."[74]

Until 2008 the Judicial Conference left the question of dedicated courtrooms for "senior," "visiting," and magistrate judges to decentralized decisionmaking.[75] Then, faced with conflicts over rent and congressional oversight, the Conference moved to the position that in new court construction, senior trial judges were to share courtrooms, as might magistrate judges and possibly others.[76]

II. The Puzzle of Under-Utilization of Federal Courtrooms

This hearing, however, is prompted in part by concerns about how courtrooms are being used. In a series of studies over a decade, the General Accountability Office (GAO) and the Congressional Budget Office (CBO) have reported on under-utilization of federal courtrooms.[77] Yet, according to the Administrative Office of the United States Courts (AO), between 1974 and 1998, Congress enacted some 474 provisions that

expanded "the workload and the jurisdiction of the federal courts."[78] Moreover, filings grew steadily during most of the course of the twentieth century—from around 30,000 in 1901 to some 325,000 by that century's end.[79]

Yet, today, of one hundred civil cases filed in federal courts, fewer than two start a trial. This phenomenon has gained widespread attention, captured in the appellation: "the Vanishing Trial."[80] Other relevant data come from the *1995 Long Range Plan of the Federal Courts*, issued by the Judicial Conference of the United States.[81] At that time, the judiciary raised concerns that too many cases were being brought to court.

The *1995 Long Range Plan* estimated that some 610,000 civil and criminal cases would be filed in 2010. But in 2008, when the Administrative Office of the United States Courts did a report on the implementation of the *Long Range Plan*, the AO noted that filings had not grown as anticipated.[82] Indeed, over the last decade, the numbers of filings of civil and criminal cases have been relatively flat – averaging about 325,000 per year.[83] See Appendix A.

But one should not assume that this figure represents the sum total of federal adjudication. Bankruptcy filings have long hovered around one million a year. Filings dipped somewhat after the bankruptcy reforms of this decade. Filings have, however, risen again to 1.4 million as of 2009.[84] Moreover, tens of thousands of claimants appear before administrative judges working within federal agencies. The largest volume is in the Social Security Administration. In addition, immigration dockets are high; as of 2008, 238 immigration judges averaged some 1,200 cases each year.[85] Concerns about process and outcomes come from many quarters, including federal appellate jurists reviewing judgments and reporting inadequate lawyering and unfair treatment.[86]

Furthermore, this country's need for courts extends far beyond the federal system. All of federal adjudication—in courts and agencies—is dwarfed by activities in the state courts, where more than 45 million cases are filed annually. Yet state courts face significant hurdles to keeping their doors open. In 2007, the New Hampshire courts cut costs by halting criminal and civil jury trials for a month. In 2008, Maine closed its clerk's offices for trial courts on some afternoons because it could not afford to keep them open. In 2009, the Chief Justice of Massachusetts' system warned that one should not assume state courts were "too big to fail," as she argued the need to face the crisis in resources.[87]

Thus, the questions raised are:

a) why, given the array of congressional authorizations for individuals allegedly harmed to bring lawsuits, federal courtroom usage is not as great as what was anticipated;

b) how Congress can act to reinvigorate the use of federal courtrooms, and

c) whether, when not needed for federal court proceedings, trial or appellate courtrooms could be used by federal administrative agencies to conduct proceedings such as immigration hearings or by state courts.

The purpose of all these inquiries is to enable more public access to adjudication. Below I sketch late twentieth century policies that have limited the use of federal courtrooms. I then turn to a discussion of why the lack of public processes in open courts poses a problem that Congress should address.

III. The Practices That Route Litigants Elsewhere

As part of the discussion is about federal courthouse buildings, the term "barrier" may invoke literal structures. My comments here seek to draw attention to other kinds of impediments that help explain the under-utilization of courtrooms.

A. Resources

Simply put, large numbers of would-be litigants lack the resources to pursue their rights. This inability to access justice has prompted recent reports from leading jurists and bar associations on the need for a "civil *Gideon*" to provide rights to counsel for poor claimants dealing with fundamental needs, such as shelter and family relations.[88] In addition, concerns have mounted about the need to provide greater support for the Legal Services Corporation.

B. Doctrine, Rules, and Policies Erecting Barriers to Courts

Some litigants do have resources to come to court. However, over the last four decades, legal policies have been developed to route individuals elsewhere. A series of decisions by the Supreme Court dealing with pleadings, standing, implied causes of action, and immunities have made it more difficult to pursue claims.[89] In addition, three mechanisms—rules and statutes pressing litigants towards private settlements, devolution of adjudication to agencies, and outsourcing to private providers by enforcement of form contracts requiring arbitration—shift the practices of adjudication away from public courtrooms.

1. **Alternative Dispute Resolution:** The promotion of "alternative dispute resolution" (ADR) can be found in revisions to the *Federal Rules of Civil Procedure*, first promulgated in 1938. Those rules created a "pre-trial" procedure for judges and lawyers to meet and confer in advance of trial so as to simplify trials. The archival records of the rule-drafters do not indicate that judges were supposed to use the occasion to encourage lawyers to settle cases or to seek methods of dispute resolution other than adjudication.

But in 1983 and again in 1993, the rulemakers reframed the judicial role such that what had once been "extra-judicial" procedures became "judicial" procedures. Judges were told to consult with parties and advise them on the desirability of settlement.

Congress has also enacted a series of statutes pressing both courts and administrative agencies to use ADR and to pursue negotiated conclusions.[90]

Federal judges are now multi-taskers—sometimes deployed as managers of lawyers and cases, sometimes acting as super-senior partners providing advice for both parties, sometimes serving as settlement masters or mediators, and at other points as referral sources sending disputants either to different personnel within courthouses or to institutions other than the courts. As a consequence, the trial judge on the bench is becoming (to borrow the words of one noted federal district court judge) an "endangered species."[91]

The rationales for this shift in doctrine and practice are many, as analytically different concerns (not detailed here) support efforts for ADR. Many of the reformers share a failing faith in adjudicatory procedure and a normative view that consent of the contracting parties, developed through negotiation or mediation, is preferable to the outcomes that judges might render. "Bargaining in the shadow of the law" is a phrase often invoked,[92] but private bargaining is increasingly becoming a requirement of the law of conflict resolution.[93]

2. **Devolution of Adjudication to Administrative Agencies**: Over the last fifty years, Congress has assigned many claimants to administrative agencies. A snapshot of the shift from court-based to administrative adjudication is provided by a comparison of the volume of evidentiary hearings during 2001 in federal agencies with those in federal courts. That year, some 100,000 evidentiary proceedings—in which district, magistrate, or bankruptcy judges received testimony of any kind (on motions as well as during trials) —took place inside the hundreds of federal courthouses around the United States.

In contrast, an estimated 700,000 evidentiary proceedings took place in four federal agencies with a high volume of adjudication.[94] Unlike federal courts, however, where constitutional precepts insist that the courtroom doors remain open, some federal administrative adjudicatory proceedings are presumptively closed to outsiders. Further, even if one is permitted to attend, finding such hearings is difficult because they take place in office buildings not readily welcoming to street traffic.

3. **Mandatory Arbitration of Federal and State Statutory Rights**: The United States Supreme Court has, over the last three decades, enforced mandatory arbitration contracts, even when entered into by consumers and employees who lack the ability to bargain for other terms. My own 2002 cell phone service agreement provides an example. By unwrapping the phone and activating the service, I waived my rights to go to court and was obligated to "arbitrate disputes arising out of or related" to prior agreements. Moreover, even when "applicable law" would permit me to join class actions or class arbitrations, the contract stated that both the provider and the consumer were precluded from pursuing any "class action or class arbitration."[95]

The law of the United States once refused to enforce such form contracts. One concern was that the party proffering the agreement had more bargaining power than

the offeree. Judges also explained that arbitration was too flexible, too lawless and too informal, in contrast to adjudication, which they praised for its regulatory role in monitoring adherence to national norms. For decades, the Supreme Court gave a limited reading to the Federal Arbitration Act, passed in 1925 to encourage commercial arbitrations. The Court concluded that the act did not, for example, bar stock purchasers from suing their brokers just because of a form waiver signed before a problem even existed.[96] Employees too could bring individual discrimination claims to court, even if their unions had entered into collective bargaining agreements.[97]

Beginning in the 1980s, however, the Supreme Court reversed some of its earlier rulings as it reread federal statutes to permit, rather than to prohibit, the enforcement of arbitration contracts when federal statutory rights were at stake—as long as the alternative provided an "adequate" mechanism by which to vindicate statutory rights.[98] Judges have not applied the test of "adequate" alternatives to require that mandatory arbitration programs provide the same procedures (such as discovery) that are available in courts. Further, the party contesting the enforcement of mandatory arbitration clauses bears the burden of showing that the costs charged to the disputants for arbitration are too great to make it qualify as an adequate alternative.

In 2001, the Supreme Court ruled (five to four) that an employee alleging discrimination under California law had to go before an arbitrator because he had signed a job application that waived his rights to court.[99] In 2009, the Court concluded (again, five to four) that employees under a collective-bargaining agreement lost their individual rights to go to court for age discrimination claims, even though they had not personally signed the agreement.[100] In addition, the Supreme Court has ruled that when parties disagree about how to interpret a contractual arbitration clause—diverging on the question of whether or not arbitration is required—the issue is to be decided, at least initially, by the private arbitrator and not by a judge.[101] In April of 2010, the Court closed another door. A panel of three arbitrators interpreted a form maritime contract that was silent on the question of class arbitrations. The arbitrators ruled that a class anti-trust arbitration (following a criminal investigation for price fixing in shipping) could proceed. But five Justices held that, because the underlying contract did not specifically authorize a class, that group-based process could not take place.[102]

4. **Congressional Responses Opening Access**: Some of the problems of bringing lawsuits to federal court have come to the attention of Congress, as its members have proposed and enacted various bills to protect opportunities for federal enforcement of rights. Congressional interventions in arbitration provide one illustration of what I am recommending: that empty courtrooms not be the predicate for a retreat from commitments to supporting open courts, but rather the basis for action.

The problem of mandatory arbitration for federal and state statutory rights provides one example. In 2002, Congress exempted car franchises from being bound by contracts to arbitrate claims against manufacturers.[103] A few years thereafter, Congress passed another act, protecting farmers dealing with large agricultural purchasing conglomerates.[104] Last fall, more than twenty-five members of this House proposed

doing the same for employees and consumers in a proposed "Arbitration Fairness Act."[105]

IV. The Democratic Role Played by Open Courts and Methods to Invigorate these Spaces

A. The Democracy in Adjudication

Above, I sketched how through case management, judicial efforts at settlement, mandatory ADR in or via the courts, devolution of disputes to administrative agencies and enforcement of waivers of rights to trial, the framework of "due process procedure," with its independent judges and open courts, is being replaced by what can fairly be called "contract procedure."[106] Despite the growing numbers of persons called "judges" and of conflicts called "cases," it is increasingly rare for government-based judges to be required to reason in public about their decisions to validate one side of a dispute. In mimetic symmetry, both judges in courts and their counterparts in the private sector now produce private outcomes that are publicly sanctioned.

These developments should be a source of concern, because public adjudicatory procedures make important contributions to functioning democracies. Indeed, this point was made in the early part of the nineteenth century by Jeremy Bentham, who called for "publicity" in courts and elsewhere.[107] He argued that open courts educate the public, enhance the accuracy of decisionmaking, and enable oversight of, as well as provide legitimacy for, the judiciary. In today's terms, Bentham could be understood both as a procedural reformer, focused on the interstices of legal rules, and as a political theorist, insistent on the role that courts play in contributing to what today is called "the public sphere"—arenas in which members of a polity develop views about the governing norms and practices.[108]

Courts are themselves a site of democratic practices. Public courts are one of many venues to understand, as well as to contest, societal norms. Courts both model the democratic precepts of equal treatment and subject the state itself to democratic constraints. The obligations of judges to protect disputants' rights, and the requirements imposed on litigants (the government included) to treat their opponents as equals, are themselves democratic practices of reciprocal respect. By imposing processes that dignify individuals as equals before the law, litigation makes good on one of democracy's promises—or may reveal democracy's failures to conform to its ideological precepts. Moreover, rights of audience divest the litigants and the government of exclusive control over conflicts and their resolution. Empowered, participatory audiences can therefore see and then debate what legal parameters ought to govern.

Consider the interaction between observers and courts. Public processes and published opinions of judges permit individuals who are neither employees of the courts nor disputants to learn, first-hand, about processes and outcomes. Indeed, courts—and

the discussions that their processes produce—are one avenue through which private persons come together to form a public so as to develop an identity as participants acting within a political and social order. Courts make a contribution by being what could be called "non-denominational" or non-partisan, in that they are some of the relatively few communal spaces not organized by political, religious or social affiliations. Open court proceedings enable people to watch, debate, develop, contest and materialize the exercise of both public and private power.

B. The Methods for Making Courtrooms Vital Public Spaces

The history provided above makes plain how important Congress has been to enabling public access to justice. While the past few decades have made plain that public processes are not always provided in courts, those functions can be reinvigorated in a variety of ways. Whether in courts or in their alternatives, one can build in a place for the public—to enable "sunshine," to borrow the term from legislation mandating open access to courts and other government institutions.[109] For example, federal judges could adopt a practice of holding many pretrial conferences in open court. Further, rules can oblige civil litigants to consent to settlement in open court, as do the legal constraints on entering guilty pleas for crimes. Moreover, limits could be placed on when discovery materials exchanged under the aegis of courts can be made confidential.

In terms of questions of courtroom sharing, I suggest that to determine how to return proceedings to courtrooms, when and if to share courtrooms, and with whom, Congress should support efforts of the judiciary to create committees in each district to evaluate usage and determine how to improve it. The model for this proposal comes from the Civil Justice Reform Committees that were chartered under a 1990 enactment calling on courts to address expense and delay. That approach is appropriate in this context, given the wide variation across districts in the roles played by magistrate and senior judges as well as very different docket pressures.

Each chief judge of a district could be asked to appoint a committee that included a diverse set of courtroom users. Relevant participants would include lawyers from different segments of the bar (for example, the United States Attorneys' Offices, Federal Public Defenders, civil litigators specializing in different kinds of cases) as well as court staff, representatives from relevant administrative agencies, from state courts, and members of the public. In terms of the scope of inquiry, these local "courtroom usage committees" should consider the number and kind of courtrooms available, including appellate as well as trial level courtrooms, the degree of sharing already under way, and any unique circumstances of particular courthouses. Further, if a district sits where a federal administrative agency conducts hearings (such as proceedings before immigration judges, social security judges, and the like), consideration should be directed to whether any of those proceedings could use courtroom space, if available.

Thank you for consideration of these comments.

Appendix A: Filing Trends

Review of Trends

The *Plan* devoted a chapter and appendix to trends that could threaten the judiciary's core values of providing equal justice, maintaining high standards of legal excellence, and sustaining legitimacy in the eyes of the public. Forecasts suggested the possibility of continued caseload increases at both the trial and appellate levels, and concomitant growth in the size of the judiciary.

Caseload and Judgeships: Forecasts versus Actuals

	Forecasts		Actual	
	2000	2010	2000	2007
District Cases Commenced	364,800	610,800	322,262	325,920
Criminal Cases	47,800	62,000	62,745	68,413
Civil Cases	317,000	548,800	259,517	257,507
Appeals	85,700	174,700	54,697	58,410
Authorized Appellate Judges	440	870	167	167
Authorized District Judges	890	1,430	665	692

Although the large growth trends forecast in 1995 have not borne out, new and unanticipated challenges have arisen such as the increase in immigration cases.

Individual committees continue to examine trends closely. The Committee on the Administration of the Bankruptcy System noted that while "the 1995 plan does not contain any explicit projection of trends in the bankruptcy system, there is at least an implicit assumption that the bankruptcy system would continue in its historical form into the foreseeable future. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 radically altered the basis for that assumption, making extensive changes to the substantive, procedural and administrative aspects of bankruptcy law and practice." As it concerns the future of the bankruptcy system, the Bankruptcy Committee notes that "as part of its long-range planning, the [committee] will have to evaluate what that steady state might look like, as well as how future economic developments... will affect the system."

	CIVIL AND CRIMINAL FILINGS	BANKRUPTCY FILINGS
1995	294,123	883,457
1996	322,390	1,111,964
1997	317,021	1,367,364
1998	314,478	1,436,964
1999	320,194	1,354,376
2000	322,262	1,262,102
2001	313,615	1,437,453
2002	341,841	1,547,669
2003	323,604	1,661,996
2004	352,360	1,618,987
2005	349,076	1,782,643
2006	312,738	1,112,542
2007	344,901	801,269
208	314,519	1,042,806
2009	333,082	1,402,816

* The above information is compiled from The Annual Reports of the Director: Judicial Business of the United States Courts, *available at* http://www.uscourts.gov/judbususc/judbus.html. The numbers contained in these reports tend to be lower than two other sources of case filing data on the Federal Judiciary webpage: Federal Court Management Statistics, *available at* http://www.uscourts.gov/fcmstat/index.html, and Judicial Facts and Figures, *available at* http://www.uscourts.gov/judicialfactsfigures/2008.html.

Endnotes

[1] For example, I was counsel of record in *Mohawk v. Carpenter*, 130 S.Ct. 599 (2009), which dealt with the question of whether a trial judge's ruling requiring disclosure of what was claimed to be protected by the attorney-client privilege was appealable, as of right, during the pendency of the case.

[2] Some of the materials presented in this Statement are drawn from my forthcoming book, coauthored with Dennis E. Curtis and entitled *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms*, to be published by Yale Press later this year. This statement was prepared with the assistance of Yale Law School students Allison Tait, Elliot Morrison, Adam Grogg, Joe Pace, Brian Holbrook, Brigid Davis, and of Katherine Haas, Rose Malloy, and Nicholas Makarov, Yale College, Class of 2012. A related statement was submitted for the record in the hearing *Eliminating Waste and Managing Space in Federal Courthouses: GAO Recommendations on Courthouse Construction, Courtroom Sharing and Enforcing Congressionally Authorized Limits on Size and Cost*, Hearing before the Subcommittee on Economic Development, Public Buildings and Emergency Management Committee on Transportation and Infrastructure Statement for the Record, U.S. House of Representatives, May 2010.

[3] The history of federal construction comes from several sources, including ANTOINETTE J. LEE, ARCHITECTS TO THE NATION: THE RISE AND DECLINE OF THE SUPERVISING ARCHITECT'S OFFICE 14–29 (2000). The phrase "a federal presence" is borrowed from Lois Craig's book THE FEDERAL PRESENCE: ARCHITECTURE, POLITICS, AND SYMBOLS IN UNITED STATES GOVERNMENT BUILDING (1978). As the Foreword by Nancy Hanks details, that history of "government attempts to house its services and activities" was prompted by concerns of the National Endowment for the Arts (NEA).

[4] LEE at 29–35. See also BATES LOWRY, BUILDING A NATIONAL IMAGE: ARCHITECTURAL DRAWINGS FOR THE AMERICAN DEMOCRACY, 1789–1912 (1985, published in conjunction with an exhibition of the same title).

[5] See *Civil Justice Reform Act of 1990*, Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471-82 (2006)). That legislation had a "sunset clause." See also *Task Force on Civl Justice Reform: Justice for All: Reducing Costs and Delay in Civil Litigation* (1989). Implementation was analyzed by RAND's Institute for Civil Justice. See also James S. Kakalik, Terence Dunworth, Laural A. Hill, Daniel F. McCaffrey, Marian Oshiro, Nicholas M. Pace, Mary E. Vaiana, *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act* (1996).

[6] The Judicial Conference has considered state court users, when noting that its policies on cameras in the courts would apply, rather than whatever policy was in place for states. See Statement of Judge Diarmuid O'Scannlain on Behalf of the Judicial Conference of the United States Regarding S. 829 as Applied to Federal Trial Courts, http://www.uscourts.gov/testimony/exhibit4CameraTest05.pdf (Nov. 9, 2005) (statement to the Senate Judiciary Committee); Bills Would Bring Rent Relief to Judiciary, Allow Cameras in Courts, Shape Judicial Security and Review, and Create Inspector General, 38 THIRD BRANCH 3 (May 2006), available at http://www.uscourts.gov/ttb/05-06/rentbill/index.html (discussing Judicial Conference policy to permit appellate courts, at their option, to televise oral arguments but to oppose "cameras in federal trial courtrooms").

[7] Charter of Fundamental Laws, of West New Jersey, Agreed Upon, ch. XXIII (1676), see http://avalon.law.yale.edu/17th_century/nj05.asp.

[8] See *Presley v. Georgia*, 130 S. Ct. 721 (2010).

[9] Randy Gragg, *Monuments to a Crime-Fearing Age*, NEW YORK TIMES MAGAZINE, May 28, 1995, at 36.

[10] Indeed, at the beginning of the nineteenth century, Congress proceeded in an ad hoc fashion through an independent authorization for each construction project. See, for example, Act of Feb. 13 1807, § 5, 2 Stat. 418, 419. Congress authorized the Secretary of the Treasury to find a "convenient site, belonging to the United States, in the city of New Orleans, a good and sufficient house, to serve as an office and place of deposit for the collector of the customs." The act appropriated $20,000 for building costs. In the 1830s, as both the federal budget and the professions related to buildings grew, the contours of a federal building program became more defined, and Robert Mills "served more or less officially" in a position sometimes called Architect of the Public Buildings. CRAIG at 56. The population of the United States doubled between 1830 and 1860. Federal expenditures more than quadrupled during those same thirty

years. See U.S. Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1970, pt. II at 1104, http://www.census.gov/prod/www/abs/statab.html.

[11] For example, the Act of March 3, 1851, appropriating money for a Custom House in Savannah, Georgia, noted that funds were to be used for "furniture and fixtures for the accommodations of the officers of the revenue, and also for the post-office, and United States Courts." See also EDWIN SURRENCY, HISTORY OF THE FEDERAL COURTS 82 (Dobbs Ferry, NY: Oceana Publications, 2nd ed. 2002).

[12] Illustrative is the 1832 designation by Congress of acreage in Little Rock for the "erection of a courthouse and jail" for the Territory of Arkansas. See Act of June 15, 1832, 4 Stat. 531. Provisions were also made in 1839 for funds for a courthouse in Alexandria, Virginia. See Serial Set Vol. No. 364, Session Vol. No. 2, 26th Congress, 1st Sess., H. Doc. 32, 7 p. Dec. 30, 1839, Expenditure.

[13] DARRELL HEVENOR SMITH, THE OFFICE OF THE SUPERVISING ARCHITECT OF THE TREASURY: ITS HISTORY, ACTIVITIES, AND ORGANIZATION 3 (Baltimore, MD: Johns Hopkins Press, 1923); LOWRY at 52.

[14] One judge presided in each of the following states: Alabama, Arkansas, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, New Jersey, North Carolina, Ohio, Rhode Island, South Carolina, Tennessee, Texas, Vermont, and Wisconsin. California, Florida, Louisiana, New York, Pennsylvania, and Virginia each had two judgeships. Our count does not include federal judges in the territorial courts, including those in the District of Columbia. See Chronological History of Authorized Judgeships in U.S. District Courts (Arranged by State) in HISTORY OF FEDERAL JUDGESHIPS: U.S. COURTS OF APPEALS AND U.S. DISTRICT COURTS, U.S. Courts, www.uscourts.gov/history/districtchronol.pdf (hereinafter Chronological History of Authorized Judgeships in U.S. District Courts). The database is provided by the Article III Judges Division, Office of Judges Programs, of the Administrative Office of the United States Courts.

[15] Act of Sept. 28, 1850, 9 Stat. 521. A reorganization reduced the number to one in 1866 but returned it to two in 1886. See Act of July 27, 1866, and Act of Aug. 5, 1886, 2 Stat. 308. As noted earlier, five other states (Florida, Louisiana, New York, Pennsylvania, and Virginia) also had two judgeships allotted.

[16] For example, in 1855 the Secretary of the Interior and the Postmaster General called for "sites for court houses and post offices" in Boston, New York, and Philadelphia. See Sites for Court House and Post Office, Message from the President of the United States, Serial Set Vol. No. 783, Session Vol. No. 5, 33rd Congress, 2d Sess., H. Doc. 43, 7 p., January 25, 1855.

[17] The work of that office is chronicled by Darrell Smith, Antoinette Lee, and others. Prior to its creation, federal officials who worked in the Treasury Department on federal building had various titles, including "Engineer in Charge of this Department" and "Supervising Architect." LEE at 29–43. No statutory authority supported the Secretary of the Treasury when he first created the unit, but legislation in the 1860s and thereafter made mention of that job. SMITH at 6–7. For example, the Act of March 14, 1864, ch. 30, 13 Stat. 22, 27, provided the Treasury with "one superintending architect, one assistant architect," several clerks and a messenger. The first architect appointee served from 1852 until 1862 as the "chief designer of all federal buildings" that fell within the Treasury Department's control. LEE at 47. Architect Young, credited with designing some seventy buildings, also made iron work the preferred material to provide fireproofing and permanency. Federal Judicial Center, Constructing Justice: The Architecture of Federal Courthouses 1-2 (A Description of Historical Photographs Exhibited at the Federal Judicial Center, undated essay); LEE at 59–60. The authority of the Supervising Architect grew after the Civil War. By 1875, Congress required that no funds be spent on public buildings without approval from the Secretary of the Treasury, "after drawings and specifications, together with estimates of costs thereof, shall have been made by the Supervising Architect" in that Department. See Act of March 3, 1875, ch. 130, 18 Stat. 371, 395. See also SMITH at 7–8.

[18] In 1849, the task of administering courts fell to the newly created Department of the Interior, charged with management of public lands and parks as well as the fiscal responsibility for the federal court system.

[19] See *Habeas Corpus Act of 1867*, ch. 28, 14 Stat. 385 (codified at 28 U.S.C. §§ 2241 et seq. (2006)).

[20] See *Civil Rights Act of 1871*, ch. 22, 17 Stat. 13 (codified at 42 U.S.C. § 1983 (2006)).

[21] See Act of March 3, 1875, ch. 137, 18 Stat. 470 (codified at 28 U.S.C. § 1331 (2006)).

[22] Act of June 22, 1870. In contrast, the First Judiciary Act had created the Office of Attorney General, to be held by a person "learned in the law," to prosecute suits for the United States and to provide

advice on legal questions to the Executive Branch. See Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92–93; Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism,* 1989 DUKE LAW JOURNAL 561, 566–570; ANTONIO VASAIO, THE FIFTIETH ANNIVERSARY OF THE U.S. DEPARTMENT OF JUSTICE BUILDING, 1934–1984, at 2 (Washington, DC: U.S. Government Printing Office, 1984).

[23] An Act to establish the Department of Justice, ch. 150, 16 Stat. 162 (1870), § 15.

[24] See David S. Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 SOUTHERN CALIFORNIA L. REV. 65, 98, table 4 (1981) (hereinafter Clark, *Adjudication to Administration*). Clark also detailed the change in the mix of cases; the proportions of criminal and civil cases varied over time as well as the ratio of civil filings by private parties to those brought by the government.

[25] Alabama got its second district judge in 1886. See Act of August 2, 1886, 24 Stat. 213. In 1871, Arkansas was given a second judge. See Act of March 3, 1871, 16 Stat. 471, 472. Other states that received second judgeships include California (1886); Georgia (1882), Iowa (1882); Louisiana (1881, returning it to two judgeships); Michigan (1863); Missouri (1857); North Carolina (1872); Tennessee (1878); Texas (1857); Virginia (1871, returning to a two judgeship provision); and Wisconsin (1870). The District of Columbia did as well in 1870. Illinois and Ohio received a second judgeship in 1855, and New York received a third in 1865. See Chronological History of Authorized Judgeships in U.S. District Courts.

[26] CRAIG at 163. The federal workforce grew from 4,847 employees in 1816 to 395,905 employees in 1911. Id.

[27] LOWRY at 58.

[28] LOWRY at 80. Some prior bills had authorized that buildings be constructed in several different locations. See, for example, Act of August 4, 1854, ch. 242, 10 Stat. 546, 571, providing for a "custom-house, post-office, and United States courts" in various cities. Another omnibus construction bill providing $45 million in funds was enacted in 1913. See Act of March 4, 1913, ch. 142, 37 Stat. 739. A third such bill, Act of May 25, 1926, Pub. L. No. 69-281, ch. 380, 44 Stat. 630, authorized construction of several kinds of federal buildings—"courthouses, post offices, immigration stations, customhouses, marine hospitals, quarantine stations, and other public buildings." While that list was similar to those found in bills from the late nineteenth century, the order had changed—the 1926 legislation put courthouses at the front.

[29] LOWRY at 80. As for the style of the buildings, many designs adopted the Beaux-Arts style popularized by the Chicago Exposition of 1893. Id. at 81–82; CRAIG at 203, 210–215. Concerns about pork-barrel funding led to cutbacks in 1911 in the workforce of the Office of Supervising Architect and to a hiatus between 1913 and 1926 in omnibus funding bills. CRAIG at 239–240.

[30] CRAIG at 163.

[31] CRAIG at 202.

[32] CRAIG at 213 (quoting the Secretary of the Treasury).

[33] CRAIG at 298. The group began publication of its magazine, *The Federal Architect,* in 1930. Id. The publication and the association "faded away" in 1947. Id.

[34] See Reorganization Plan No. I of 1939, 4 Fed. Reg. 2727 (Jul. 1, 1939), 53 Stat. 1423 (pursuant to the Reorganization Act of 1939, Pub. L. No. 79-19, 53 Stat. 561). In that same year, the Treasury's Section of Painting and Sculpture became the Section of Fine Arts, under the auspices of Public Buildings Administration; it became "inactive" in the 1940s. See Lloyd Goodrich, *Government and Art: History and Background*, 8 COLLEGE ART JOURNAL 171, 173 (1949). In 1949 Congress enacted the Public Buildings Act, authorizing the site selection and construction of federal buildings. See Public Buildings Act of 1949, Pub. L. No. 81-105, 63 Stat. 176 (codified as amended in scattered sections of 40 U.S.C.).

[35] Created under President Harry Truman at the end of World War II, the GSA was supposed to centralize the procurement and superintendence of government property. Functions of other agencies were transferred to the GSA, which was run by an "Administrator" appointed by the President. See Federal Property and Administrative Services Act of 1949, Pub. L. No. 81-152, 63 Stat. 377 (codified in scattered sections of 40 U.S.C., 41 U.S.C., and 50 U.S.C.). The GSA described its 1949 mandate as "standardization, direct purchase, mass production, and fiscal savings." GENERAL SERVICES ADMINISTRATION, GROWTH, EFFICIENCY AND MODERNISM: GSA BUILDINGS OF THE 1950S, 60S, AND 70S at 29 (Washington, DC: GSA, 2006) [hereinafter GSA MODERNISM], available online at http://www.gsa.gov/gsa/.cm_attachments/GSA_DOCUMENT/Modern_R2-v01-t_0Z5RDZ-i34K-pR.pdf. A series of other acts added to GSA responsibilities, and the Public Buildings Act of 1959 gave the GSA more direct control over

federal construction. Public Buildings Act of 1959, Pub. L. No. 86-249, 73 Stat. 479 (codified at 40 U.S.C. §§ 490, 601–619, current version at 40 U.S.C.A. §§ 581–590, 3301–3315).

[36] LEE at 290–291.

[37] John Wetenhall, *Camelot's Legacy to Public Art: Aesthetic Ideology in the New Frontier*, 48 ART JOURNAL 303, 304 (1989).

[38] The history and importance of these principles are chronicled in three volumes published by the GSA, entitled VISION + VOICE, that include commentary and reflections from various participants (including architects, members of selection panels, and administrators) in the GSA programs. Published four decades after "Moynihan wrote the 'Guiding Principles for Federal Architecture,'" the set credits his work with changing "the course of public architecture in our nation." Id., Preface by F. Joseph Moravec, Commissioner, Public Buildings Service. Volumes II and III, both titled "Changing the Course of Federal Architecture," were published in 2004.

[39] The "Guiding Principles for Federal Architecture" are reproduced in I VISION + VOICE at 4–5 [hereinafter Guiding Principles, I VISION + VOICE].

[40] Guiding Principles, I VISION + VOICE at 4.

[41] Guiding Principles, I VISION + VOICE at 5.

[42] Act of Feb. 20, 1893, ch. 146, 27 Stat. 468 (Tarsney Act).

[43] Guiding Principles, I VISION + VOICE at 5. See also Wetenhall at 305; GROWTH, EFFICIENCY AND MODERNISM: GSA BUILDINGS OF THE 1950S, 60S, AND 70S at 44 (Washington, DC: U.S. General Services Administration, 2003) (hereinafter GSA MODERNISM).

[44] NEA, MULTIPLE-USE FACILITIES at 5.

[45] See Pub. L. No. 94-541, 90 Stat. 2505 (1976) (codified as amended at 40 U.S.C. §§ 3306 et seq. (2006)). The act imposed on the Administrator of the Public Buildings Service the obligation to "encourage the location of commercial, cultural, educational, and recreational facilities and activities in public buildings" (id. at section 102(a)(2)) as well as to "acquire and utilize space in suitable buildings of historical architectural, or cultural significance" (id. at 102(a)(1)).

[46] GSA MODERNISM at 58. The legislation was also responsive to the opinion of the GSA General Counsel that, absent new legislation, the agency lacked legal authority to rent space for other uses.

[47] CRAIG at 441.

[48] National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4331 et seq. (2000)).

[49] GSA MODERNISM at 11.

[50] GSA MODERNISM at 49–51.

[51] Guiding Principles, I VISION + VOICE at 5.

[52] *Architectural Barriers Act of 1968*, Pub. L. No. 90-480, 82 Stat. 718, 719 (codified at 42 U.S.C. §§ 4151 et seq. (2000)).

[53] *Architectural Barriers Act of 1968* at §§ 2-5.

[54] The Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 337, provides in Title II (codified at 42 U.S.C. §§ 12131–12165) that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

[55] *Tennessee v. Lane*, 541 U.S. 509 (2004). The legal question was whether the doctrine of sovereign immunity, embodied to some (contested) extent in the Eleventh Amendment to the United States Constitution, limited the power of Congress to authorize lawsuits against states for damages when the ADA was violated. In a five-to-four decision, with Justice Stevens writing for the majority, the Court upheld Congress's power to do so. Justice Souter, joined by Justice Ginsburg, concurred, explaining that courts had been in the business of perpetuating discrimination on the basis of handicap. *Id.* at 534. Chief Justice William Rehnquist, joined by Justices Kennedy and Thomas, in dissent, argued that Congress lacked the power to subject states to monetary damages for the violations. *Id.* at 538. Justices Scalia and Thomas each explained their further disagreements with the majority in separate dissents. *Id.* at 554 (Scalia, J., dissenting) and at 565 (Thomas, J., dissenting).

[56] *Tennessee v. Lane*, at 514.

[57] A HISTORY OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS: SIXTY YEARS OF SERVICE TO THE FEDERAL JUDICIARY 198 (Cathy A. McCarthy and Tara Treacy, eds., Washington, D.C.: Administrative Office of the United States Courts, 2000) [hereinafter HISTORY OF THE AO]. The bombing

of the Alfred P. Murrah Federal Building also damaged the U.S. courthouse that was located nearby, separated from it by a plaza. Id. at 199.

[58] HISTORY OF THE AO at 200.

[59] THE DESIGN EXCELLENCE PROGRAM GUIDE: BUILDING A LEGACY (Architect/Engineer Selection and Design Review) 70 (Washington, DC: U.S. General Services Administration, 2000) [hereinafter GSA DESIGN EXCELLENCE PROGRAM GUIDE]. In 2005, the Judicial Conference divided "the Committee on Security and Facilities into two committees: the Committee on Judicial Security, and the Committee on Space and Facilities[,] . . . enabling a separate committee to devote its full attention [to] judicial security." Lorraine H. Tong, Judicial Security: Responsibilities and Current Issues, Congressional Research Service, June 12, 2006 (RL33464) at 12.

[60] GSA DESIGN EXCELLENCE PROGRAM GUIDE at 70-71.

[61] See General Services Administration, Public Building Service, UNITED STATES COURTS DESIGN GUIDE (1 May 1979) [hereinafter 1979 GSA COURTS DESIGN GUIDE] and U.S. General Services Administration, Mar. 9, 1984 [hereinafter 1984 GSA COURTS DESIGN GUIDE].

[62] 1979 and 1984 GSA COURTS DESIGN GUIDES, ch. 4 at 2 (focusing on the layout of a district courtroom). While prisoners, judges, and the public had different entryways to the courtroom (id. at 3), a concept of maintaining discrete zones throughout the building was not put forth. Judges were encouraged, when possible, to have private elevators. Id., ch. 14 at 2.

[63] See also JCUS and DIRECTOR OF THE AO REPORT at 262 (Apr. 5–6, Sept. 13–14, 1973). That report had inventoried courtroom space and found that, as of 1973, the 705 courtrooms ranged in size from 600 to 4,330 square feet and that 75 percent measured 1,700 or more square feet. The following year, the number of courtrooms had grown to 714. JCUS and DIRECTOR OF THE AO REPORT at 138 (Mar. 7–8, Sept. 19–20, 1974).

[64] Those layouts for trial-level courts were twenty-eight by forty, thirty-four by forty-four, thirty-five by fifty-two, and forty by sixty feet. Those guidelines had been provided by the Judicial Conference. See JCUS Oct. 26 and 27, 1972, at 44–45. As the 1979 and 1984 Design Guides explain, the Judicial Conference had prescribed three sizes in the early 1970s, but "consultation" with both Chief Justice Warren Burger and Attorney General Griffin B. Bell "[led] to a reexamination of spatial requirements and the subsequent increase in size of the intermediate size courtroom." 1979 and 1984 GSA COURTS DESIGN GUIDES, ch. 4 at 1. Appellate courtrooms were to be from 1,500 to 2,400 square feet. Id, ch. 17 at 1 ("Circuit Courts of Appeals").

[65] See, for example, 1984 GSA COURTS DESIGN GUIDE, ch. 4 at 3 (limited-use courtrooms); ch. 4 at 7–8 (intermediate courtrooms); ch. 4 at 9–10 (standard courtrooms); ch. 4 at 11–12 (large courtrooms).

[66] 1979 GSA COURTS DESIGN GUIDE, at ch. 4 at 1.

[67] See Judicial Conference of the United States and DIRECTOR OF THE AO REPORT Mar. 12–13, June 30, and Sept. 18–19, 1986, at 53.

[68] See 1987 DIRECTOR OF THE AO REPORT at 70; HISTORY OF THE AO at 195. According to the 1988 DIRECTOR OF THE AO Report, the study "documented the need for the Judiciary to take a more aggressive role in managing its own space." Or, as the AO put it in 2000, the academy "recommended that the judiciary play a greater role in planning for and designing court facilities." HISTORY OF THE AO at 195. Thereafter the director of the AO and the administrator of the GSA entered into a "Memorandum of Understanding, establishing a planning process involving both GSA and the Judiciary, and defining relationships for funding space and facility projects." See 1988 DIRECTOR OF THE AO REPORT at 75. To provide such funding, the Judicial Conference launched a study of space standards and needs. Id. By the 1990s the AO had created a "space management information system." 1992 DIRECTOR OF THE AO REPORT at 24.

[69] HISTORY OF THE AO at 195.

[70] 1991 U.S. COURTS DESIGN GUIDE at 71.

[71] 1997 U.S. COURTS DESIGN GUIDE at 3-9.

[72] See JCUS Oct. 28–29, 1971, at 64.

[73] This rule was formulated by 1997 as Judicial Conference policy: "With regard to district judges, one courtroom should be provided for each active judge. In addition, with regard to senior judges who do not draw caseloads requiring substantial use of courtrooms and to visiting judges, judicial councils should utilize the following factors as well as other appropriate factors in evaluating the number of courtrooms at a facility necessary to permit them to discharge their responsibilities." JCUS Mar. 11, 1997, at 17.

[74] SPACE AND FACILITIES COMMITTEE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, U.S. COURTS DESIGN GUIDE, 2007 ed. [hereinafter 2007 U.S. COURTS DESIGN GUIDE] at 2-8.

[75] JCUS Mar. 11, 1997, at 17. See also 2007 U.S. COURTS DESIGN GUIDE at 2-8.

[76] See *Judicial Conference Adopts Courtroom Sharing Policy as Latest Cost-Saver*, 40 THIRD BRANCH 1 (Sept. 2008).

[77] See, e.g., *Courthouse Construction: Improved 5-Year Plan Could Promote More Informed Decisionmaking, U.S. Government General Accounting Office,* GAO/GGD-97-27 (Dec. 1996), available at http://www.gao.gov/archive/1997/gg97027.pdf; Courtroom Construction: Better Courtroom Use Data Could Enhance Facility Planning and Decisionmaking 1997). These materials have all come before this Subcommittee in a series of hearings. See, e.g., *Future of the Federal Courthouse Construction Program: Results of a Government Accountability Office Study on the Judiciary's Rental Obligations; Hearing before the Subcomm. on Economic Development, Public Buildings, and Emergency Management of the H. Comm. on Transportation and Infrastructure,* 109th Cong. 2 (2006).

[78] See Administrative Office of the U.S. Courts, Revision of List of Statutes Enlarging Federal Court Workload (Sept. 18, 1998 memorandum). Tracking of such statutes began in the 1970s and was updated periodically.

[79] Data on U.S. Court of Appeals, Number of Judgeships and Appellate Filings, Selected Years, and U.S. District Courts, Number of Judgeships and Cases Filed, Selected Years, 1998 (Administrative Office of the United States Courts, memorandum). The number of pending cases was higher, reported at about 54,559. See David S. Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 SOUTHERN CALIFORNIA L. REV. 65, 98, table 4 (1981) (hereinafter Clark, *Adjudication to Administration*). Clark obtained some data related to the era from 1876 to 1900 from 1 American Law Institute, A STUDY OF THE BUSINESS OF THE FEDERAL COURTS 107 (1934).

[80] See Marc Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts" 1 J. Empirical Legal Stud. 459 (2004); Judith Resnik, Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts, 1 J. EMPIRICAL LEGAL STUD. 783 (2004) (hereinafter Resnik, *Declining Trial Rates*). For a discussion of changes to Rule 16 of the *Federal Rules of Civil Procedure*, governing pretrial procedures, see Judith Resnik, Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III, 113 HARV. L. REV. 924, 934-43 (2000); Judith Resnik, Managerial Judges, 96 HARV. L. REV. 376, 378-80 (1982).

[81] Judicial Conference of the United States, Committee on Long Range Planning, Long Range Plan for the Federal Courts (1995).

[82] Administrative Office of the U.S. Courts (Implementation Status Reported by Committees of the Judicial Conference of the United States) *Implementation of the Long Range Plan for the Federal Courts, Status Report* (April 2008) at 1-18.

[83] Data come from the Annual Reports of the Director: Judicial Business of the United States Courts at Tables C, D, and F, available at http://www.uscourts.gov/judbususc/judbus.html. See also Federal Judiciary webpage: Federal Court Management Statistics, http://www.uscourts.gov/fcmstat/index.html, and Judicial Facts and Figures, http://www.uscourts.gov/judicialfactsfigures/2008.html.

[84] See 2009 Annual Report of the Director: Judicial Business of the United States Courts at Table F, available online at http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/appendices/F00Sep09.pdf.

[85] See Marcia Coyle, *Immigration Judges Seek Article I Status*, NATIONAL LAW J., Aug 10, 2009, at 13. See also Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007).

[86] See, e.g., *Bensilimane v. Gonzales*, 430 F.3d 828, 833 (7th Cir. 2005); Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEOR. J. LEGAL ETHICS 3 (2008).

[87] See Margaret H. Marshall, At the Tipping Point: State Courts and the Balance of Power, The Benjamin N. Cardozo Lecture, Bar Association of the City of New York, Nov. 10, 2009.

[88] See William Glaberson, *Top New York Judge Urges Greater Legal Rights for Poor*, N.Y. TIMES, May 4, 2010, at A21; and also AMERICAN BAR ASSOCIATION, Task Force on Access to Civil Justice, Report to House of Delegates (Approved by H. of Delegates August 7, 2006), available online at http://www.abanet.org?legalservices/sclaid/downloads/06A112A.pdf.

[89] See, e.g., *Ashcroft v. Iqbal*, 556 U.S. __, 126 S.Ct. 1937 (2009). See generally Stephen Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109 (2009).

[90] See, e.g., *Alternative Dispute Resolution Act of 1998*, Pub. L. No. 105-315, 112 Stat. 2993 (codified at 28 U.S.C. § 651 (2006)).

[91] See D. Brock Hornby, *The Business of the U.S. District Courts*, 10 GREEN BAG 2d 453, 462 (2007). He explained that the work had shifted to offices where judges used "a computer and court administrative staff to monitor the entire caseload and individual case progress; conferring with lawyers (often by telephone or videoconference) in individual cases to set dates or limits; in that same office at a computer, poring over a particular lawsuit's facts, submitted electronically as affidavits, documents, depositions, and interrogatory answers; structuring and organizing those facts, rejecting some or many of them; finally, researching the law (at the computer, not a library) and writing (at the computer) explanations of the law for parties and lawyers in light of the sorted facts." Id. See also Patrick Higginbotham, *So Why Do We Call Them Trial Courts?*, 55 S.M.U L. REV. 1405 (2002).

[92] See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

[93] See Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593 (2004) (hereinafter Resnik, *Procedure as Contract*).

[94] Those agencies were the Social Security Administration, the Veterans Administration, the Equal Employment Opportunities Commission, and the Immigration Court. Details of these data are in Resnik, *Declining Trial Rates* at 798-811.

[95] See, e.g., Verizon Wireless, "Customer Agreement," online: http://www.verizonwireless.com/b2c/globalText?textName=CUSTOMER_AGREEMENT&jspName=footer/customerAgreement.jsp. For such an agreement, see Judith Resnik, *Whither and Whether Adjudication?* 86 B.U. L. REV. 1101, 1134-39 (2006). Similar examples can be found on the websites of many service providers.

[96] See e.g., *Wilko v. Swan*, 346 U.S. 427, at 438 (1953).

[97] See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

[98] See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, at 640 (1985); and *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, at 218 (1985). See generally Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. DISP. RESOL. 211, 246-53 (1995). Discovery on costs may be permissible, if the opponent to arbitration can persuade the court that such costs undercut the adequacy of the alternative. See *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, at 89-92 (2000).

[99] See Circuit *City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

[100] *14 Penn Plaza LLC v. Pyett*, 129 S.Ct. 1456 (2009).

[101] See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006); *Preston v. Ferrer*, 128 S. Ct. 978 (2008)

[102] See *Stolt-Nielsen S.A., et al. v. AnimalFeeds International Corp.* (08-1198), 130 S. Ct. 1758, (2010).

[103] *21st Century Department of Justice Appropriations Act*, Nov. 2, 2002, 70 Stat. 1125, (codified at 15 U.S.C. §§ 1221 et seq).

[104] *Food Conservation and Energy Act of 2008*, Pub. L. 110-246, § 1105, 122 Stat. 1651, 2119 (amending 7 U.S.C. § 197(c)).

[105] *Arbitration Fairness Act of 2009*, H.R. 1020, 111th Cong. (2009).

[106] See Resnik, *Procedure as Contract* at 594.

[107] See Jeremy Bentham, "Rationale of Judicial Evidence" (1827), in John Bowring, ed., *The Works of Jeremy Bentham*, vol. VI (Edinburgh: William Tait, 1843), bk. II, ch. X, 351. The Bentham Project, of the University College London, is in the midst of reviewing thousands of sheets of Bentham's original writings and republishing a full set of his works.

[108] See generally JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY, trans. by William Rehg (1996); Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, in Craig Calhoun, ed., HABERMAS AND THE PUBLIC SPHERE 109 (1992).

[109] See, e.g., *Sunshine in Litigation Act of 2009* (S. 537); *Sunshine in the Courtroom Act of 2005* (S. 829) 109th Cong. (March 30, 2006). See also *Sunshine in Litigation Act*, Fla. Stat. Ann. § 69.081 (West 2004).

Mr. JOHNSON. Thank you, Professor Resnik.

I have a few questions, Mr. Goldstein. And if you would, I have got four questions that can be answered either yes or no. And if you could answer the four questions yes or no, then I will give you time to explain, if you desire to do so. Is that fair enough?

Mr. GOLDSTEIN. Certainly.

Mr. JOHNSON. All right. Thank you. One, did the GAO conclude that no new Federal courthouse construction projects should be funded?

Mr. GOLDSTEIN. No, sir. That was not in our report.

Mr. JOHNSON. All right. Two, did the GAO conclude that the recommended courtroom-sharing must be applied?

Mr. GOLDSTEIN. We made no recommendations per se about courtroom-sharing, other than they should adopt their own policies.

Mr. JOHNSON. Three, did the GAO conclude that security concerns in courthouses should be subjugated to space calculations?

Mr. GOLDSTEIN. We did not directly address security concerns in this report, sir.

Mr. JOHNSON. And, four, did the GAO conclude that the Judicial Conference has resisted a congressional directive to share courtrooms?

Mr. GOLDSTEIN. No, sir, we did not.

Mr. JOHNSON. And I lied. I have got a fifth question. How much did we pay for that report on courtroom-sharing, the modeling?

Mr. GOLDSTEIN. We paid roughly $45,000.

Mr. JOHNSON. Okay. Now, any explanation that you would like to give with respect to either one of the 5 questions?

Mr. GOLDSTEIN. No, because I answered with more than a simple yes or no.

Mr. JOHNSON. All right. Okay. Thank you, sir.

Mr. GOLDSTEIN. Certainly.

Mr. JOHNSON. Judge Ponsor, my next question—in fact, Judge Conrad, you may have something to relate on this question, as well—I have extended an invitation to the United States Marshals Service, but they were not able to join us as a witness on your panel due to scheduling concerns.

The Marshals Service is planning to submit a written statement for the record, however. And maintaining security in our courthouses is extremely important. And I assume that this is a concern that is shared by all of the Members on this Committee and the public.

The marshals play the key role in ensuring that security. Can you discuss the courthouse protections provided by the Marshals Service? And can you also discuss the increased need for those protections in light of recent violence in courthouses, including a shooting in Atlanta several years ago, and the increased threat of terrorism since 2001? And also, can you discuss how that changes the funding requirements for the judiciary, Judge Ponsor?

Judge PONSOR. Yes. The legendary Judge Arnold once said of the courts, there has to be a place where people can go and be safe, and we have to be it. There has to be a place where people can go and have their rights vindicated, and we have to be it. If we don't have that, we are Somalia. We are northern Mexico. We are Colombia. Our judicial system and the protection of people who seek ac-

cess to our judicial system must be secure. And there is no question that that is getting to be more and more difficult.

In my little town of Springfield, Massachusetts, which has about 150,000 people, before we built our new courthouse, I came into my court one day, and I found bullet holes in the window facing the jury. Imagine the unnerving experience of sliding into a jury box and seeing it look like something out of Al Capone, bang, bang, bang, bang, four bullet holes in the window shot from an adjoining garage over the weekend.

I was using, as with Judge Conrad, elevators that were used by the same defendants that I just sentenced. They were usually in custody, fortunately. But I would also take the elevator with their family members. And there were some pretty tense elevator rides with family members and fellow gang members of individuals that I had sentenced.

Costs have gone up. New courthouses have got to be blast-resistant. There has to be a certain amount—at least on the lower floors—of bullet-resistant glazing. Setback requirements have increased. Architects have come to learn how to construct bollards and other reasonably attractive devices which serve to keep vehicles away from the courthouses. We live in an environment where we have to expect the possibility of serious problems.

In the Los Angeles courthouse, which is one of our highest priorities, if not our highest priority, they are trying Mexican gang cartel cases with sometimes a couple of dozen defendants at a time. And they have the courtrooms arranged in such a way that the defendants can be shackled while they are in the courtroom out of the view of the jury.

This is not going to get easier. It is not going to get easier. And the construction of courthouses that can handle this is absolutely essential.

So, yes, Mr. Chairman, it is more expensive. It is pressing. But it is critically important if we are going to maintain civil society.

Mr. JOHNSON. Thank you.

Judge Conrad, anything to add to that?

Judge CONRAD. Briefly, I think our marshals serve heroically, are asked to do a great deal with not sufficient resources. Our marshals in recent cases in Charlotte have dealt with gang cases and with people in witness protection programs and trying to transport these defendants and witnesses in a way that doesn't prejudice them in front of the jury.

And given the inadequate security—the inadequately designed security measures in our courtroom and the amount of things we ask marshals to do in a very dangerous situation, I think they perform heroically. But the funding issue for them is always an issue.

Mr. JOHNSON. Thank you.

Professor Resnik, can you discuss increasing access to justice—well, you discussed increasing access to justice in both your written statement and your testimony. What steps should Congress take to increase access to the courts? And are there any particular initiatives that you would like to see?

Ms. RESNIK. I do have specific suggestions. First, to commend to you the legislation that you have initiated, which is that the Federal Arbitration Act, which was created in 1925, spoke to manda-

tory arbitration in—spoke to changing the judicial view, which was very negative arbitration, in commercial activities.

In 1925, it isn't clear that the U.S. Supreme Court would have interpreted the commerce clause as reaching the employment contracts of an individual and their employer or a modest country contact.

Up until the mid-1980's, the U.S. Supreme Court further interpreted the Federal Arbitration Act as not applying to contracts that we would call adhesive, that—I don't have any negotiating capacity, but have to sign off—and further, interpreted some Federal statutes as so important that the courts had to be in the public realm, and therefore the Federal judges, like those sitting on this panel, needed to rule on claims of rights.

Starting in the mid-1980's, however, the Supreme Court reversed its interpretation, often 5-4, and said instead that the FAA, the Federal Arbitration Act, did apply to eventually employee, consumer, and a host of other contracts, that if you wanted to argue that the alternative did not—in the terms of art—adequately vindicate your statutory rights, you, the party protesting the contract, had to show that the other proceeding was too expensive or too difficult. I know.

Mr. JOHNSON. If you would, go up and wrap up that question.

Ms. RESNIK. And so these are statutory interpretations that obviously defenders on the court think are the wrong interpretations. Congress has complete ability to insist on the interpretation of these statutes, which will re-enact amendments to these statutes that make plain that they should not be applied to consumers and employees.

Congress has already done so for franchisers and franchisees in some car cases, in an automobile fairness act in 2002. Congress can do this again.

The equal act—the justice act can be revisited to be sure that the lawyers, not the prevailing parties, get the fees. And furthermore, you could pass a statute like the Civil Justice Reform Act called the Equal Access to Courts Act of 2010 that would invite all of us into a conversation about how to help get access to courts and put on the agenda "civil Gideon," state courts and state court needs, turning to the State Justice Institute and asking for information from the chief justices of the state courts, as well as for the—functionally, the judges, who are working in administrative agencies, because what we want is public decision-making.

Mr. JOHNSON. All right. Thank you, Professor.

And this question will require either yes, no, or just silence. Does anybody on the panel ever—does anyone on the panel have knowledge of any case where the judicial branch, the coequal judicial branch of the United States, has ordered the legislature to fund corrections to courthouses or judicial facilities that are uninhabitable? Has anyone ever heard of such a thing happening before?

Okay. Everyone is silent, so I suppose not. That would be an interesting law school exam.

Ms. RESNIK. In the law school hat here, I should add that there are state courts where state judges have held that the failure to fund judiciaries violates state separations of power obligations.

There is a pending lawsuit in New York, because there has been a failure to raise judicial salaries.

And in Canada, the Canadian supreme court has held that there has to be independent setting of judges' salaries, so there are at least some models for courts saying to legislatures, "Please fund us as a matter of constitutional independence."

Mr. JOHNSON. Thank you.

I will now turn it over to the Ranking Member of this Subcommittee, Mr. Coble.

Mr. COBLE. Thank you, Mr. Chairman.

Good to have you all with us.

The courtrooms and courthouses portrayed by Judge Conrad and Congressman Cooper are inexcusable. Conversely, I am confident there are some courthouses and courtrooms that are excessively lavish, and I think they would be equally inexcusable.

Let me then question the two judges. Gentlemen, what can the judiciary do to fulfill its constitutional mission in a more cost-efficient manner? Judge Ponsor or Judge Conrad?

Judge PONSOR. There are two initiatives that I would highlight, I think at least to start the conversation, that I could think of. The first is the asset management planning process that the judiciary has been adopting for the last several years. That was referred to by Congressman Cooper.

It means that we are able to apply objective criteria to courthouse situations and only fund new courthouses or renovations to existing courthouses where applying an objective yardstick, we find that it is really needed. And that process has been very helpful in prioritizing projects and making sure that only the projects that are needed get funded. That is one.

Two, we have a design guide now, which has been refined over the recent years and which ensures that we are able to a very great extent standardize courtroom sizes, ceiling heights, offices, square footage, in a way which keeps costs under control.

Despite the criticisms—and we aren't perfect—but despite the criticisms, we have improved that area of our effort tremendously. We were the first branch of the government to do really careful asset management planning. And we have specific criteria for that, and we are continuing to apply those criteria.

The third point that I think I would emphasize is the fact that there is some requests that we courtroom share. And we have been courtroom-sharing. We have taken that initiative. We have studied it. We took the step of—now we have two senior judges sharing one courtroom in our new construction. That was a difficult process for us to come to. The senior judges are among the most revered and, in some cases, beloved members of our cohort. And we did that.

We are sharing with magistrate judge courtrooms now, two-for-one, with an extra criminal courtroom set aside. That has allowed us to tighten up on our courtroom construction. We are studying sharing bankruptcy judges, and we are thinking of sharing for larger courthouses.

Mr. COBLE. Do you concur, Judge?

One more question, if I may, Mr. Chairman. The GAO indicated that judiciary may have contributed to some of the problems by not maintaining of caseload protection records that help in measuring

future workloads and the need for new judges and, secondly, the failure to adopt more expansive courtroom sharing policies.

Judge Conrad, do you want to respond to that? And I will be glad to hear from Mr. Goldstein, if he wants to answer it in rebuttal.

Judge CONRAD. Could you repeat the question? I am sorry.

Mr. COBLE. Yes, the GAO indicated that the judiciary may have contributed to the problems by not maintaining caseload protection records that assist in measuring future workloads and the need for new judges, A, and, B, by failing to adopt more expansive courtroom-sharing policies.

Judge CONRAD. I think Judge Ponsor's response to the courtroom-sharing question, response to that, I think the magistrate judges, bankruptcy judges, and senior judges, we are engaged in a sharing policy. The active Article III judges, for the reasons I described in my testimony, I think that sharing would be counterproductive and contrary to the needs of justice.

Mr. COBLE. Thank you, sir. Thank you, sir.

Mr. Goldstein, want to respond?

Mr. GOLDSTEIN. Thank you, sir. The notion that we asked the courts to retain historical records comes from the fact that it is difficult for them to predict with any certainty—obviously, in a number of ways—just how much—how many judges, you know, will be in any courtroom in 10 years. Everyone recognizes that between the, you know, vacancies and being able to appoint judges, as well as when senior judges will actually change.

The area where we do think they can do a little better is in understanding the connection between caseloads and the need for judges, because a number of the case study courthouses we went to showed that, despite their prediction, that there would be a significant increase, and therefore they requested additional judges and built out space to accommodate that, there had been no change in caseloads.

So by having a longer record, we would hope that they would be able to then better predict and better understand, you know, the varieties, you know, and the kinds of things that go into making those numbers up.

Mr. COBLE. Thank you all again.

I yield back, Mr. Chairman.

Mr. JOHNSON. Thank you, Ranking Member Coble.

Next questions from Congressman Gonzalez.

Mr. GONZALEZ. Thank you, Mr. Chairman.

And I know that I am going to have to be really brief, so I will ask the witnesses to see how brief they can be in their responses, but I just want to touch on something, Mr. Goldstein. In the GAO report—and the problem for the rest of the witnesses—Mr. Peck already knows this, the commissioner knows this—we place great stock on the GAO, because we charge them with so much in the way of responsibility, and we always say, "Well, let's get a GAO report on this thing," so that is why we are where we are today.

However, Mr. Goldstein, do you have an opinion as to whether members of Transportation and Infrastructure should be actually advocating for a moratorium on any of the courthouses that are in the 5-year plan, pursuant to the letter that has been referenced of August the 2nd?

Mr. GOLDSTEIN. Congressman, that is really a policy issue. GAO does not take policy positions such as that. My purpose here today is to talk about issues you may have to discuss or need more information with respect to the report we wrote.

Mr. GONZALEZ. But you have responded that there was no suggestion in there that there should be a moratorium.

Mr. GOLDSTEIN. We have made no suggestion. We have had no discussion of that in our report, that is correct, sir.

Mr. GONZALEZ. Did you take into consideration that if you did call a timeout, what kind of additional costs that and how do you make up for that? I am just going to give you a real quick example. You know, full disclosure, in fiscal year 2012, the San Antonio courthouse should be number one, but they are in a building that wasn't even designed to be a courthouse.

But I don't even want to get into the particulars of what is parochial and such, because this is really across the board. I will ask Professor Resnik real quick, I think I understood what you were trying to get to and such, but what about the criminal caseload?

Ms. RESNIK. The——

Mr. GONZALEZ. I mean, in my area, that is substantial. And you are not going to have that taking place anywhere outside of a courtroom setting.

Ms. RESNIK. No, I am actually for trying to get more things into court. But the numbers—the 300,000 to 350,000 filings a year include civil and criminal. And I think what you are pointing to is exactly the great disparity of density of use—border states being in very acute need for space and some other areas of the country with less.

On the courtroom-sharing, one courtroom that has not been much mentioned are the court of appeals. I have argued in several of them, as I am sure others here have, and those are very scheduled spaces that are often not used, for example, in the afternoons in some circuits, sometimes for a couple weeks at a time. And if we are looking for more space and capacity in the system, one could look to consider how to use all the rooms.

But I want to be very clear. The hope is you will look at the flattening filings nationwide and say, "That is a problem that Congress needs to fix," in helping people——

Mr. GONZALEZ. No, and I——

Ms. RESNIK [continuing]. Come into——

Mr. GONZALEZ. And that definitely impacts our needs in identifying them. But I am going to ask Judge Ponsor and Judge Conrad, I mean, if you have a moratorium while you are trying to address the concerns of certain Members of the Committee that does have jurisdiction over construction, what could be the potential consequence of that?

I know what it is for San Antonio, because we have got a land swap going with the city of San Antonio, and they are demolishing the police department in order to make room for the Federal courthouse, but then that has to make available the building in the round. We have—you have been to our courthouse. It was part of HemisFair 1968. It was an exhibit building.

But what is the danger of the moratorium? I mean, what does that mean to the courts? What does that mean to the Federal budget?

Judge PONSOR. I truly hope that this does not happen, because it would be devastating. In 15 to 20 cities, where these projects are waiting, we have sites that have been purchased, we have designs that have been developed, we have an opportunity in this economic climate to save millions and millions of dollars, if we can get going on our construction.

The economic consequences are tremendous. The Salt Lake City courthouse, as I said, it is shovel-ready. It is designed. They have a site. They are ready to go. The money has been appropriated. We have rebid the project and saved $25 million, if we can begin the project now.

The San Antonio situation is replicated over and over again in the country. And that is just the economic and logistical consequences that we will face if there is a moratorium.

The impact upon human beings, flesh-and-blood people who need access to courts, in many communities, the state courts are overwhelmed. The only real access to justice has to be the Federal courthouse. The door has to be open. The facilities have to be available. And there we have a problem.

Mr. GONZALEZ. Judge, I hate to cut you short. My time is up. And I don't want to make the Chairman miss a vote, that is for sure. So I am just at this point—and I apologize, Judge Conrad. Hopefully I will never have to appear in your court, but I will yield back. Thank you.

Mr. JOHNSON. Yes, I hope that I will not have to appear in your court, also, Judge Conrad, under those conditions that you cited.

Judge CONRAD. Bring a bucket. Bring a bucket if you do.

Mr. JOHNSON. Yes, I will, and my hard hat.

Mr. COBLE. Mr. Chairman, if you will yield, Judge Conrad's family are good friends of mine, so don't be too hard on him.

Mr. JOHNSON. Well, no. He is probably not deserving of such harsh treatment as he has been receiving as a Federal judge. But I do want to thank all the witnesses for the testimony today. Without objection, you will have 5 legislative days to submit any additional written questions, and I am speaking of the Members, which we will forward to the witnesses and ask that you answer as promptly as you can and be made a part of the record.

Without objection, the record will remain open for 5 legislative days for submission of any other additional materials.

I reiterate my concerns about justice not being run over in a misguided attempt to maximize efficiency in our Federal courthouses. Again, I thank everyone for their time and patience. This hearing of the Subcommittee on Courts and Competition Policy is adjourned.

[Whereupon, at 5:39 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

PREPARED STATEMENT OF JOHN F. CLARK, DIRECTOR,
UNITED STATES MARSHALS SERVICE, DEPARTMENT OF JUSTICE

STATEMENT OF

JOHN F. CLARK
DIRECTOR
UNITED STATES MARSHALS SERVICE
DEPARTMENT OF JUSTICE

BEFORE THE

SUBCOMMITTEE ON COURTS AND COMPETITION POLICY
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

FOR A HEARING ENTITLED

"COURTROOM USE: ACCESS TO JUSTICE, EFFECTIVE JUDICIAL ADMINISTRATION, AND COURTROOM SECURITY"

PRESENTED

SEPTEMBER 29, 2010

Statement for the Record of
John F. Clark
Director
United States Marshals Service
Department of Justice

For a Hearing Entitled
"Courtroom Use: Access to Justice, Effective Judicial Administration, and Courtroom Security"

Before the
Subcommittee on Courts and Competition Policy
Committee on the Judiciary
House of Representatives

September 29, 2010

Thank you for the opportunity to discuss the role of the United States Marshals Service in providing for the security of the Federal judicial system.

Protecting the Judiciary

The Marshals Service is committed to safeguarding the judicial process by ensuring the secure conduct of judicial proceedings and providing protection for Federal judges, United States Attorneys, Assistant United States Attorneys, jurors, and other members of the Federal court family. Marshals Service personnel consider the safety and security of judicial proceedings a paramount concern and work to protect members of the judiciary by anticipating and deterring threats and employing innovative protective techniques. Judicial security includes both personnel security, such as protective details for members of the judiciary, as well as infrastructure for the secure movement of prisoners, many who pose significant security threats, through our Federal courthouses.

Every day, the Marshals Service holds an average of approximately 59,000 prisoners. In 2010 alone, the Marshals Service produced approximately 885,000 prisoners for Federal judicial proceedings. This high volume of prisoner production requires an infrastructure in our courthouses that not only protects the judicial family, but also the general public, whose access to judicial proceedings is a hallmark of the American legal system.

Increasing Threats

Since the passage of the Court Security Improvement Act, the Marshals Service established several new programs and enhanced others in an effort to better protect the judiciary and the court family. The Threat Management Center ("TMC"), opened in September 2007, provides 24/7 response capability for any threat received. The TMC is designed to facilitate

information sharing within the Marshals Service, with other intelligence agencies, and with other Federal, State, and local, law enforcement.

In fiscal year ("FY") 2009, nearly 1,400 threats and inappropriate communications against Marshals Service protectees were investigated, analyzed, and assessed to determine the level of risk they represented. The Marshals Service also established a new District Protective Intelligence and Investigations Program which recruited, trained, and staffed 34 district offices with Protective Intelligence Investigators ("PII"). These PII/Deputy Marshals conduct complex protective investigations, identify and mitigate potential threats, and evaluate and manage subjects that pose a potential risk to Marshals Service protectees.

Preventing an incident from ever occurring is the ultimate goal of the Marshals Service and consequently, a counter-surveillance and surveillance detection program was begun in 2009 to detect and deter hostile surveillance. These missions protect both people and facilities using static and mobile surveillance to identify and track targets which may be known or unknown prior to the commencement of the operations.

The Marshals Service has a long and successful history of securing high-risk, high-threat, and high-public interest trials and court proceedings including those related to organized crime, the Patty Hearst trial and the Moody mail bombing. Today, the Marshals Service protects the judiciary and America's communities while our courts prosecute high-threat terrorists and drug lords. We ensured security as our courts brought justice to criminals and terrorists like the World Trade Center bombers, former Panamanian President Manuel Noriega, Gulf Cartel leader Osiel Cardenas Guillen, Timothy McVeigh, and the Unabomber. The Marshals Service has a robust security plan in place at all Federal courthouse locations across the United States to handle any high-profile criminal defendant tried in a United States court.

These high-threat trials are becoming more routine, including cases against defendants who are members of al-Qaeda. The Marshals Service currently has custody of Ahmed Ghailani, the accused al-Qaeda terrorist charged in the 1998 bombings of two United States embassies in Africa. In June 2009, he was removed from Guantanamo Bay by the Marshals Service and transported to the Southern District of New York. Ghailani has been securely detained and managed since his arrival, and his trial has begun without any security breaches.

Infrastructure Requirements

Physical security is essential to safeguarding high-threat or high-profile prisoners, as well as other detainees, judicial personnel, and the general public. The increasing number of detainees presented for prosecution along the Southwest Border and elsewhere underscores the need for courthouse safety. This includes assessing and addressing courthouse security in all infrastructure areas including: space to move prisoners throughout a court facility; courtrooms; cellblocks; and sally ports. The Marshals Service has an ongoing requirement to renovate and repair many of these facilities to ensure healthy, safe, and secure conditions. To focus and direct these repairs, the Marshals Service uses a National Security Survey. Originally developed in 1997, this survey is updated every three years and is a useful tool to aid in the prioritization of renovation projects with safety and security being central to our infrastructure investments.

While we work to ensure that our security infrastructure meets the needs of today's judicial environment, particularly in high-threat trials, we must deal with the challenge of both aging and overcrowded courthouses. A 2009 United States Marshals Service National Facility Assessment revealed that 69% of Marshals Service facilities have serious security and safety deficiencies. Of the facilities surveyed, 65% lack adequate courtroom holding cells; 59% lack adequate isolation and holding cells; 56% do not have secure prisoner elevators; 44% of cellblocks lack adequate duress alarms; 50% do not have adequate prisoner-attorney interview rooms; and 51% do not have an enclosed vehicle sally port.

The Brian Nichols incident in the Fulton County, Georgia, Courthouse in March 2005 gravely illustrates the need for secure courthouses. His murderous rampage resulted in the deaths of a Superior Court judge, court reporter, sheriff's deputy, and a United States Customs agent. The Marshals Service works each day to ensure a level of security that will avoid such an incident in the Federal system. However, with a surging prisoner population, especially on the Southwest Border, our physical resources are strained. Maintaining a high-level of security with an expanding prisoner population, as well as a rising number of high-threat trials, is a challenge for the Marshals Service and the judiciary. On the Southwest Border, for example, many cellblocks and holding facilities operate at double or triple their designed capacity. Under such conditions every aspect of security, health, and sanitation are stretched beyond acceptable limits.

Optimal security at courthouses often requires that the Marshals Service occupy space wholly separate from space used by the judiciary and the public. Secure space is often the unseen backbone of a courthouse. Covered sally ports, separate and secure elevators, and private prisoner walkways are just a few examples of security infrastructure which is vital to maintaining the security of courthouses. Similarly, cellblocks must be adequate to ensure the proper execution of justice, the separation of prisoners, and the safety of prisoners, the judiciary and Marshals Service personnel alike. For example, proper ventilation systems must be in place to avoid transmission of infectious diseases among prisoners, judicial personnel, and the public in

our courthouses. At many United States courthouses, important infrastructure is in need of repair.

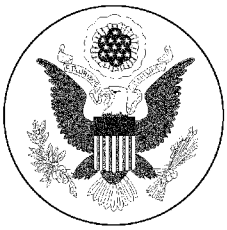
In FY 2010, Congress took a major step by funding the Marshals Service's courthouse construction program at $14 million in the FY 2010 Commerce, Justice, Science Appropriations bill, and another $8 million in the recently passed Southwest Border supplemental appropriation. With these funds, we are addressing the most pressing needs, as we continuously assess courthouse infrastructure and security concerns. The Department of Justice will continue to work hand in hand with the judiciary to identify security vulnerabilities and focus resources on the highest priority security improvements. I appreciate this Committee's attention to the security needs at Federal courthouses and assure you that we at the Marshals Service will work with you to protect our judiciary and the general public.

PREPARED STATEMENT OF JUDGE JOHN M. ROLL, CHIEF DISTRICT JUDGE, DISTRICT OF ARIZONA

JUDICIAL CONFERENCE OF THE UNITED STATES

STATEMENT OF

JUDGE JOHN M. ROLL
CHIEF DISTRICT JUDGE
DISTRICT OF ARIZONA



SUBMITTED FOR THE RECORD
OF THE HEARING
HELD BY

THE SUBCOMMITTEE ON COURTS AND COMPETITION POLICY

COMMITTEE ON THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES

ON

"COURTROOM USE: ACCESS TO JUSTICE,
EFFECTIVE JUDICIAL ADMINISTRATION,
AND COURTROOM SECURITY"

SEPTEMBER 29, 2010

House Judiciary Committee
Subcommittee on Courts and Competition Policy
Statement of Hon. John M. Roll
Chief Judge, U.S. District Court for the District of Arizona
September 29, 2010

Thank you for the opportunity to submit written testimony regarding the Evo A. DeConcini U.S. Courthouse in Tucson, Arizona. I regret being unable to present my testimony in person. I have first hand experience with the hardships that courtroom sharing has on court operations that I will explain in this statement. I am thankful to this Subcommittee for holding a hearing on this very important issue.

I. Background - Tucson Courthouse

The District of Arizona is a single district; Tucson division is one of the 3 divisions in the district. The process for obtaining a new federal courthouse for Tucson division began in 1990. The new federal courthouse – the Evo A. DeConcini U.S. Courthouse, was completed in 2000. The DeConcini Courthouse was designed to meet the needs of the District Court in Tucson, as best could be anticipated at that time. My testimony discusses what drove the need for a new courthouse in Tucson in 1990, the move to the new courthouse in 2000, and the fact that more courthouse space is desperately needed in 2010 due to burgeoning caseloads on the southwest border.

A. The Need for a New Courthouse in 1990

In 1990, Tucson had three active district judges and no senior judges. It also had two magistrate judges in residence. District court operations were housed in two buildings connected by a walkway that extended over Broadway Boulevard in downtown Tucson.

The court facility on the north side of the walkway was the Walsh Courthouse. It included courtrooms and chambers for two district judges and two magistrate judges, a courtroom for video-taped depositions, a grand jury room, a chambers for a Ninth Circuit judge, the U.S. Marshals Service (USMS) Office, and the court library. When a new district judge was confirmed in 1998 for Tucson, there was no courtroom for him to use. He shared courtroom space

with a senior district judge, and both had criminal caseloads. Regularly, hearings were scheduled simultaneously for the new district judge and the senior district judge, requiring one of them to hold hearings in a magistrate judge courtroom, thereby requiring the displaced magistrate judge to hold court elsewhere.

Because the Walsh courthouse was a historic building, there was no separate secure circulation for judges, prisoners, and the public, and everyone used the same public elevator. Some of the courtrooms were under-sized, lacked adequate jury boxes, and sufficient holding cells. Sharing these courtrooms was problematic for the litigants, jurors, attorneys, USMS, and court staff.

The court facility on the south side of the walkway was a court annex, which was leased space. It included a parking lot on the ground floor, courtrooms and chambers for two district judges, and the clerk of court's office. The walkway connecting the 2 court buildings extended over one of Tucson's busiest streets. The walkway was used to shuttle prisoners between courtrooms and was utilized by judges and court staff, sometimes at the same time. The elevator in the annex was shared by prisoners and court staff. It was a security nightmare.

The bankruptcy court's judges' chambers, courtrooms and clerk's office, as well as the U.S. Attorney's Office, were all housed in leased space approximately 1 city block from the court annex. There have been two bankruptcy judgeships in Tucson since the early 1990s.

B. Occupancy of the Evo A. DeConcini U.S. Courthouse in 2000

In 2000, the new federal courthouse in Tucson - the Evo A. DeConcini U.S. Courthouse - was ready for occupancy. Plans called for the new courthouse to include space for all district, magistrate and bankruptcy judges, the clerk of court's office, the USMS, the Office of Probation, Office of Pretrial Services, and the U.S. Attorney's Office. The design called for one wing of the courthouse to be used for the bankruptcy court and the larger wing to be used for all other district court matters. Specifically, one special proceedings courtroom,

six district/senior judge courtrooms, four magistrate judge courtrooms and three bankruptcy judge courtrooms were planned for the building.

A total of five district judges and three magistrate judges moved to the DeConcini Courthouse in 2000. Before the 2000 move, all three of the active district judges sitting on the court in 1990 had assumed senior status and three new district judges were appointed to replace them. Of the three senior district judges, two moved to the new courthouse while one senior district judge died before the move occurred.

Before the move was made, it was clear that insufficient space existed in the new courthouse to house the bankruptcy court due to an increase in the number of magistrate judges in Tucson. Accordingly, the bankruptcy court stayed in leased space. Because it was not anticipated that criminal matters would be heard in the bankruptcy wing, that wing did not have security safeguards for felony hearings and secure prisoner movement. In addition, the size of these courtrooms is insufficient to conduct the large arraignments and initial appearances that are conducted by magistrate judges several days a week in Tucson. For that reason, the magistrate judges must use district judge courtrooms when they are available for these proceedings.

C. Needs of the Tucson Courthouse in 2010

1) Unique Needs of A Southwest Border District

Any discussion regarding courthouse space needs in Tucson would be incomplete without a brief summary of the demands placed upon the court family in the Evo A. DeConcini U.S. Courthouse as a result of southwest border enforcement.

The District of Arizona is one of the five southwest border districts, the others being the Southern District of California, the District of New Mexico, the Western District of Texas, and the Southern District of Texas. Although the southwest border districts are only five of the 94 districts in the nation, these five districts heard 40% of the nation's criminal cases in fiscal year (FY) 2009. (2009 Annual Report of the Director, Administrative Office of the United States

Courts, pp. 201-203) ("Director's Report"). The five southwest border districts ranked first through fifth of the nation's 94 districts in criminal caseload in FY 2009. (2009 Director's Report, pp. 201-206).

The 5 southwest border districts handled 73% of the nation's criminal immigration case filings in FY 2009. (2009 Director's Report, pp. 228-232). These crimes include alien smuggling and illegal re-entry after deportation subsequent to a felony conviction. The five southwest border districts also handled more than a third of the nation's federal drug cases. (2009 Director's Report, pp. 228-232).

2) Number of Judgeships

Since 2000, the number of active district judges in Tucson has increased by two and another district judge's arrival is imminent. Presently, five district judges have courtrooms and chambers in the DeConcini Courthouse, including four active district judges and District Judge Frank R. Zapata, who assumed senior status last month. A replacement district judge for Senior Judge Zapata is in the process of being appointed, which will result in five active district judges and one senior district judge utilizing the six district judge courtrooms and chambers in the DeConcini Courthouse.

Because four new magistrate judge positions have been added in Tucson division since the move in 2000, seven magistrate judges now have chambers and courtrooms in the DeConcini Courthouse. As soon as Judge Zapata's replacement is named, the DeConcini Courthouse will have a total of 13 judges.

Further, visiting judges are used liberally in the District of Arizona in order to cope with the huge criminal caseload, which is among the highest of the 94 federal judicial districts. Since November 2009, the Tucson division has used eight visiting district judges for terms of service of one to three weeks. These district judges conducted over 550 hearings during more than 80 days in court. These judges need courtrooms to conduct these proceedings - another strain on the limited courtroom resources we have in Tucson due to the huge number of criminal filings handled on a daily basis.

In addition, in light of our district's caseload, more judges could join the District of Arizona, further exacerbating the space pressures in the Tucson division. The Judiciary is currently in the process of evaluating workload-based judgeship needs nationally in advance of making judgeship recommendations to Congress. The District of Arizona ranks first in the Ninth Circuit and third in the Nation in criminal caseload, and our district's weighted caseload is at the level that previously led the Judicial Conference to recommend five additional judgeships for our court. Should Congress pass the judgeship bill currently pending before this Congress, at least one of the two judgeships recommended for the District of Arizona would be assigned to the Tucson division.

3) Lack of Space

Simply put, there is no space in the DeConcini Courthouse for expansion. The court's special proceedings courtroom has been dedicated full-time to the Border Patrol's Operation Streamline program and the 16,000 plus cases heard each year in Tucson in connection with that program. Operation Streamline, also referred to as Arizona Denial Prosecution Initiative, is a prosecution initiative in which petty offense and misdemeanor offenders arrested by Border Patrol are arraigned, plead guilty, and are sentenced in a single day. For that reason, the court is no longer able to use that courtroom for other proceedings. For example, naturalization services are now held in the jury assembly room, when that jury room is not being utilized for jurors. Initial appearances and arraignments of felony defendants require the use of one of the district judge courtrooms. If the judgeship bill currently pending before Congress is enacted and two additional district judgeships are created for the district in Tucson, they will not have a courtroom available to do their job.

Further, because of the enormous criminal case increase, the workload measurement formula for district clerks offices supports the addition of 20 positions in FY 2011 for the Clerk's Office.

Even with the 20 new positions recently funded, the Probation Office is understaffed by approximately 38 positions. Recently, the USMS was required to find additional office space away from the DeConcini Courthouse as was the Probation Office.

The significant current and projected growth in the Pretrial Services Office in Tucson has led to a necessary space expansion project estimated to cost $850,482.37. Although workload gains during the past year have resulted in an increase of 20 staff members, the current workload supports the hiring of an additional 17 Pretrial Services staff.

II. Caseload in Tucson from 1990 to Today

As the attached chart illustrates, the caseload in Tucson, Arizona, in particular criminal cases, has grown tremendously over the last 20 years. (See Attachment 1.)

Today, the District of Arizona has the highest criminal caseload in the Ninth Circuit and the third highest criminal caseload in the nation. From FY 2009 through August of FY 2010, the judges of the Tucson division have handled 62% of the District of Arizona's felony case filings. During that same time period, felony case filings in Tucson have increased by nearly 25%. This includes a huge increase in the number of petty offense and misdemeanor cases handled primarily by the magistrate judges in Tucson.

One of the primary reasons for the large increase in criminal cases in Tucson is the implementation of the Operation Streamline program. Everyday at the Tucson courthouse, 70 Operation Streamline defendants are sentenced. You can imagine the impact this has on the workload of everyone in the courthouse. Without sufficient courtrooms to process these cases, the delivery of justice to these individuals would be delayed.

Proposals to double (32,000 petty offense and misdemeanor cases) or triple (48,000 petty offense and misdemeanor cases) the annual number of Operation Streamline cases in Tucson division have recently been discussed in Congress. Obviously, the expansion of the program in these ways would have a significant impact on the workload of the court in Tucson.

III. Conclusion

The Tucson division's enormous felony caseload is coupled with what will likely be the nation's highest petty offense and misdemeanor caseloads in FY 2010. For the last eleven months, the USMS has produced 68,000 detainees for court in the DeConcini Courthouse and many more criminal hearings are held involving non-custodial defendants. This volume of cases effectively rules out any notion that courtroom sharing is a good fit for a southwest border district court.

No one familiar with the actual situation in Tucson could reasonably suggest that the DeConcini Courthouse was overbuilt in 2000 or that the Courthouse has excess space. In fact, there is a constant search for tenants who will leave the Courthouse in order to free up additional space.

I am attaching to my testimony my response to the recent GAO report on federal courthouse construction and courtroom sharing. (See Attachment 2.) I strongly disagree with many of the conclusions reached in the report, particularly as to the claims of unused space and the practicality of courtroom sharing. My letter refers to the GAO draft report, but the final report made no significant changes.

Again, I thank the Subcommittee for the opportunity to provide this written statement on this critical topic.

Attachment 1

CRIMINAL FILINGS IN TUCSON, ARIZONA				
CASES	**1990**	**2000**	**2010 (First 8 Mths)**	**Percentage Change**
Civil	818	715	524	-13% (90-00) -36% (90-10)
Felony	667	1827	2660	147% (90-00) 299% (90-10)
Petty Offense	383	1,564	15,253	308% (90-00) 3883% (90-10)
Misdemeanor	565	158	2,070	-72% (90-00) 266% (90-10)
Notes:	Source: 1990 U.S. District Court for the District of Arizona Annual Rpt, pp. 18, 39	Source: 2000 U.S. District Court for the District of Arizona Annual Rpt, pp. v, vii, xi	Source: CM/ECF District of Arizona September 2010 Report. In the entire nation in FY 2009, magistrate judges heard 109,132 petty offense cases and 8,700 class A misdemeanor cases. Source: Director's Rept, pp. 350-53, 356-58	

Attachment 2

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
Evo A. DeConcini U.S. Courthouse
405 W. Congress
Suite 5190
Tucson, Arizona 85701-5053

John M. Roll
Chief United States District Judge

Telephone: (520) 205-4520
Fax: (520) 205-4529

June 16, 2010

Mr. Mark L. Goldstein
Director, Physical Infrastructure Issues
U.S. Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548

Re: GAO Draft Report on Federal Courthouse Construction

Dear Mr. Goldstein:

Having read Administrative Office of the U.S. Courts Director Jim Duff's excellent response of June 1, 2010, and Chief Judge Loretta Preska's powerful letter of the same date, both written in response to the Government Accountability Office ("GAO") draft report on federal courthouse construction, very little remains to be said. However, I would like to point out a few pertinent observations particular to the District of Arizona and the Evo A. DeConcini and Sandra Day O'Connor U.S. Courthouses, which are referred to in the draft report.

Introduction

The GAO recently released a draft report concerning several federal courthouse projects completed since 2000. This draft report was discussed during a recent House subcommittee hearing and the draft report was the subject of a lengthy article recently appearing in the *Federal Times* - Tim Kauffman, "GAO: Wasted Courthouse Space Drives Up Costs," *Federal Times*, May 31, 2010, p. 6.

The GAO draft report, in part, discusses two Arizona federal courthouse projects completed in 2000 - the Sandra Day O'Connor Courthouse in Phoenix and the Evo A. DeConcini Courthouse in Tucson. The report asserts that both courthouses exceed the space authorized by Congress, that the DeConcini Courthouse has 5 excess courtrooms, and that the projected number of judges for the DeConcini Courthouse was over-estimated. The *Federal Times* article repeats many of these assertions, but contains the additional vice of incorrectly stating that the DeConcini Courthouse only has 3 actual judges.

Although the federal judiciary, in AO Director Duff's letter, has already submitted a formal response to the GAO study, I write to focus upon the inaccuracies contained in the report specific to District of Arizona.

The 1995 estimate regarding 15 judges in DeConcini Courthouse was reasonable - Although 12 judges presently use the DeConcini Courthouse full-time, a 13th judge will be in place in 2010, visiting judges routinely assist at the DeConcini Courthouse and require courtroom space, and 3 senior judges were expected to use the DeConcini Courthouse

The DeConcini Courthouse in Tucson was available for occupancy in 2000. The GAO draft report indicates that in 2010, the DeConcini Courthouse falls 3 judges short of the 1995 estimate of 15 judges at the Courthouse. The DeConcini Courthouse presently has a total of 12 district and magistrate judges, but will have 13 judges when District Judge Frank Zapata takes senior status in August 2010. The *Federal Times* article referred to above inaccurately characterized the GAO draft report's statement that the DeConcini Courthouse has 3 fewer actual judges than projected in 1995 as stating that the Courthouse has "3 actual judges" - obviously glaringly incorrect.

Further, however, the 1995 estimate can hardly be faulted in light of the fact that in 1995, it was then reasonably expected that 3 additional judges would be serving in senior status at the DeConcini Courthouse. Two of those senior judges have died and the third senior judge is medically unable to continue judicial work.

Visiting judges frequently sit in Tucson to assist with the very robust southwest border criminal caseload. In the past 12 months, visiting judges have accepted 10 assignments to sit in Tucson and have conducted nearly 3 months of hearings.

It must be noted that for several years in the recent past, the Judicial Conference has recommended that Arizona receive additional district judgeships, but, regrettably, these proposals were not acted upon.

But for unforeseeable events, the DeConcini Courthouse would have far more than the 15 judges projected in 1995.

Courthouse space at the O'Connor and DeConcini Courthouses now claimed to be space exceeding congressional authorization is a result of atrium space at both Courthouses - which was not space to be attributed to the District Court

The draft GAO report asserts that the Sandra Day O'Connor U.S. Courthouse in Phoenix exceeded congressionally authorized square footage by 50% and that the DeConcini Courthouse in Tucson exceeded authorized square footage by 5%. However, in both instances, the respective atriums are the reasons for the discrepancy.

When these projects were approved, the Court was assured that atrium space would not be charged against the Court's total square footage.

The DeConcini Courthouse does not have "5 extra courtrooms" - All existing courtrooms are fully utilized and the Special Proceedings Courtroom has even been appropriated for daily criminal calendar use

Courtroom sharing is a totally impractical proposal for a southwest border courthouse

The draft GAO report asserts that the DeConcini Courthouse has 5 "extra" courtrooms, based on the totally arbitrary assertion that the 12 Tucson judges really only need 7 courtrooms. Chief Judge Preska's compelling presentation explains why federal courtrooms are not simply interchangeable conference rooms. In any event, courtroom sharing was a theory with no currency when the DeConcini Courthouse was approved for construction in 1992.

Most importantly, however, the daily stream of hundreds of criminal cases heard in Tucson, with statutes and rules mandating prompt attention for each case, make the DeConcini Courthouse a poor poster child for "wasted courtroom space."

The District of Arizona has one of the highest criminal caseloads in the nation. According to Director Duff's recently released report on court activity in FY-2009, the District of Arizona is 1st in the Ninth Circuit and 3rd (of the nation's 94 districts) in criminal case filings. (2009 Annual Report of the Director, Administrative Office of the United States Courts, pp. 201-203). Nearly 2/3s of these criminal case filings are in Tucson division. (Phoenix division has 80% of the District's civil case filings).

Every courtroom, including the Special Proceedings Courtroom, is used daily

The District of Arizona's criminal case filings in FY-2009 were 67.3% higher than in FY-2008. This has necessitated the widespread use of visiting judges to sit in Tucson division. Since November 2009, visiting judges have sat in Tucson for 9 terms of service, ranging from 1-3 weeks, for a total of 79 court days and more than 550 court proceedings. These judges require courtroom space in addition to that required by the 5 active judges and the 7 magistrate judges.

The 7 magistrate judges sitting in Tucson division preside over an enormous number of felony changes of plea, motions hearings on report and recommendation, and petty and misdemeanor offenses. In FY-2009, the 7 magistrate judges in Tucson division heard more than 16,000 operation streamline cases (the single-day program in which 70 Border Patrol defendants are adjudicated on petty and misdemeanor offenses in a single day) and accepted 4,173 felony changes of plea - 1st in the nation. The Special Proceedings Courtroom is used daily for operation streamline cases.

Tenants are being removed from the DeConcini Courthouse to create additional needed space

Any suggestion that the DeConcini Courthouse has excess space must necessarily overlook the fact that the Probation Department and the U.S. Marshals Service have had to move personnel to off-site locations because of insufficient space in the Courthouse. In fact, one major impediment to an increase in the volume of criminal cases in Tucson is the present lack of detention space and the absence of available space that could be dedicated to add new detention space.

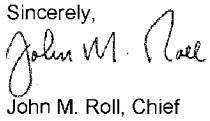
Currently, plans call for the U.S. Attorney's Office to leave the courthouse to create more badly needed space.

The notion that the DeConcini Courthouse has unused space is plainly mistaken.

Conclusion

The above clarification of the record is necessary in order to eliminate incorrect impressions that might be drawn from the GAO draft report's discussion of the O'Connor and DeConcini Courthouses. As to "excess courtrooms," the DeConcini Courthouse is, in actuality, functioning at a level beyond anyone's expectations.

Sincerely,



John M. Roll, Chief
District Judge

cc: James Duff, Director, Administrative Office
Hon. Michael A. Ponsor
Hon. Julie Robinson
Hon. Loretta A. Preska

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