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REPORT ON THE ACTIVITIES

OF THE

COMMITTEE ON THE JUDICIARY

OF THE

HOUSE OF REPRESENTATIVES

DURING THE

ONE HUNDRED SEVENTH CONGRESS

PURSUANT TO

CLAUSE 1(d) RULE XI OF THE RULES OF THE HOUSE OF REPRESENTATIVES

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COMMITTEE ON THE JUDICIARY

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LETTER OF TRANSMITTAL

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC, January 2, 2003.

Hon. JEFF TRANDAHL,
Clerk of the House of Representatives,
Washington, DC.

DEAR MR. TRANDAHL: Pursuant to clause 1(d) of rule XI of the Rules of the House of Representatives, I am transmitting the report on the activities of the Committee on the Judiciary of the U.S. House of Representatives in the 107th Congress.

Sincerely,

F. JAMES SENSENBRENNER, Jr.,
Chairman.

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Union Calendar No. 508

107TH CONGRESS, 2d Session | HOUSE OF REPRESENTATIVES | REPORT 107–807

REPORT ON THE ACTIVITIES OF THE COMMITTEE ON THE JUDICIARY

JANUARY 2, 2003.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SENSENBRENNER, from the Committee on the Judiciary, submitted the following

R E P O R T

Jurisdiction of the Committee on the Judiciary

The jurisdiction of the Committee on the Judiciary is set forth in Rule X, 1.(k) of the Rules of the House of Representatives for the 107th Congress:

* * * * * * *

RULE X.—ESTABLISHMENT AND JURISDICTION OF STANDING COMMITTEES

THE COMMITTEES AND THEIR JURISDICTION

1. There shall be in the House the following standing committees, each of which shall have the jurisdiction and related functions assigned to it by this clause and clauses 2, 3, and 4. All bills, resolutions, and other matters relating to subjects within the jurisdiction of the standing committees listed in this clause shall be referred to those committees, in accordance with clause 2 of rule XII, as follows:

* * * * * * *

(k) Committee on the Judiciary

(1) The judiciary and judicial proceedings, civil and criminal.
(2) Administrative practice and procedure.
(3) Apportionment of Representatives.
(4) Bankruptcy, mutiny, espionage, and counterfeiting.
(5) Civil liberties.
(6) Constitutional amendments.

(7) Federal courts and judges, and local courts in the Territories and possessions.

(8) Immigration and naturalization.

(9) Interstate compacts, generally.

(10) Claims against the United States.

(11) Meetings of Congress, attendance of Members and their acceptance of incompatible offices.

(12) National penitentiaries.

(13) Patents, the Patent Office, copyrights, and trademarks.

(14) Presidential succession.

(15) Protection of trade and commerce against unlawful restraints and monopolies.

(16) Revision and codification of the Statutes of the United States.

(17) State and Territorial boundaries.

(18) Subversive activities affecting the internal security of the United States.

Tabulation of Legislation and Activity

LEGISLATION REFERRED TO COMMITTEE

Public Legislation:	
House bills	760
House joint resolutions	66
House concurrent resolutions	35
House resolutions	25
	886
Senate bills	24
Senate joint resolutions	1
Senate concurrent resolutions	2
	27
Subtotal	913
Private Legislation:	
House bills (claims)	24
House bills (copyrights)	1
House bills (immigration)	48
House resolutions (claims)	1
	74
Senate bills (claims)	1
Senate bills (immigration)	7
	8
Subtotal	82
Total	995

ACTION ON LEGISLATION NOT REFERRED TO COMMITTEE

Held at desk for House action:	
Senate bills	2
	2
Conference appointments:	
House bills	5
Senate bills	1
	6
Total	8

FINAL ACTION

House concurrent resolutions approved (public)	3
House resolutions approved (public)	4
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Printed Hearings

Serial No. and Title

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1. Consequences for Juvenile Offenders Act of 2001. Subcommittee on Crime. March 8, 2001. (H.R. 863).
2. Presidential Pardon Power. Subcommittee on the Constitution. February 28, 2001.
3. Drug Trafficking on the Southwest Border. Subcommittee on Crime. March 29, 2001.
4. Unborn Victims of Violence Act of 2001. Subcommittee on the Constitution. March 15, 2001. (H.R. 503).
5. Business Method Patents. Subcommittee on Courts, the Internet, and Intellectual Property. April 4, 2001.
6. United States Copyright Office. Subcommittee on Courts, the Internet, and Intellectual Property. May 2, 2001.
7. Bankruptcy Abuse Prevention and Consumer Protection Act of 2001. Committee on the Judiciary. February 7, 8, 2001. (H.R. 333).
8. ICANN, New gTLDS, and the Protection of Intellectual Property. Subcommittee on Courts, the Internet, and Intellectual Property. March 22, 2001.
9. Patents: Improving Quality and Curing Defects. Subcommittee on Courts, the Internet, and Intellectual Property. May 10, 2001.
10. Executive Orders and Presidential Directives. Subcommittee on Commercial and Administrative Law. March 22, 2001.
11. Federal Prison Industries Competition in Contracting Act of 2001. Subcommittee on Crime. April 26, 2001. (H.R. 1577).
12. Music on the Internet. Subcommittee on Courts, the Internet, and Intellectual Property. May 17, 2001.
13. State and Local Implementation of Existing Charitable Choice Programs. Subcommittee on the Constitution. April 24, 2001.
14. Technology, Education and Copyright Harmonization Act of 2001. Subcommittee on Courts, the Internet, and Intellectual Property. June 27, 2001. (S. 487).
15. Reauthorization of the U.S. Department of Justice: Executive Office for U.S. Attorneys, Civil Division, Environment and Natural Resources Division, Executive Office for U.S. Trustees, and Office of the Solicitor General. Subcommittee on Commercial and Administrative Law. May 9, 2001.
16. U.S. Patent and Trademark Office Operations and Funding. Subcommittee on Courts, the Internet, and Intellectual Property. June 7, 2001.
17. Constitutional Role of Faith-Based Organizations in Competitions for Federal Social Service Funds. Subcommittee on the Constitution. June 7, 2001.
18. Internet Freedom and Broadband Deployment Act of 2001. Committee on the Judiciary. June 5, 2001. (H.R. 1542).
19. American Broadband Competition Act of 2001 and the Broadband Competition and Incentives Act of 2001. Committee on the Judiciary. May 22, 2001. (H.R. 1698 and H.R. 1697).
20. Constitutional Issues Raised by Recent Campaign Finance Legislation Restricting Freedom of Speech. Subcommittee on the Constitution. June 12, 2001.
21. INS and the Executive Office for Immigration Review. Subcommittee on Immigration and Claims. May 15, 2001.
22. Guestworker Visa Programs. Subcommittee on Immigration and Claims. June 19, 2001.
23. Whois Database: Privacy and Intellectual Property Issues. Subcommittee on Courts, the Internet, and Intellectual Property. July 12, 2001. (See also Serial No. 70).
24. Unsolicited Commercial Electronic Mail Act of 2001 and the Anti-Spamming Act of 2001. Committee on the Judiciary. May 10, 2001. (H.R. 718 and H.R. 1017).
25. Federal Courts Improvement Act of 2001. Subcommittee on Courts, the Internet, and Intellectual Property. July 26, 2001. (H.R. 2522).
26. Internet Tax Nondiscrimination Act. Subcommittee on Commercial and Administrative Law. June 26, 2001. (H.R. 1552 and H.R. 1675).
27. Notification and Federal Employee Anti-Discrimination and Retaliation Act of 2001. Committee on the Judiciary. May 9, 2001. (H.R. 169).
28. Consumer Product Protection Act of 2001. Subcommittee on Crime. July 26, 2001. (H.R. 2621).

29. Preauthorization of the United States Department of Justice: Criminal Law Enforcement. Subcommittee on Crime. May 3, 15, 2001.
30. U.S. Population and Immigration. Subcommittee on Immigration and Claims. August 2, 2001.
31. Internet Tax Moratorium and Equity Act. Subcommittee on Commercial and Administrative Law. July 18, 2001. (H.R. 1410).
32. Born-Alive Infants Protection Act of 2001. Subcommittee on the Constitution. July 12, 2001. (H.R. 2175).
33. Fighting Caber Crime. Subcommittee on Crime. May 24, June 12, 14, 2001.
34. Law Enforcement and Community Efforts to Address Crimes Against Seniors. Subcommittee on Crime. July 11, 2001.
35. Child Sex Crimes Wiretapping Act of 2001. Subcommittee on Crime. June 21, 2001. (H.R. 1877).
36. Child Custody Protection Act. Subcommittee on the Constitution. September 6, 2001. (H.R. 476).
37. United States Department of Justice. Committee on the Judiciary. June 6, 2001.
38. Two Strikes and You're Out Child Protection Act of 2001. Subcommittee on Crime. July 31, 2001. (H.R. 2146).
39. Administration's Draft Anti-Terrorism Act of 2001. Committee on the Judiciary. September 24, 2001.
40. Human Cloning. Subcommittee on Crime. June 7, 19, 2001. [Oversight, H.R. 1644, and H.R. 2172 (a bill referred to the Committee on Energy and Commerce).]
41. Internet Tax Fairness Act of 2001. Subcommittee on Commercial and Administrative Law. September 11, 2001. (H.R. 2526).
42. Market Power and Intellectual Property Litigation. Subcommittee on Courts, the Internet, and Intellectual Property. November 8, 2001.
43. Using Information Technology to Secure America's Borders: INS Problems with Planning and Implementation. Subcommittee on Immigration and Claims. October 11, 2001.
44. Immigration and Naturalization Service Performance Issues. Subcommittee on Immigration and Claims. October 17, 2001.
45. Operations of Federal Judicial Misconduct Statutes. Subcommittee on Courts, the Internet, and Intellectual Property. November 29, 2001.
46. Implementation of the International Convention for the Suppression of Terrorist Bombings and the International Convention for the Suppression of the Financing of Terrorism. Subcommittee on Crime. November 14, 2001. (H.R. 3275).
47. Unlawful Internet Gambling Funding Prohibition Act and the Combating Illegal Gambling Reform and Modernization Act. Subcommittee on Crime. November 29, 2001. (H.R. 556 and H.R. 3215).
48. Anti-Hoax Terrorism Act of 2001. Subcommittee on Crime. November 7, 2001. (H.R. 3209).
49. Help America Vote Act of 2001. Committee on the Judiciary. December 5, 2001. (H.R. 3295).
50. Direct Broadcast Satellite Service and Competition in the Multichannel Video Distribution Market. Committee on the Judiciary. December 4, 2001.
51. Fairness in Antitrust in National Sports (FANS) Act of 2001. Committee on the Judiciary. December 6, 2001. (H.R. 3288).
52. Digital Millennium Copyright Act Section 104 Report. Subcommittee on Courts, the Internet, and Intellectual Property. December 12, 13, 2001.
53. Federal Trademark Dilution Act. Subcommittee on Courts, the Internet, and Intellectual Property. February 14, 2002.
54. Alabama-Coosa-Tallapoosa River Basin Compact and the Apalachicola-Chattahoochee and Flint River Basin Compact. Subcommittee on Commercial and Administrative Law. December 19, 2001.
55. Review of Department of Justice Immigration Detention Policies. Subcommittee on Immigration and Claims. December 19, 2001.
56. Settlement Agreement by and among the United States of America, the Federal Communications Commission, NextWave Telecom, Inc., et al. Subcommittee on Commercial and Administrative Law jointly with the Subcommittee on Courts, the Internet, and Intellectual Property. December 6, 2001.
57. Operations of the Executive Office for Immigration Review (EOIR). Subcommittee on Immigration and Claims. February 6, 2002.
58. Cyber Security Enhancement Act of 2001. Subcommittee on Crime. February 12, 2002. (H.R. 3482).
59. Class Action Fairness Act of 2001. Committee on the Judiciary. February 6, 2002. (H.R. 2341).

60. Patent Law and Non-Profit Research Collaboration. Subcommittee on Courts, the Internet, and Intellectual Property. March 14, 2002.
61. Implications of Transnational Terrorism for the Visa Waiver Program. Subcommittee on Immigration and Claims. February 28, 2002.
62. Temporary Filling of House of Representatives Vacancies During National Emergencies. Subcommittee on the Constitution. February 28, 2002. (H.J. Res. 62).
63. INS's March 2002 Notification of Approval of Change of Status for Pilot Training for Terrorist Hijackers Mohammed Atta and Marwan Al-Shehhi. Subcommittee on Immigration and Claims. March 19, 2002.
64. U.S. Patent and Trademark Office: Operations and Fiscal year 2003 Budget. Subcommittee on Courts, the Internet, and Intellectual Property. April 11, 2002.
65. Proposed Change of Utah-Nevada State Boundary; Amendments to the New Hampshire-Vermont Interstate School Compact; and Tax Treatment of Bonds Issued by the Government of American Samoa. Subcommittee on Commercial and Administrative Law. March 6, 2002. (H.R. 2054, H.R. 3180, and H.R. 1448).
66. Legal Services Corporation. Subcommittee on Commercial and Administrative Law. February 28, 2002.
67. HUD's "Legislative Guidebook" and Its Potential Impact on Property Rights and Small Businesses, Including Minority-Owned Businesses. Subcommittee on the Constitution. March 7, 2002.
68. INS and Office of Special Counsel for Immigration Related Unfair Employment Practices. Subcommittee on Immigration and Claims. March 21, 2002.
69. Restructuring the INS—How the Agency's Dysfunctional Structure Impedes the Performance of Its Dual Mission. Committee on the Judiciary. April 9, 2002.
70. Accuracy and Integrity of the Whois Database. Subcommittee on Courts, the Internet, and Intellectual Property. May 22, 2002. (See also Serial No. 23).
71. Office of Justice Programs. Subcommittee on Crime. March 5, 7, 14, 2002.
72. Consumer Benefits of Today's Digital Rights Management (DRM) Solutions. Subcommittee on Courts, the Internet, and Intellectual Property. June 5, 2002.
73. U.S. Commission on Civil Rights. Subcommittee on the Constitution. April 11, 2002.
74. Victims' Rights Amendment. Subcommittee on the Constitution. May 9, 2002. (H.J. Res. 91).
75. Enhancing Child Protection Laws After the April 16, 2002 Supreme Court Decision, Ashcroft v. Free Speech Coalition. Subcommittee on Crime, Terrorism, and Homeland Security. May 1, 2002.
76. Child Obscenity and Pornography Prevention Act of 2002 and the Sex Tourism Prohibition Improvement Act of 2002. Subcommittee on Crime, Terrorism, and Homeland Security. May 9, 2002. (H.R. 4623 and H.R. 4477).
77. Administrative and Procedural Aspects of the Federal Reserve Board/Department of the Treasury Proposed Rule Concerning Competition in the Real Estate Brokerage and Management Markets. Subcommittee on Commercial and Administrative Law. May 16, 2002.
78. Copyright Arbitration Royalty Panel (CARP) Structure and Process. Subcommittee on Courts, the Internet, and Intellectual Property. June 13, 2002.
79. Patent Reexamination and Small Business Innovation. Subcommittee on Courts, the Internet, and Intellectual Property. June 20, 2002.
80. Federal Agency Protection of Privacy Act. Subcommittee on Commercial and Administrative Law. May 1, 2002. (H.R. 4561).
81. Civil Rights Division of the U.S. Department of Justice. Subcommittee on the Constitution. June 25, 2002.
82. Unpublished Judicial Opinions. Subcommittee on Courts, the Internet, and Intellectual Property. June 27, 2002.
83. Homeland Security Information Sharing Act. Subcommittee on Crime, Terrorism, and Homeland Security. June 4, 2002. (H.R. 4598).
84. Anti-Terrorism Explosives Act of 2002. Subcommittee on Crime, Terrorism, and Homeland Security. June 11, 2002. (H.R. 4864).
85. Immigration and Naturalization Service's (INS) Interior Enforcement Strategy. Subcommittee on Immigration, Border Security, and Claims. June 19, 2002.
86. Risk to Homeland Security from Identity Fraud and Identity Theft. Subcommittee on Immigration, Border Security, and Claims jointly with the Subcommittee on Crime, Terrorism, and Homeland Security. June 25, 2002.
87. Tort Liability Under the Temporary Emergency Wildfire Suppression Act. Subcommittee on Immigration, Border Security, and Claims. June 28, 2002. (H.R. 5017).
88. Free Market Antitrust Immunity Reform (FAIR) Act of 2001. Committee on the Judiciary. June 5, 2002. (H.R. 1253).

89. Innocence Protection Act of 2001. Subcommittee on Crime, Terrorism, and Homeland Security. June 18, 2002. (H.R. 912).

90. Litigation and Its Effect on the Rails-to-Trails Program. Subcommittee on Commercial and Administrative Law. June 20, 2002.

91. Role of Immigration in the Department of Homeland Security Pursuant to H.R. 5005, the Homeland Security Act of 2002. Subcommittee on Immigration, Border Security, and Claims. June 27, 2002.

92. U.S. Patent and Trademark Office: Fee Schedule Adjustment and Agency Reform. Subcommittee on Courts, the Internet, and Intellectual Property. July 18, 2002.

93. Partial-Birth Abortion Ban Act of 2002. Subcommittee on the Constitution. July 9, 2002. (H.R. 4965).

94. Proposal to Create a Department of Homeland Security. Subcommittee on Crime, Terrorism, and Homeland Security. July 9, 2002.

95. Ninth Circuit Court of Appeals Reorganization Act of 2001. Subcommittee on Courts, the Internet, and Intellectual Property. July 23, 2002. (H.R. 1203).

96. Administrative Law, Adjudicatory Issues, and Privacy Ramifications of Creating a Department of Homeland Security. Subcommittee on Commercial and Administrative Law. July 9, 2002.

97. Health Care Litigation Reform: Does Limitless Litigation Restrict Access to Health Care? Subcommittee on Commercial and Administrative Law. June 12, 2002.

98. Fairness in Sentencing Act of 2002. Subcommittee on Crime, Terrorism, and Homeland Security. May 14, 2002. (H.R. 4689).

99. Homeland Security Act of 2002. Committee on the Judiciary. June 26, 2002. (H.R. 5005).

100. Privacy Concerns Raised by the Collection and Use of Genetic Information by Employers and Insurers. Subcommittee on the Constitution. September 12, 2002.

101. Supreme Court's School Choice Decision and Congress' Authority to Enact Choice Programs. Subcommittee on the Constitution. September 17, 2002.

102. Preserving the Integrity of Social Security Numbers and Preventing Their Misuse by Terrorists and Identity Thieves. Subcommittee on Immigration, Border Security, and Claims of the Committee on the Judiciary jointly with the Subcommittee on Social Security of the Committee on Ways and Means. September 19, 2002.

103. Piracy of Intellectual Property on Peer-to-Peer Networks. Subcommittee on Courts, the Internet, and Intellectual Property. September 26, 2002.

104. Plant Breeders Equity Act of 2002. Subcommittee on Courts, the Internet, and Intellectual Property. September 19, 2002. (H.R. 5119).

105. Immigration and Naturalization Service's (INS's) Implementation of the Foreign Student Tracking Program. Subcommittee on Immigration, Border Security, and Claims. September 18, 2002.

106. Justice for United States Prisoners of War Act of 2001. Subcommittee on Immigration, Border Security, and Claims. September 25, 2002. (H.R. 1198).

107. Satellite Radio Freedom Act and the Satellite Services Act. Subcommittee on Commercial and Administrative Law. September 25, 2002. (H.R. 4869 and H.R. 5429).

108. A Judiciary Diminished is Justice Denied: The Constitution, the Senate, and the Vacancy Crisis in the Federal Judiciary. Subcommittee on the Constitution. October 10, 2002.

109. Reducing Americans' Vulnerability to Ecstasy Act of 2002. Subcommittee on Crime, Terrorism, and Homeland Security. October 10, 2002. (H.R. 5519).

110. Immigration and Naturalization Services' (INS's) Interactions with Hesham Mohamed Ali Hedayet. Subcommittee on Immigration, Border Security, and Claims. October 9, 2002.

111. United States and Canada Safe Third Country Agreement. Subcommittee on Immigration, Border Security, and Claims. October 16, 2002.

112. Child Abduction Prevention Act. Subcommittee on Crime, Terrorism, and Homeland Security. October 1, 2002. (H.R. 5422).

113. Bail Bond Fairness Act of 2001. Subcommittee on Crime, Terrorism, and Homeland Security. October 8, 2002. (H.R. 2929).

Committee Prints

Serial No. and Title

1. Federal Rules of Appellate Procedure. December 1, 2001.
2. Federal Rules of Civil Procedure. December 1, 2001.
3. Federal Rules of Criminal Procedure. December 1, 2001.
4. Federal Rules of Evidence. December 1, 2001.
5. Federal Rules of Appellate Procedure. December 1, 2002.
6. Federal Rules of Civil Procedure. December 1, 2002.
7. Federal Rules of Criminal Procedure. December 1, 2002.
8. Federal Rules of Evidence. December 1, 2002.

House Documents

H. Doc. No. and Title

107–12. Apportionment Population and State Representation. Communication from the President of the United States transmitting his report on the apportionment population for each State as of April 1, 2000, and the number of Representatives to which each State would be entitled, pursuant to 2 U.S.C. 2a(a) and 13 U.S.C. 141(b). Referred to the Committee on the Judiciary and the Committee on Government Reform. January 6, 2001. (Executive Communication No. 88).

107–15. Legislative Proposal for an Agreement Between the United States and Jordan on the Establishment of a Free Trade Area. Message from the President of the United States transmitting a legislative proposal to implement the agreement between the United States of America and the Hashemite Kingdom of Jordan on the establishment of a free trade area. Referred to the Committee on Ways and Means and the Committee on the Judiciary. January 20, 2001. (Presidential Message No. 3).

107–36. Rallying the Armies of Compassion. Message from the President of the United States transmitting a report to support the heroic works of faith-based and community groups across America. Referred to the Committees on Ways and Means, the Judiciary, Education and the Workforce, Government Reform, and Financial Services. January 31, 2001. (Presidential Message No. 4).

107–39. New Freedom Initiative. Communication from the President of the United States transmitting his report to increase investment in and access to assistive technologies and a quality education, and help integrate Americans with disabilities into the workforce and into community life. Referred jointly to the Committees on Education and the Workforce, Financial Services, Ways and Means, Energy and Commerce, Transportation and Infrastructure, the Judiciary, and House Administration. February 6, 2001. (Executive Communication No. 672).

107–60. Amendments to the Federal Rules of Bankruptcy Procedure. Communication from the Chief Justice, the Supreme Court of the United States, transmitting amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Court, pursuant to 28 U.S.C. 2075. April 24, 2001. (Executive Communication No. 1574).

107–61. Amendments to the Federal Rules of Civil Procedure. Communication from the Chief Justice, the Supreme Court of the United States, transmitting amendments to the Federal Rules of Civil Procedure that have been adopted by the Court, pursuant to 28 U.S.C. 2072. April 24, 2001. (Executive Communication No. 1575).

107–62. A Letter Regarding Section 245(i) of the Immigration and Nationality Act. Communication from the President of the United States transmitting a letter in support of legislation to extend the window created under section 245(i) of the Immigration and Nationality Act during which qualified immigrants may obtain legal residence in the United States without being forced to leave the country and their families for several years. May 1, 2001. (Executive Communication No. 1677).

107–139. A Legislative Proposal. Message from the President of the United States transmitting a legislative proposal to implement the International Convention for the Suppression of Terrorist Bombings and the International Convention for the Suppression of the Financing of Terrorism. October 29, 2001. (Presidential Message No. 53).

107–203. Amendments to the Federal Rules of Criminal Procedure. Communication from the Chief Justice, the Supreme Court of the United States, transmitting

amendments to the Federal Rules of Criminal Procedure that have been adopted by the Court, pursuant to 28 U.S.C. 2072. May 3, 2002. (Executive Communication No. 6621).

107–204. Amendments to the Federal Rules of Civil Procedure. Communication from the Chief Justice, the Supreme Court of the United States, transmitting amendments to the Federal Rules of Civil Procedure that have been adopted by the Court, pursuant to 28 U.S.C. 2072. May 3, 2002. (Executive Communication No. 6623).

107–205. Amendments to the Federal Rules of Bankruptcy Procedure. Communication from the Chief Justice, the Supreme Court of the United States, transmitting amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Court, pursuant to 28 U.S.C. 2075. May 3, 2002. (Executive Communication No. 6624).

107–206. Amendments to the Federal Rules of Appellate Procedure. Communication from the Chief Justice, the Supreme Court of the United States, transmitting amendments to the Federal Rules of Appellate Procedure that have been adopted by the Court, pursuant to 28 U.S.C. 2072. May 3, 2002. (Executive Communication No. 6622).

Summary of Activities of the Committee on the Judiciary

LEGISLATION ENACTED INTO LAW

A variety of legislation within the Committee's jurisdiction was enacted into law during the 107th Congress. The public and private laws, along with approved resolutions, are listed below and are more fully detailed in the subsequent sections of this report recounting the activities of the Committee and its individual subcommittees.

PUBLIC LAWS

Public Law 107–8.—To extend for 11 additional months the period for which chapter 12 of title 11 of the United States Code is reenacted. (H.R. 256) (Approved May 11, 2001; effective date July 1, 2000).

Public Law 107–12.—To authorize the Public Safety Officer Medal of Valor, and for other purposes. "Public Safety Officer Medal of Valor Act of 2001." (H.R. 802) (Approved May 30, 2001).

Public Law 107–17.—To extend for 4 additional months the period for which chapter 12 of title 11 of the United States Code is reenacted. (H.R. 1914) (Approved June 26, 2001; effective date June 1, 2001).

Public Law 107–37.—To provide for the expedited payment of certain benefits for a public safety officer who was killed or suffered a catastrophic injury as a direct and proximate result of a personal injury sustained in the line of duty in connection with the terrorist attacks of September 11, 2001. (H.R. 2882) (Approved September 18, 2001).

Public Law 107–42.—To preserve the continued viability of the United States air transportation system. "Air Transportation Safety and System Stabilization Act." (H.R. 2926) (Approved September 22, 2001).

Public Law 107–43.—To implement the agreement establishing a United States-Jordan free trade area. "United States-Jordan Free Trade Area Implementation Act." (H.R. 2603) (Approved by the President September 28, 2001; effective dates vary).

Public Law 107–45.—To amend the Immigration and Nationality Act to provide permanent authority for the admission of "S" visa non-immigrants. (S. 1424) (Approved October 1, 2001).

Public Law 107–51.—Memorializing fallen firefighters by lowering the American flag to half-staff in honor of the National Fallen Firefighters Memorial Service in Emmitsburg, Maryland. (H.J. Res. 42) (Approved October 16, 2001).

Public Law 107–56.—To deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes. "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001." (H.R. 3162) (Approved October 26, 2001; effective dates and termination dates vary).

Public Law 107–72.—To amend the Improving America's Schools Act of 1994 to extend the favorable treatment of need-based educational aid under the antitrust laws. "Need-Based Educational Aid Act of 2001." (H.R. 768) (Approved November 20, 2001; effective date September 30, 2001).

Public Law 107–75.—To extend the moratorium enacted by the Internet Tax Freedom Act through November 1, 2003, and for other purposes. "Internet Tax Nondiscrimination Act." (H.R. 1552) (Approved November 28, 2001).

Public Law 107–104.—To amend chapter 90 of title 5, United States Code, relating to Federal long-term care insurance. (H.R. 2559) (Approved December 27, 2001; effective as if included in the enactment of section 1002 of the Long-Term Care Security Act—Public Law 106–265).

Public Law 107–107.—To authorize appropriations for fiscal year 2002 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe personnel strengths for such fiscal year for the Armed Forces, and for other purposes. "National Defense Authorization Act for Fiscal Year 2002." (S. 1438) (Approved December 28, 2001; effective dates vary).

Public Law 107–110.—To close the achievement gap with accountability, flexibility, and choice, so that no child is left behind. "No Child Left Behind Act of 2001." (H.R. 1) (Approved January 8, 2002; effective dates vary).

Public Law 107–119.—To amend the Ethics in Government Act of 1978 (5 U.S.C. App.) to extend the authorization of appropriations for the Office of Government Ethics through fiscal year 2006. "Office of Government Ethics Authorization Act of 2001." (S. 1202) (Approved January 15, 2002).

Public Law 107–124.—To provide for work authorization for nonimmigrant spouses of treaty traders and treaty investors. (H.R. 2277) (Approved January 16, 2002).

Public Law 107–125.—To provide for work authorization for nonimmigrant spouses of intracompany transferees, and to reduce the period of time during which certain intracompany transferees have to be continuously employed before applying for admission to the United States. (H.R. 2278) (Approved January 16, 2002).

Public Law 107–126.—To extend for 4 years, through December 31, 2005, the authority to redact financial disclosure statements of

judicial employees and judicial officers. (H.R. 2336) (Approved January 16, 2002).

Public Law 107–128.—To extend the basic pilot program for employment eligibility verification, and for other purposes. "Basic Pilot Extension Act of 2001." (H.R. 3030) (Approved January 16, 2002).

Public Law 107–140.—To amend title 18 of the United States Code to correct a technical error in the codification of title 36 of the United States Code. (S. 1888) (Approved February 8, 2002).

Public Law 107–150.—To amend the Immigration and Nationality Act to provide for the acceptance of an affidavit of support from another eligible sponsor if the original sponsor has died and the Attorney General has determined for humanitarian reasons that the original sponsor's classification petition should not be revoked. "Family Sponsor Immigration Act of 2002." (H.R. 1892) (Approved March 13, 2002; effective dates vary).

Public Law 107–155.—To amend the Federal Election Campaign Act of 1971 to provide bipartisan campaign reform. "Bipartisan Campaign Reform Act of 2002." (H.R. 2356) (Approved March 27, 2002; general provisions effective date November 6, 2002; other effective dates vary).

Public Law 107–169.—To make technical amendments to section 10 of title 9, United States Code. (H.R. 861) (Approved May 7, 2002).

Public Law 107–170.—To extend for 8 additional months the period for which chapter 12 of title 11 of the United States Code is reenacted. (H.R. 4167) (Approved May 7, 2002; effective date October 1, 2001).

Public Law 107–171.—To provide for the continuation of agricultural programs through fiscal year 2011. (H.R. 2646) (Approved May 13, 2002).

Public Law 107–173.—To enhance the border security of the United States, and for other purposes. "Enhanced Border Security and Visa Entry Reform Act of 2002." (H.R. 3525) (Approved May 14, 2002).

Public Law 107–174.—To require that Federal agencies be accountable for violations of antidiscrimination and whistleblower protection laws; to require that each Federal agency post quarterly on its public Web site, certain statistical data relating to Federal sector equal employment opportunity complaints filed with such agency; and for other purposes. "Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002." (H.R. 169) (Approved May 15, 2002).

Public Law 107–179.—To require a report on the operation of the State Justice Institute. (H.R. 2048) (Approved May 20, 2002).

Public Law 107–185.—To extend eligibility for refugee status of unmarried sons and daughters of certain Vietnamese refugees. (H.R. 1840) (Approved May 30, 2002).

Public Law 107–188.—To improve the ability of the United States to prevent, prepare for, and respond to bioterrorism and other public health emergencies. "Public Health Security and Bioterrorism Preparedness and Response Act of 2002." (H.R. 3448) (Approved June 12, 2002; effective dates vary).

Public Law 107–196.—To amend the Omnibus Crime Control and Safe Streets Act of 1968 to ensure that chaplains killed in the line of duty receive public safety officer death benefits. "Mychal Judge Police and Fire Chaplains Public Safety Officers" Benefit Act of 2002." (S. 2431) (Approved June 24, 2002; effective date September 11, 2001, and applicable to injuries or deaths that occur in the line of duty on or after such date).

Public Law 107–197.—To implement the International Convention for the Suppression of Terrorist Bombings to strengthen criminal laws relating to attacks on places of public use, to implement the International Convention of the Suppression of the Financing of Terrorism, to combat terrorism and defend the Nation against terrorist acts, and for other purposes. (H.R. 3275) (Approved June 25, 2002; effective dates vary).

Public Law 107–204.—To protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes. "Sarbanes-Oxley Act of 2002." (H.R. 3763) (Approved July 30, 2002).

Public Law 107–207.—To protect infants who are born alive. "Born-Alive Infants Protection Act of 2002." (H.R. 2175) (Approved August 5, 2002).

Public Law 107–208.—To amend the Immigration and Nationality Act to determine whether an alien is a child, for purposes of classification as an immediate relative, based on the age of the alien on the date the classification petition with respect to the alien is filed, and for other purposes. "Child Status Protection Act." (H.R. 1209) (Approved August 6, 2002).

Public Law 107–209.—Conferring honorary citizenship of the United States posthumously on Marie Joseph Paul Yves Roche Gilbert du Motier, the Marquis de Lafayette. (S.J. Res. 13) (Approved August 6, 2002).

Public Law 107–210.—To extend the Andean Trade Preference Act, to grant additional trade benefits under that Act, and for other purposes. (H.R. 3009) (Approved August 6, 2002).

Public Law 107–217.—To revise, codify, and enact without substantive change certain general and permanent laws, related to public buildings, property, and works, as title 40, United States Code, "Public Buildings, Property, and Works." (H.R. 2068) (Approved August 21, 2002).

Public Law 107–228.—To authorize appropriations for the Department of State for fiscal years 2002 and 2003, and for other purposes. (H.R. 1646) (Approved September 30, 2002).

Public Law 107–234.—To extend the Irish Peace Process Cultural and Training Program. (H.R. 4558) (Approved October 4, 2002).

Public Law 107–241.—To amend the charter of the AMVETS organization. (H.R. 3214) (Approved October 16, 2002).

Public Law 107–242.—To amend the charter of the Veterans of Foreign Wars of the United States organization to make members of the armed forces who receive special pay for duty subject to hostile fire or imminent danger eligible for membership in the organization, and for other purposes. (H.R. 3838) (Approved October 16, 2002).

Public Law 107–252.—To establish a program to provide funds to States to replace punch card voting systems, to establish the Election Assistance Commission to assist in the administration of Federal elections and to otherwise provide assistance with the administration of certain Federal election laws and programs, to establish minimum election administration standards for States and units of local government with responsibility for the administration of Federal elections, and for other purposes. "Help America Vote Act of 2002." (H.R. 3295) (Approved October 29, 2002).

Public Law 107–258.—To amend the Bring Them Home Alive Act of 2000 to provide an asylum program with regard to American Persian Gulf War POW/MIAs, and for other purposes. "Persian Gulf War POW/MIA Accountability Act of 2002." (S. 1339) (Approved October 29, 2002).

Public Law 107–273.—To authorize appropriations for the Department of Justice for fiscal year 2002, and for other purposes. "21st Century Department of Justice Appropriations Authorization Act." (H.R. 2215) (Approved November 2, 2002).

Public Law 107–274.—To establish new nonimmigrant classes for border commuter students. "Border Commuter Student Act of 2002." (H.R. 4967) (Approved November 2, 2002).

Public Law 107–293.—To reaffirm the reference to one Nation under God in the Pledge of Allegiance. (S. 2690) (Approved November 13, 2002).

Public Law 107–296.—To establish the Department of Homeland Security, and for other purposes. "Homeland Security Act of 2002." (H.R. 5005) (Approved November 25, 2002).

Public Law 107–297.—To ensure the continued financial capacity of insurers to provide coverage for risks from terrorism. "Terrorism Risk Insurance Act of 2002." (H.R. 3210) (Approved November 26, 2002).

Public Law 107–307.—To amend title 18, United States Code, with respect to consumer product protection. "Product Packaging Protection Act of 2002." (H.R. 2621) (Approved December 2, 2002).

Public Law 107–309.—To amend title 36, United States Code, to clarify the requirements for eligibility in the American Legion. (H.R. 3988) (Approved December 2, 2002).

Public Law 107–314.—To authorize appropriations for fiscal year 2003 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe personnel strengths, for such fiscal year for the Armed Forces, and for other purposes. "Bob Stump National Defense Authorization Act for Fiscal Year 2003." (H.R. 4546) (Approved December 2, 2002).

Public Law 107–321.—To suspend for a period of 6 months the determination of the Librarian of Congress of July 8, 2002, relating to rates and terms for the digital performance of sound recordings and ephemeral recordings. "Small Webcaster Settlement Act of 2002." (H.R. 5469) (Approved December 4, 2002).

Public Law 107–347.—To enhance the management and promotion of electronic Government services and processes by establishing a Federal Chief Information Officer within the Office of Management and Budget, and by reestablishing a broad framework of measurers that require using Internet-based information tech-

nology to enhance citizen access to Government information and services, and for other purposes. "E-Government Act of 2002." (H.R. 2458) (Approved December 17, 2002).

Public Law 107–352.—To consent to certain amendments to the New Hampshire-Vermont Interstate School Compact. (H.R. 3180) (Approved December 17, 2002).

Public Law 107–377.—To extend for 6 months the period for which chapter 12 of title 11 of the United States Code is reenacted. (H.R. 5472) (Approved December 19, 2002).

PRIVATE LAWS

Private Law 107–1.—For the relief of Rita Mirembe Revell (a.k.a. Margaret Rita Mirembe). (S. 560) (Approved July 17, 2001).

Private Law 107–2.—For the relief of retired Sergeant First Class James D. Benoit and Wan Sook Benoit (S. 1834) (Approved October 1, 2002).

Private Law 107–3.—For the relief of Barbara Makuch. (H.R. 486) (Approved October 4, 2002).

Private Law 107–4.—For the relief of Eugene Makuch. (H.R. 487) (Approved October 4, 2002).

Private Law 107–5.—For the relief of Anisha Goveas Foti. (H.R. 2245) (Approved November 5, 2002).

Private Law 107–8.—For the relief of So Hyun Jun. (H.R. 3758) (Approved December 2, 2002).

CONCURRENT AND SIMPLE RESOLUTIONS APPROVED

H. Con. Res. 225.—Expressing the sense of the Congress that, as a symbol of the solidarity following the terrorist attacks on the United States on September 11, 2001, every United States citizen is encouraged to display the flag of the United States. Agreed to by the House September 13, 2001; agreed to by the Senate September 13, 2001.

H. Con. Res. 227.—Condemning bigotry and violence against Arab-Americans, American Muslims, and Americans from South Asia in the wake of terrorist attacks in New York City, New York, and Washington, D.C., on September 11, 2001. Agreed to by the House September 15 (legislative day September 14), 2001; agreed to by the Senate September 26, 2001.

H. Con. Res. 243.—Expressing the sense of the Congress that the Public Safety Officer Medal of Valor should be presented to the public safety officers who have perished and select other public safety officers who deserve special recognition for outstanding valor above and beyond the call of duty in the aftermath of the terrorist attacks in the United States on September 11, 2001. Agreed to by the House October 30, 2001; agreed to by the Senate April 18, 2002.

H. Res. 103.—Referring the bill (H.R. 1258), entitled "A bill for the relief of Sarabeth M. Davis, Robert S. Borders, Victor Maron, Irving Berke, and Adele E. Conrad", to the chief judge of the United States Court of Federal Claims for a report thereon. Agreed to by the House May 21, 2002.

H. Res. 193.—Requesting that the President focus appropriate attention on the issues of neighborhood crime prevention, community policing, and reduction of school crime by delivering speeches,

convening meetings, and directing his Administration to make reducing crime an important priority, and for other purposes. Agreed to by the House August 2, 2001.

H. Res. 224.—Honoring the New Jersey State Law Enforcement Officers Association. Agreed to by the House November 1, 2001.

H. Res. 417.—Recognizing and honoring the career and work of Justice C. Clifton Young. Agreed to by the House October 1, 2002.

H. Res. 459.—Expressing the sense of the House of Representatives that Newdow v. U.S. Congress was erroneously decided, and for other purposes. Agreed to by the House June 27, 2002.

CONFERENCE APPOINTMENTS

Members of the Committee were named by the Speaker as conferees on the following bills which were not referred to the Committee but which contained legislative language within the Committee's Rule X jurisdiction:

H.R. 4 (S. 517)

To enhance energy conservation, research and development and to provide for security and diversity in the energy supply for the American people, and for other purposes. "Securing America's Future Energy Act of 2001" or the "SAFE Act of 2001." Passed the House, amended, August 2 (legislative day August 1), 2001 (240 yeas; 189 nays). Passed the Senate, amended, April 25, 2002 (88 yeas; 11 nays). The Senate requested a conference April 25, 2002; appointed conferees May 1, 2002. The House agreed to a conference June 12, 2002, and appointed conferees (including from the Committee on the Judiciary). The House appointed an additional conferee October 3, 2002. The conference committee did not file a conference report.

H.R. 1646 (S. 1803)

To authorize appropriations for the Department of State for fiscal years 2002 and 2003, and for other purposes. "Foreign Relations Authorization Act, Fiscal years 2002 and 2003." Passed the House, amended, May 16, 2001. Passed the Senate, amended, May 1, 2002. The Senate requested a conference May 1, 2002, and appointed conferees. The House agreed to a conference September 12, 2002, and appointed conferees (including from the Committee on the Judiciary). Conference report filed in the House September 23, 2002 (H. Rept. 107–671). The House agreed to the conference report September 25, 2002 (voice vote). The Senate agreed to the conference report September 26, 2002 (unanimous consent). Approved by the President September 30, 2002—Public Law 107–228.

H.R. 2646 (S. 1731)

To provide for the continuation of agricultural programs through fiscal year 2011. "Farm Security Act of 2001." Passed the House, amended, October 5, 2001. Passed the Senate, amended, February 13, 2002. The Senate requested a conference February 13, 2002, and appointed conferees. The House agreed to a conference February 28, 2002, and appointed conferees from the Committee on Agriculture. The House named additional conferees March 7, 2002 (including from the Committee on the Judiciary). Conference report

filed in the House May 1, 2002 (H. Rept. 107–424). The House agreed to the conference report May 2, 2002 (280 yeas; 141 nays). The Senate agreed to the conference report May 8, 2002 (64 yeas; 35 nays). Approved by the President May 13, 2002—Public Law 107–171.

H.R. 3009

To extend the Andean Trade Preference Act, to grant additional trade benefits under that Act, and for other purposes. "Andean Trade Promotion and Drug Eradication Act." Passed the House, amended, Nov. 16, 2001. Passed the Senate, amended, May 23, 2002. The House agreed to the Senate amendment, amended, June 27, 2002. The House requested a conference June 27, 2002, and appointed conferees (including from the Committee on the Judiciary). The Senate agreed to a conference July 12, 2002, and appointed conferees. Conference report filed in the House July 27 (legislative day July 26), 2002 (H. Rept. 107–624). The House agreed to the conference report July 27 (legislative day July 26), 2002 (215 yeas; 212 nays). The Senate agreed to the conference report August 1, 2002 (64 yeas; 34 nays). Approved by the President August 6, 2002—Public Law 107–210.

H.R. 3448

To improve the ability of the United States to prevent, prepare for, and respond to bioterrorism and other public health emergencies. "Public Health Security and Bioterrorism Response Act of 2001." Passed the House December 12, 2001. Passed the Senate, amended, December 20, 2001. The Senate requested a conference December 20, 2001, and appointed conferees. The House agreed to a conference February 28, 2002, and appointed conferees (including from the Committee on the Judiciary). Conference report filed in the House May 21, 2002 (H. Rept. 107–481). The House agreed to the conference report May 22, 2002 (425 yeas; 1 nay). The Senate agreed to the conference report May 23, 2002 (98 yeas; 0 nays). Approved by the President June 12, 2002—Public Law 107–188.

H.R. 3763 (S. 2673)

To protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes. "Corporate and Auditing Accountability, Responsibility, and Transparency Act of 2002." Passed the House, amended, April 24, 2002. Passed the Senate, amended, July 15, 2002. The Senate requested a conference July 15, 2002, and appointed conferees July 17, 2002. The House agreed to a conference July 17, 2002, and appointed conferees (including from the Committee on the Judiciary). Conference report filed in the House July 24, 2002 (H. Rept. 107–610). The House agreed to the conference report July 25, 2002 (423 yeas; 3 nays). The Senate agreed to the conference report July 25, 2002 (99 yeas; 0 nays). Approved by the President July 30, 2002—Public Law 107–204.

H.R. 4546 (S. 2514)

To authorize appropriations for fiscal year 2003 for military activities of the Department of Defense, for military construction, and

for defense activities of the Department of Energy, to prescribe personnel strengths for such fiscal year for the Armed Forces, and for other purposes. "National Defense Authorization Act for Fiscal Year 2003." Passed the House, amended, May 10 (legislative day May 9), 2002. Passed the Senate, amended, June 27, 2002. The House requested a conference July 25, 2002, and appointed conferees (including from the Committee on the Judiciary). The Senate agreed to a conference July 26, 2002, and appointed conferees. The House appointed additional conferees July 27, 2002. Conference report filed in the House November 12, 2002 (H. Rept. 107–772). The House agreed to the conference report November 12, 2002, by voice vote. The Senate agreed to the conference report November 13, 2002, by voice vote. Approved by the President December 2, 2002—Public Law 107–314.

S. 1438 (H.R. 2586)

To authorize appropriations for fiscal year 2002 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe personnel strengths for such fiscal year for the Armed Forces, and for other purposes. "National Defense Authorization Act for Fiscal Year 2002." Passed the Senate, amended, October 2, 2001. Passed the House, amended, October 17, 2001. The House requested a conference October 17, 2001, and appointed conferees (including from the Committee on the Judiciary). The Senate agreed to a conference October 17, 2001, and appointed conferees. Conference report filed in the House December 12, 2001 (H. Rept. 107–333). The House agreed to the conference report December 13, 2001 (382 yeas; 40 nays). The Senate agreed to the conference report December 13, 2001 (96 yeas; 2 nays). Approved by the President December 28, 2001—Public Law 107–107.

COMMITTEE ON THE JUDICIARY

F. JAMES SENSENBRENNER, JR., Wisconsin, *Chairman* [1]

HENRY J. HYDE, Illinois
GEORGE W. GEKAS, Pennsylvania
HOWARD COBLE, North Carolina
LAMAR S. SMITH, Texas
ELTON GALLEGLY, California
BOB GOODLATTE, Virginia
ED BRYANT, Tennessee [6] [8]
STEVE CHABOT, Ohio
BOB BARR, Georgia
WILLIAM L. JENKINS, Tennessee
ASA HUTCHINSON, Arkansas [4]
CHRIS CANNON, Utah
LINDSEY O. GRAHAM, South Carolina
SPENCER BACHUS, Alabama
JOE SCARBOROUGH, Florida [5]
JOHN N. HOSTETTLER, Indiana
MARK GREEN, Wisconsin
RIC KELLER, Florida
DARRELL E. ISSA, California
MELISSA A. HART, Pennsylvania
JEFF FLAKE, Arizona
MIKE PENCE, Indiana [7]
J. RANDY FORBES, Virginia [9]

JOHN CONYERS, JR., Michigan
BARNEY FRANK, Massachusetts
HOWARD L. BERMAN, California
RICK BOUCHER, Virginia
JERROLD NADLER, New York
ROBERT C. SCOTT, Virginia
MELVIN L. WATT, North Carolina
ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas
MAXINE WATERS, California
MARTIN T. MEEHAN, Massachusetts
WILLIAM D. DELAHUNT, Massachusetts
ROBERT WEXLER, FLorida
STEVEN R. ROTHMAN, New Jersey [2]
TAMMY BALDWIN, Wisconsin
ANTHONY D. WEINER, New York
ADAM B. SCHIFF, California [3]

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[1] F. James Sensenbrenner, Jr., Wisconsin, elected to the Committee as Chairman pursuant to House Resolution 19, approved by the House January 7, 2001.

Republican Members elected to the Committee pursuant to House Resolution 19, approved by the House January 7, 2001.

Democratic Members elected to the Committee pursuant to House Resolution 25, approved by the House January 31, 2001.

[2] Steven R. Rothman, New Jersey, resigned from the Committee effective February 7, 2001.

[3] Adam B. Schiff, California, elected to the Committee pursuant to House Resolution 33, approved by the House February 8, 2001.

[4] Asa Hutchinson, Arkansas, resigned from the House effective midnight August 6, 2001.

[5] Joe Scarborough, Florida, resigned from the House effective September 6, 2001.

[6] Ed Bryant, Tennessee, elected to the Committee to rank after Mr. Goodlatte pursuant to House Resolution 249, approved by the House October 2, 2001.

[7] Mike Pence, Indiana, elected to the Committee pursuant to House Resolution 249, approved by the House October 2, 2001.

[8] Ed Bryant, Tennessee, resigned from the Committee effective May 16, 2002.

[9] J. Randy Forbes, Virginia, elected to the Committee pursuant to H. Res. 423, approved by the House May 16, 2002.

Tabulation of activity on legislation held at the full Committee

Legislation held at the full Committee	150
Legislation failed to be ordered reported to the House	1
Legislation reported favorably to the House	26
Legislation reported adversely to the House	1
Legislation discharged from the Committee	17
Legislation pending in the House	6
Legislation failed passage by the House	1
Legislation passed by the House	37
Legislation pending in the Senate	8
Legislation enacted into public law as part of another measure	5
Legislation enacted into public law	18

Tabulation of activity on legislation held at the full Committee—Continued

House concurrent resolutions approved	3
House resolutions approved	1
Legislation on which hearings were held	10
Days of legislative hearings	11
Days of oversight hearings	4

FULL COMMITTEE ACTIVITIES

During the 107th Congress, the full Judiciary Committee retained original jurisdiction with respect to a number of legislative and oversight matters. This included exclusive jurisdiction over antitrust and liability issues. In addition, a number of specific legislative issues were handled exclusively by the full Committee, including the 21st Century Department of Justice Appropriations Authorization Act, the No Fear Act, and the USA/Patriot Act.

LEGISLATIVE ACTIVITIES

ANTITRUST

The Committee on the Judiciary has jurisdiction over all laws relating to antitrust. United States antitrust laws are tailored to ensure the competitive functioning of the marketplace—i.e. competition in the marketplace and not the protection of any individual competitor. There are two principal antitrust laws in the United States—the Sherman Act and the Clayton Act. Both are enforceable by the Antitrust Division of the Department of Justice (DOJ), the Federal Trade Commission (FTC), and private persons. Other federal agencies have authority to examine competitive aspects of market transactions within their jurisdiction.

H.R. 768, the "Need-Based Educational Aid Act of 2001"

Summary.—H.R. 768 makes permanent an existing temporary antitrust exemption that allows colleges and universities that admit students on a need-blind basis to agree on common standards for assessing need for purposes of awarding institutional financial aid. The current temporary exemption is set to expire on September 30, 2001.

Beginning in the mid-1950's, a number of prestigious private colleges and universities agreed to award institutional financial aid (i.e. aid from the school's own funds) solely on the basis of demonstrated financial need. Last year, institutional grant aid at all colleges and universities amounted to about $12.2 billion as compared to Federal grant aid of about $8.9 billion. These schools also agreed to use common principles to assess each student's financial need and to give essentially the same financial aid award to students admitted to more than one member of the group. Among the schools engaging in this practice were the Ivy Overlap Group (Brown, Columbia, Cornell, Dartmouth, Harvard, Princeton, Penn, Yale, and MIT) and the Pentagonal/Sisters Overlap Group (Amherst, Williams, Wesleyan, Bowdoin, Dartmouth, Barnard, Bryn Mawr, Mount Holyoke, Radcliffe, Smith, Vassar, Wellesley, Colby, Middlebury, Trinity, and Tufts).

From the 1950's through the late 1980's, the practice continued undisturbed. In 1989, the Antitrust Division of the Department of

Justice brought suit against the nine members of the Ivy Overlap Group to enjoin these practices. In 1991, the eight Ivy League schools (i.e. all of the Ivy Overlap Group except for MIT) agreed to a consent decree that for all practical purposes ended the practices of the Overlap Group. See *United States* v. *Brown University,* 1991 U.S. Dist. Lexis 21168, 1993–2 Trade Cases 70,391 (E.D. Pa. 1991).

In 1992, Congress passed a temporary antitrust exemption to allow the schools to agree to award financial aid on a need-blind basis and to use common principles of needs analysis. Higher Education Amendments of 1992, Sec. 1544, Pub. L. No. 102–325, 106 Stat. 448, 837 (1992). This temporary exemption specifically prohibited any agreement as to the terms of a financial aid award to any specific student. By its terms, it expired on September 30, 1994.

In the meantime, MIT continued to contest the lawsuit. After a non-jury trial, the district court ruled that the practices of the Overlap Group violated the antitrust laws, but specifically invited a legislative solution. *United States* v. *Brown University,* 805 F.Supp. 288 (E.D. Pa. 1992). On appeal, MIT won a reversal of the district court's decision. *United States* v. *Brown University,* 5 F.3d 658 (3d Cir. 1993). The appeals court held that the district court had not engaged in a sufficiently thorough antitrust analysis and remanded for further consideration. After that decision, the parties reached a final settlement.

In 1994, Congress passed another temporary exemption from the antitrust laws. Improving America's Schools Act of 1994, Sec. 568, Pub. L. No. 103–382, 108 Stat. 3518, 4060 (1994). This exemption resembled the one passed in 1992 in that it allowed agreements to provide aid on the basis of need only and to use common principles of needs analysis. It also prohibited agreements on awards to specific students. However, unlike the 1992 exemption, it also allows agreement on the use of a common aid application form and the exchange of the student's financial information through a third party. This exemption roughly mirrors the settlement reached in 1993. It was to expire on September 30, 1997.

Under that exemption, financial aid officers from some of the affected schools in 1997 proposed a set of guidelines to determine eligibility for institutional aid. These guidelines address issues like expected contributions from non-custodial parents, treatment of depreciation expenses which may reduce apparent income, valuation of rental properties, and unusually high medical expenses. However, a number of schools were reluctant to join the discussions because of fears about the expiration of the exemption. In 1997, Congress extended the exemption again through September 30, 2001. The 1997 extension passed the Committee and the full House by voice vote. It passed the Senate by unanimous consent.

Since that extension, the affected schools have made further progress. Seventeen prestigious colleges that were not part of the original overlap groups have joined the discussions. Thus, the exemption has encouraged these schools to adhere to need-blind admissions and need-based aid. That is particularly important when the cost of elite universities is increasingly beyond the reach of the middle class. See, e.g., Stuart Rojstaczer, "Colleges Where the Middle Class Need Not Apply," The Washington Post, at A27, March

9, 2001. The presidents of the universities have tentatively agreed to a common set of principles affirming the primacy of need-based aid. In addition, they are discussing and testing guidelines based on the 1997 proposals of the financial aid officers. The presidents expect to announce agreement on the principles and guidelines in the next several months. In the past 2 months, Harvard, Princeton, and MIT have announced major new efforts to reduce the amount of loans that students must take out by substantially increasing their institutional grant aid. These efforts demonstrate that nothing in the exemption limits the ability of schools to respond to demonstrated need on an individual basis. As this progress shows, common treatment of these types of issues makes sense. The existing exemption has worked well so far. Progress is being made, and more schools are moving to need-blind admissions and need-based aid.

The need-based financial aid system serves social goals that the antitrust laws do not adequately address—namely, making financial aid available to the broadest number of students solely on the basis of demonstrated need. Without it, the schools would be required to compete, through financial aid awards, for the very top students. Those very top students would get all of the aid available which would be more than their demonstrated need. The rest would get less than their demonstrated need or none at all. Ultimately, such a system would serve to undermine the principles of need-based aid and need-blind admissions. No student who is otherwise qualified ought to be denied the opportunity to go to one of the nation's most prestigious schools because of the financial situation of his or her family. H.R. 768 will help protect need-based aid and need-blind admissions and preserve that opportunity.

Legislative History.—H.R. 768 was introduced by Rep. Lamar Smith (R–TX) on February 28, 2001, and was referred to the Judiciary Committee on the same day. On March 28, 2001, the Committee met in open session and reported the bill without amendment by voice vote (H. Rept. 107–32). On April 3, 2001, H.R. 768 passed the House on suspension of the rules by a vote of 414–0. On November 20, 2001, the bill was enacted into law after receiving the signature of President Bush (Public Law 107–72).

H.R. 809, the "Antitrust Technical Corrections Act of 2001"

Summary.—There are two primary federal antitrust statutes. Enacted in 1890, the Sherman Act (15 U.S.C. §§ 1–7) prohibits contracts or conspiracies in "restraint of trade," or attempts toward market monopolization. The Clayton Act of 1914 (15 U.S.C. §§12–27) contains the damage provisions of the antitrust laws, and contains provisions requiring pre-merger notification to antitrust authorities of specified acquisitions or merger. H.R. 809 makes miscellaneous changes to the antitrust laws. Three of these changes repeal outdated provisions; one clarifies a longstanding ambiguity regarding the application of the antitrust laws in the District of Columbia and the territories; and two correct typographical errors in recently passed laws.

First, H.R. 809 repeals the Act of March 3, 1913, which required public proceedings for the taking of depositions for equitable suits brought by the United States under the Sherman Act. Second, the

bill repeals provisions of the Panama Canal Act which bar the use of the Panama Canal to violators of U.S. antitrust laws.

H.R. 809 also amends the Sherman Act to extend the prohibitions against monopolizing trade or commerce among the States or with foreign nations to monopolizing trade or foreign commerce in or among any U.S. Territories and the District of Columbia. In addition, the bill amends the Wilson Tariff Act of 1894 (15 U.S.C. § 8 and 9), which prohibits conspiracies in restraint of import trade, to repeal provisions that authorized any person injured in his business or property by this statute from recovering treble damages and the costs of litigation in Federal Circuit Court.

Legislative History.—H.R. 809 was introduced by Committee Chairman F. James Sensenbrenner, Jr. on March 1, 2001. In addition to the Judiciary Committee, the bill was referred to the Committee on Armed Services. The Committee held a markup on March 8, 2001, and the bill was ordered favorably reported without amendment by voice vote (H. Rept. 107–17, part 1). H.R. 809 was then referred to the Committee on Armed Services, which discharged the bill without further consideration. H.R. 809 was included without amendment in H.R. 2215, the 21st Century Department of Justice Authorization Act, and passed the House under suspension of the rules by voice vote on March 14, 2001. On November 2, 2002, this bill was signed into law by President Bush (Pub. Law 107–273).

H.R. 1253, the "Free Market Antitrust Immunity Reform (FAIR) Act of 2001"

Summary.—Ocean carriers and ports form the basis of an international trading system upon which America's economic vitality depends. Nearly 80 percent of U.S. merchandise exports and 85 percent of merchandise imports are carried over international shipping lanes, and in times of war ocean carriers play a critical transportation role. Because transportation costs are an important factor in the determination of market prices for goods shipped to and from the United States, the shipping industry directly affects the consumer choices of all Americans.

To understand the discussion below, one must first understand the terms applied to the various participants in the ocean shipping industry. The businesses which own ships and sell the service of transporting cargo on those ships are known as carriers. While American carriers were central actors in this market for several decades, today all of the major carriers operating to and from the United States are foreign-owned. The businesses which transport their goods on these carriers are commonly known as "shippers." Shippers range in size from large retail operations like J.C. Penney or Wal-Mart to much smaller businesses. Carriers generally sell cargo space on their ships in relatively large units, and larger shippers generally receive lower rates. As a result, smaller shippers use several methods to consolidate their cargo into larger shipments in order to obtain lower rates. One of the primary methods that smaller shippers use is to ship through "non-vessel operating common carriers" (known as "NVOCCs" or simply "NVOs"). NVOs contract with carriers for larger cargo volumes, and then fill that space by

consolidating numerous small shipments into one large shipment in order to obtain a volume-discounted rate.

In addition to contracting with NVOs, shippers have also formed "shippers" associations" of their own to obtain lower ocean transportation costs. Shippers' associations perform essentially the same consolidation and brokerage function as NVOs, but are generally owned cooperatively by shippers themselves. Finally, some shippers use businesses known as "freight forwarders" or "customs brokers" to assist with their shipping needs. These businesses simply help shippers with the administrative burdens associated with importing or exporting goods. However, because freight forwarders and customs brokers do not consolidate transportation contracts on behalf of shippers, they are unable to obtain the discounted carrier transportation rates provided to shippers by NVOs and shippers' associations. All of these businesses conduct shipping activity through ports, which are more formally known as "marine terminal operators." Shipping ports are owned by local governments, but are sometimes operated by private contractors selected by state or local governments. Some businesses also have their own private marine terminal facilities, but operations at these facilities are generally limited to the activities of the owning business and not open to the general public. Like ocean carriers, port authorities are exempt from antitrust scrutiny.

Goods destined for export or import must be transported to and from ports for carriage. Interport transfer of goods is known as drayage. Trucking companies also transport cargo between ports and inland points. Truckers have long contended that ocean carriers occupy a dominant and unfair marketing position that has been used to set artificially low and discriminatory trucking prices. These trucking companies assert that ocean carriers abuse their antitrust immunity by collectively establishing secret "voluntary rate guidelines" which include inland transportation costs. According to trucking concerns, including the International Brotherhood of Teamsters, ocean carriers then contract with port drivers to deliver goods to and from ports at sub-market rates. Trucking businesses and unions which represent these drivers further contend that carriers discriminate against union truckers, and that these carriers use their dominant and united market position to extract unfair market concessions. Trucking interests further assert that this bargaining disparity is compounded by the fact that port drivers, the vast majority of whom operate as independent contractors, are prevented from organizing or taking collective action under federal law.

Overcapacity has plagued the ocean shipping industry since its inception in the mid-1800s. This overcapacity arises for several reasons. The primary cause of shipping overcapacity is the presence of international policies designed to promote national-flag carriers and to promote indigenous shipbuilding capacity for employment purposes and to maintain maritime military transportation in time of war.[1] Ocean liners are expensive to manufacture, requiring an extensive investment in both time and capital. Once built, ocean liners tend to last a long time, and their owners must use them for

[1] S. Rep. No. 105–61, at 3 (1997).

several years in order to recoup the costs of construction. In addition, these vessels cannot easily be converted to other uses in times of low demand. Thus, once transport ships are built, they tend to remain a part of total available capacity for several years.

Some governments have exacerbated overcapacity in the international shipping market by subsidizing their own liners. For example, Taiwan, the People's Republic of China, South Korea, and Japan provide direct and indirect financial support to domestic ocean carrier lines. This subsidization takes the form of both direct government ownership or payments or other favorable policies for national carrier owners. While there is growing international pressure to reassess whether ocean carriers should be accorded antitrust immunity, all other maritime nations currently exempt ocean carrier conferences and discussion groups from the application of antitrust or competition laws.[2]

In the late 1800s, overcapacity led to rate wars and vigorous competition among carriers. As early as 1875, carriers began to form "conferences" to privately and jointly set rates to avoid potentially self-destructive rate wars. From that time until World War I, the United States did not regulate these conferences. In the mid 1910s, Congress began to investigate these agreements and concluded that the conference system served the public interest by providing stability to U.S. ocean carriers and international commerce.[3] Congress passed the Shipping Act of 1916 ("the 1916 Act") to provide a statutory basis for this conclusion.[4]

The 1916 Act gave ocean carrier conferences antitrust immunity to set rates jointly. It also gave similar antitrust immunity to port authorities and operators. Recognizing the potential for anti-competitive practices associated with exempting carriers and port authorities from antitrust laws, the 1916 Act also established the United States Shipping Board, a predecessor of today's Federal Maritime Commission, to regulate the industry. The Board was given authority to review rates set by carrier conferences before they could take effect. The 1916 Act also created a common carrier obligation which required international shipping companies to carry the cargo of shippers on nondiscriminatory terms overseen by the Board.[5] In subsequent judicial decisions, the Supreme Court broadly construed the scope of the antitrust immunity contained in the 1916 Act. For example, in a 1932 decision, the Court held that carriers and their conferences can not be sued under the antitrust laws even if they failed to file their conference agreements with the regulating United States Shipping Board.[6] Subsequently expansive

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[2] Supra, note 6.

[3] Id. In a 1915 report to Congress, the Alexander Committee, named after the then-Chairman of the House Committee on Merchant Marine and Fisheries, recommended providing legal protection to the conference system but also determined that conference practices should be regulated to ensure carriers did not abuse their market position at the expense of shippers.

[4] Shipping Act of 1916, ch. 451, 39 Stat. 728 (1916) (Those parts of the 1916 Act that have not been subsequently repealed are codified at 46 U.S.C. App. § 801 et seq.).

[5] A common carrier is required by law to convey passengers or freight without refusal if the approved fare or charge is paid in contrast to private or contract carriers. Black's Law Dictionary 275 (6th ed. 1990).

[6] *United States Navigation Co.* v. *Cunard Steamship Co.,* 284 U.S. 474 (1932).

interpretations of the 1916 Act triggered concern that the 1916 Act required legislative revision.[7]

In 1961, Congress responded to these concerns by amending the Shipping Act of 1916. The 1961 legislation abolished the United States Shipping Board and replaced it with the Federal Maritime Commission (FMC) that exists today.[8] In addition, Congress made important substantive changes to the 1916 Act in separate legislation known commonly as the "1961 Amendments."[9] Most importantly, the 1961 Amendments required the FMC to disapprove of any conference agreement it determined to be contrary to the public interest. The 1961 Amendments also instituted a mandatory public tariff filing system in order to give substance to the shipping companies' common carrier obligations. The public interest and mandatory public filing system expanded the FMC's authority to investigate and punish ocean carrier transgressions and authorized it to disapprove rates considered to be detrimental to United States commerce.

The FMC subsequently issued regulations that specified the grounds upon which conference agreements would be considered inconsistent with the public interest. The regulations stated that agreements that were contrary to the pro-competitive goals of the antitrust laws would be considered presumptively invalid. In litigation stemming from the promulgation of these regulations, the Supreme Court began to narrow the antitrust exemption accorded to carrier conferences.[10] Carriers asserted that this new policy substantially eroded their antitrust immunity and undermined the purposes of the 1916 Act. Carriers further contended that the FMC was ill-equipped to analyze the antitrust implications of carrier conference agreements and that this analysis resulted in costly and protracted delays.[11]

In 1984, Congress revisited the international shipping industry by enacting the Shipping Act of 1984[12] ("the 1984 Act"). The 1984 Act represented the most substantive, comprehensive overhaul of the nation's shipping law since 1916. However, it maintained the basic compromise of the 1916 Act by preserving antitrust immunity for collective carrier ratesetting, while continuing to subject ocean carriers to common carrier obligations and continued regulatory scrutiny by the FMC. The principle innovation of the 1984 Act was to allow carriers to attempt to weaken the unity of carrier conferences by entering into contracts with individual shippers at rates discounted from established conference rates. The legislation also allowed conferences to enter into service contracts in which shippers receive a discounted rate (from the conference-set schedule) in return for agreeing to ship a minimum amount of cargo with a particular carrier. However, the legislation specified that if a carrier entered into such service contracts, it had to offer the

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[7] See, e.g. *Far East Conference* v. *United States,* 342 U.S. 570 (1952) (in which the Court upheld a conference-set, dual-rate system against a private shipper seeking relief under the Sherman Act for anti-competitive practices).

[8] See Reorganization Plan No. 7 of 1961, 75 Stat. 840 (1961).

[9] Act of October 3, 1961, Pub. L. No. 87–346, 75 Stat. 762 (1961).

[10] See, e.g. *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213 (1966). *Federal Maritime Commission* v. *Aktiebol Svenska Amerika Linien,* 390 U.S. 238 (1968).

[11] Senate Report, supra, note 8 at 6.

[12] Shipping Act of 1984, Pub. L. No. 98–237, 98 Stat. 67 (codified at 46 U.S.C. App. § 1701 et seq.,) repealed by the Ocean Shipping Reform Act of 1998, 112 Stat.1902 (1998).

same terms to all similarly situated shippers and further required that these rates be publicly disclosed. The 1984 Act made several other important changes. The legislation strengthened carrier antitrust immunity by explicitly protecting carriers from the Clayton Antitrust Act. In addition, the 1984 Act formally recognized the existence of NVOs and shippers' associations, and gave them substantive rights to petition the FMC in instances of carrier violations. Finally, the 1984 Act set up an Advisory Commission to study the legislation's impact after it had been in effect for five and a half years.

Since passage of the 1984 Act, the market power of traditional carrier conferences has declined. To some extent, conferences have been replaced by broader groups of carriers commonly known as discussion agreements. These broader groups are not officially recognized in either the statute or FMC regulations, but they are arguably encompassed within the statutory term "cooperative working agreements" defined in the 1984 Act. As with conferences, these agreements operate under protection from antitrust laws, but membership includes independent shippers as well as traditional conference carriers. In addition, the collective ratemaking authority of these agreements is limited to nonbinding recommendations. Shippers have expressed continued concern about the power of discussion agreements in a seller's market. While discussion agreements are purportedly voluntary bodies without joint ratemaking authority, some industry analyst assert that, as a practical matter, these bodies set rates jointly.[13]

The Advisory Commission established by the 1984 Act filed its report in April of 1992. Although it did not come to a consensus, the Commission report highlighted a number of key concerns by various industry participants. These conclusions formed the basis of the Ocean Shipping Reform Act of 1998 (OSRA).[14] OSRA's principle reform was to permit carriers to enter into service contracts with individual shippers on a confidential basis.[15] In addition, carriers were no longer required to provide the same rates to other similarly-situated shippers. Rather than issuing mandatory rate guidelines, conferences were required only to publish voluntary schedules.[16] Under OSRA, carrier conferences could continue to discuss and jointly set rates without losing their antitrust immunity. The 1998 Act did not afford the same rights to NVOs and other participants in discussion groups. NVOs may enter into confidential service contracts with carriers when they buy space, but they must still publicly disclose their shipping contracts through a public tariff filing system.

Finally, OSRA expressly permits ocean carriers to set rates they will charge for inland transportation through "joint rates by a conference, joint venture, or an association of ocean common car-

[13] See Robert J. Bowman, Maritime Reform Will Re-Make Shipper-Carrier Relationships, Global Logistics and Supply Chain Strategies, January/February, 1999.

[14] Ocean Shipping Reform Act of 1998, Pub. L. No. 105–258, 112 Stat. 1902 (codified as amended at 46 U.S.C. et seq. (2000)).

[15] See Paul Edelman, The Ocean Shipping Reform Act of 1998, Intl. Trade L. J., Summer 2000.

[16] Id.

riers."[17] Providing antitrust exemption to permit carriers to jointly set inland transportation rates in a noncompetitive context is strenuously opposed by independent transportation providers and trucking organizations.

While all other maritime nations have retained antitrust immunity for ocean carriers, the scope of this privilege has received increased scrutiny in recent years. The European Union, for example, has moved away from granting broad antitrust immunity for carriers to set shipping and inland transportation rates. Earlier this year, a European Court held that European carrier conferences were prohibited from collectively establishing joint inland transportation rates.[18] This holding directly conflicts with existing U.S. law. International organizations, such as the Organization for Economic Cooperation and Development (OECD), which includes the world's industrialized economies, have pointedly questioned the economic justification for continued exemption.

For example, on April 22, 2002, the OECD issued a report recommending the abolition of antitrust immunity for ocean carriers.[19] The report's authors concluded that they had "not found convincing evidence that the practice of discussing and/or fixing rates and surcharges among competing carriers offers more benefits than costs to shippers and customers."[20] The report also made little distinction between carrier conferences and less formal discussion agreements, terming the latter "soft cartels." Finally, the report concluded that "antitrust exemptions for [carrier] conference price-fixing no longer serve their stated purpose * * * and are no longer relevant."[21]

H.R. 1253 would lift the antitrust exemption currently accorded to ocean carriers which transport goods to and from the United States. The bill would not affect the antitrust exemption currently provided to port authorities. During the 106th Congress, the Judiciary Committee held a legislative hearing on H.R. 3138, the "Free Market Antitrust Immunity Reform (FAIR) Act of 1999."

Legislative History.—H.R. 1253 was introduced by Chairman Sensenbrenner on March 27, 2001. The following witnesses testified at the hearing: Charles James, Assistant Attorney General, Antitrust Division, United States Department of Justice; James P. Hoffa, President, International Brotherhood of Teamsters; Robert Coleman, President, Pacific Coast Forwarders and Customs Association; and Christopher Koch, President and Chief Executive Officer, World Shipping Council. H.R. 1253 received no further Committee consideration.

H.R. 1407, to amend title 49, United States Code, to permit air carriers to meet and discuss their schedules in order to reduce flight delays, and for other purposes

Summary.—The Sherman Act of 1980 (15 U.S.C. §§ 1–7) prohibits contracts or conspiracies in "restraint of trade," or attempts toward market monopolization. These provisions prohibit competi-

[17] 46 U.S.C. § 1702 (11) and (12) (2000).
[18] In Case T–96/95, Judgment of the Court of First Instance (Third Chamber), ¶ 12, (2002).
[19] Organization for Economic Cooperation and Development, Competition Policy in Liner Shipping: Final Report, April 16, 2002.
[20] Id.
[21] Id. at 77.

tors from joint rate-setting or other practices which might be considered anticompetitive. On August 31, 1984, the Civil Aeronautics Board (CAB) issued an order granting antitrust immunity to airlines to meet and discuss their schedules. This action was taken to alleviate aviation system congestion and to reduce flight delays following the air traffic controller strike of 1981. Several airlines availed themselves of this immunity, but CAB's authority to grant antitrust immunity passed to the Department of Transportation (DOT) after its abolition in 1984. DOT extended antitrust immunity for airlines to discuss and set schedules in 1987, and in 1989, the Department of Justice was provided authority to grant antitrust immunity in this area. No further extensions were granted by the Department of Justice.

H.R. 1407 amends Federal aviation law to authorize an air carrier to file with the Attorney General a request for: (1) authority to discuss with one or more other air carriers or foreign air carriers agreements or cooperative arrangements limiting flights at an airport during a time period when scheduled air transportation exceeds airport capacity; and (2) approval of such agreements or cooperative arrangements with respect to such limits on interstate air transportation. The bill also would direct the Attorney General, notwithstanding U.S. antitrust laws, to approve such requests if the following conditions are met. First, these discussions and resulting agreements are not adverse to the public interest. Second, these agreements will facilitate voluntary adjustments in air carrier schedules that could lead to a substantial reduction in travel delays and improvement of air transportation service to the public. Third, these arrangements will not substantially lessen competition or tend to create a monopoly. Finally, any resulting reduction in delays achieved by these agreements cannot be obtained by any other immediately available means.

Furthermore, H.R. 1407 would authorize the Attorney General to: (1) approve such agreements and cooperative arrangements only if each air carrier or foreign air carrier providing service or seeking to provide service to an airport under such an agreement or cooperative arrangement has agreed to it; and (2) impose any terms or conditions on any approved agreement that are needed to protect the public interest and to protect air service to an airport that has less than .25 percent of the total annual boardings in the United States (non-hub and small hub airports). The bill would explicitly prohibit participants in approved discussions from: (1) discussing or entering into agreements regarding rates, fares, charges, or inflight services; or (2) discussing particular city pairs, or submitting to other air carriers or foreign air carriers information on their proposed service or schedules in a fashion that indicates the involvement of city pairs.

Legislative History.—H.R. 1407 was introduced by Rep. Don Young (R–AK) and 26 co-sponsors on April 4, 2001. The bill sequentially referred to the Committee on Transportation and Infrastructure and the Committee on the Judiciary. On May 15, 2001, the Committee on Transportation and Infrastructure reported H.R. 1407 with amendment by voice vote. It was referred to the Judiciary Committee on May 23, 2001, and was ordered favorably reported without amendment by voice vote on June 20, 2001. (H.

Rept. 107–77, Part II). The bill was then placed on the Union Calender, but received no further consideration by the House.

H.R. 1542, the "Internet Freedom and Broadband Deployment Act of 2001"; H.R. 1697, the "Broadband Competition and Incentives Act of 2001"; H.R. 1698, the "American Broadband Competition Act of 2001"; H.R. 2120, the "Broadband Antitrust Restoration and Reform Act"

Summary.—The version of H.R. 1542 which passed the floor on February 27, 2002, contained versions of the two amendments which were adopted by the Judiciary Committee. These amendments were negotiated between the Judiciary and Energy and Commerce Committees. The first amendment provides that, not less than 30 days before offering interLATA high speed data service or Internet backbone service in an in-region State, a Bell operating company shall submit to the Attorney General a statement expressing the intention to commence providing such service, providing a description of the service to be offered, and identifying the geographic region in which the service will be offered. This statement shall not be made public except as may be relevant to any administrative or judicial proceeding.

This amendment is important because of the long and checkered antitrust history of the telecommunications market. H.R. 1542 would eliminate the need to go through a regulatory process in deploying broadband, as the RBOCs will continue to be required to do for telephone services, and this amendment mandates that the antitrust enforcers at the Department of Justice will get 30 days notice before such service is offered.

The second amendment provides that the savings clause found in section 601(b) of the Telecommunications Act of 1996 shall be interpreted to mean that the antitrust laws are not repealed by, not precluded by, not diminished by, and not incompatible with the Communications Act of 1934, this Act, or any law amended by either such Act. This amendment, a version of which was adopted by the Judiciary Committee, is a response to concerns raised about any conflicting, confusing, or contradictory language found in the Seventh Circuit Court of Appeals' opinion in *Goldwasser* v. *Ameritech Corp*., 222 F. 3d 390 (7th Cir. 2000). In *Goldwasser*, the Seventh Circuit Court of Appeals construed the savings clause found in section 601(b)(1) (47 U.S.C. § 152 note) of the Telecommunications Act of 1996 (P.L. No. 104–104, 110 Stat. 56).

The Telecommunications Act of 1996

The Telecommunications Act of 1996 arose from an antitrust consent decree. That consent decree, the Modified Final Judgement (MFJ), prevented the Regional Bell Operating Companies (RBOCs) from entering the long distance business because of their monopoly control over the local exchange. Congress structured the 1996 Act to offer the RBOCs a basic trade: the RBOCs were to open their local exchanges to competitors for interconnection and, in return, they were to be allowed entry into the long distance market.

In particular, it added a new Sec. 271 to the Communications Act to provide criteria and a process for scrutinizing RBOC efforts to open their local monopolies. 47 U.S.C. 271. Given the Justice De-

partment's unique expertise in competitive matters, Congress expressly provided within 271 that the Department would review RBOC compliance with the market-opening provisions of the act and that the Federal Communications Commission would give the Department's analysis substantial weight in making its decision with respect to an RBOC application to provide long distance service. 47 U.S.C. 271(d)(2)(A). These provisions were included at the insistence of the Committee on the Judiciary. In providing this role for the Department, Congress sought to expand the Department's traditional enforcement authority in an effort to prevent anticompetitive harms.

During the 5 years since enactment of the 1996 Act, the Department has fulfilled its statutory obligations in reviewing RBOC applications for entry into long distance service. In fact, after reviewing each of the first five petitions filed by RBOCs under the 1996 Act, the Department concluded that none of the RBOCs met its obligation under the act. The FCC concurred and ultimately denied each of the first five RBOC petitions.

In 2000, the Justice Department recommended denial of two applications based on antitrust concerns—one involving SBC, the other involving Verizon. In each instance, the applicant withdrew and resubmitted its application, in an effort to remedy the antitrust concerns raised by the Justice Department. In five cases, including the two resubmitted applications—New York, Texas, Kansas, Oklahoma, and Massachusetts—the Department did not recommend rejection, but did indicate problems that needed to be addressed before approval. In those five instances, the FCC approved the applications. Thus, the Justice Department's Sec. 271 opinion has essentially determined the outcome of each application that the RBOCs have filed to date.

Telecommunications Since the 1996 Act

President Clinton signed the 1996 Act on February 8, 1996. At that time, the Internet was in its infancy. Most observers thought that the RBOCs would remain separate companies, that they would begin competing in long distance quickly, and that they might enter the cable business. By the same token, most observers thought that the long distance companies would remain separate companies, that they would begin competing in local service quickly, and that they probably would not enter the cable business. As for the cable companies, most observers thought that they would remain separate companies, that they might enter the telephone business, and that they would face substantial competition in the cable business from satellite companies and telephone companies.

In the 5 years since the 1996 Act was signed, the Internet has changed everything. At that time, it was a technological marvel that was just becoming available to ordinary people and was hardly used for commerce. Since then, it has become a means for conducting a substantial and ever growing amount of commerce.

In 1996, data traffic was not a substantial portion of the long distance business. Estimates vary as to what the percentage was, but it was probably less than 10%. Today, it is probably more than 50%. The demand keeps exploding. As a result, being a carrier of voice (i.e. traditional telephone calls) has become relatively less im-

portant and being a carrier of data has become relatively more important. Moreover, it is now possible to transmit voice telephone calls over the Internet thus blurring the distinction between voice and data.

As anyone who has used the Internet knows, it can be frustratingly slow depending on what technology one is using. Both cable companies and telephone companies are upgrading their networks in many areas. At the same time, both of these technologies are getting better and faster, and they are also becoming capable of carrying voice (i.e. telephone calls), video (i.e. cable programming), and data (i.e. Internet content) through the same pipe. This is what is referred to as "convergence" of the technologies.

Most telecommunications companies, irrespective of whether they started as RBOCs, long distance companies, cable companies, or something else, now think that their future lies in being capable of providing a package of all of the "convergent" services on a global basis. Because getting into a new part of this business from scratch requires massive investment, many companies have decided to buy another company rather than build from scratch. That has led to a wave of mergers.

First, the RBOCs began to merge with each other. Bell Atlantic bought Nynex and GTE. SBC bought Pacific Telesis and Ameritech. Then, new competitors began to buy existing companies. WorldCom, a relatively new local competitor, bought MCI, one of the major long distance companies. WorldCom also tried to buy Sprint, but the deal failed because of antitrust concerns. Qwest, a relatively new long distance competitor, bought USWest, an RBOC.

Finally, AT&T, the biggest of the old line long distance companies, bought Tele-Communications, Inc. ("TCI") and MediaOne. TCI and MediaOne were two of the largest cable companies in the nation. These mergers gave AT&T ownership of many cable lines going into American homes. Again, estimates of the percentage vary depending on who is counting. At the same time, Microsoft has purchased a stake in AT&T as part of an effort to accelerate the deployment of broadband services across the country.

When Congress was considering the 1996 Act, most observers thought that controlling the transmission of telephone voice calls was the future. Now, most observers believe that controlling broadband communications lines, be they phone or cable, is the future. H.R. 1542 seeks to allow the RBOCs to leverage their monopoly control of the local exchange to control the broadband future.

The Provisions of H.R. 1542

Fundamentally, H.R. 1542, as reported by the Committee on Energy and Commerce, eliminates several of the most important restrictions on the monopoly power of the incumbent local exchange carriers. In addition, with respect to data, it completely undoes the basic trade that made the 1996 Act possible: the RBOCs would no longer have to open their networks in order to offer long distance data service.

Section 4(a) of H.R. 1542 creates a new Sec. 232 of the Communications Act of 1934. Subsection (a) of that new 232 provides for a sweeping prohibition of any Federal Communications Commission or State limits of any kind on any high speed data service,

Internet backbone service, Internet access service, or network elements used to provide such services. Section 3(a) of H.R. 1542 defines the terms "high speed data service," "Internet backbone service," and "Internet access service" in very broad terms. For example, high speed data service is defined as any packet-switched or successor technology that transmits information at a speed generally not less than 384 kilobits per second. This definition could easily include voice transmission over the Internet. The desire to let the Internet grow unfettered is understandable. However, this sweeping language could eliminate even basic anti-fraud protections as well as many other consumer protection statutes. In addition, this sweeping language could be read to eliminate the rights of the Commission and the State attorneys general to bring antitrust suits under 4, 4C, and 11 of the Clayton Act. 15 U.S.C. 15, 15c, & 21.

Section 4(b) of H.R. 1542 creates a new subsection (j) of Sec. 251 of the Communications Act. 47 U.S.C. 251. Section 251 sets forth the basic obligations of RBOCs and other incumbent local exchange carriers to open their local exchanges for competitors to interconnect. The new 251(j) contains exemptions that would generally eliminate their obligations to share the fiber optic parts of their network, to provide unbundled network elements for high speed data service, and to provide access to remote terminals as an unbundled network element. These obligations on incumbent local exchange carriers allow competitors the ability to provide competing high speed data service. In short, this provision allows the incumbents effectively to leverage their monopoly control over the local exchange and exclude competition in high speed data service. That is troublesome enough, but taken together with the broad definition of high speed data service, it could represent the potential remonopolization of the industry.

Subsection 6(a) of H.R. 1542 inserts high speed data service and Internet access service into the definition of incidental interLATA services contained in Sec. 271(g) of the act. 47 U.S.C. 271(g). Under 271(b)(3), the RBOCs are allowed to provide incidental interLATA services without meeting the antimonopoly provisions of 271. 47 U.S.C. 271(b)(3). Thus, this provision moves high speed data service and Internet access service out of the 271 process altogether and allows the RBOCs to start providing them immediately without any further review by the Department of Justice, the Federal Communications Commission, or the States. Given the broad definitions of these terms, this provision undoes much of the basis of the 1996 Act. More specifically, this language would eliminate the role of the Department of Justice in reviewing much activity that would currently fall within the parameters of 271.

Subsection 6(b) of H.R. 1542 creates a new Sec. 271(k) that would prohibit the RBOCs from offering in any in-region State any interLATA voice telecommunications service obtained by means of a high speed data access or Internet access service. This provision attempts to maintain the 271 restrictions for voice in the face of the broad definitions for the two key terms. However, it does not provide any definition of the term "interLATA voice telecommunications service." Apparently, this would be left to the FCC. Thus, in what claims to be a deregulatory bill, the purportedly funda-

mental distinction between voice and data is left undefined. However, regardless of how voice or data are defined or who defines them, this provision is intended to, and will, change the parameters of what the Justice Department will review in 271 applications.

Finally, subsection 6(c)(2) of H.R. 1542 eliminates the act's requirement that the RBOCs must conduct their interLATA information services through a separate affiliate. The act's definition of "information services" appears to include high speed data access or Internet access service. 47 U.S.C. Sec. 153(20). The separate affiliate requirement was a key provision designed to ensure that the RBOCs could not leverage their monopoly power over the local exchange to other lines of business. The elimination of this requirement simply adds to the elimination of any restriction on that monopoly power.

In short, H.R. 1542, as reported by the Energy and Commerce Committee, reverses many of the basic antimonopoly provisions of the 1996 Act. In doing so, it eliminates potential antitrust actions by the FCC and the States and substantially limits the role of the Department of Justice in reviewing the monopoly power of the RBOCs.

The Goldwasser Case

One recent development in the courts particularly interests this Committee. The Telecommunications Act of 1996 included an antitrust savings clause that read as follows: "Except as provided in paragraphs (2) and (3) [which are not relevant here], nothing in this act or the amendments made by this act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." Sec. 601(b)(1) of the Telecommunications Act of 1996. It also included a general savings clause that read as follows: "This act and the amendments made by this act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such act or amendments." 601(c)(1) of the Telecommunications Act of 1996. Until recently, it was widely thought that this language made clear that nothing in the Telecommunications Act in any way effected any implied repeal of the antitrust laws.

Recently, however, the Seventh Circuit effectively read these savings clauses out of the law in *Goldwasser* v. *Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000). It held:

[S]uch a conclusion [*i.e.*, that the complaint at issue alleged a freestanding antitrust claim] would then force us to confront the question whether the procedures established under the 1996 Act for achieving competitive markets are compatible with the procedures that would be used to accomplish the same result under the antitrust laws. In our view, they are not. The elaborate system of negotiated agreements and enforcement established by the 1996 Act could be brushed aside by any unsatisfied party with the simple act of filing an antitrust action. Court orders in those cases could easily conflict with the obligations the State commissions or the FCC imposes under the sec. 252 agreements. The 1996 Act is, in short, more specific legislation that must take precedence over

the general antitrust laws, where the two are covering precisely the same field.

This is not the kind of question that requires further development of a factual record, either on summary judgment or at a trial. We therefore agree with the district court that it was proper for resolution under rule 12(b)(6). There are many markets within the telecommunications industry that are already open to competition and that are not subject to the detailed regulatory regime we have been discussing; as to those, the antitrust savings clause makes it clear that antitrust suits may be brought today. At some appropriate point down the road, the FCC will undoubtedly find that local markets have also become sufficiently competitive that the transitional regulatory regime can be dismantled and the background antitrust laws can move to the fore. Our holding here is simply that this is not what Congress has mandated at this time for the ILEC duties that are the subject of the *Goldwasser* complaint. The district court thus correctly rejected the plaintiffs' antitrust theory.

Id. at 401–02. The Committee believes that this holding is wrong and plainly misstates the clear intent of Congress in both savings clauses. However, for the moment at least, it is the law in the Seventh Circuit. Another case raising the same issue, *Intermedia Communications, Inc.* v. *BellSouth Telecommunications, Inc.*, is currently pending before the Eleventh Circuit. In that case, the Department of Justice and the Federal Communications Commission have filed a joint amicus brief arguing that the Seventh Circuit wrongly decided *Goldwasser* with respect to this issue.

Chairman Sensenbrenner's Amendment

Chairman Sensenbrenner offered an amendment to address two of the antitrust problems in the bill. First, the Sensenbrenner amendment restores current law in Sec. 271 of the Communications Act with respect to Bell entry into long distance data service except that it makes the Justice Department the decisionmaker rather than the Federal Communications Commission. Second, it adds language clarifying the meaning of the antitrust savings clause in the Telecommunications Act of 1996 and reversing the misinterpretation of that clause in the *Goldwasser* case. The Committee adopted the Chairman's amendment by voice vote.

A great deal of confusion has arisen over the meaning of the part of the Sensenbrenner amendment that addresses the *Goldwasser* decision. In light of that confusion, the Committee wishes to clarify the following matters. First, the clarification is directed only at that part of the *Goldwasser* decision that is quoted above in section E. This clarification is not intended to disturb other parts of the decision. Second, the clarification is not limited to the local exchange context, but would apply to any case in which a party claimed that the Communications Act in some way effected an implied repeal of the antitrust laws.

Third, over the years, case law has added to antitrust law in ways that are not explicitly set out in the antitrust statutes, like the primary jurisdiction doctrine, the filed rate doctrine, the State action immunity doctrine, and other similar matters. The Com-

mittee believes these matters are part of the "rights, obligations, powers, and remedies" provided under the antitrust laws that the language in the provision intends to save. The provision is not intended to limit or eliminate these or other similar doctrines.

Fourth, parties are free to sign contracts that waive their rights to bring antitrust actions or actions under the Communications Act. This language is not intended to override any otherwise valid contract provision that makes such a waiver.

Finally, the Committee emphasizes again the general notion that the quoted portion of *Goldwasser* upset. With respect to conduct within the ambit of the Communications Act, the Act and the antitrust laws are parallel and complementary remedy systems. Conduct may violate the Act and not the antitrust laws; it may violate the antitrust laws and not the Act; it may violate both; or it may violate neither. When an action like *Goldwasser* is filed alleging conduct violating both the Act and the antitrust laws, a court should analyze the conduct to see if it violates the Act, and it should separately analyze the conduct to see if it violates the antitrust laws. The Committee understands the portion of *Goldwasser* quoted in section E, above, to hold that such conduct—at least if it relates to an incumbent local exchange carrier's obligations under Sec. 251 of the Act before the local exchange market becomes competitive—can only be analyzed under the Act and not the antitrust laws.

That is not what Congress intended in 1996. The courts may not simply read the antitrust savings clause out of the law. Accordingly, the Committee believes this clarification is in order to make it clear to the courts that the antitrust savings clause meant what its plain language said.

Legislative History.—Chairman Tauzin introduced H.R. 1542 on April 4, 2001. Congressman Conyers introduced H.R. 1697 on May 3, 2001. Congressman Cannon introduced H.R. 1698 on May 3, 2001. Congressman Cannon introduced H.R. 2120 on June 12, 2001. All three bills were referred to the Committee. On May 22, 2001, the Committee held a hearing on H.R. 1697, and H.R. 1698. The Committee received testimony from four witnesses: Honorable Terry Harvill, Commissioner, Illinois Commerce Commission, Chicago, Illinois; Honorable Bill Barr, Executive Vice President and General Counsel, Verizon, Washington, DC; Mr. Jeff Blumenfeld, Partner, Blumenfeld & Cohen, Washington, DC; and Mr. John Malone, President and Chief Executive Officer, The Eastern Management Group, Bedminster, New Jersey.

The Committee held a hearing on H.R. 1542 on June 5, 2001. The Committee received testimony from four witnesses: Honorable Tom Tauke, Senior Vice President for Public Policy and External Affairs, Verizon, Washington, DC; Mr. Clark McLeod, Chairman and Co-Chief Executive Officer, McLeodUSA, Cedar Rapids, Iowa; Ms. Margaret Greene, Executive Vice President for Regulatory and External Affairs, BellSouth Corporation, Atlanta, Georgia; and Mr. Jim Glassman, Resident Fellow, American Enterprise Institute, Washington, DC.

On June 13, 2001, the Committee conducted a markup session on H.R. 1542 and H.R. 2120. The Committee defeated the motion to report on H.R. 2120, by a 15–19 vote. The Committee adversely or-

dered reported, amended H.R. 1542, by voice vote. On June 18, 2001, the Committee filed its report, H. Rept. 107–83 pt. II. On February 27, 2002, the House passed H.R. 1542, by a vote of 273–157.

H.R. 3288, the "Fairness in Antitrust in National Sports (FANS) Act of 2001"

Review of Major League Baseball's antitrust status and documents submitted by the Office of the Commissioner of Major League Baseball

Summary.—The Committee on the Judiciary has maintained thorough oversight over the operation of Major League Baseball (MLB). While the jurisdiction of the Committee includes the operation of other professional sports leagues, MLB is the only professional sports league that enjoys a judicially created exemption to the antitrust laws. On November 6, 2001, MLB voted to contract two teams from the 2002 season roster to address the League's alleged financial crisis. As a result H.R. 3288, the "Fairness in Antitrust in National Sports (FANS) Act of 2001," which would have applied the antitrust laws to the contraction or relocation of Major League clubs, was introduced on November 14, 2001. On December 6, 2001, the Committee conducted a legislative hearing on H.R. 3288 that included: a detailed submission of financial statements by MLB; a careful review by the Committee to assess these and other related documents; and subsequent requests by the Committee for additional information. Although no legislative action was taken on H.R. 3288, MLB did not contract two teams from the 2002 roster. In addition, wide concerns over inflated costs to baseball fans and supporting communities have been highlighted by: MLB's claim of financial peril and the increasing valuation of Major League Club sales; the increasing value of player's salaries; and threats of a labor strike by the Major League Baseball Players Association.

History of Major League Baseball's antitrust status

MLB is the only professional sport that enjoys a virtual exemption from the antitrust laws. In 1922, the Supreme Court held that "exhibitions of baseball" were not interstate commerce for the purposes of federal antitrust jurisdiction.[22] In 1953 the Court reaffirmed that position, noting that "if there are evils in this field which now warrant application of the antitrust laws it should be by legislation" and not by judicial action.[23] In 1972, the Court opined that the antitrust-exempt status of professional baseball an "anomaly" and an "aberration" in the application of the antitrust laws—both to business generally and to professional sports particularly, but that the "inconsistency or illogic" of that situation would have to be "remedied by Congress and not by this Court."[24]

[22] *Federal Baseball Club of Baltimore, Inc.* v. *National League of professional Baseball Clubs, 259 U.S. 200 (1922).*
[23] *Toolson* v. *New York Yankess*, 346 U.S. at 356, 357 (1953).
[24] *Flood* v. *Kuhn*, 407 U.S. at 282, 284, 258 (1972).

Legislative history of baseball antitrust

In the 103rd Congress, (1) the Senate Judiciary Committee voted not to report S. 500 (Sen. Metzenbaum, "Professional Baseball Reform Act of 1993"); (2) H.R. 108 (Rep. Bilirakis, a measure to make the antitrust laws applicable to professional baseball teams and the leagues of which they are a part remained pending in the Economic and Commercial Law Subcommittee of the House Judiciary Committee; (3) several measures—each titled "Baseball Fans Protection Act"—to "encourage serious negotiation between the players and the owners of major league baseball" by amending the Clayton Act to make the antitrust laws applicable to "unilateral terms or conditions * * * imposed by any party that has been subject to an agreement between the owners of major league baseball and labor organizations representing the players of major league baseball * * *," were introduced immediately prior to or at the beginning of the 1994 baseball strike; (4) September 1994 hearings before the Economic and Commercial Law Subcommittee of the House Committee on the Judiciary focused on labor-specific measures; (5) in November, 1994, H.R. 4994 (Rep. Synar, "Baseball Fans and Communities Protection Act," which applied the antitrust laws to MLB's labor negotiations but exempted "non-major league baseball club[s]") was reported by the Judiciary Committee (H.Rept. 103–871), but not acted upon; and (6) S. 2380 (Sen. Metzenbaum, "Baseball Fans Protection Act of 1994," which applied the antitrust laws to MLB's labor negotiations) was placed on the Senate calendar, but not acted upon by the full Senate. More than a dozen other measures that would have applied the antitrust laws to were introduced in the 104th Congress, many of which coincided with the 1994 Baseball labor strike.

In 1998 (105th Congress), the "Curt Flood Act," Pub. L. 105–297, was enacted (S. 53, 105th Congress). The Curt Flood Act establishes a new section § 27 to the Clayton Act (15 U.S.C. §§ 12 et seq.) to clarify that major league baseball players are covered under the federal antitrust laws to the same extent as are other professional athletes. Although questions over the Act's efficacy have not been tested, the Act defines "major league baseball players" as persons who are or were parties to major league players' contracts, and specifically does not purport to affect in any way, inter alia: (1) professional baseball's relations with "organized professional minor league baseball"; or (2) "the agreement between organized professional major league baseball teams and the National Association of Professional Baseball Leagues ("Professional Baseball Agreement")." The Act is intended to provide more autonomy for major league players by allowing them to market themselves as free agents and has little impact on MLB's antitrust status.

The only statute which exempts professional sports leagues other than baseball from the antitrust laws is the Sports Broadcasting Act.[25] This Act permits professional sports teams to pool their separate telecasting rights and the revenues received from these rights without violating the antitrust laws. As media rights are the most valuable economic contributor to the bottom line of individual sports franchises, this law plays a significant role in the ongoing

[25] See 15 U.S.C. §§ 1291 et seq.

debate over MLB's decision to contract two Major League clubs. While it is widely known that MLB's richest teams are located in the largest media markets and its poorest teams are located in the smallest media markets, "revenue sharing" of broadcasting revenues, or the lack thereof, creates a severe anti-competitive perception.

Major League Baseball owners decide to contract the League

On the evening of November 6, 2001, the Associated Press reported that the MLB owners had made the decisions that day to contract the League by two teams. According to the news report, the owners:

> * * * would not specify which cities would be cut * * *. The vote was 28–2, with the Minnesota Twins and Montreal Expos opposing contraction * * *. Montreal, Minnesota and the Florida Marlins recently have been mentioned as the likeliest candidates, while Oakland and Tampa Bay were discussed earlier this year.
>
> "It makes no sense for Major League Baseball to be in markets that generate insufficient local revenues to justify the investment in the franchise," commissioner Bud Selig said. "The teams to be contracted have a long record of failing to generate enough revenues to operate a viable major league franchise."
>
> Baseball's decision reverses nearly a half-century of expansion during which the major leagues grew from 16 teams in 1960 to 30 since 1998, when Arizona and Tampa Bay were added.
>
> The amount of money that would be paid to the eliminated teams was not discussed during the meeting.
>
> This would be the first contraction by Major League Baseball since the National League shrank from 12 teams to eight following the 1899 season. No major league team has moved since the Washington Senators became the Texas Rangers in 1972.[26]

Based on this news, the Committee recognized the necessity of examining the antitrust implications of a League contraction. The Committee requested a Congressional Research Service memorandum from the American Law Division addressing the Antitrust Status of MLB as well as the impact of H.R. 3288 on the contraction or relocation of Major League clubs. H.R. 3288 establishes a provision of the Clayton Act to apply the antitrust laws to the elimination or relocation of a Major League club in the same manner that the antitrust laws are applied to the elimination or relocation of a franchise in any other professional sports business affecting interstate commerce. The bill would apply only to the elimination or relocation of Major League clubs and would allow the antitrust exemption to remain for the balance of MLB's operations, notably revenue sharing authorized in the Sports Broadcasting Act and minor league operations. The advocates of the bill proposed it as a remedy under the idea that, except for MLB's antitrust exemp-

[26] Associated Press Newswire Report, "Owners vote to eliminate two MLB teams," November 6, 2001.

tion, a decision by MLB's owners to consolidate would be found by a court to violate the federal antitrust laws. However, removing MLB's antitrust exemption only for the purposes of Major League club contraction or relocation, could permit the owners to act unilaterally to contract or relocate a club without agreement by the other owners. Therefore, while H.R. 3288 is narrowly tailored to the contraction or relocation of Major League clubs and presumably would prevent the owners from voting to contract or relocate a Major League club, the bill would not necessarily provide a predictable or desirable outcome.

December 6, 2001 hearing on anti-trust issues in Major League Baseball

While it was noticed as a Legislative Hearing on H.R. 3288, the "Fairness in Antitrust in National Sports (FANS) Act of 2001," the Full Committee hearing on December 6, 2001, included a comprehensive examination of MLB's antitrust status, the effect of multi-million dollar player salary contracts, and the use of public funds for stadiums to house Major League clubs and possibly attract new Major League clubs. The Committee Chairman's opening statement provided an eloquent explanation of the Committee's intent.

> In 1922, the judicial branch of government was there to help Major League Baseball. In a unique decision, the United States Supreme Court held that baseball was not a business and thus not subject to the antitrust laws. With minor modification, baseball's antitrust exemption has survived to this day. It is an exemption enjoyed by none of the other major league sports. Seventy-nine years ago Major League Baseball consisted of 16 teams clustered in the Northeast and Midwest. Players were paid what was generously described as a pittance. Ballparks were privately owned, and genuine fan loyalty was built upon stars playing with the same team for most of their careers. Today 30 teams play in major cities throughout the country except one, the Nation's Capital. Players receive astronomical salaries, the newer parks were largely built with taxpayers' money, and free agency sends the stars from one team to another almost before they can warm their places in the dugout. The major argument for using taxpayers' funds to build new stadiums has been the economic boom brought to a community by having a Major League Baseball team.
>
> At this hearing we will receive testimony that baseball is in dire financial straits and that the antitrust exemption should remain. One of the many questions which baseball must answer is why so many teams are in financial peril with the protection of special legal status when major league football, basketball and hockey teams are not? Perhaps the help given to baseball by the Supreme Court in 1922 really has not been so helpful after all. And another question to be answered by baseball is how a sport which grosses over $3 billion a year is still not a business when

> the presence of a team obviously stimulates business throughout the lucky communities.
>
> For years baseball has told Congress that it can heal itself, and it obviously has not done so, even though this year baseball has had record attendance and the best World Series in history. The numbers do not add up. Success on the field and at the box office should bring success to the bottom line. So maybe the Supreme Court's help in 1922 has outlived its usefulness, and the market should be allowed to work in baseball like it has in other major sports.

Legislative History.—Witnesses testifying at the hearing were Mr. Allan H. (Bud) Selig, Commissioner of Major League Baseball (Commissioner), The Honorable Jesse Ventura, Governor of Minnesota (Governor), Mr. Jerry Bell, President, Minnesota Twins, and Mr. Steven A. Fehr, outside counsel for the Major League Baseball Players Association. Also, all Members of the Minnesota House delegation accepted an invitation to participate in this hearing.

The first witness, the Commissioner, identified MLB's economic problems, and discussed MLB's decision to contract two teams to advance the long-term economic interests of professional baseball. The decision to contract teams was justified to eliminate MLB's most severe financial burdens. The Commissioner testified that "the consolidated loss for all thirty clubs in 2001 will be approximately $519 million. Twenty-five clubs lost money and five made money." He provided further details of the losses and directed attention to written documents distributed at the hearing (see below). The Commissioner testified that H.R. 3288, as introduced, would not be helpful to MLB and would severely undermine the franchise stability league owners have worked to achieve. Additionally, the Commissioner questioned how far the removal of the exemption would go since there was a 1998 change to the exemption in the area of labor relations.

Governor Jesse Ventura, the 38th governor of Minnesota, testified against eliminating the Minnesota Twins and criticized Major League Baseball's "failed logic" in support of eliminating the Twins.[27] The Governor emphasized that, in order to rectify the MLB situation, Congress simply has to pass a law that "says the Sherman Act applies to all businesses without exception," and to make clear that there is no exemption for MLB.

The Committee then heard testimony from Jerry Bell, President of the Minnesota Twins. Mr. Bell testified to the need for a new revenue sharing approach in MLB to increase prospects for improving local revenues for clubs such as the Twins. Mr. Bell specifically noted the severe lack of local revenues in Minnesota and testified that the only way to generate sufficient local revenue was with a new ballpark.

Finally, the Committee heard testimony from Steven A. Fehr, Outside Counsel for the Major League Baseball Players Association. Mr. Fehr testified that the players fully supported the FANS Act of 2002, and oppose contraction within the league. Mr. Fehr

[27] Id. at 27–31.

agreed with Gov. Ventura that passing the bill would remove all doubt that MLB is subject to antitrust laws.

LIABILITY ISSUES

H.R. 2037, Protection of Lawful Commerce in Arms Act

Summary.—H.R. 2037, the "Protection of Lawful Commerce in Arms Act," provides protections for those in the firearms industry from lawsuits arising out of the criminal or unlawful acts of people who misuse their products. The legislation would allow Congress to prevent one or a few state courts from bankrupting the national firearms industry and undermining all citizens' right to bear arms.

A gun, by its very nature, must be dangerous. Tort law, however, rests upon a moral foundation which presupposes that a product may not be defined as defective unless there is something "wrong" with the product, rather than with the product's user. However, in the last several years, lawsuits have been filed against the firearms industry on theories of liability that would hold those in the firearms industry liable for the actions of others who use their products in a criminal or unlawful manner. Such lawsuits threaten to separate tort law from its basis in personal responsibility, and to force firearms manufacturers into bankruptcy, leaving potential plaintiffs asserting traditional claims of product manufacturing defects unable to recover more than pennies on the dollar in federal bankruptcy court.

Lawsuits seeking to hold the firearms industry responsible for the criminal and unlawful use of its products by others are attempts to accomplish through litigation what has not been achieved by legislation and the democratic process. An equally destructive dynamic of such lawsuits is created when plaintiffs seek to obtain through the courts stringent limits on the sale and distribution of firearms beyond the court's jurisdictional boundaries. Under the currently unregulated tort system, a state lawsuit in a single county could destroy a national industry and deny citizens nationwide the ability to keep and bear arms guaranteed by the Constitution. These complaints have the practical effect of shutting down interstate commerce in firearms, and Congress has the power to protect interstate commerce. Such lawsuits directly implicate core federalism principles articulated by the United States Supreme Court.

H.R. 2037 would allow Congress to fulfill its constitutional duty and exercise its authority under the Commerce Clause to prevent a few state courts from bankrupting the national firearms industry and denying all Americans their fundamental right to self-defense.

Legislative History.—Representative Stearns introduced H.R. 2037, the "Protection of Lawful Commerce in Arms Act," on May 25, 2001. The Judiciary Committee held a mark-up session on H.R. 2037 on October 2, 2002, and reported the bill favorably as amended by the yeas and nays: 18–7. The Committee filed its report on October 8, 2002, H. Rept. 107–727, Part II.

H.R. 2341, the "Class Action Fairness Act of 2002"

Summary.—H.R. 2341 provides meaningful improvements in litigation management by allowing federal courts to hear large interstate class actions and by establishing new protections for con-

sumers against abusive class action settlements. In making these improvements, H.R. 2341 does not limit access to the courthouse or alter any existing state or federal substantive law. Furthermore, it will help prevent a handful of state courts from usurping the authority of other states and the rights of their citizens.

First, H.R. 2341 amends the current federal diversity-of-citizenship jurisdiction statute (28 U.S.C. § 1332)—to allow large interstate class actions to be adjudicated in federal courts. Currently, federal courts have jurisdiction over (a) lawsuits dealing with a federal question and (b) cases meeting current diversity jurisdiction requirements—matters in which all plaintiffs are citizens of jurisdictions different than all defendants, and each claimant has an amount in controversy in excess of $75,000. H.R. 2341 would change the diversity jurisdiction requirement for class actions, generally permitting access to federal courts in class actions where there is "minimal diversity" (that is, any member of the proposed class is a citizen of a state different from any defendant) and the aggregate amount in controversy among all class members exceeds $2 million. In that way, H.R. 2341 recognizes that large interstate class actions deserve federal court access because they typically affect more citizens, involve more money, and implicate more interstate commerce issues than any other type of lawsuit.

Secondly, it implements long needed protections for consumers against abusive settlements. These protections are established in the "Consumer Class Action Bill of Rights" (Bill of Rights), which is located in Section 3 of the bill. The Bill of Rights would: (1) establish new "Plain English" requirements (non-legal jargon) so that class members can better understand class action settlement notices and how these notices effect their rights; (2) enhance judicial scrutiny of coupon settlements; (3) provide judicial scrutiny over settlements that would result in a net monetary loss to plaintiffs; (4) prohibit unjustified payments, also known as bounties, to class representatives; and (5) protect out-of-state class members against settlements that favor class members based upon geographic proximity to the courthouse.

Federal diversity jurisdiction

While federal courts have jurisdiction over questions or disputes concerning federal law, Article III of the Constitution empowers Congress to establish federal jurisdiction over any law when there is diversity—disputes "between citizens of different States." Diversity jurisdiction is premised on concerns that state courts might discriminate against out of state defendants. Since 1806, with some exceptions, the federal courts have followed the rule of *Strawbridge* v. *Curtiss,* which states that federal jurisdiction lies only where all plaintiffs are citizens of states different than all defendants.[28] This is known as the "complete diversity" rule.[29] In a class action, only the citizenship of the named plaintiffs is considered for deter-

[28] *Strawbridge* v. *Curtiss,* 7 U.S. (3 Cranch) 267 (1806).

[29] The Supreme Court has regularly recognized that the decision to require complete diversity, and to set a minimum amount in controversy, are political decisions not mandated by the Constitution. See, e.g., *Newman-Green, Inc.* v. *Alfonzo-Larrian,* 490 U.S. 826, 829 n.1 (1989). It is therefore the prerogative of the Congress to broaden the scope of diversity jurisdiction to any extent it sees fit, as long as any two adverse parties to a lawsuit are citizens of different states. See *State Farm Fire & Cas. Co.* v. *Tashire,* 386 U.S. 523, 530–31 (1967).

mining diversity, which means that federal diversity jurisdiction will not exist if the named plaintiff is a citizen of the same state as the defendant, regardless of the citizenship of the rest of the class. See *Snyder* v. *Harris,* 394 U.S. 332 (1969). And, since the early days of the country, Congress has imposed a monetary threshold—now $75,000—for federal diversity claims.[30] However, the amount in controversy requirement is satisfied in a class action only if all of the class members are seeking damages in excess of the statutory minimum.[31]

These jurisdictional statutes were originally enacted years ago, well before the modern class action arose, and they lead to perverse results. For example, under current law a citizen of one state may bring in federal court a simple $75,001 slip-and-fall claim against a party from another state. But if a class of 25 million consumers living in all 50 states brings claims collectively worth $15 billion against the manufacturer, the lawsuit usually must be heard in state court. The current statutes also allow attorneys to game the system to keep class actions out of federal court. Attorneys often name irrelevant parties to their class actions in an effort to "destroy diversity"—that is, to keep the case from qualifying for federal diversity jurisdiction. In fact, plaintiff's counsel have made statements about a case to prevent a defendant from removing the case to federal court (e.g., "plaintiffs seek only a very small amount of money in this case"). After one year, however, the same counsel will recant those statements, since at that point, current statutes bar removal of the case to federal court.[32]

Removal statute

The general federal removal statute provides, inter alia, that any civil action brought in a State court of which U.S. district courts have original jurisdiction, may be removed by the defendant(s) to the appropriate Federal court.[33] Removal is based on the same general assumption as diversity jurisdiction, that an out-of-state defendant may become a victim of local prejudice in State court.[34]

A defendant must file for removal to Federal court within 30 days after receipt of a copy of the initial pleading (or service of summons if a pleading has been filed in court and is not required to be served on the defendant).[35] An exception exists beyond the 30-day deadline when the case stated by the initial pleading is not removable. If so, a notice of removal must be filed within 30 days of receipt by the defendant of "a copy of an amended pleading, motion, order, or other paper from which it may first be ascertained that the case [is removable]." In no event may a case where Federal jurisdiction is based on diversity be removed more than one year from commencement of the action.[36]

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[30] See 28 U.S.C. §1332(a).
[31] See *Zahn* v. *International Paper Co.,* 414 U.S. 291 (1973).
[32] Hearings on H.R. 1875 and 2005: the "Interstate Class Action Jurisdiction Act of 1999" and "Workplace Goods Job Growth and Competitiveness Act of 1999" Before the House Comm. on the Judiciary, 106th Cong., 1st Sess. 57 (July 21, 1999) (prepared statement of John Beisner).
[33] See 28 U.S.C. § 1441(a).
[34] See David P. Currie, Federal Jurisdiction at 140 (3rd ed. 1990).
[35] See 28 U.S.C. § 1446(b).
[36] Id.

The Act

H.R. 2341 establishes the following six requirements to enhance the rights of members of a class action:

(1) Judicial scrutiny over coupon and other noncash settlements—requires the court to conduct a hearing to determine whether a coupon or noncash settlement is fair, reasonable, and adequate for class members;

(2) Protections against net losses by class members—requires the court to make a written finding that non-monetary benefits to class members outweigh the monetary loss of a proposed settlement in which any class member is obligated to pay sums to class counsel that would result in a net loss to the class member;

(3) Protections against discrimination based on geographic location—prohibits settlements providing greater awards to class members on the basis they are in closer geographic proximity to the court;

(4) Prohibit the payment of bounties—prohibits settlements providing additional awards to class representatives other than awards approved by the court for reasonable time or costs associated with the class member's obligation as a class representative;

(5) Clearer and simpler settlement information—establishes a new "Plain English" requirement for any written and broadcast notices concerning a proposed class action settlement; and

(6) Pleading requirements for class actions—establishes the following pleading requirements for class actions:

(a) The complaint shall specify with particularity the nature and amount of all relief sought on behalf of any class member, and the nature of the injury allegedly caused to members of the class.

(b) In actions asserting that the defendant acted with a particular state of mind, the complaint shall state with particularity the facts, if proven, with respect to each alleged act demonstrating that the defendant acted with the required state of mind.

(c) Any defendant may move to dismiss a complaint based on failure to comply with the provisions of this section. All discovery shall be stayed during the pendency of a motion to dismiss.

H.R. 2341 expands federal diversity jurisdiction by amending 28 U.S.C. § 1332 to grant original jurisdiction in federal court to hear interstate class actions where any member of the proposed class is a citizen of a state different from any defendant and the total amount in controversy is at least $2,000,000. This would include civil actions where a named plaintiff purports to act on behalf of other at least 100 other members of the same action on the grounds that claims involve common questions of law or fact, and would apply to any class action before or after the entry of a class certification order. An interstate class (i.e. federal diversity jurisdiction) action would not include:

(1) Intrastate cases—cases in which a "substantial majority" of the class members and defendants are citizens of the same

state and the claims will be governed primarily by that state's law;

(2) Limited scope cases—cases involving fewer than 100 class members or where the aggregate amount in controversy is less than $2 million; and

(3) State action cases—cases where the primary defendants are states or state officials, or other governmental entities against whom the district court may be foreclosed from ordering relief.

Other class actions excluded from this expanded diversity jurisdiction are specific actions, including claims brought by shareholders that solely involve:

(1) Section 16(f)(3) of the Securities Act of 1933 and section 28 (f)(5)(E) of the Securities Exchange Act of 1934;

(2) The internal affairs or governance of a corporation or other form of incorporated business enterprise; and

(3) The rights, duties, and obligations relating to any security.

H.R. 2341 establishes a new section providing for removal of class actions to federal court where the action is filed in State court and the federal court has original jurisdiction. While the existing general removal provisions contained in chapter 89 of Title 28 would continue to apply, the new removal section overrides circumstances where these statutes may be in conflict. Generally, the new removal provision preserves all facets of the expanded diversity jurisdiction established by the bill and provides three distinctive features:

(1) Unnamed class members (plaintiffs) may remove to federal court class actions in which their claims are being asserted within 30 days after formal notice. Under current rules only the defendants are allowed to remove.[37]

(2) Removal of class actions to federal court would be available to (a) any defendant without the consent of all defendants, (b) any named plaintiff class member without the consent of all members, or (c) any unnamed plaintiff class member after the class has been certified by a state court. Current removal rules—which apply only to defendants—require the consent of all defendants.

(3) Section 1446 of Title 28 requires that a notice of removal be filed within 30 days of the receipt by the defendant of a copy of the pleading which gives notice of grounds for removal. However, that section bars the removal of cases to federal court after one year, even if the basis for removal does not occur until after that time. H.R. 2341 would eliminate the bar to removal of class actions after one year, and would apply the same removal notice rules to plaintiffs.

Under H.R. 2341, if a removed class action is found not to meet the requirements for proceeding on a class basis, the federal court would dismiss the action without prejudice. Plaintiffs would then

[37] In 1875, the right to remove was extended to plaintiffs as well as defendants, but the experiment was short-lived, and in 1887, the predecessor of 28 U.S.C. 1441 once again restricted removal to defendants only. In individual cases, this reflects the fact that the plaintiff has chosen voluntarily to submit to the jurisdiction of the state court by choosing to file suit there. This rationale does not apply in the case of putative plaintiff class members who did not control the decision as to where to bring a class action; See 28 U.S.C. 1446.

be permitted to re-file their claims in state court, presumably in a form amended either to fall within one of the types of cases not considered interstate class actions, or to be maintainable as a class action under federal Rule 23. The statute of limitations on individual class members' claims in such a dismissed class action would not run during the period the action was pending in federal court.

Finally, H.R. 2341 provides for an immediate appeal of an order by a Federal District Court granting or certifying class certification under Rule 23 of the Federal Rules of Civil Procedure. Accordingly, discovery pursuant to the certification order at issue will be stayed until the Federal Circuit court has ruled on the appeal in question. However, the court may order discovery by motion and a showing of necessity by a party to the action.

Legislative History.—H.R. 2341 was introduced by Congressmen Bob Goodlatte and Rick Boucher on June 27, 2001 and ultimately garnered 56 cosponsors. The full committee conducted a hearing on the bill on February 6, 2002, those testifying include: Ms. Hilda Bankston of Jefferson County, Mississippi; Mr. John Beisner, Esq., O'Melveny & Myers LLP; Mr. Peter Detkin, Vice President, Assistant General Counsel, Intel Corporation; and Mr. Andrew Friedman, Esq., Bonnett, Fairbourn, Friedman & Balint. Following two days of markup on March 6th and 7th, the full committee ordered the bill reported to the House, as amended, by a vote of 16 ayes to 10 nays. H.R. 2341 was reported to the House on March 12, 2002, (House Report No. 107–370. By a vote of 233 ayes to 190 nays, the House passed H.R. 2341 on March 13, 2002. While the Senate Judiciary Committee conducted a hearing on July 31, 2002 on companion legislation S. 1712 no additional legislative activity was conducted on this legislation by the Senate.

H.R. 2926, the "Air Transportation Safety and System Stabilization Act"

Summary.—Litigation management provisions were necessary to address the exposure of air carriers to potentially limitless and bankrupting lawsuits for damages arising out of the terrorist attacks of September 11, 2001. H.R. 2926 included provisions creating a "September 11th Victims Compensation Fund" to be administered by a Special Master. The Fund was created to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001. H.R. 2926 also included provisions providing that notwithstanding any other provision of law, liability for all claims, whether for compensatory or punitive damages, arising from the terrorist-related aircraft crashes of September 11, 2001, against any air carrier shall not be in an amount greater than the limits of the liability coverage maintained by the air carrier. H.R. 2926 also provided that there shall exist a Federal cause of action for damages arising out of the hijacking and subsequent crashes of American Airlines flights 11 and 77, and United Airlines flights 93 and 175, on September 11, 2001, that would be the exclusive remedy for damages arising out of the hijacking and subsequent crashes of such flights. The substantive law for decision in any such suit shall be derived from the law, in-

cluding choice of law principles, of the State in which the crash occurred unless such law is inconsistent with or preempted by Federal law. H.R. 2926 also provided that the United States District Court for the Southern District of New York shall have original and exclusive jurisdiction over all actions brought for any claim (including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001. H.R. 2926 also provided that nothing in such provisions shall in any way limit any liability of any person who is a knowing participant in any conspiracy to hijack any aircraft or commit any terrorist act.

Legislative History.—On September 21, 2001, H.R. 2926 was referred to the House Judiciary Committee. That same day, H.R. 2926 passed the House by the yeas and nays, 356–54, with 2 Members voting present. On September 22, 2001, H.R. 2926 was signed by the President and became Public Law No. 107–42.

H.R. 3210, the "Terrorism Risk Insurance Act"

Summary.—As introduced, H.R. 3210 contained a prohibition on punitive damages and a provision providing that a defendant would be liable only for the amount of noneconomic damages allocated to the defendant in direct proportion to the percentage of responsibility of the defendant for the harm to the claimant. These provisions applied only in actions brought for damages claimed by an insured pursuant to, or in connection with, any commercial property and casualty insurance. These provisions failed to protect innocent Americans and American businesses who were the victims of terrorist attacks and who might be sued by non-insureds for damages arising out of terrorist attacks.

Legislative History.—H.R. 3210 was introduced by Representative Oxley, Chairman of the House Financial Services Committee, on November 1, 2001. On November 19, 2001, it was referred sequentially to the House Committee on the Judiciary for a period ending not later than November 26, 2001 for consideration of such provisions of the bill and amendment as fall within the jurisdiction of that committee pursuant to clause 1(k), rule X. On November 26, 2001, H.R. 3210 was discharged by the Committee on Judiciary. Pursuant to H. Res. 297, H.R. 3357 was adopted as an amendment in the nature of a substitute to H.R. 3210. H.R. 3210 passed the House on November 29, 2001, by the yeas and nays, 227–193. On November 14, 2002, the conference report on the bill, H. Rept. 107–779, was agreed to by the House by voice vote. On November 26, 2002, H.R. 3210 was signed by the President and became Public Law No. 107–297.

H.R. 4600, Help Efficient, Accessible, Low-cost, Timely Healthcare Act (the HEALTH Act)

Summary.—A national insurance crisis is ravaging the nation's health care system. Skyrocketing insurance rates have caused major insurers to drop coverage, and decimated the ranks of doctors and other health care providers by forcing them to abandon patients and practices, particularly in high-risk specialties such as obstetrics and emergency medicine. The problem is particularly acute for practitioners in managed care, where prescribed fixed

costs prevent them from recouping insurance costs. The HEALTH Act, modeled after California's quarter-century old and highly successful health care litigation reforms, addresses the current crisis and will make health care delivery more accessible and cost-effective in the United States. Its time-tested reforms will make medical malpractice insurance affordable again, encourage health care practitioners to maintain their practices, reduce health care costs for patients, and save billions of dollars a year in federal taxpayer dollars by significantly reducing the incidence of wasteful "defensive medicine" without increasing the incidence of adverse health outcomes. Its enactment will particularly help traditionally underserved rural and inner city communities, and women seeking obstetrics care. It will create a "fair share" rule, by which damages are allocated fairly, in direct proportion to fault, reasonable guidelines—but not caps—on the award of punitive damages, and a rule preventing unfair and wasteful windfall double-recoveries. Finally, it will accomplish reform without in any way limiting compensation for 100% of plaintiffs' economic losses, their medical costs, their lost wages, their future lost wages, rehabilitation costs, and any other economic out of pocket loss suffered as the result of a health care injury. The HEALTH Act also does not preempt any State law that caps non-economic damages, such as those for pain and suffering.

Legislative History.—Rep. Greenwood, along with Rep. Cox, Murtha, Toomey, Moran of Virginia, Peterson of Minnesota, Stenholm, Lucas of Kentucky, Pickering, and Weldon of Florida, introduced H.R. 4600 on April 25, 2002. The Judiciary Committee held a mark-up session on H.R. 4600 on July 23, 2002, and on September 10, 2002, when it reported the bill favorably as amended by voice vote. The Committee filed its report on September 25, 2002, H. Rept. 107–693, Part I. On September 26, 2002, the House passed H.R. 4600 by the yeas and nays: 217–203.

MATTERS HELD AT FULL COMMITTEE

H.R. 7, the "Community Solutions Act"

Summary.—Government should ensure that members of organizations seeking to take part in government programs designed to meet basic and universal human needs are not discriminated against because of their religious views. The rules for participation in programs of government funding through grants and cooperative agreements, and through indirect forms of assistance, for the provision of social services must assess eligibility to participate without regard to the religious character of an organization, and any religious beliefs that organization might hold, or the intensity of those beliefs, should not be a basis for rejecting their participation out-of-hand. Indeed, faith-based organizations often allow their beneficiaries greater and more flexible access to the social services they offer.

These so-called "charitable choice" principles, embodied in H.R. 7, allow for the public funding of faith-based organizations on the same basis as other nongovernmental organizations and permit them to maintain their religious character by choosing their staff, board members, and methods. These principles also protect the

rights of conscience of their clients and ensure that alternative providers that are unobjectionable to them on religious grounds are available.

"Charitable choice" is not new. Examples of existing laws that include "charitable choice" provisions are the Substance Abuse and Mental Health Services Administration, P.L. 106–310, 42 U.S.C. § 300x–65; the Community Services Block Grant Act of 1998, Pub. L. No. 105–285, 42 U.S.C. § 9920; the Welfare Reform Act of 1996, P.L. 104–193, 42 U.S.C. § 604a; and the Community Renewal Tax Relief Act of 2000, P.L. 106–554, 42 U.S.C. § 290kk–1. Each was signed into law by President Clinton.

H.R. 7 simply seeks to apply the tested principles of charitable choice, which in the case of welfare services have been federal law for five years, to cover additional federal programs, bringing greater clarity and constitutional adherence to a wider scope of federal funding programs. The charitable choice language in H.R. 7 has been carefully tailored to respond to discussions of earlier versions of the provision. New language emphasizes that government funding of a religious service provider is not intended to endorse religion but rather to purchase effective assistance; makes it clearer that beneficiaries may not be coerced into religious observance, but instead inherently religious activities such as worship and proselytization must be privately funded, voluntary, and offered separately from the government-funded services; requires religious organizations to sign a certificate acknowledging this duty of non-coercion; clearly obligates government to inform clients of their religious liberty rights; emphasizes that the civil rights exemption that allows religious organizations to take religion into account in hiring decisions does not remove their obligation to respect the other nondiscrimination requirements in federal law from which they are not already exempt; requires religious organizations to keep direct government funds separate from other funds to enable government to audit the books of a religious organization without entangling itself in strictly religious matters; emphasizes that religious organizations that receive federal funds are held to the same performance standards as well as the same accounting standards as other grantees; requires religious organizations to conduct an annual self audit to ensure compliance and corrective action; provides for $50 million in new federal funding for technical assistance to novice and small nongovernmental organizations to help ensure that they have the knowledge and administrative capacity to comply with these and other federal requirements; and clarifies how charitable choice principles apply when an organization that receives federal funds in turn subgrants funds to other organizations.

Under H.R. 7, religious organizations receiving grants under covered programs may not use the provided funds for "sectarian instruction, worship, or proselytization," and a beneficiary's taking advantage of a social service program cannot be conditioned on taking part in such activities. Existing charitable choice law, part of the Welfare Reform Act of 1996, contains an explicit protection of a beneficiary's right to "refus[e] to actively participate in a religious practice," thereby insuring a beneficiary's right to avoid any unwanted religious practices, and a similar provision in H.R. 7 makes

clear that participation, if any, in sectarian instruction, worship, or proselytization must be voluntary and noncompulsory.

H.R. 7 also requires a religious organization receiving funds under a covered program to sign a certificate of compliance that certifies that the organization is aware of and will comply with the provisions against the use of government funds for inherently religious activities. This certificate, which has the purpose of impressing upon both the government grantor and the faith-based organization the importance of both voluntariness and the need to separate sectarian instruction, worship, and proselytization, must be filed with the government agency disbursing the funds.

Subsection (g) of the Community Solutions Act also protects beneficiaries of charitable choice programs by requiring the presence of an alternative that is unobjectionable to beneficiaries on religious grounds when a religious organization is providing social services. Subsection (g) also requires the appropriate Federal, State, or local governmental agency to give notice to beneficiaries receiving services under the covered programs of their right to an alternative that is unobjectionable to them on religious grounds.

Further, charitable choice principles prohibit faith-based organizations taking part in programs covered by Title II of H.R. 7 from discriminating on the basis of religion against those who seek to be beneficiaries of such programs. Subsection (m) of the Community Solutions Act also provides that intermediaries authorized to act under a grant or other agreement to select nongovernmental organizations to provide assistance under any program covered by Title II of H.R. 7 have the same duties under Title II as the government when selecting or otherwise dealing with subgrantors, but the intermediary grantor, if it is a religious organization, shall retain all other rights of a religious organization under Title II.

Misguided understandings of the Constitutional have for too long deterred Federal, State, and local governments from even inviting religious organizations to participate in informational meetings designed for those willing to compete for social service funds. H.R. 7 simply make clear to the federal government, states, and localities, that if they provide a grant to or enter into a cooperative agreement with religious organizations under charitable choice principles, they need not fear that their actions are unconstitutional.

Legislative History.—Representative Watts, Representative Hall, and Speaker Hastert introduced H.R. 7, the "Community Solutions Act," on March 29, 2001. On June 7, 2001, the Subcommittee on the Constitution held an oversight hearing on the "Constitutional Role of Faith-Based Organizations in Competitions for Federal Social Service Funds." The following witnesses testified at the hearing: Carl Esbeck, Senior Counsel to the Deputy Attorney General, United States Department of Justice; Douglas Laycock, Associate Dean for Research and Alice McKean Young Regents Chair in Law, The University of Texas School of Law; David N. Saperstein, Adjunct Professor of Law; Director, Religious Action, Center of Reform Judaism, Georgetown University Law Center; Ira C. Lupu, Louis Harkey Mayo Research Professor of Law, The George Washington University School of Law. On April 24, 2001, the Subcommittee on the Constitution held an oversight hearing on "State and Local Implementation of Existing Charitable Choice Programs." The fol-

lowing witnesses testified at the hearing: Dr. Amy Sherman, Senior Fellow, Welfare Policy Center, Hudson Institute; Reverend Donna Lawrence Jones, Cookman United Methodist Church, Philadelphia, Pennsylvania; Charles Clingman, Executive Director, Jireh Development Corporation, Cincinnati, Ohio; Reverend J. Brent Walker, Executive Director, Baptist Joint Committee on Public Affairs. On June 28, 2002, the Judiciary Committee held a mark-up session on H.R. 7 and reported the bill favorably as amended by the yeas and nays: 20–5. The Committee filed its report on July 12, 2001, H. Rept. 107–138, Part II. On July 19, 2001, the House passed H.R. 7 by the yeas and nays: 233–198.

H.R. 169, the "Notification and Federal Employee Antidiscrimination and Retaliation Act of 2001"

Summary.—Chairman Sensenbrenner introduced H.R. 169, the "Notification and Federal Employee Antidiscrimination and Retaliation Act of 2001," (No FEAR Act) on January 3, 2001. The bill requires that Federal agencies be accountable for violations of discrimination and whistleblower protection laws. H.R. 169 provides Federal employees throughout the Federal Government with additional on-the-job protection from illegal discrimination, retaliation, and other mistreatment by deterring and punishing government misconduct toward them.

H.R. 169, the No FEAR Act, was in response to a year-long congressional investigation under the direction of Chairman Sensenbrenner as the Chairman of the Committee on Science of civil rights violations at the Environmental Protection Agency (EPA). When the EPA was questioned on its behavior, the agency responded that it had a great diversity record. When questioned about notifying employees of their rights under the various whistleblower provisions, the EPA responded that it was only required to notify the employees under one of the laws, not the others. When asked how the agency pays for judgements and settlements for discriminating or retaliating, the EPA responded such payments were made of the general treasury—not the Federal agencies. Following the hearings and the investigation, Federal employees in other agencies began contacting the Committee on Science with allegations of similar problems. Immediately after the October 2000 hearing, Chairman Sensenbrenner and Representatives Sheila Jackson Lee and Connie Morella introduced the No FEAR Act to rectify the three problems highlighted in the investigation. The bill was reintroduced on the first day of the 107th Congress.

Legislative History.—On May 9, 2001, the Committee on the Judiciary held a legislative hearing on H.R. 169, the No FEAR Act. The four witnesses that testified were: Kweisi Mfume, President & CEO of the National Association for the Advancement of Colored People; J. Christopher Mihm, Director of Strategic Issues for the General Accounting Office; Bobby L. Harnage, Sr., National President of the American Federation of Government Employees, AFL–CIO; and Marsha Coleman-Adebayo, Ph.D, private citizen. The National Whistleblower Center also provided written testimony to the Committee regarding the need for the bill to protect whistleblowers. On May 23, 2001, the Committee met in open session and ordered favorably reported the bill, with an amendment in the na-

ture of substitute, by voice vote, a quorum being present. The bill was reported to the House on June 14, 2001 (H. Rept. 107–101, Part I). On October 2, 2001, the bill passed the House by a recorded vote of 420 yeas to 0 nays (roll no. 360). On April 23, 2002, the bill passed the Senate with amendments by unanimous consent. On April 30, 2002, the House agreed to the Senate amendments by a recorded vote of 412 yeas to 0 nays (roll no. 117). The President signed the bill on May 15, 2002, and it became Public Law 107–174.

H.R. 741, the "Madrid Protocol Implementation Act"

Summary.—Introduced by Representative Howard Coble, H.R. 741 implements the Madrid Protocol, an international trademark treaty. It makes the process of registering marks in other countries more convenient and far less expensive for American citizens and businesses.

Legislative History.—On March 8, 2001, the Committee met in open session and ordered favorably reported H.R. 741 without amendment, by voice vote. On March 13, 2001, the Committee reported S. 741 to the House (H. Rept. 107–19). On March 14, 2001, the House passed H.R. 741 under suspension of the rules, by voice vote. The provisions of H.R. 741 were later incorporated into H.R. 2215, the "21st Century Department of Justice Appropriations Authorization Act," which is Public Law 107–273.

H.R. 802, the "Public Safety Officer Medal of Valor Act of 2001"

Summary.—Representative Lamar Smith (R–TX) introduced H.R. 802, the "Public Safety Officer Medal of Valor Act of 2001," on February 28, 2001. While law enforcement agencies at all levels present their own awards and medals to those who demonstrate bravery, the Federal Government has no medal in recognition of acts of courage and valor demonstrated by public safety officers. This bill establishes a national medal, to be given by the President in the name of the United States Congress, to public safety officers who display extraordinary valor above and beyond the call of duty. The Public Safety Medal of Valor will be the highest national award for valor by a public safety officer. The Attorney General may select up to five recipients of the medal each year. The legislation creates a Medal of Valor Review Board, composed of members appointed by Congress and the President, to make recommendations to the Attorney General as to persons deserving of the medal. The Board will be staffed by a new office within the Department of Justice known as the National Medal of Valor Office.

Legislative History.—On March 8, 2001, the Committee met in open session and ordered favorably reported the bill, H.R. 802, by voice vote, a quorum being present. The bill was reported to the House on March 12, 2001 (H. Rept. 107–15). The House passed the bill on March 22, 2001, by a recorded vote of 414 yeas to 0 nays (Roll no. 59). On May 14, 2001, the Senate passed the bill by unanimous consent. The President signed the bill on May 30, 2001, and it became Public Law 107–12.

H.R. 860, the "Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001"

Summary.—Introduced by Representative F. James Sensenbrenner, Jr., H.R. 860 would allow a designated U.S. district court (a so-called "transferee" court) under the multidistrict litigation statute to retain jurisdiction over referred cases arising from the same fact scenario for purposes of determining liability and punitive damages, or to send them back to the respective courts from which they were transferred. In addition, the legislation would streamline the process by which multidistrict litigation governing disasters are adjudicated.

Legislative History.—On March 8, 2002, the Committee met in open session and favorably reported H.R. 860 without amendment, by voice vote. H.R. 860 was reported by the Committee to the House on March 12, 2001 (H. Rept. 107–14). On March 14, 2001, the House passed H.R. 860 under suspension of the rules, by voice vote. The provisions of H.R. 860 were later incorporated into H.R. 2215, the "21st Century Department of Justice Appropriations Authorization Act," which is Public Law 107–273.

H.R. 861, to make technical amendments to Section 10 of Title 9, United States Code (Pub. L. No. 107–169)

Summary.—Title 9 of the United States Code pertains to domestic and international arbitration law. Chapter 1 of title 9 contains the title's general provisions, including section 10. Subsection 10(a) enumerates the grounds for which a Federal district court may vacate an arbitration award and authorizes the court to order a rehearing, under certain circumstances. As drafted, subsection 10(a) consists of five paragraphs, four of which enumerate the grounds for vacating an arbitration award. The fifth paragraph, however, is clearly intended to be a separate provision of subsection 10(a) as it specifies the basis of the court's authority to direct a rehearing by the arbitrator.

H.R. 861 corrects this drafting error, which has existed from the legislation's original enactment in 1925, by simply converting the fifth paragraph into a separate subsection of section 10, namely, subsection 10(b), and making conforming grammatical and technical revisions to section 10. H.R. 861 is identical to legislation introduced by Representative George W. Gekas (R–PA) and passed by the House in the 105th and 106th Congresses.

Legislative History.—Representative Gekas introduced H.R. 861 on March 6, 2001. Given the noncontroversial nature of H.R. 861 (for example, it has often been referred to as the "Comma Bill"), no hearings were held on this legislation and it was retained by the Committee for its consideration. On March 8, 2001, the Committee ordered favorably reported the bill without amendment by voice vote. Thereafter, the Committee filed its report on March 12, 2001 as H. Rept. 107–16.

On March 14, 2001, the House passed the bill under the suspension of the rules by a vote of 413 to 0. H.R. 861 was received in the Senate on the following day and referred to the Senate Committee on the Judiciary. Thereafter, the Senate Judiciary Committee reported the bill without amendment and without a written report on December 13, 2001. On April 18, 2002, the Senate passed

H.R. 861 without amendment by unanimous consent. The bill was thereafter signed into law on May 7, 2002 as Public Law 107–169.

HR. 1209, the "Child Status Protection Act" (Public Law 107–208)

Summary.—The Immigration and Nationality Act provides two avenues for family-based immigrants to acquire permanent resident status. Immediate relatives (spouses, unmarried children under 21, and parents) of United States citizens may receive such status without numerical limitation. Certain other relatives of U.S. citizens (unmarried sons and daughters 21 or over, married sons and daughters, and siblings) and of permanent resident aliens (spouses, unmarried children under 21, unmarried sons and daughters 21 or over) may receive such status as family-based preference immigrants, which are subject to numerical limitations each year.

Under prior law, the date at which the age of an alien was measured for purposes of eligibility for an immigrant visa was the date the adjustment of status application filed on his or her behalf was processed by INS, not the date that the preceding immigrant visa petition was filed on their behalf. With the INS taking up to 3 years to process applications, aliens who were under 21 when their petitions were filed often found themselves over 21 by the time their applications were processed. When a child of a U.S. citizen "ages out" by turning 21, the child automatically shifted from the immediate relative category to the family first preference category. This put the child at the end of long waiting list for a visa. H.R. 1209 provides that the determination of whether the unmarried son or daughter of a citizen is considered a child (under 21) is to be made using the alien's age as of the time an immigrant visa petition is filed on his or her behalf.

This rule also applies: (1) when permanent resident parents petition for immigrant visas for their sons and daughters and later naturalize (making the sons and daughters potentially eligible for immediate relative visas); and (2) when citizen parents petition for immigrant visas for their married sons and daughters, and the sons and daughters later divorce (making them potentially eligible for immediate relative visas).

The Act also extends age-out protection to cover:

• *Children of Permanent Residents.* When a child of a permanent resident turns 21, he or she goes from the second preference "A" waiting list to the second preference "B" waiting list, which is much longer.

• *Children of Family and Employer-Sponsored Immigrants and Diversity Lottery Winners.* When an alien receives permanent residence as a preference-visa recipient or a winner of the diversity lottery, a minor child receives permanent residence at the same time. After the child turns 21, the parent has to apply for him or her to be put on the second preference "B" waiting list.

• *Children of Asylees and Refugees.* When an alien receives asylum or is granted refugee status, a minor child receives permanent residence at the same time as the parent. After the child turns 21, the parent has to apply for him or her to be put on the second preference "B" waiting list.

Finally, the Act fixes a troubling anomaly in the immigration law. Under prior law, when a permanent resident naturalized who

had sponsored adult sons and daughters for preference visas, they moved from the second preference "B" category (for the adult sons and daughters of permanent residents) to the first preference category (for the adult sons and daughters of citizens). Normally, the wait for a first preference visa is much shorter than the wait for a second preference "B" visa. However, currently this is not the case for the sons and daughters of immigrants from the Philippines. The line actually gets longer for the sons and daughters when the parent naturalizes. The Act ameliorates this impact by allowing an adult son or daughter of a naturalized citizen who has already been sponsored for permanent residence to choose not to be transferred from the second preference "B" category to the first preference category.

Legislative History.—On March 26, 2001, Subcommittee on Immigration and Claims Chairman George Gekas introduced H.R. 1209. On April 4, 2001, the Judiciary Committee ordered H.R. 1209 reported by a voice vote. On April 20, 2001, the Judiciary Committee reported H.R. 1209 (H. Rept. 107–45). On June 6, 2001, the House passed H.R. 1209 under suspension of the rules by a vote of 416–0. On May 16, 2002, the Senate Judiciary Committee ordered H.R. 1209 reported, as amended, and reported H.R. 1209 without a written report. On June 13, 2002, the Senate passed H.R. 1209, as amended, by unanimous consent. On July 22, 2002, the House passed H.R. 1209, as amended, by the Senate under suspension of the rules by a voice vote. On August 6, 2002, the President signed H.R. 1209 into law (Public Law 107–208).

H.R. 1701, the "Consumer Rental Purchase Agreement Act"

Summary.—While H.R. 1701 establishes a "Federal floor" for consumer protection in rental-purchase transactions in many states, it preempts the existing law regulating rent-to-own transactions in Wisconsin, Minnesota, New Jersey, Vermont, and North Carolina. Provisions dealing with civil liability, government liability, and criminal liability were sequentially referred to the Committee on the Judiciary.

Legislative History.—H.R. 1701 was introduced by the Congressman Walter Jones on May 3, 2001 and ultimately garnered 83 cosponsors. H.R. 1701 was reported, as amended, by the Committee on Financial Services on June 27, 2002. (House Report No. 107–590 Part I) and provisions within the jurisdiction of the Committee on the Judiciary were sequentially referred for a time not later than September 9, 2002. The Committee on the Judiciary conducted no hearings on H.R. 1701, and ordered reported the bill, as amended, on September 5, 2002 by a vote of 14 ayes to 12 nays. The Committee on the Judiciary reported H.R. 1701 on September 9, 2002, (House Report No. 107–590 Part II). On September 18, 2002, the House of Representatives passed H.R. 1701 by a vote of 215 ayes to 201 nays. H.R. 1701 was received in the Senate and referred to the Senate Committee on Banking, Housing, and Urban Affairs, no legislative action was taken.

H.R. 2068, to revise, codify, and enact without substantive change certain general and permanent laws, related to public buildings, property, and works, as title 40, United States Code, "Public Buildings, Property, and Works"

Summary.—H.R. 2068 was prepared by the Office of the Law Revision Counsel as part of the program, required by 2 U.S.C. 285b, to prepare and submit to the Committee on the Judiciary, one title at a time, a complete compilation, restatement, and revision of the general and permanent laws of the United States. The bill makes no substantive change in existing law. Rather, the bill removes ambiguities, contradictions, and other imperfections from existing law and repeals obsolete, superfluous, and superseded provisions.

H.R. 2068 was introduced on June 6, 2001, and referred to the Committee on the Judiciary in accordance with clause 1(k)(16) of rule X of the Rules of the House of Representatives. Upon introduction, the bill was circulated for comment to interested parties including committees of Congress and agencies and departments of the Government. The Office of the Law Revision Counsel reviewed and considered all comments, contacting parties to resolve outstanding questions. Some comments, suggesting substantive changes, could not be incorporated in the restatement because this bill makes no substantive change in existing law. Other comments, proposing changes to improve organization and clarity, were incorporated in the restatement. The Office of the Law Revision Counsel has prepared an amendment in the nature of a substitute which reflects the changes resulting from the review and comment process.

Legislative History.—Chairman Sensenbrenner introduced H.R. 2068 on June 6, 2001, and it was referred to the Committee. On May 8, 2002, the Committee ordered reported H.R. 2068, with an amendment, by voice vote. On June 11, 2002, the House passed amended H.R. 2068, by a voice vote. On August 1, 2002, the Senate passed H.R. 2068, without amendment by unanimous consent. H.R. 2068 was signed by the President on August 21, 2002, and became Public Law 107–217.

H.R. 2137, the "Criminal Law Technical Amendments Act of 2001"

Summary.—The last half of the 20th century saw an explosion of federal criminal statutes. According to a study conducted by the Task Force on Federalization of Criminal Law of the Criminal Law Section of the American Bar Association, "[m]ore than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970." This explosion of lawmaking has resulted in numerous technical mistakes which litter the criminal code. This legislation corrects those mistakes.

H.R. 2137, introduced by Chairman Sensenbrenner is cosponsored by Reps. Conyers, Smith of Texas, and Scott of Virginia. The bill makes over 60 clerical and technical corrections to title 18 and other criminal laws. The technical amendments are related to criminal law and procedure. This bill makes over 60 separate technical changes to various criminal statutes by correcting missing and incorrect words, margins, punctuation, redundancies, outmoded fine amounts, cross references, and table of sections. These amendments resulted from suggestions and extensive consultation

between the majority and minority and the Office of Legislative Counsel and the Office of Law Revision Counsel.

Legislative History.—Chairman Sensenbrenner introduced H.R. 2137 on June 12, 2001, and it was referred to the Committee. On June 26, 2001, the Committee conducted a markup session on H.R. 2137. On June 26, 2001, the Committee ordered H.R. 2137 reported by a voice vote. On July 10, 2001, the Committee filed its report, H. Rept. 107–126. On July 24, 2001 the House passed amended, H.R. 2137 by a vote of 374–0. For further action see H.R. 2215, which became Public law 107–273 on November 2, 2002.

H.R. 2215, the "21st Century Department of Justice Appropriations Authorization Act" (Public Law Number 107–273)

Summary.—H.R. 2215, the "21st Century Department of Justice Appropriations Authorization Act," is a comprehensive authorization of the United States Department of Justice ("DOJ" or the "Department").

The Department of Justice has not been formerly authorized since 1979. Since that time, several attempts to authorize the Department have failed either because of poor timing or because the authorization bills were compromised by controversial amendments. H.R. 2215 represents the first statutory authorization of the Department and its various components in nearly a quarter century. H.R. 2215 also contains several additional legislative proposals, many of which passed the House during the 107th Congress. Through authorization, legislative committees establish management objectives and provide expertise and guidance to the Appropriations Committee.

The following is a detailed summary of H.R. 2215, as signed into law on November 2, 2002.

Section 101 authorizes appropriations to carry out the work of the various components of the Department of Justice for fiscal year 2002. Section 102 authorizes appropriations to carry out the work of the various components of the Department of Justice for fiscal year 2003. Section 103 authorizes the Attorney General to transfer 200 additional Assistant U.S. Attorneys from among the six litigating divisions at the Justice Department's headquarters (Main Justice) in Washington, D.C., to the various U.S. Attorneys offices around the country. Section 104 adds 94 additional U.S. Attorneys to work with State and local law enforcement for identification and prosecution of violations of Federal firearms laws, especially in and around schools.

Section 201 sets out the Attorney General's authority to use appropriated funds to carry out his official duties. Section 202 requires the Attorney General to submit a report to Congress if: (1) any officer of the Department of Justice establishes a formal or informal policy to refrain from enforcing any provision of Federal law, or any rules, regulations, programs or policies within the responsibility of the Attorney General on the grounds that such a provision is unconstitutional or within the jurisdiction of the judicial branch: (2) the Attorney General decides to challenge the constitutionality of any Federal law, rule, regulation, or policy, or declines to defend the constitutionality of Federal law rule, regulation, or policy; or (3) approves the settlement of a claim against the

United States that exceeds or likely to exceed $2 million, or any agreement, consent decree or order that provides injunctive or other nonmonetary relief that exceeds 3 years. Section 203 amends the Omnibus Crime Control and Safe Streets Act of 1968 to clarify that grants or contracts to the Bureau of Justice Assistance Grant Programs are used for law enforcement or law enforcement support. Section 204 makes miscellaneous amendments to the Department. Section 204 makes technical amendments to section 524(c) of title 28, United States Codes, clarifies the Attorney General's authority to transfer property of marginal value, and requires the use of standard criteria for the purpose of categorizing offenders, victims, actors, and those acted upon in any data, records, or other information acquired, collected, classified, preserved, or published by the Attorney General for any statistical, research, or other aggregate reporting purpose. It also requires the Attorney General to notify Congress in writing of any civil asset forfeiture award greater than $500,000. Section 205 requires the Attorney General to submit to the Committees on the Judiciary and Appropriations of each House of Congress a report: (1) identifying and describing every grant, cooperative agreement that was made for which additional or supplemental funds were provided in the immediately preceding year; (2) identifying and reviewing every Office of Justice Programs grant, cooperative agreement, or programmatic contract. Section 206 provides clarifying amendments to title 28, United States Code, relating to the enforcement of Federal criminal law. Section 207 allows the payment of a retention bonus and other extended assignment incentives to retain law enforcement personnel in U.S. territories, commonwealths and possessions.

Section 301 repeals open-ended authorization of appropriations for the National Institute of Corrections and United States Marshals Service. Section 302 makes several minor clarifying amendments to title 18, United States Code. Section 303 requires the President (as he may judge necessary and expedient) to submit to the House and Senate Committees on the Judiciary proposed legislation authorizing appropriations for the Department of Justice for fiscal years 2004 and 2005. Section 304 directs the Attorney General to conduct a study within six months of enactment to assess the number of untested rape examination kits that currently exist nationwide and submit the findings to Congress. Section 305 would require the Attorney General to report to Congress on the use of DCS 1000 (Project Carnivore) under a title 18 U.S.C. 3123 order, which is a pen register or trap and trap order and under a title 18 U.S.C. 2518 order, which is a wiretap order. Generally, law enforcement will need a wiretap order, pen/trap register or search warrant for surveillance, depending the information sought. A pen register captures the outgoing numbers or email addresses (the to's) and a trap and trace device captures the incoming numbers or email addresses (the from's). A wiretap allows law enforcement to intercept live communications. DCS 1000 is an electronic surveillance system used by the FBI to filter and conduct electronic surveillance through wire tap, pen register and trap and trace investigations for communications occurring over computer networks. The system is installed on the network of an Internet Service Provider to monitor communications on the network and record mes-

sages sent or received by a targeted user. The Federal Bureau of Investigation (FBI) initially called the system "Carnivore" because the system could get to "the meat" of an enormous quantity of data. The FBI has explained that the system provides the FBI with the ability to intercept and collect only the communications subject to the lawful order and ignore communications the FBI is not authorized to intercept. The reports will provide Congress with a better understanding of the FBI's use of this system.

Section 306 requires the Attorney General to submit (within six months of enactment of this Act) a report to the chairman and ranking member of the House and Senate Committees on the Judiciary, detailing the distribution and allocation of appropriated funds, attorneys and per-attorney workloads, for each Office of United States Attorney except those at the Justice Management Division. Section 307 expands the purposes for truth-in-sentencing and violent offender grants to allow use of these funds to establish separate detention facilities, correctional staff and an ombudsman for juvenile offenders. Section 308 provides the Inspector General discretion to investigate allegations of criminal wrongdoing or administrative misconduct by an employee of the Department of Justice, and allows the Inspector General to refer such allegations to the Office of Professional Responsibility or the internal affairs office of the appropriate component of the Department of Justice. Also requires the Inspector General to refer allegations of misconduct involving Department attorneys, investigators, or law enforcement personnel (where the allegations relate to official authority) to the Counsel, Office of Professional Responsibility. Section 309 requires the Inspector General to appoint an official from the IG's office to supervise and coordinate independent oversight of programs and operations of the FBI until September 30, 2004. Also requires the Inspector General to submit to the chairman and ranking member of the House and Senate Judiciary Committees an oversight plan of the FBI within 30 days after enactment of this Act. Section 310 authorizes $2 million to the Department to increase the Office of Inspector General by 25 employees, to fund expanded audit coverage of Office of Justice Programs (OJP) and to conduct special reviews of efforts by the FBI to implement recommendations of the Inspector General. This section further authorizes $1.7 million to the FBI to increase staffing of the Office of Professional Responsibility by 10 special agents and 4 full time support employees.

Section 311 requires the Attorney General to report to Congress (not later than 45 days after the end of fiscal year 2002) on the number of investigations and prosecutions involving Federal law enforcement officials, Federal judges and other Federal officials in the FY 2002. Section 312 authorizes eight new permanent judgeships as follows: five judgeships in the Southern District of California, two judgeships in the Western District of Texas, and one judgeship in the Western District of North Carolina. It would also convert four temporary judgeships to permanent judgeships—one each in the Central District of Illinois, the Southern District of Illinois, the Northern District of New York, and the Eastern District of Virginia. Additionally, section 312 creates seven new temporary judgeships, one each in the Northern District of Alabama, the Dis-

trict of Arizona, the Central District of California, the Southern District of Florida, the District of New Mexico, the Western District of North Carolina, and the Eastern District of Texas. Finally, it extends the temporary judgeship in the Northern District of Ohio for five years.

Section 401 creates a Violence Against Women Office (VAWO) in the Department of Justice, under the general authority of the Attorney General. The Office shall be headed by a Director who reports directly to the Attorney General and has final authority over all grants, cooperative agreements and contracts awarded by VAWO. The compromise version gives the Attorney General the discretion to place VAWO wherever he deems appropriate at the Department. Section 403 states that this Title shall take effect 90 days after the date of enactment of this amendment.

Section 1101 provides for an increase in funds available for grants to the Boys and Girls Club for FY 2002–2005. The funds will allow the Boys and Girls Clubs to increase outreach efforts and increase membership nationwide.

Section 2001 provides that the short title of this Act shall be the "Drug Abuse Education, Prevention, and Treatment Act of 2001." Section 2101 authorizes the use of Residential Substance Abuse Treatment (RSAT) Grants for treatment and sanctions both during incarceration and after release. Section 2102 would allow states to use RSAT funds to establish nonresidential aftercare programs as well. Additionally, this section requires that 10% of any funds under the RSAT program shall be used to make grants to local correctional facilities. Section 2103 allows revocation of probation or supervised release if an individual tests positive for illegal controlled substances more than 3 times over the course of 1 year. Section 2201 requires the National Institute of Justice to conduct a study alternative drug-testing technologies and report its conclusions to Congress within one year after enactment of the Act. Section 2202 requires the President, in consultation with the Attorney General, and Secretary of Health and Human Services, to deliver a review of all Federal drug and substance abuse treatment and prevention programs and to recommend to Congress ways in which those programs could be streamlined, consolidated, simplified, coordinated, and made more effective.

Section 2203 provides authority to expand research and disciplinary trials with treatment centers of the National Drug Abuse Treatment Clinical Trials Network.

Section 2301 reauthorizes the Drug Courts program. However, this section improves the current system by consolidating all drug court programs into one office and incorporating the evaluation methods suggested by the General Accounting Office. Section 2302 authorizes appropriations for the Drug Courts Office to provide grants to states. Section 2303 requires the General Accounting Office (GAO) to assess the effectiveness of programs established with grants provided by the Drug Courts office, including specific data to be evaluated.

Section 2411 establishes a Federal Reentry Center Demonstration project, under which individualized plans will be developed to reduce recidivism by offenders to be released from the Federal prison population. Section 2421 authorizes the Attorney General to

make grants of up to $1 million to States, Territories, and Indian tribes to establish demonstration projects to promote successful reentry of criminal offenders.

Section 2501 amends the Controlled Substances Act. Current law provides for a 3-year moratorium on a State's ability to preclude physicians, by regulation, from prescribing schedule III, IV, or IV drugs for maintenance or detoxification treatment (21 U.S.C. 823(g)(2)(I)). The moratorium ends on October 17, 2003. This section would prevent States from precluding the use of such drugs for maintenance or detoxification treatment for 3 years after the FDA approval of any drug in these categories. Section 2502 transfers a methamphetamine study requirement from the Institute of Medicine of the National Academy of Sciences to the National Institute on Drug Abuse. Section 2503 authorizes not less than $5 million for FY03 for regional antidrug training by the DEA for law enforcement entities in the South and Central Asia region. Section 2504 authorizes $75,000 for FY03 and FY04 to establish an exchange program for prosecutors, judges, and policy makers of Thailand to observe U.S. Federal prosecutors.

Section 3001 raises the penalty for using physical force or attempting physical force to tamper with a witness from a maximum imprisonment of 10 years to a maximum imprisonment of 20 years. This section also adds a conspiracy section to the tampering and retaliating against a witness statutes so that whoever conspires to commit any of the offenses shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy. Section 3002 corrects certain statutes in title 18 and title 28 to allow for both the imposition of a fine and a sentence of imprisonment. Section 3003 allows Federal District Courts to reinstate any charges that are dismissed as a result of a plea agreement if the guilty plea is vacated on the motion of the defendant.

Section 3004 amends the statute that allows the United States to appeal an order of a District Court dismissing an indictment to clarify that any part of any count of the dismissed indictment may be appealed. Section 3005 clarifies that the longer periods of supervised release set forth in title 21 for certain drug related crimes are not superseded by the shorter terms set forth in the general supervised release statute of title 18. Section 3006 clarifies that in certain cases where the court has reduced the term of imprisonment because the defendant is over the age of 70 and has served at least 30 years, the court may impose a period of supervised release.

Section 3007 clarifies that the need to provide victims with restitution in a case is a factor to be considered by the court in determining whether to include a term of supervised release in a defendant's sentence.

Section 4001 makes over 60 separate technical changes to various criminal statutes by correcting missing and incorrect words, margins, punctuation, redundancies, outmoded fine amounts, cross references, and other technical and clerical errors. This section incorporates H.R. 2137, which was reported from the House Judiciary Committee on July 10, 2001, and which passed the House on July 23, 2001. Section 4003 makes additional minor, technical corrections to Federal criminal statutes. Section 4004 further repeals out-

dated provisions in the criminal code. Section 4005 makes technical amendments to the USA Patriot Act. Section 4006 makes technical corrections to the International Convention for the Suppression of Terrorist Bombings.

Section 5001 amends the Paul Coverdell National Forensic Sciences Improvement Act of 2000 to permit local crime labs to receive grants. Section 5002 authorizes necessary funds for fiscal years 2002 through 2007 for the Center for Domestic Preparedness of the Department of Justice; the Texas Engineering Extension Service of Texas A&M University; the Energetic Materials Research and Test Center of the New Mexico Institute of Mining and Technology; the Academy of Counterterrorist Education at Louisiana State University; the National Exercise, Test, and Training Center of the Department of Energy, located at the Nevada test site; the National Center for the Study of Counter-Terrorism and Cyber-Crime at Norwich University; and the Northeast Counterdrug Training Center at Fort Indiantown Gap, Pennsylvania.

Section 11101 authorizes grants for the construction of memorials to honor the men and women in the United States who were killed or disabled while serving as law enforcement or public safety officers. Section 11002 adds sections 1956 and 1957 of Title 18 (money laundering) to the list of "banking law violations" where a prosecutor can disclose grand jury information to a Federal or State financial institution regulatory agency. Section 11003 expands the uses for grant funds and changes the name from the Office of State and Local Domestic Preparedness Support to the Office of Domestic Preparedness. Section 11004 allows the Attorney General to exchange NCIC information with the United States Sentencing Commission. The U.S. Sentencing Commission has stated that this provision is necessary to help complete a study on recidivism rates that they have been charged by Congress to complete. The Sentencing Commission is currently working with the FBI, which supports this provision.

Section 11005 amends section 151 of the Foreign Relations Act, fiscal years 1990 and 1991 (5 U.S.C. 5928 note), to prohibit the "Secretary of State from denying a request by the Federal Bureau of Investigation (FBI) to authorize a danger pay allowance under title 5 section 5928 for any employee of the FBI. Under title 5 section 5928, "an employee serving in a foreign area may be granted a danger pay allowance on the basis of civil insurrection, civil war, terrorism, or wartime conditions which threaten physical harm or imminent danger to the health or well-being of the employee." The note stated that the Secretary of State may not deny a request by the Drug Enforcement Administration. This section expands this note to cover the FBI.

Section 11006 provides for increases in the tuition allotments for police corps officers scholarship/reimbursement from $10,000 to $13,333 per year. It reauthorizes the program for four more years and increases the stipend for training from $250 to $400 per week. It also eliminates the $10,000 direct payment to participating police agencies. Section 11007 amends the Radiation Exposure Compensation Act of 1990 (RECA). RECA was enacted to affirm the responsibility of the Federal Government to compensate individuals

who were harmed by radioactive fallout from atomic testing, or were harmed by being a test site participant, or in the mining of the uranium necessary for the production of nuclear weapons. This section contains technical amendments to this Act.

Section 11008 incorporates S. 1099, the "Federal Judiciary Protection Act of 2001," which passed the Senate on December 20, 2001. Section 11008 enhances penalties for threatening or attempting to impede Federal officials carrying out their official duties. Section 11009 incorporates H.R. 1007 and S. 166, of the same name. S. 166 passed the Senate on May 14, 2001 and H.R. 1007 was reported favorably by the Judiciary Committee on July 19, 2001. This section directs the United States Sentencing Commission to review and amend the Federal sentencing guidelines to provide an appropriate enhancement for any crime of violence or drug trafficking in which the defendant used body armor. This section also prohibits the purchase, ownership, or possession of body armor by convicted violent felons.

Section 11010 amends Federal law to clarify that a law enforcement officer does not need to be present for a warrant to be served or executed "for service or execution of a search warrant directed to a provider of electronic communication service or remote computing service for records or other information pertaining to a subscriber to or customer of such service." Due to the nature of electronic communications, much of this information is in the possession of Internet Provider Services (ISPs) and law enforcement officials often serve such warrants over facsimile machines and are not present at the site of the ISP. The ISP accept theses warrants. In a recent child pornography case, a Michigan Federal district court, in *U.S.* v. *Bach,* however, ruled that this procedure was an unreasonable search and seizure. The Court found that a police officer had to be present at the time. This section makes it clear that a police officer does not have to be present at the time a warrant is served.

Section 11011 requires the Attorney General to conduct a study of offenders with mental illness who are released from prison or jail to determine how many such offenders qualify for Medicaid, SSI, or SSDI, and other government aid. Section 11012 makes technical corrections and revisions to the Omnibus Crime Control and Safe Streets Act. Section 11013 expands the use of the Department's Three Percent Debt Collection Fund. This fund was established by Section 108 of P.L. 103–121. The language of that Act permits the Department to credit three percent of all civil debt collections resulting from Department debt collection activities to the Working Capital Fund (the Three Percent Fund) and to use those deposits to the Fund only for the costs of processing and tracking civil debt collection litigation. Section 11014 reauthorizes funds for the State Criminal Alien Assistance Program (SCAAP) for FY 2003 and 2004. Under this program, the Federal government provides payments to states who house illegal or criminal aliens. Section 11015 reforms the Department of Justice's practice for using annuity brokers in structured settlements in two ways. First, it directs the Attorney General to establish a list of annuity brokers who meet minimum qualifications for providing annuity brokerage services in connection with structured settlements entered by the United States. Sec-

ond, this provision permits the United States Attorney (or his designee) involved in any settlement negotiations (except those negotiated exclusively through the Civil Division of the Department of Justice) to have the exclusive authority to select an annuity broker from the list of such brokers established by the Attorney General, provided that all documents related to any settlement comply with Department of Justice requirements.

Section 11016 amends the Immigration and Nationality Act to specify that processing fees for certain entry documents shall be deposited in the Land Border Inspection Fee Account as offsetting receipts. Section 11017 extends the authority of the U.S. Parole Commission to continue operations for an additional three years. This section also requires the Attorney General to prepare a report to Congress on the most efficient entity to administer the District of Columbia supervised release program. Section 11018 incorporates H.R. 4858, to "Improve Access to Physicians in Medically Underserved Areas," which was reported by the House Judiciary Committee on June 24, 2002, and passed the House on June 25, 2002. This section extends authorization for a waiver to permit certain foreign medical doctors to practice medicine in underserved areas without first leaving the United States. Aliens who attend medical school in the United States on "J" visas must leave the U.S. after school to reside abroad for two years before they may practice medicine in the U.S. In 1994, Congress created a waiver of the two-year requirement for foreign doctors who commit to practicing medicine for no less than three years in the geographic area or areas which are designated by the Secretary of Health and Human Services as having a shortage of health care professionals. The waiver limited the number of foreign doctors to 20 per state so that under-served areas in all states receive doctors. Section 11018 increases the numerical limitation on waivers to 30 per state. It also extends the deadline for the authorization of the waiver until June 1, 2006.

Section 11019 restores two provisions of Rule 16 of the Federal Rules of Criminal Procedure that were inadvertently omitted when the Supreme Court transmitted a revision of the Rules to Congress on April 29, 2002. Section 11020 incorporates H.R. 860, the "Multiparty, Multiforum Trial Jurisdiction Act of 2002," which was reported by the House Judiciary Committee on March 8, 2001 and passed the House on March 14, 2001. It would streamline the process by which multidistrict litigation governing disasters are adjudicated. Section 11021 authorizes judges in the Southern District of Ohio to hold court in St. Clairsville, Ohio. Section 11022 states that during any period that the Federal Aviation Administration has in effect restrictions on airline passengers to ensure their safety, a person who purchases wine while visiting a winery can ship wine to another state provided that the purchaser could have carried or brought the wine into the state to which the wine is shipped.

Section 11023 would require the FBI to implement the Webster Commission Implementation Report. In response to the Robert Hanssen espionage case, former Director Freeh of the FBI asked Judge Webster to conduct a review of the FBI's internal security functions and procedures and recommend improvements. The March 31, 2002, Webster Report included strong criticism and sev-

eral recommendations to improve the security at the FBI. This section would require the FBI to submit a plan for implementing the recommendations of the Commission by no later than six months after the enactment of this Act. Section 11024 authorizes the establishment of a police force within the FBI to provide protection for FBI buildings and personnel in areas. For example, FBI police provide security and protection at the main headquarters building in Washington, D.C., the FBI academy at Quantico, Virginia, and the Criminal Justice Information Services Complex in Clarksburg, West Virginia. Additionally, the FBI police will be authorized to provide these security services at the FBI's larger field offices. Section 11025 requires the Director of the FBI to submit to Congress a report on the information management and technology programs of the FBI including recommendations for any legislation needed to enhance the effective of such programs. The report is due no later than nine months after the date of enactment of this Act. Section 11026 requires the Comptroller General of the United States to submit a report on the issue of how statistics are reported and used by Federal law enforcement agencies. The report is due no later than nine months after the date of enactment of this Act.

Section 11027 authorizes $30 million over three years for the Attorney General to make grants to State criminal justice, Byrne, or other designated agencies to develop rural States' capacity to assist local communities in the prevention and reduction of crime, violence, and substance abuse. Section 11028 incorporates H.R. 1296 and S. 1140, the "Motor Vehicle Franchise Contract Arbitration Fairness Act of 2001," which was reported by the Senate Judiciary Committee on October 31, 2001. It requires that whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to the contract, arbitration may be used to settle the controversy only if both parties consent in writing after such controversy arises. This section also requires the arbitrator to provide the parties with a written explanation of the factual and legal basis for the decision. The section provides that its provisions shall apply only to contracts entered into, modified, renewed or extended after the date of enactment. This section does not amend the Federal Arbitration Act.

Section 11029 permits the U.S. District Court for the Southern District of Iowa to hold court in Rock Island, Illinois, from January 1, 2003 through July 1, 2005, while the Davenport, Iowa courthouse undergoes renovation. Section 11030 incorporates H.R. 2623, the "Posthumous Citizenship Restoration Act of 2001." In 1990, Congress passed the Posthumous Citizenship for Active Duty Service Act (Pub. L. No. 101–249). This permitted the next-of-kin or another representative to file a posthumous citizenship claim on behalf of a United States non-citizen war veteran who died as a result of military service to our nation. Currently, the request for the posthumous citizenship must be filed no later than two years after the date of enactment of the Act (March 6, 1990), or two years after the date of the person's death, whichever date is later.

This provision establishes an additional two-year period for the family members of deceased non-citizen veterans to file posthumous citizenship claims. This will give families who missed the opportunity to file posthumous citizenship claims on behalf of their

deceased relatives when the law was enacted in 1990 another opportunity to file for citizenship. The provision retains the two-year filing window for deaths which may occur after the bill's grace period expires.

Section 11030A pertains the status for aliens with lengthy adjudications. Prior to the enactment of the American Competitiveness in the 21st Century Act of 2000 (Pub. L. 106–313), an alien possessing a H–1B nonimmigrant visa was authorized work in the U.S. for up to six years. The Act provided for an extension of H–1B status beyond 6 years in one year increments, as long as an employment based immigrant visa petition or employment based adjustment of status application has been filed and at least 365 days have elapsed since the filing of the petition or a labor certification application on the alien's behalf (In many instances, labor certifications are required to be approved by the Department of Labor before an employment based immigrant visa petition or adjustment of status application can be filed.). This provision was added to the Immigration and Nationality Act so that employers would not have to dismiss H–1B workers after 6 years because their petitions for immigrant visas or applications for adjustment of status were caught in processing backlogs. Growing delays in the processing of labor certifications have in certain instances prevented employers from taking advantage of the 2000 Act, since their labor certifications had not been approved in time for them to be able to file immigrant visa petitions or adjustment of status applications by the required date. Thus, this provision eliminates the requirement that an immigrant visa petition or adjustment of status application have been filed. As long as 365 days have elapsed since the filing of a labor certification application (that is filed on behalf of or used by the alien) or an immigrant visa petition, H–1B status can likewise be extended in one year increments. This will be true even if the alien has since obtained a non-H–1B nonimmigrant status. If an application for a labor certification or adjustment of status or a petition for a immigrant visa petition is denied, the extended H–1B status ends at that point.

Section 11030B amends the Immigration and Nationality Act to permit a United States citizen grandparent or U.S. citizen legal guardian to apply for naturalization on behalf of a child born outside of the U.S., who has not acquired citizenship automatically under section 320 of the INA, if the child's U.S. citizen parent has died during the preceding five years.

Section 11031 sets forth new procedures for certain investors to remove conditional resident status. They must meet three conditions: (1) they filed an I–526 petition and had it approved by the INS between January 1, 1995 and August 31, 1998; (2) they obtained conditional resident status; and (3) before the date of enactment of this bill they filed an I–829 to remove their conditional resident status. Section 11032 provides similar procedures for EB–5 investors whose I–526 petitions were approved, but who never became conditional residents because the INS never acted on their adjustment of status applications or because they remained overseas. This subsection states that the INS must approve applications under this section within 180 days after enactment.

Section 11033 requires the INS to publish implementing regulations within 120 days of enactment. Until regulations are promulgated, the INS may not deny a pending I–829 petition or adjustment of status application relating to an alien covered under the terms of sections 11031 or 11032, or commence or continue removal proceedings against affected EB–5 investors. Section 11034 states that the terms used in this title shall have the meaning given such terms in section 101(b) of the Immigration and Nationality Act ("INA"), unless otherwise provided. Section 11035 defines full-time employment for purposes of section 203(b)(5) of the INA as a position requiring at least 35 hours a week. Section 11034 amends section 203(b)(5) of the INA to eliminate the "establishment" requirement for EB–5 investors. Instead of showing that they have "established" a commercial enterprise, Investors need only that they have "invested" in a commercial enterprise. This section also amends section 216A of the INA to eliminate the "establishment" requirement for EB–5 investors who have filed I–829 petitions. They also must show that they have "sustained" their investment actions over the two-year period. This section also clarifies that a "commercial enterprise" may include a limited partnership. The changes made by this section apply to I–526 and I–829 petitions pending on or after the date of enactment.

Section 11037 amends section 610(a) of the 1993 Commerce, State, Justice appropriations act to clarify that an EB–5 regional center can promote increased export sales, improved regional productivity, job creation, or increased domestic capital investment.

Section 11041 names this subtitle the "Judicial Improvements Act of 2002, which pertains to judicial discipline procedures. It is based upon H.R. 3892 and S. 2713, of the same name. H.R. 3892 passed the House on July 22, 2002. S. 2713 was reported by the Senate Judiciary Committee on July 31, 2002. These amendments "tighten" the existing statute that permits individuals to file misconduct complaints against federal judges and magistrates. As a result, the statute will be easier to locate and use, and will clarify the responsibilities of the chief judge in a given circuit who initially reviews a complaint.

Section 11043 makes technical and conforming amendments to title 28 relating to the judicial discipline amendment. Section 11044 states that if any part of this subtitle is found unconstitutional, the remainder of the Act will not be affected.

Section 11051 incorporates H.R. 2325, "the Antitrust Modernization Commission Act of 2001." Section 11052 establishes and states that the responsibilities of the Commission are to examine whether the antitrust laws are in need of modernization, to solicit the views of all concerned parties, to evaluate proposals, and to prepare and submit a report to Congress and the President. Section 11054 sets out the membership of the Commission, which will have 12 members, with four appointed by the President, two each by the majority and minority leaders of the Senate, and two each by the Speaker and minority leader of the House. The President's nominees will include two members of the opposing party, to be chosen by that party's Congressional leaders. The President will choose the chair of the Commission, while the Congressional leaders from the other party will choose the vice chair. Section 11055 describes the com-

pensation of those who serve on the Commission. Section 11056 states that the chairperson of the Commission may appoint and terminate an executive director and other necessary staff, and use experts and consultants. Section 11057 states that the Commission may hold such hearings and take such testimony as it considers appropriate, may take testimony under oath, and obtain information directly from any executive agency or court. Section 11058 states that the Commission shall submit a detailed report to Congress and the President within three years after its first meeting, including recommendations for legislative and administrative action the Commission considers appropriate. Section 11059 states that the Commission shall cease to exist 30 days after it submits its report. Section 11060 authorizes $4 million to carry out this subtitle.

Section 12101 provides that the short title of this subtitle may be cited as the "Consequences for Juvenile Offenders Act of 2002." Section 12102 incorporates, H.R. 863, the "Consequences for Juvenile Offenders Act of 2002," into the bill. H.R. 863 passed the House on October 16, 2001 by voice vote. This subtitle incorporates H.R. 863 to authorize the Department of Justice to make grants to States and local governments to strengthen their juvenile justice systems. The subtitle allows the States and localities flexibility in using the grant funds and provides an illustrative list of possible uses for the grant money. The grant money may be used for a range of purposes from the hiring of more judges, prosecutors and corrections personnel to supporting juvenile gun courts, drug court programs and accountability-based school safety programs. The flexibility allows States and localities to strengthen their juvenile justice systems in way that best meet their needs. To be eligible for the grant funds, a State must have or agree to implement a system of graduated sanctions for juvenile offenders. Under the bill, the graduated sanctions system must ensure that sanctions are imposed on juveniles offenders for every offense, that the sanctions escalate in intensity with each subsequent more serious offense, that the courts will be flexible in applying sanctions that address the specific problems of the individuals offender, and that consideration is given to public safety and victims of crime. Additionally, this subtitle provides that a state or locality may still qualify for a grant even if its system of graduated sanctions is discretionary, allowing juvenile courts to not participate. If an application's system is discretionary, however, then the non-participating juvenile courts must report at the end of the year why they did not impose graduated sanctions.

Section 12201 states that this subtitle may be cited as the "Juvenile Justice and Delinquency Prevention Act of 2002." This section incorporates H.R. 1900, which passed the House on September 20, 2002. Section 12202 states the findings of Congress on the seriousness of juvenile crime. Section 12203 describes the purpose of this subsection: to assist State and local governments in preventing acts of juvenile delinquency and holding offenders accountable.

Section 12204 modifies and adds to the definitions under the Juvenile Justice and Delinquency Act (JJDPA). Section 12205 modifies the duties of the Administrator of the Office of Juvenile Justice and Delinquency Prevention. Section 12206 makes a technical cor-

rection to the JJDPA to comply with the current title of the House Education and Workforce Committee.

Section 12207 amends section 207 of the JJDPA to require an annual evaluation of the effectiveness of programs under this title. Section 12208 makes technical changes to clarify the process by which States and territories receive funding under the Act. Section 12209 eliminates specific state plan requirements and modify the list of activities eligible for funding under the formula grant program. Section 12210 creates a new Part C that establishes the Juvenile Delinquency Prevention Block Grant and sets forth the allocation of funds, state plan requirements and criteria and eligibility for state and local grants. Section 12211 creates new authority for research, training, technical assistance and information dissemination regarding juvenile justice matters through the Office of Juvenile Justice and Delinquency Prevention.

Section 12212 permits the administrator to award grants for developing, testing, and demonstrating new initiatives and programs for the prevention, control or reduction of juvenile delinquency. Section 12213 authorizes such sums as may be appropriate to carry out Title II of this act. Section 12214 modifies the administrator's authority to establish rules, regulations, and procedures. Section 12215 amend section 299C of the JJDPA to state, among other things, that no funds shall be paid to a residential program unless the State in which it is located has minimum licensing standards. Section 12216 amends the JJDPA by adding a requirement that funds not be used to support the unsecured release of juveniles charged with a violent crime.

Section 12217 amends the JJDPA by adding a new section to clarify that nothing in Titles I or II (a) prevents otherwise eligible organizations from receiving grants, or (b) should be construed to modify or affect existing federal or state laws related to collective bargaining rights of employees. Section 12218 permits the administrator to receive surplus Federal property and lease it to eligible entities for use in juvenile facilities or for delinquency prevention and treatment activities. Section 12219 allows the administrator to issue rules to carry out this title.

Section 12220 amends JJDPA to add a new section requiring that materials funded by this act for the purpose of hate crimes prevention shall not abridge or infringe upon the constitutionally protected rights of free speech, religion, and equal protection of juveniles or their parents or legal guardians. Section 12221 sets forth technical and conforming amendments. Section 12222 reauthorizes Title V of the JJDPA, which provides for grants for delinquency prevention programs and activities. Section 12223 establishes the effective date of the act and states that amendments made by the act shall apply to fiscal years beginning after September 30, 2002.

Section 12301 amends 18 U.S.C. § 5037 to modify current federal law regarding the sentencing of juvenile delinquents. Specifically, it (1) provides authority to impose a term of juvenile delinquency supervision to follow a term of official detention, (2) provides authority to sanction a violation of probation when a person adjudicated a juvenile delinquent is over 21 at the time of the violation, and (3) makes technical corrections in response to the Supreme Court's decision in *United States* v. *R.L.C.*

Section 13101 states that the short title of this subtitle is the "Patent and Trademark Authorization Act of 2002." This section incorporates H.R. 2047, which passed the House on November 16, 2001, and S. 674, which passed the Senate on June 26, 2002. Section 13102 authorizes the Patent and Trademark Office (PTO) to receive appropriations for fiscal years 2003 through 2008 in amounts equal to those fees collected by the agency in each such fiscal year. The Director of the PTO must submit estimates of the fees for the next fiscal year to the Committees on Appropriations and Judiciary of the Senate and the Committees on Appropriations and Judiciary of the House of Representatives no later than February 15 each fiscal year. Section 13103 requires the Director to develop a user-friendly electronic system for the filing and processing patent and trademark applications. The system must be completed within 3 years of the date of enactment of this legislation. This section authorizes not more than $50,000,000 for each of fiscal years 2003, 2004 and 2005 to carry out this Section. Section 13104 requires the Secretary of Commerce to submit annual updates to the House and Senate Committees on the Judiciary on the implementation of the "21st Century Strategic Plan," which was issued on June 3, 2002, and any amendments to that plan. Section 13105 modifies the sections of Title 35 of the U.S. Code that instruct the Director to determine whether substantial new questions of patentability are raised by requests for prior art citations to the Office, ex parte reexaminations of patents, or inter partes reexaminations of patents.

Section 13106 amends 35 U.S.C. Section 315 by adding the Court of Appeals for the Federal Circuit as a venue where a third party requester may appeal, or be a party to an appeal of, a final decision on patentability. Section 13201 may be cited as the "Intellectual Property and High Technology Technical Amendments Act of 2002." This section incorporates S. 320, of the same name, which passed the Senate on February 13, 2002, and the House on March 13, 2001.

Section 13202 of the bill clarifies the Patent Act's inter partes reexamination section by stipulating that it will apply to the proper parties and operate as envisioned. Section 13203 clarifies the status and authority of the Deputy Director of the PTO and conforms the membership of the Trademark Trial and Appeal Board and the Board of Patent Appeals and Interferences to include the Deputy Director. Section 13204 is technical in nature and clarifies the effective date of international applications which may qualify for the provisional rights based on early publication. Section 13205 contains a safeguard that the PTO will only rely on information published in English in patent applications as it makes the essential determination of novelty during the examination of a patent application. This limits the evidence from foreign applications that may be considered "prior art" and could affect patentability. This is an important safeguard for independent inventors and small American businesses that do not have access to expensive translation services and the foreign patent offices.

Section 13206 contains a series of highly technical clerical amendments developed by the Office of Legislative Counsel upon its own initiative. Section 13207 makes technical corrections to

Trademark Law by removing redundancies without foreclosing remedies. Section 13208 corrects a clerical error pertaining to the section of the law cited relating to the adjustment of trademark fees and the consumer price index. Section 13209 makes amendments to Title I of IPCORA to eliminate existing ambiguities. Section 13210 makes several technical amendments and revisions to Title 17. Section 13211 makes additional technical and conforming amendments.

Section 13301 amends the Copyright Act to encompass performances and displays of copyrighted works in digital distance education under appropriate circumstances. The section expands the scope of works to which the amended section 110(2) exemption applies to include performances of reasonable and limited portions of works other than nondramatic literary and musical works

Section 13401 incorporates the "Madrid Protocol Implementation Act." Section 13402 incorporates H.R. 741 (of the same name), which passed the House on March 14, 2001. This section streamlines the process by which holders of applications or registrations before the Patent and Trademark Office (PTO) may file an international application for trademark protection at the PTO and requires the PTO Director to transmit the application to the WIPO International Bureau. Section 13403 states that the effective date of the act shall commence on the date on which the Madrid Protocol enters into force with respect to the United States or 1 year after the date of enactment, whichever occurs later.

Section 14101 incorporates the "Antitrust Technical Corrections Act of 2001," which made minor antitrust-related amendments. It is identical to H.R. 809 and S. 809. H.R. 809 was reported by the Judiciary Committee on March 12, 2001, and passed the House on March 14, 2001. S. 809 was reported by the Senate Judiciary Committee on March 15, 2001. Section 14102 amends the Panama Canal Act, which prohibits ships owned by persons who are violating the antitrust laws from passing through the Canal. Section 14103 establishes the effective dates for these provisions.

Legislative History.—H.R. 2215 was introduced by Chairman Sensenbrenner and Ranking Member Conyers on June 19, 2001. Several Judiciary Committee Subcommittees conducted hearings on this bill. The Committee's Subcommittee on Crime, Terrorism, and Homeland Security conducted an oversight hearing on May 3, 2001 and received testimony from four witnesses: Louie McKinney, Acting Director for the United States Marshals Service; Donnie Marshall, Administrator of the Drug Enforcement Administration; Thomas Pickard, Deputy Director for the Federal Bureau of Investigation; and Kathleen Sawyer, Director of the Federal Bureau of Prisons.

On May 9, 2001, the Subcommittee on Commercial and Administrative Law conducted an oversight hearing and received testimony from five witnesses: Mark Calloway, Director of the Executive Office for the United States Attorneys; John Cruden, Acting Assistant Attorney General for the Environment and Natural Resources Division; Martha Davis, Acting Director of the Executive Office for United States Trustees; Stuart Schiffer, Acting Assistant Attorney General for the Civil Division; Barbara Underwood; Acting Solicitor General of the United States.

On May 15, 2001, the Subcommittee on Crime, Terrorism and Homeland Security conducted a second oversight hearing and received testimony from five witnesses: Michael Horowitz, Chief of Staff of the Department's Criminal Division; Ralph Justus, Acting Director of the Community Oriented Policing Services Program (COPS); and Mary Leary, Acting Assistant Attorney General for the Office of Justice Programs. Also on May 15, 2001, the Subcommittee on Immigration and Claims conducted an oversight hearing and received testimony from five witnesses: Roy Beck, Executive Director of Numbers USA.com; John Lacey, Chairman of the Foreign Claims Settlement Commission; Peggy Philbin, Acting Director for the Executive Office for Immigration Review; Kevin Rooney, Acting Commissioner of the Immigration and Naturalization Service (INS); and Bishop Thomas G. Wenski, Auxiliary Bishop of Miami on behalf of National Conference of Catholic Bishops' Committee on Migration. In addition, Attorney General Ashcroft testified before the Full Committee during a June 6, 2001, oversight hearing.

On Wednesday, June 20, 2001, the Committee reported H.R. 2215, as amended, by voice vote (H. Rept. 107–125). H.R. 2215 passed the House under suspension of the rules on July 23, 2002. On October 30, 2002, the bill was reported by the Senate Judiciary Committee with an amendment in the nature of a substitute. The Senate passed its amended version of the bill on December 20, 2002. The bill then proceeded to conference. Chairman Sensenbrenner, and Representatives Henry Hyde (R–IL); George W. Gekas (R–PA); Howard Coble (R–NC); Lamar Smith (R–TX); Elton Gallegly (R–CA); John Conyers (D–MI); Barney Frank (D–MA); Bobby Scott (D–VA); and Tammy Baldwin (D–WI) were appointed House Judiciary Committee conferees. In addition, Representative Berman was appointed in lieu of Ms. Baldwin for consideration of section 312 (Additional Federal Judgeships) of the Senate amendment.

The House filed the Conference Report (H. Rept. 107–685) on September 25, 2002. On September 26, 2002, the House agreed to the Conference Report by a vote of 400–4. On October 3, 2002, the Conference Report passed the Senate by voice vote. On November 2, 2002, the bill was signed by President Bush and became Public Law Number 107–273. On October 8, 2002, the house passed H. Con. Res. 503 to correct the enrollment of the bill H.R. 2215. The Senate agreed to H. Con. Res. 503 by Unanimous Consent on October 17, 2002.

H.R. 2458, the E-Government Act of 2002

Summary.—H.R. 2458 establishes the Office of Information Policy in the Office of Management and Budget (OMB) to be administered by a Federal Chief Information Officer who shall provide direction, coordination, and oversight of the development, application, and management of information resources by the government. H.R. 2458 establishes an E-government Fund in the Treasury to be used to fund interagency information technology projects and other innovative uses of information technology. H.R. 2458 also establishes an online federal telephone directory, an online national Library, and an individual Federal court websites. Lastly the legislation re-

quires the Chief Information Officer and each agency to develop and post on the Internet a public domain directory of government websites.

Legislative History.—H.R. 2458 was introduced on July 11, 2001 by Congressman Turner. On November 11, 2002 the Committee on the Judiciary was granted a sequential referral for consideration of provisions of the bill for a period not later than November 14, 2002. On November 15, 2002 the bill passed the House without objection. On November 15, 2002 the Senate passed the bill without amendment by Unanimous Consent. On Decmber 17, 2002 the President signed H.R. 2458 and the bill became Public law 107–347.

H.R. 2882, to provide for the expedited payment of certain benefits for a public safety officer who was killed or suffered a catastrophic injury as a direct and proximate result of a personal injury sustained in the line of duty in connection with the terrorist attacks of September 11, 2001

Summary.—Under 42 U.S.C. § 3796, the Bureau of Justice Assistance (BJA) is allowed to determine whether or not a public officer has died as a direct or proximate cause of a personal injury sustained in the line of duty, and if such criteria is met the Bureau is directed to pay a monetary benefit to such officers surviving family members. After the tragedy of September 11, H.R. 2882 was introduced as a way to expedite the disbursement of those funds to the proper beneficiaries as determined by the Public Safety Officer Benefit Program outline. H.R. 2882 allowed that, upon certification by a public agency that a public safety officer employed by such agency was killed or suffered a catastrophic injury as a direct and proximate result of a personal injury sustained in the line of duty in connection with the rescue or recovery efforts related to the terrorist attacks of September 11, 2001, the Director of the Bureau of Justice Assistance was authorized to make payment to qualified beneficiaries, with such payment to be made not later than 30 days after receipt of such certification.

Legislative History.—On September 13, 2001, H.R. 2882 was introduced by Representative Nadler of New York, and subsequently referred to the Committee on the Judiciary. On that same day the Committee discharged the bill to the House without amendment. Also on that day, the House passed the bill H.R. 2882, 413–0. On that same day, the Senate considered H.R. 2882 by unanimous consent and was subsequently signed into law by the President on September 18, 2001, becoming Public Law No. 107–037.

H.R. 3162/H.R.2975, the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001"

Summary of crime related provisions.—On September 11, 2001, terrorists attacked the United States and killed nearly 3,000 United States citizens. These attacks demonstrated the immediate need for changes in U.S. Federal law to protect our Nation, our liberty, our economy and our citizens' within our own borders. The Committee immediately made the fight against terrorism its top priority. In response to the attacks, Chairman Sensenbrenner introduced H.R. 2975, "the Provide Appropriate Tools Required to

Intercept and Obstruct Terrorism Act of 2001," (PATRIOT Act) on October 2, 2001. This bill was similar to the Administration's proposal.

The legislation provided enhanced investigative tools and improved information sharing for the law enforcement and intelligence communities to combat terrorism and terrorist related crimes. The enhanced law enforcement tools and information sharing provisions assist in the prevention of future terrorist activities and the preliminary acts and crimes which further such activities. To protect the delicate balance between privacy and protection, the bill provided additional government reporting requirements, disciplinary actions for abuse, and civil penalties. The bill also provided for increased penalties for Federal terrorism offenses, eliminated the statute of limitations, and provided for extended post-incarceration supervised release for persons convicted of such offenses. Additionally, the bill amended Federal money laundering laws, added new terrorism offenses, updated the bioterrorism laws, and adjusted existing federal criminal procedures relating to terrorism. The bill also changed immigration law to increase the Federal Government's ability to prevent foreign terrorists from entering the U.S., to detain suspected foreign terrorists and to deport foreign terrorists.

Summary of immigration related provisions.—Under Title IV, subtitle A—Protecting the Northern Border, authorizes sums necessary to triple the number of Border Patrol agents, INS inspectors and Customs Service personnel, along with supporting personnel and infrastructure, in each State (and port of entry) along the northern border. It also authorizes $50 million to both the INS and the Customs Service to make improvements in technology for monitoring the northern border and acquiring additional equipment at the northern border.

The subtitle requires that the Attorney General and the FBI Director provide the INS and the State Department with access to the criminal history record information contained in the National Crime Information Center's Interstate Identification Index and certain other files in the form of extracts for the purpose of determining whether or not visa applicants or applicants for admission have criminal history records. The State Department can receive complete records upon submission of fingerprints and any required fee. The Department shall implement procedures for the taking of fingerprints and establish conditions for use of information received from the FBI to limit its redissemination, to ensure that it is used solely for visa issuance and admittance decisions, to secure its security and confidentiality and to protect any privacy rights of the subjects of the information.

The Attorney General and the Secretary of State shall have two years to develop and certify a technology standard that can be used to verify the identity of persons applying for U.S. visas or seeking to enter the U.S. in order to conduct background checks and confirm identity. This shall be done through the National Institute of Standards and Technology and other federal law enforcement and intelligence agencies. The technology standard shall be the technological basis for an electronic database system to share law enforcement and intelligence information necessary to confirm the identity

of persons seeking to enter the U.S. This system shall be readily and easily accessible to consular officers responsible for the issuance of visas, federal inspection agents at border inspection points, and to law enforcement and intelligence officers responsible for the investigation or identification of aliens admitted to the U.S. Periodic reports shall be provided to Congress regarding the technology standard and the database system. Such sums as may be necessary are authorized to carry out these provisions.

Subtitle B—Enhanced Immigration Provisions

Under prior law, an alien was inadmissible and deportable for engaging in many terrorist activities only when the alien had used explosives or firearms. The subtitle provides that an alien using any weapon or dangerous device in terrorist activity is inadmissible and deportable.

Under prior law, there was no general prohibition against an alien contributing funds or other material support to a terrorist organization, while there was a prohibition against soliciting membership in or funds from others for a terrorist organization. The subtitle provides that an alien is inadmissible and deportable for contributing funds or other material support to, or soliciting funds for, or membership in, an organization that has been designated as a terrorist organization by the Secretary of State, or for contributing to, or soliciting in or for, any non-designated terrorist organization, unless the alien can demonstrate that he did not know and should not reasonably have known that the funds or other material support or solicitation would further terrorist activity. However, inadmissibility or deportability for material support provided to an organization or individual who has committed terrorist activity shall not apply if the Attorney General or Secretary of State concludes that they should not.

Prior immigration law did not define "terrorist organization" for purposes of making an alien inadmissible and deportable. The subtitle defines such an organization to include (1) an organization so designated by the Secretary of State (under a process provided for under prior and continuing law); (2) an organization otherwise publically designated by the Secretary of State as a terrorist organization, after finding that the organization engages in certain forms of terrorist activity or provides material support to further terrorist activity; and (3) any group of two of more individuals, whether organized or not, that engages in certain forms of terrorist activity. The subtitle clarifies that the Secretary of State can redesignate organizations as terrorist organizations and can revoke designations and redesignations.

The subtitle provides that an alien is inadmissible if the alien is a representative of a political, social, or other similar group whose public endorsement of terrorism undermines the effort of the U.S. to eliminate or reduce terrorism. Also inadmissable will be an alien who has used his or her prominence to endorse or espouse terrorism or to persuade others to support terrorism, if this would undermine the efforts of the U.S. to reduce or eliminate terrorism, and an alien who is associated with a terrorist organization and intends, while in the U.S., to engage in activities that could endanger the welfare, safety, or security of the U.S. These provisions are

similar to the "foreign policy" ground of inadmissibility, barring entry to an alien whose entry or proposed activities in the U.S. would have potentially serious adverse foreign policy consequences for the U.S.

The subtitle provides that the spouses or children of aliens who are inadmissible for engaging in terrorist activity within the last five years are also inadmissible (with certain exceptions). The Secretary of State may determine that the amendments made by the foregoing provisions of this subtitle shall not apply with respect to actions by an alien taken outside the U.S. before the date of enactment of this Act upon the recommendation of a consular officer who has concluded that there are not reasonable grounds to believe that the alien knew or reasonably should have known that the actions would further terrorist activity.

Under the prior regulatory regime, the INS could detain an alien for 48 hours before making a decision as to charging the alien with a crime or removable offense (except that in the event of emergency or other extraordinary circumstance, an additional reasonable time was allowed). The INS used this time to establish an alien's true identity, to check domestic and foreign databases for information about the alien, and to liaise with law enforcement agencies.

This subtitle provides an alternative mechanism whereby the Attorney General can certify an alien as a suspected terrorist (or as having engaged in espionage and certain other offenses) and detain him for up to seven days before placing him in removal proceedings or charging him with a crime. If no charges are filed by the end of this period, the alien must be released. Otherwise, the Attorney General shall maintain custody of the alien until the alien is removed from the U.S. or found not to be inadmissible or deportable. The Attorney General must submit a report to Congress on the use of these provisions every six months.

Under this mechanism, the Attorney General or Deputy Attorney General (with no further power of delegation) may certify an alien if they have reasonable grounds for their belief. The alien shall be maintained in custody irrespective of any relief from removal granted the alien, until the Attorney General determines that the alien no longer warrants certification. However, if an alien detained pursuant to this section is ordered removed as a terrorist (or on the other grounds allowing certification) but has not been removed within 90 days and is unlikely to be removed in the reasonably foreseeable future, the alien may only be detained for additional periods in six month allotments if the Attorney General demonstrates that release will threaten the national security of the U.S. or the safety of the community or of any person.

The Attorney General shall review his certification of an alien every six months. If the Attorney General determines in his discretion that the certification should be revoked, the alien may be released on such conditions as the Attorney General deems appropriate. The alien may request each six months in writing that the Attorney General reconsider the certification and may submit documents or other evidence in support of that request.

Judicial review as to certification or detention is limited to habeas corpus review. A final order of any circuit or district judge is subject to review on appeal only by the U.S. Court of Appeals for

the District of Columbia Circuit. The law applied by the Supreme Court and the Court of Appeals for the District of Columbia Circuit shall be regarded as the rule of decision in all such habeas corpus proceedings. Habeas corpus review shall include review of the merits of a decision to certify an alien as a terrorist or to detain an alien despite the fact that removal is unlikely in the reasonably foreseeable future.

The subtitle provides that the Secretary of State may, on the basis of reciprocity, provide to a foreign government information in the State Department's visa lookout database and related information with regard to individual aliens at any time on a case-by-case basis for the purpose of preventing, investigating, or punishing acts that would constitute crimes in the U.S., or with regard to any or all aliens in the database pursuant to conditions the Secretary establishes in an agreement with the foreign government in which that government agrees to use such information only for such purposes or to deny visas to person who would be inadmissible in the U.S.

The subtitle also states the sense of Congress of the need to expedite implementation of the integrated entry and exit data system established by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

The subtitle amends the foreign student tracking system created by IIRIRA to clarify that the system applies to educational institutions such as air flight schools, language training schools, or vocational schools approved by the Attorney General to accept foreign students under "F", "J", or "M" student visas. The subtitle authorizes approximately $37 million to fully implement the tracking system by January 1, 2003.

Finally, the subtitle advances the date by which aliens wanting to be admitted through the visa waiver program must have machine-readable passports to October 1, 2003. However, between that date and the old deadline of October 1, 2007, the Secretary of State may waive this requirement with respect to aliens of particular countries if he determines that a country is making progress toward making such passports generally available and has taken appropriate measures to protect against misuse of its passports that are not machine readable.

Subtitle C—Preservation of Immigration Benefits for Victims of Terrorism

A number of aliens legally present in the United States were likely victims of the terrorist attacks on the U.S. on September 11, 2001, were the family members of victims, or were caught up in the attacks' aftermath. This subtitle was designed to make certain modifications to the immigration law to provide humanitarian relief to these aliens. Most importantly, the subtitle provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed on or before September 11 to grant the alien permanent residence as a family-sponsored or employer-sponsored immigrant, or the beneficiary of an application for labor certification filed on or before September 11, if the petition or application would otherwise have been rendered null because of the death or disability of the petitioner, applicant,

or beneficiary, or the loss of employment due to physical damage of, or destruction of, the business of the petitioner or applicant, as a direct result of the terrorist attacks on September 11.

Another of the provisions provides for the extension of status for aliens who were legally in a nonimmigrant status on September 11 and were the spouses and children of aliens who died as a direct result of the terrorist attacks, or who themselves had been disabled as a direct result of the terrorist attacks on September 11. The extension lasts until the later of the date that his or her status normally would have terminated or one year after the death or onset of disability.

Legislative History.—On September 24, 2001, the Committee on the Judiciary held one hearing on the Administration's proposed legislation "the Mobilization Against Terrorism Act of 2001," which formed the basis of H.R. 2975, "the Provide Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001," (PATRIOT Act). Testimony was received from four witnesses, representing the Department of Justice. The witnesses were: the Honorable John Aschroft, Attorney General; Michael Chertoff, Assistant Attorney General for the Criminal Division; Larry Thompson, Deputy Attorney General; and Viet Dinh, the Assistant Attorney General for Legal Policy. On October 3, 2001, the Committee met in open session and ordered favorably reported the bill H.R. 2975, as amended, by a 36–0 vote, a quorum being present. The bill was reported to the House on October 11, 2001 (H. Rept. 107–236). On October 12, 2001, Chairman Sensenbrenner introduced H.R. 3108, which was incorporated as an amendment in the nature of a substitute into H.R. 2975. On October 11, 2001, the Senate passed its version of the bill, S. 1510, the "Uniting and Strengthening America Act of 2001," (U.S.A. Act). The House passed H.R. 2975, as amended, on October 12, 2001, by a recorded vote (Roll No. 385) of 337 yeas to 79 nays. After informal negotiations, the House and Senate incorporated the two versions into H.R. 3162, the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001," (The U.S.A. Patriot Act). H.R. 3162 also incorporated provisions of H.R. 3004, the "Financial Anti-Terrorism Act," and H.R. 3160, the "Bioterrorism Prevention Act of 2001." H.R. 3162 became Public Law 107–56 on 10/26/2001.

H.R. 3295, the "Help America Vote Act of 2002" (Public Law 107–252)

Summary.—Reports of problems in Florida and elsewhere during the 2000 election raised concerns among the American public about specific failures and the overall integrity of the election system such as: voting fraud and irregularities; problems with ballots from military and overseas voters; the electoral college; and the effect of media projections of state outcomes before the polls have closed. Previously obscure details of voting and vote counting became the focus of public attention. More than 80 bills and resolutions were introduced in the 107th Congress to make broad-reaching or more limited changes to the electoral system in the U.S. The House and Senate each passed differing versions of election reform bills. Subsequently, a House/Senate conference committee was convened and

resulted in passage of H.R. 3295, the "Help America Vote Act of 2002," in response to the concerns of Americans raised by the 2000 Presidential elections. This legislation marked the first significant reforms to our electoral system in the U.S. since passage of the Voting Rights Act of 1964.

H.R. 3295 establishes a new federal commission to replace the Office of Election Administration (OEA) of the Federal Election Commission and also to perform some new functions. Funding for the Commission is authorized for three fiscal years and members are appointed by the President. It also establishes two new boards, with broad-based state and local membership, to address various aspects of voting system standards. The main duties of the Commission include administering the grant programs, providing for testing and certification of voting systems, studying elections issues, and issuing voluntary guidelines for voting systems and other federally-mandated requirements in the bill. The Commission will not have any new rule-making authority.

H.R. 3295 provides formula grants to replace punchcard systems, lever voting machines, and other general election administration improvements. With respect to voting systems and technology, H.R. 3295 requires voters be provided with an opportunity to correct errors and sets minimum requirements for voting systems to assure voting machinery meets minimum error rates.

H.R. 3295 also provides grants to states to help ensure the disabled have access to the polling place and that the voting systems are fully accessible to those with disabilities.

The final agreement also contains new anti-vote fraud provisions, including the following: (1) states are now required to maintain a computerized statewide voter registration list; (2) voter registration applicants must specifically affirm their American citizenship; (3) new voters who register by mail must provide proof of identity at some point in the process;[38] (4) it is now a federal crime to conspire to commit voter fraud; (5) voters who do not appear on a registration list must be allowed to cast a provisional ballot, however, those ballots will be held and counted separately until verified a legal vote; (6) if a poll is held open beyond the time provided by state law, votes cast after that time will be cast provisionally and held separately; and (7) voters will be required to include either their driver's license number or the last four digits of their social security number on their voter registration form.

And finally, H.R. 3295 leaves the specific methods of implementing the requirements to the discretion of the states but requires the OEA develop voluntary guidance to help states meet the requirements. In addition, states must establish administrative procedures to receive and act on complaints with regard to violations of the requirements set out in the Act.

The Senate amendment sections within the Judiciary Committee's jurisdiction

Both the House and Senate versions of the bill provided grants to state and local governments for replacing and improving reg-

[38] Among the acceptable forms of identification are the following: utility bill, government check, bank statement, or driver's license. In lieu of the individual providing proof of identity, states may also electronically verify an individual's identity against existing state databases.

istration and voting systems and improvements in election administration. However, the method of administering the grant programs were significantly different and of primary concern to the Committee. Under the Senate-passed amendment, Title II, parts A, B, and C, required the Civil Rights Division of the DOJ to promulgate implementation guidelines for states to meet federally mandated requirements for voting systems, provisional voting, voting information requirements, and voter registration. And, if states were not in compliance with such guidelines, the Attorney General was then to bring a civil action against any noncompliant states. The conference report eliminates the role of the DOJ in administering the grant programs.

Under the final version conference report, states will now self-certify compliance with the Act, and if a state is found to be noncompliant, the DOJ will enforce the Act. In addition, section 311 of the Senate amendment was then eliminated in the conference report due to the change in responsibility for administration of the grant program from the Department of Justice to the newly created Election Assistance Commission.

Section 101 of the Senate amendment describing Voting Systems Standards became section 301 of the conference report. The significant change to the original language was to Section 101(a)(4) referring to alternative language accessibility. The conference report section 301(a)(4) made this provision consistent with the already existing requirements of section 203 of the Voting Rights Act of 1965 (42 U.S.C. 1973aa–1a).

Section 102 of the Senate amendment providing for provisional voting was kept essentially the same in the conference report, however, one significant portion was added. Section 302(c) added language that now requires that if polls are held open after the poll-closing time as a result of a court order, those votes will be held separately from other provisional ballots.

Section 104 of the Senate amendment provided for enforcement of Title I by the Assistant Attorney General of the Civil Rights Division to bring any civil actions for declaratory or injunctive relief. The role of the Civil Rights Division was eliminated from the final version, and enforcement power for the new law is found in Title IV and was given to the Attorney General. In addition, the safe harbor provision which protected states until January 1, 2010 from civil action for noncompliance with certain provision of the Act, such as provisional voting, was removed. This change now requires states to comply with the provisional voting and computerized statewide voter registration system by 2004, and to comply with the voting equipment requirements by 2006.

Sections 501 (providing for the AG to review and report on existing electoral fraud statutes and penalties and provide such a report to Congress) and 502 (providing new criminal penalties for conspiracy to deprive voters of a fair election and providing false information when registering or voting) of the Senate amendments remained in the final version of the conference report.

The House bill sections within the Judiciary Committee's jurisdiction

Section 216 of the House bill remained exactly the same in the conference report. This section provides that 28 U.S.C. chapters 161 and 171 apply with respect to the liability of the Standards Board, and the Board of Advisors, such that there is no protection from personal liability for criminal acts of a member of the Standards Board or the Board of Advisors.

Section 221 of the House bill covered voluntary election standards and made the Election Assistance Commission responsible for making periodic studies available to the public regarding election administration issues. The conference report changes this section in several ways. First, it makes election standards mandatory, and second, section 241(b)(5–13) makes the language more explicit with respect to blind and visually impaired voters, Native American or Alaska Native citizens, and other information regarding voter fraud, intimidation and eligibility.

Title IV of the House bill became Section 601 of the conference report and remained the same. Section 601 amends Part B of subtitle II of 36 U.S.C. to establish the federally chartered Help America Vote Foundation to mobilize secondary school students to participate as nonpartisan poll workers and assistants. It permits the Attorney General to bring a civil action for relief for behavior by the foundation that is inconsistent with the purposes designated in the Act.

Legislative History.—H.R. 3295, the "Help America Vote Act of 2001" was introduced on November 14, 2002, after several months of negotiation, by the Chairman and Ranking Member of the House Administration Committee, Representatives Bob Ney (R–OH) and Steny Hoyer (D–MD) (for themselves and 77 original cosponsors). A markup was held by the House Administration Committee on November 15, 2001, and the bill was reported favorably to the House by a unanimous vote of the Committee. The House Administration Committee file H. Rept. 107–325, on December 12, 2001. The following committees received referrals of H.R. 3295 at introduction: Armed Services, Science, Government Reform and Judiciary. The other three committees waived their jurisdiction, however, the Judiciary Committee held a legislative hearing on H.R. 3295 on December 5, 2001. The particular provisions of the original bill that invoked Judiciary Committee jurisdiction included certain provisions of Title II, which required statutory compliance with the Voting Rights Act of 1965 (42 U.S.C. 1973, et. seq.), as well as Title V provisions authorizing the Attorney General of the United States to bring a civil action against any state that did not satisfy the requirements of the title.

The witnesses testifying at the hearing included: Cleta Mitchell, Election Law Attorney, Foley & Lardner; Philip D. Zelikow, Executive Director, National Commission on Federal Election Reform (The Ford/Carter Commission); John R. Lott Jr., Resident Scholar, American Enterprise Institute; Lloyd J. Leonard, Legislative Director, The League of Women Voters; and Jim Dickson, Vice President of Government Affairs, American Association of People with Disabilities. Of significant concern to the Committee was the issue of voter fraud, enforcement of the proposed law by the Department of

Justice (DOJ), and enforcement of current laws involving voting rights and voting fraud.

The Armed Services, Science, Government Reform, and Judiciary Committees were discharged from further consideration of the bill on December 10, 2001. H.R. 3295 passed in the House on December 12, 2001 on a 362 to 63 vote and H.R. 3295 was referred to the Senate for consideration. The Senate passed H.R. 3295, amended, by a vote of 99 to 1 on April 11, 2002.

The Senate appointed conferees on May 1, 2002, and the House appointed conferees on May 16, 2002. The following Members from the Committee on the Judiciary were appointed as conferees for the consideration of sections 216, 221, Title IV, sections 502, and 503 of the House bill and sections 101, 102, 104, subtitles A, B and C of Title II, sections 311, 501 and 502 of the Senate amendments, and modifications committed to conference: Chairman Sensenbrenner, Steve Chabot (R–OH), and Ranking Member John Conyers (D–MI).

On July 9, 2002, the House voted to instruct conferees to accept the Senate provision on standards for polling place accessibility. Additional instructions urging conferees to reach agreement by early October were passed on September 19, September 26, and October 2, 2002. A conference agreement was announced by the managers on October 4, 2002 and the conference report, H. Rept. 107–730, was filed on October 8, 2002. It was adopted by the House on October 10, 2002 on a vote of 357 to 48, and by the Senate on October 16, 2002, on a vote of 92 to 2. The President signed the bill into law on October 29, 2002 (P.L. 107–252).

H.R. 3525, the Enhanced Border Security and Visa Entry Reform Act of 2002 (Public Law 107–173)

Summary.—Since September 11, 2001, the nation has learned how deeply vulnerable our immigration system is to exploitation by aliens who wish to harm Americans. H.R. 3525 makes needed changes to our immigration laws to fight terrorism and prevent such exploitation.

H.R. 3525 authorizes an increase of INS inspectors and support staff by at least 200 full-time employees over the levels authorized in the USA–PATRIOT Act for fiscal years 2003–06, and an increase of INS investigators and support staff by the same amount. The Act also authorizes sums necessary to increase the rate of pay for certain Border Patrol agents, inspectors and other INS personnel and necessary to train INS personnel in order to better protect U.S. borders and enforce the Immigration and Nationality Act. The Act authorizes $150 million in order for the INS to improve border security technology and to facilitate the flow of commerce and persons at ports of entry. The Act authorizes funds for the INS and State Department to improve facilities used by their employees.

The Act provides that the State Department's machine-readable visa fee shall be the higher of $65 or the actual cost, and that a $10 surcharge may be added for the issuance of a machine-readable visa in a nonmachine-readable passport.

The Act requires the President to submit to Congress a report identifying federal law enforcement and intelligence community information needed by the State Department to screen visa appli-

cants and by the INS to screen applicants for admission and to identify inadmissible and deportable aliens. This report replaces one that had been required by the USA–PATRIOT Act. Based on the findings of this report, the President shall develop and implement a plan to require federal law enforcement agencies and the intelligence community to provide the necessary information to the State Department and INS. This plan shall establish conditions on the use of this information in order to limit its redissemination; to ensure that it is used solely for its intended purposes; to secure its accuracy, security and confidentiality; to protect privacy rights of subjects; to provide for data integrity; and to protect the sources and methods of intelligence information. Misuse of information carries criminal penalties. Until the plan is implemented, federal law enforcement agencies and the intelligence community shall, to the extent practicable, share information with the State Department and the INS relevant to the admissibility and deportability of aliens.

The Act advances the dates established by the USA–PATRIOT Act by which the Attorney General and the Secretary of State must develop and certify a technology standard that can be used to verify the identity of persons applying for U.S. visas.

By the time the President begins implementing the information sharing plan, he must develop and implement an interoperable electronic data system to provide immediate access to information in databases of federal law enforcement agencies and the intelligence community relevant to determining whether to issue a visa or to determine the admissibility or deportability of an alien. As part of this system, the INS must fully integrate all its databases that process or collect information on aliens. In developing the system, the President shall consult with the National Institute of Standards and Technology and other appropriate agencies. The technology standard utilized shall be the one established by the USA–PATRIOT Act. Information in the data system shall be readily and easily accessible to consular officers, federal officials responsible for determining the admissibility or deportability of aliens, or any federal law enforcement or intelligence officer responsible for the investigation or identification of aliens. The President shall develop appropriate limitations on access to the information. The system shall have the capacity to compensate for different spelling of names in different component databases. The system shall also be searchable in a linguistically sensitive basis that accounts for variations in name formats and transliterations and that incorporates advanced linguistic and other methods. Linguistically sensitive algorithms shall be developed and implemented within certain time frames for no fewer than four high priority languages selected by the Secretary of State. Such sums as are necessary are authorized to carry out this system.

The President shall establish a Commission on Interoperable Data Sharing to provide oversight of the data system and monitor the associated privacy and other protections regarding the data.

The Attorney General may hire and fix the compensation of (up to the rate payable at level III of the Executive Schedule) necessary scientific, technical, engineering, and other analytical personnel for purposes of the development and implementation of the system.

The Act requires the Secretary of State to provide to the INS an electronic version of the visa file of each alien who has been issued a visa so that it is available to INS inspectors at ports of entry.

In developing the integrated entry and exit data system for ports of entry required by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as amended, the Attorney General and the Secretary of State shall use the technology standard required under the USA–PATRIOT Act; establish a database containing the arrival and departure data from machine-readable visas, passports and other documents; and make interoperable all security databases relevant to making determinations of inadmissibility of aliens.

The Act requires that no later than October 26, 2004, the Attorney General and the Secretary of State shall issue to aliens only machine-readable, tamper-resistant visas and other travel documents that use biometric identifiers, employing the technology standard established pursuant to the USA–PATRIOT Act. Document authentication standards and biometric identifiers standards are to be employed from among those biometric identifiers recognized by domestic and international standards organizations. By this same date, the Attorney General shall install at all ports of entry equipment to allow biometric comparison and authentication of all U.S. visas and travel documents and passports issued by visa waiver program countries, also relying on the USA–PATRIOT Act technology standard. Also by this date, each country participating in the visa waiver program shall certify, as a condition for participation in the program, that it has a program to issue to its nationals machine-readable passports that are tamper-resistant and incorporate biometric and document authentification identifiers that comply with International Civil Aviation Organization standards. On or after the October 26, 2004, date, any alien applying for admission under the visa waiver program must present a passport that meets these requirements unless the passport was issued prior to that date. Not later than 180 days after enactment, a report must be submitted to Congress assessing the actions that will be necessary to carry out these plans by the October 2004 date. The Act authorizes such sums as may be necessary to carry out these plans.

The Act requires the Secretary of State to maintain terrorist lookout committees that meet at least monthly at each U.S. mission in a foreign country to identify known or potential terrorists and to ensure that such information is brought to the attention of appropriate U.S. officials and entered into the appropriate lookout databases. The Act authorizes such sums as may be necessary to carry out these plans.

The Secretary of State shall require that all consular officers responsible for adjudicating visa applications first receive specialized training in the effective screening of visa applicants who pose a threat to the safety or security of the U.S. Consular officers should also be provided with as much nonclassified information as possible regarding such visa applicants. The Act authorizes such sums as may be necessary to carry out these plans.

The Act provides that no nonimmigrant visa may be issued to any alien who is a national of a country that is a state sponsor of

international terrorism as determined by the Secretary of State, unless the Secretary determines that such alien does not pose a threat to the safety or national security of the U.S.

The Act provides that a country can only be designated into the visa waiver program if it certifies that it report to the U.S. on a timely basis the theft of blank passports issued by that country. The Attorney General must evaluate at least every two years the effect of each participating country's continued participation in the visa waiver program on the law enforcement and security interests of the U.S. Also, if the Attorney General and the Secretary of State jointly determine that a participating country is not reporting the theft of blank passports as required, the country shall be terminated from the program. Prior to the admission of any alien under the visa waiver program, the INS must determine that the alien does not appear on any of the appropriate lookout databases available to immigration inspectors.

Once the law enforcement and intelligence data system is implemented, the Attorney General and the Secretary of State shall enter into the system the corresponding identification number for lost or stolen passports within 72 hours of receiving notification. The identification numbers of U.S. and foreign passports lost or stolen prior to the implementation of the data system shall be entered to the extent practicable.

The Act requires the President to conduct a study of the feasibility of establishing a North American National Security Program to enhance the mutual security and safety of the U.S., Canada, and Mexico. The study shall consider the feasibility of establishing a program enabling foreign national travelers to the U.S. to submit voluntarily to a preclearance procedure and of expanding reinspection facilities at foreign airports.

The Act requires that for each commercial vessel or aircraft transporting any person to any U.S. seaport or airport from abroad, the U.S. border officer at the port must be given manifest information about each passenger, crew member, and other occupant prior to its arrival. Similar departure manifests must be given when leaving the U.S. (unless the Attorney General authorizes their provision at a later date regarding certain vessels and aircraft making regular trips to the U.S.). Not later than January 1, 2003, manifest information must be transmitted electronically. No clearance papers will be granted until the manifest provisions are complied with. If a carrier refuses or fails to provide manifest information, or provides inaccurate or incomplete information, a fine of $1,000 per traveler will be assessed. The Attorney General may waive the manifest provisions upon such circumstances and conditions as he may specify. The Act requires that the President conduct a study regarding the feasibility of extending the manifest requirements to commercial land carriers.

The Act repeals the provision of immigration law requiring that arriving passengers on scheduled airline flights have their immigration processing completed within 45 minutes. However, the INS should staff ports of entry with the goal of meeting the 45 minute standard.

The Act allows U.S. border inspection agencies to conduct joint U.S.-Canada inspections projects on the international border between the two countries.

The Act modifies the electronic foreign student tracking system so that it monitors and verifies: (1) the issuance of an acceptance of a foreign student or an exchange visitor by an educational institution; (2) the transmittal of the documentation to the State Department; (3) the issuance of a visa to such alien; (4) the admission into the U.S. of the alien; (5) the notification of the institution that the alien has been admitted to the U.S.; (6) the enrollment of the student or participation in the exchange program; and (7) any change in institution by the alien or termination of studies or participation.

Institutions must report within 30 days of a deadline for an alien registering for classes or commencing participation in an exchange program any failure of the alien to enroll or to commence participation. Not later than 120 days after the date of enactment, and until the electronic foreign student tracking system (as here amended) is fully implemented, a transitional program must be in place to provide much of this information.

Not later than two years after enactment, and every two years thereafter, the INS shall conduct a review of the institutions certified to receive aliens under the student and exchange visitor nonimmigrant visa programs. The review shall determine the institutions' compliance with the record keeping and reporting requirements of the visa programs and of the electronic foreign student tracking system. Also, the Secretary of State shall conduct similar reviews of entities designated to sponsor exchange visitors. Material failure of an institution or entity to comply shall result in suspension for at least one year, or termination of the institution's approval to accept students or to sponsor exchange visitors.

Finally, the Act extended to October 1, 2002, the deadline by which only the biometric border crossing identification cards required by the IIRIRA will be accepted. See discussion of H.R. 2276.

Legislative History.—On December 19, 2001, Chairman F. James Sensenbrenner introduced H.R. 3525. On December 19, 2001, the House passed H.R. 3525 under suspension of the rules, as amended, by a voice vote. On April 18, 2002, the Senate passed H.R. 3525, as amended, by a vote of 97–0. On May 8, 2002, the House passed H.R. 3525, as amended, by the Senate by a vote of 411–0 with 2 present. On May 14, 2002, the President signed H.R. 3525 into law (Public Law No. 107–173). See H. Res. 365.

H.R. 3925, the "Digital Tech Corps Act"

Summary.—Representative Tom Davis introduced H.R. 3925, the "Digital Tech Corps Act," on March 12, 2002. The bill establishes an employee exchange program for information technology management personnel between the Federal Government and the private sector. H.R. 3925 provides Federal employees throughout the Federal Government with additional on-the-job training and education. Additionally, the bill will enhance the ability of Federal agencies to attract and retain quality information technology experts.

H.R. 3925, the "Digital Tech Corps Act of 2002", is in response to a growing concern that the Federal Government is unable to at-

tract and retain quality information technology experts. This problem is magnified with the increased use of technology throughout the Federal Government. The Government Accounting Office (GAO) found that the Federal Government faces a substantial human capital shortage that is estimated to intensify because 34 percent of the Federal workforce is eligible to retire in the next 5 years. This shortfall is even worse for the information technology fields. When a GAO official testified before the Government Reform Committee last summer on the earlier version of the bill, GAO explained that "estimated that fifty percent of the government's technology workforce will be eligible to retire by 2006."[39] Information technology is one of the top priorities for the Nation in all respects including national security, law enforcement and economic growth. This legislation addressed the human resource issues.

Legislative History.—The Committee on Government Reform reported the bill, as amended, favorably on March 14, 2002. The legislation was then referred to the Committees on the Judiciary and Ways and Means for a 1-day referral on March 18, 2002 and that referral was extended to April 9, 2002. The Committee on the Judiciary did not hold hearings on H.R. 3925, the "Digital Tech Corps Act of 2002." On March 20, 2002, the Committee met in open session and ordered favorably reported the bill, as amended, by voice vote, a quorum being present. The bill was reported to the House on April 9, 2002 (H. Rept. 107–379, Part II). On April 10, 2002, the bill passed the House by voice vote. No further action was taken on the bill, H.R. 3925, during the 107th Congress.

H.R. 5005/H.R. 5710, the "Homeland Security Act of 2002" (Public Law Number 107–296)

Summary.—The United States faces increasingly diffuse threats to its internal security. Given the overwhelming superiority of U.S. military power, hostile nations and terrorist organizations increasingly employ nonconventional methods to threaten the American people and institutions. A basic and fundamental role of the federal government under our Constitution is to protect the American people from domestic and foreign threats. Currently, the United States does not possess a coordinated assessment, reduction, and response program to protect the American homeland against these increasingly diverse threats. Federal antiterrorism and homeland defense responsibilities are dispersed over more than 22 departments and agencies throughout the federal government.[40]

The terrorist attacks on the World Trade Center and the Pentagon took more than 3,000 lives, caused approximately $100 billion in economic losses, triggered U.S. military intervention in Afghanistan to topple the Taliban regime, and led to passage of an historic overhaul of federal law enforcement policies and priorities culminating in the enactment of the PATRIOT Act.[41] The events of September 11th, 2001 will reverberate for many years, if not dec-

[39] H.R. Rep. No. 107–379, pt. 1, at 6.

[40] David. M. Walker, Comptroller General, General Accounting Office, Combating Terrorism, Selected Challenges and Related Recommendations, Report to Congressional Committees, September 20, 2001, GAO–01–822, at 5.

[41] Pub. L. No. 107–56, 115 Stat 272 (codified as amended in scattered sections of 18 U.S.C.) (2001).

ades.[42] These events also lent impetus to House passage of legislation to tighten security at America's airports,[43] reform the Immigration and Naturalization Service,[44] and to enhance border security.[45]

JUDICIARY COMMITTEE AND HOMELAND SECURITY

The creation of a Department of Homeland Security overwhelmingly implicates the jurisdiction of the Committee on the Judiciary. House Rule X provides the Judiciary Committee with jurisdiction over "subversive activities affecting the internal security of the United States."[46] The Committee also has jurisdiction over civil and criminal judicial proceedings.[47] As a result, the Committee has jurisdiction over federal law enforcement activities undertaken by a number of federal departments and agencies, including the United States Secret Service, Federal Bureau of Investigation, and the Immigration and Naturalization Service of the Department of Justice. The proposed Department's central, predominate purpose is to assess, prevent, and respond to terrorism and other threats affecting America's internal security. The Committee also has exclusive jurisdiction over the nation's immigration and naturalization laws,[48] as well as the federal administrative practice and procedure which governs federal agencies.[49] In addition, the proposed Department would incorporate a number of federal agencies over which the Judiciary Committee presently exercises exclusive legislative and oversight responsibilities. The centrality of the newly established Department's law enforcement mission necessitates careful consideration by this Committee.

Departmental components transferred by H.R. 5005 (as introduced) to the Department of Homeland Security within the jurisdiction of the Judiciary Committee

Immigration and Naturalization Service, including the Border Patrol

Section 402 of H.R. 5005 would have transferred all operational assets and control over the Immigration and Naturalization Service to the new Department's Border and Transportation Security Division. Transferring the Immigration and Naturalization Service (INS) raises a number of critical questions. The proposal vests the Secretary of the new Department with authority to regulate the issuance of entry visas at United States diplomatic or consular offices overseas "through the authority of the Secretary of State." As

[42] See Michael E. O'Hanlon, et. al, Protecting the American Homeland, A Preliminary Analysis, The Brookings Institution, Brookings Institution Press, 2002 at 1, visited June 23, 2002), <http://www.brook.edu/dybdocroot/fp/projects/homeland/homeland.htm.>

[43] "Air Transportation Safety and System Stabilization Act," Pub L. No. 107–42, 115 Stat. 230 (2001).

[44] H.R. 3231, the "Barbara Jordan Immigration Reform and Accountability Act," 107th Congress (2002), (passed the House of Representatives, April 25, 2002).

[45] "Enhanced Border Security and Visa Entry Reform Act of 2002," Pub. L. No. 107–173, 116 Stat 543 (2002).

[46] See House Rule X (k)(18), Rules of the House of Representatives; see also Judy Schneider, House and Senate Committee Organization and Jurisdiction: Considerations Related to Proposed Department of Homeland Security, Congressional Research Service, June 10, 2002, RL31449, <http://www.congress.gov/erp/rl/pdf/RL31449.pdf>.

[47] House Rule X (k)(1).

[48] Id. at (k)(8).

[49] Id. at (k)(2).

a result, the Department of State would continue to exercise authority over the issuance of visas by United States embassies and consulates.

United States Secret Service

Section 720 of H.R. 5005 transfers the United States Secret Service to the new Department. However, the bill specifies that the Secret Service shall be maintained as a distinct entity with the new Department. The Committee on the Judiciary has authorizing jurisdiction over the Service. The bill maintains the present appointment of the Director of the Secret Service by the President, but transfers operation control of the Service from the Department of the Treasury. The measure maintains the security role the Secret Service has begun to provide at national security events, and retains the Service's core mission of protecting the President and his family. Crime prevention is central to the mission of the Secret Service. Under applicable statutes, the Secret Service engages in several law enforcement functions, such as anti-counterfeiting,[50] threats against the President or his successors,[51] credit card fraud,[52] computer crimes,[53] and fraud against financial institutions.[54] The Secret Service's core law enforcement functions would be maintained under the President's proposal.

National Infrastructure Protection Center, Federal Bureau of Investigation

Section 202 of H.R. 5005 would have transferred operational control of the National Infrastructure Protection Center (NIPC) of the F.B.I. to the new Department. NIPC, was established in 1998 to ensure coordination among intergovernmental and private organizations to protect against terrorist threats to critical infrastructures.[55] NIPC's mission is to serve as the federal government's focal point for threat assessment, warning, investigation, and response for threats or attacks against critical facilities, including telecommunications, computer, energy, banking and finance, water systems, government operations, and emergency services. A significant part of its mission involves establishing mechanisms to increase the sharing of vulnerability and threat information between the government and private industry.

On May 22, 1998 President Clinton announced two new directives designed to strengthen U.S. defenses against terrorism and other unconventional threats: Presidential Decision Directives (PDD) 62 and 63. PDD–62 highlights the growing range of unconventional threats, including "cyber-terrorism" and chemical, radiological, and biological weapons, and creates a new and more systematic approach to defending against them.[56] PDD–63 focuses specifically on protecting the Nation's critical infrastructures from

[50] 18 U.S.C. §§ 331–333 and 470–504 (2000).
[51] Id. at § 871.
[52] Id. at § 1029.
[53] Id. at § 1030.
[54] Id. at § 1344.
[55] See Federal Bureau of Investigation, National Infrastructure Protection Center, [available at: http://www.fas.org/irp/agency/doj/fbi/nipc/].
[56] Presidential Decision Directive 62, Protection Against Unconventional Threats to the Homeland and Americans Overseas, May 22, 1998.

both physical and computer-based attacks.[57] NIPC was established as a result of this Directive.

Office for Domestic Preparedness of the Office of Justice Programs, Department of Justice

The Office for Domestic Preparedness (ODP) was established by the Attorney General in 1998 to develop and implement a national program to enhance the capacity of state and local agencies to respond to incidents of domestic terrorism, particularly those involving weapons of mass destruction (WMD), through coordinated training, equipment acquisition, technical assistance, and support for Federal, state, and local exercises.[58] ODP fulfills this mission through a series of program efforts responsive to the specific requirements of state and local agencies; ODP works directly with emergency responders and conducts assessments of state and local needs and capabilities to guide the development and execution of these programs. Assistance provided by ODP is directed at a broad spectrum of state and local emergency responders, including firefighters, emergency medical services, emergency management agencies, law enforcement, and public officials. The Office for Domestic Preparedness (ODP) (formerly The Office for State & Local Domestic Preparedness) is the program office within the Department of Justice (DOJ) responsible for enhancing the capacity of state and local jurisdictions to respond to, and mitigate the consequences of, incidents of domestic terrorism.

National Domestic Preparedness Office, Federal Bureau of Investigation

Former Attorney General Janet Reno created the National Domestic Preparedness Office (NDPO) on October 16, 1998, following a stakeholders conference that brought together leading members of the emergency response community. At this meeting, stakeholders recommended that all federal WMD preparedness assistance programs be coordinated by a single office. After consultation with the National Security Council, the Federal Bureau of Investigation (FBI), and others, the Attorney General directed the Bureau to lead an interagency coordination effort now known as the NDPO.

The NDPO's federal partners include the Federal Emergency Management Agency, FBI, Department of Energy, Environmental Protection Agency, Department of Justice, Office for State and Local Domestic Preparedness Support, Department of Health and Human Services, and the National Guard Bureau. To coordinate and facilitate all federal WMD efforts to assist state and local emergency responders with planning, training, equipment, exercise, and health and medical issues necessary to respond to a WMD events. The NDPO's program areas encompass the six broad areas of domestic preparedness requiring coordination and assistance, including: Planning, Training, Exercises, Equipment, Information Sharing, and Public Health and Medical Services.

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[57] Presidential Decision Directive 63, Critical Infrastructure Protection, May 22, 1998.

[58] See United States Department of Justice, Office of Justice Programs, Office for Domestic Preparedness, Overview, [available at: http://www.ojp.usdoj.gov/odp/about/ overview.htm].

Additional federal law enforcement functions transferred by H.R. 5005 to the Department of Homeland Security

United States Coast Guard

The President's proposal transfers the Coast Guard from the Department of Transportation to the new Department of Homeland Security. With approximately 43,600 full-time uniformed and civilian personnel, the Coast Guard would be the largest federal agency absorbed into the Department. The Coast Guard is the federal government's principal maritime law-enforcement agency. It has about 37,000 active-duty uniformed personnel, about 6,000 civilian personnel, about 8,000 reserve uniformed personnel, and an annual budget of $5.702 billion.[59] It performs a variety of missions that it groups into four major roles—maritime law enforcement, maritime safety, marine environmental protection, and national defense. The Coast Guard also performs a variety of law enforcement functions, including maritime narcotics enforcement.[60]

Transportation Security Administration

The Transportation Security Administration (TSA) was created by the "Air Transportation Safety and System Stabilization Act"[61] last year. H.R. 5005 transfers TSA from the Department of Transportation to the proposed Department of Homeland Security. TSA's primary mission is to provide for the security of the civil aviation system including all domestic cargo and passenger air transportation, as well as the civil aviation infrastructure. TSA has authority to receive, assess and distribute intelligence information and assess threats to transportation facilities.[62] TSA also has authority to equip its officers with firearms and deploy federal air marshals on civilian airliners.[63]

Customs Service

H.R. 5005 transfers the Customs Service from the Department of the Treasury to the new Department of Homeland Security. While the Customs Service performs revenue and duty functions, it has broad law enforcement authority. The Customs Service is charged with interdicting a wide range of contraband (including illegal narcotics, obscene material, pirated intellectual property, etc.) at our nation's borders.[64] Federal law provides Customs officers authority to board vessels, seize property, and engage in activities which are fundamentally law enforcement in nature.

Federal Protective Services, General Services Administration

H.R. 5005 transfers Federal Protective Services (FPS) of the General Services Administration to the new Department. FPS provides security and law enforcement services to all Federal buildings, including office buildings, court houses, and border stations.[65] FPS

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[59] United States Coast Guard, Overview, <http://www.uscg.mil/overview/essence_of_the_coast_guard.htm.

[60] See 46 U.S.C. App. 1903, 14 U.S.C. § 89, 16 U.S.C. § 2409 (2000).

[61] Pub L. No. 107–42, 115 Stat. 230 (2001).

[62] 49 U.S.C. § 114(f) (2001).

[63] Id. at 44917.

[64] See 18 U.S.C. § 496 et seq. (2000).

[65] Federal Protective Services, General Services Administration, [available at: http://hydra.gsa.gov/pbs/redirectfps.htm].

personnel responding to criminal incidents and other emergencies, conduct physical security surveys, and coordinate a comprehensive program for occupants' emergency plans. FPS agents exercise a range of law enforcement responsibilities, and exercise considerable police powers.[66]

Law enforcement-related personnel issues

The new Department of Homeland Security would incorporate law enforcement personnel from a number of existing agencies. Disparate pay scales and retirement policies among law enforcement personnel who would do similar work within the new Department of Homeland Security might threaten to erode employee morale and jeopardize the success of the new Department's law enforcement mission. While not directly within the jurisdiction of the Committee on the Judiciary, a harmonized pay schedule for law enforcement personnel might help ensure the success of the new Department.

JUDICIARY COMMITTEE AMENDMENTS TO H.R. 5005

On July 10, 2002, the Judiciary Committee held a legislative markup on H.R. 5005. A summary of the key provisions reported by the Committee, as well as a description as to whether these amendments became part of the homeland security legislation (H.R. 5710) ultimately signed into law is contained below.

Immigration Enforcement and Services Amendments

The Committee recommended the incorporation of many of the immigration-related structural reform provisions contained in H.R. 3231, the "Barbara Jordan Immigration Reform and Accountability Act," which passed the House by a vote of 405–9. Like H.R. 3231, the Committee recommended the abolition of the Immigration and Naturalization Service (INS). In addition, the amendment retains H.R. 3231's requirements concerning: the Ombudsman; the Citizenship Office; the requirement to utilize Internet-based technology to promote administrative efficiency; pilot initiatives for reducing administrative backlogs; voluntary separation incentive payments; the authority to conduct a demonstration project relating to disciplinary action of immigration officers; the managerial rotation program; and an assessment of shifting demands presented by fluctuating immigration needs. These provisions were contained in H.R. 5710.

Separation of Immigration Enforcement from Immigration Services

The Committee recommended establishing the Bureau of Border Security (designated Bureau of Immigration Enforcement in H.R. 3231) within the Department of Homeland Security's office of Border and Transportation Security (renamed the division of Enforcement and Security), while establishing the Bureau of Citizenship and Immigration Services in the Department of Justice. The Bureau of Border Security recommended by the amendment would be nearly identical to the enforcement bureau created by H.R. 3231,

[66] 40 U.S.C. § 318 (2000).

the "Barbara Jordan Immigration Reform and Accountability Act of 2002," which passed the House on April 25, 2002, by a vote of 405–9. The organization for the Bureau of Citizenship and Immigration Services, is also very similar to the services bureau contained in H.R. 3231. Finally, the Committee amendment would have created an Assistant Attorney General for Citizenship and Immigration Services who would report to the Deputy Attorney General.

These organizational reforms were intended to address widely-recognized, systemic "mission overload" problems within the INS, while helping to ensure that immigration services will receive the resources necessary to professionally respond to the needs of legal immigrants. By separating immigration enforcement from immigration services and elevating the status of immigration services within the Justice Department, the amendment would have given legal immigration services the focus and attention they deserve. Maintaining immigration services in the Justice Department would also have promoted a closer examination of the financial needs of the service bureau to improve immigration services than if the component resided in the Department of Homeland Security.

With respect to immigration enforcement, the Committee recognized that several enforcement functions of the INS, such as inspections and the Border Patrol, are consistent with enforcement activities performed by Customs and other border components. The Committee recommended that these units should be consolidated as a border security unit, which is an integral part of the Department of Homeland Security. Therefore, the Committee recommended that the immigration enforcement unit be transferred to DHS and established as the Bureau of Border Security within the Border and Transportation Security division (renamed the division of Enforcement and Security).

With the proposed transfer of immigration enforcement and services functions to two separate Departments, the Committee considered it essential that the enforcement and service bureaus communicate effectively with one another. Many aliens must interact with both immigration services and enforcement officers; this overlap is unavoidable. Accordingly, the Committee recommended the creation of a liaison in each bureau to communicate with the other bureau. To ensure that the two bureaus share information and coordinate their efforts, each liaison would be required to create a common information system to ensure common access to information technology, databases, records, files, and other administrative resources. Currently, the INS has chronic administrative and organizational problems, often misplacing or losing applications and other paperwork. Sending and receiving paper files between the two Departments would only have compounded the problem. The Committee Amendment, like H.R. 3231, required the Attorney General to establish an Internet-based system so that aliens may apply for benefits and check the status of their applications online. The INS must move away from its antiquated paper filing system. Dividing the INS between DHS and the Justice Department would have facilitated movement toward an electronic filing system so that both the service and enforcement bureaus can easily access and maintain the integrity of alien files. Most importantly, these changes would ensure that fewer files are lost. The final version of home-

land security legislation signed into law by the President placed both immigration services and enforcement functions within DHS to help facilitate the coordination of immigration services and enforcement. However, both functions retain the essential independence that they were given in H.R. 3231 and H.R. 5005.

Office of Children's Affairs

With respect to the Office of Children's Affairs, the Committee amendment transferred the same functions created in H.R. 3231 to the Director of the Office of Refugee Resettlement within the Department of Health and Human Services. These functions include "unaccompanied alien childrens" care and placement that were exercised by the INS Commissioner prior to the effective date of the bill; coordinating and implementing the law and policy for unaccompanied alien children who come into federal custody; making placement determinations for all unaccompanied alien children in federal custody; identifying and overseeing the infrastructure and personnel of facilities that house unaccompanied alien children; annually publishing a state-by-state list of professionals or other entities qualified to provide guardian and attorney services; maintaining statistics on unaccompanied alien children; and reuniting unaccompanied alien children with a parent abroad, where appropriate. H.R. 5710 transfers to the Department of Health and Human Services' Office of Refugee Resettlement Director functions under the immigration laws with respect to the care of unaccompanied alien children that were performed by the Commissioner of the INS. The Act does not alter or affect substantive immigration law with regard to unaccompanied alien children in the United States.

The Committee amendment also provided the Assistant Secretary of the Bureau of Border Security the responsibility for collecting information relating to nonimmigrant foreign students and other exchange program participants, including the Student and Exchange Visitor Information System, and using such information to carry out the enforcement functions of the bureau.

Crime, terrorism and law enforcement amendments

The Committee recommended the statutory definition of terms which are critical to the effective functioning of the proposed Department. The definition of critical infrastructures was based up Presidential Decision Directive 63. The definition of terrorism was derived from 18 U.S.C. § 2331 as amended by the PATRIOT Act of 2001. The Committee recommended clarification of these terms to provide guidance and consistency to the Department. The final version of the bill contained similar definitions to those recommended by the Committee. The Committee also defined crisis management and consequence management to better delineate the functions of the new Department. "Crisis management" includes measures to identify, acquire and plan the use of resources needed to anticipate, prevent, or resolve a threat or act of terrorism. In contrast, "consequence management" is primarily concerned with the response and coordination of relief activities after an attack occurs. There is a clear and vital distinction between crisis and consequence management and this distinction must not be lost in the creation of the new Department. The final version of the bill that

became Public Law 107–296 did not include the crisis and consequence management definitions.

The Act did, however, include a structural change to the Department that clarified the importance of training both in crisis and consequence management. The Committee recommended modifying the provisions of H.R. 5005 that would transfer all of functions of the Federal Emergency Management Agency (FEMA) to the new Department. This is because FEMA's main mission as a consequence management agency is to respond to natural disasters. In most fiscal years, 75 to 95 percent of FEMA's budget is directed towards disaster relief assistance. Transferring FEMA in its entirety to DHS would detract from the agency's core mission. A terrorist attack is a federal crime and a crisis event, which requires a response different from that of a natural disaster. In addition, transferring all of FEMA to the new Department would divert FEMA from its vital and highly effective disaster relief role.

The Judiciary Committee's recommendation to maintain FEMA as a separate federal agency obviated the need for an Under Secretary for Emergency Preparedness and Response. Thus, the Committee recommended the elimination of the Under Secretary for Emergency Preparedness and Response, and the transfer of its remaining functions to the Undersecretary for Border and Transportation Security. To reflect the centrality of law enforcement to this component, the Judiciary Committee recommended the title of the Undersecretary for Border and Transportation Security to the Under Secretary for Enforcement and Security. The Committee believed that this change properly reflected the comprehensive enforcement and security functions of this division, while acknowledging the primacy of other law enforcement functions and responsibilities which would be transferred. For example, the Coast Guard, Customs Service, and Border Patrol are charged with enforcing federal laws pertaining to drug interdiction, child pornography, intellectual property, and illegal immigration.

In addition, the Committee concluded that FEMA did not belong at Homeland Security Department because directors of FEMA explicitly refused to provide first responders with training and assistance in crisis management/law enforcement functions. For example, in a March 13, 2002, letter to Chairman Sensenbrenner, the Director of FEMA stated that FEMA would not handle crisis management or law enforcement training, technical assistance, exercises, and equipment. The Director asserted that: "While FEMA will coordinate grants and assistance to first responders, it will not assume any law enforcement functions, nor will FEMA provide law enforcement training—training or investigative techniques, evidence collection techniques * * *". State and local emergency responders must receive crisis management training as it is an essential component of an effective, coordinated homeland security strategy.

As reported by the Judiciary Committee, H.R. 5005 made the Under Secretary for Enforcement and Security responsible for training and coordinating state and local emergency responders in both crisis and consequence management. The final bill included this recommendation, but still transferred FEMA into the new Department.

However, the final bill included the Committee's recommendation to separate FEMA's Office of National Preparedness (ONP) and transfer its functions to the Under Secretary for Border and Transportation Security. ONP's primary focus is to provide training and technical assistance for first responders in consequence management following a terrorist attack. Transferring ONP to the Border and Transportation Security Division from FEMA augments other training and emergency assistance functions transferred to new Department and ensures that DHS serves all first responders through training and assistance in both consequence and crisis management to be adequately prepared for today's terrorist threat.

The final version of the bill also included, as recommended by the Committee, the transfer of the Office for Domestic Preparedness (ODP) from the Department of Justice to the Under Secretary for Border and Transportation Security instead of the Undersecretary for Emergency Preparedness and Response. Placing ONP and ODP together under the law enforcement division of the Department ensures a centralized crisis and consequence management function at the new Department.

As introduced, H.R. 5005 proposed the transfer of the Secret Service to DHS while preserving the Service as a "distinct entity." The Committee recommended streamlining and focusing the proposed Department by transferring Secret Service to the Department of Justice rather than DHS. The Judiciary Committee is the authorizing Committee for the Secret Service and concluded that the Service does not properly belong at DHS. Crime prevention and law enforcement are central to the mission of the Secret Service. The Secret Service is charged with enforcing several federal statutes relating to counterfeiting, threats against governments officials such as the President and Vice President, credit card fraud, computer crimes, and fraud against financial institutions. Furthermore, unlike nearly all of the law enforcement agencies H.R. 5005 would transfer to DHS, the Service is not a border or transportation security agency. Finally, while the Service coordinates with federal and state agencies when providing security for national events, these activities comprise a fraction of its overall responsibilities. The Act, however, transferred the Secret Service to the Department of Homeland Security as originally proposed.

The Committee recommended transferring the Federal Law Enforcement Training Center (FLETC) from the Treasury Department to the Justice Department. FLETC was established in 1970 to provide an interagency law enforcement training program to train federal, state, local, and foreign law enforcement entities. FLETC's training curriculum closely resembles that provided by the Federal Bureau of Investigation. Its basic training course provides instruction in criminal investigation to uniformed law enforcement officers who possess authority to carry firearms and effect arrests. FLETC's transfer to the Department of Justice assures a greater level of consistency and coordination of federal law enforcement training procedures under the direction of the nation's chief law enforcement officer, the Attorney General. The rationale for shifting FLETC to the Department of Justice is even more pronounced given the fact that H.R. 5005's transfer of the Customs Service from the Treasury Department to DHS would leave Treasury with

a greatly diminished law enforcement mission. The Act transferred FLETC to the Department of Homeland Security.

The final homeland security legislation also incorporated several measures which received consideration by the Committee. H.R. 5710 included H.R. 3482, the "Cyber Security Enhancement Act of 2002;" H.R. 4864, the "Anti-Terrorism Explosives Act of 2002;" and H.R. 4598, the "Homeland Security Information Sharing Act." Additionally, the bill included the transfer of the law enforcement functions of the Bureau of Alcohol, Tobacco and Firearms to the Department of Justice.

Protections against potential abuses by the department

Committee amendments to H.R. 5005 added important provisions to protect against the unauthorized use or disclosure of private information. All of these provisions were enacted into law. The amendments required the appointment of a Privacy Officer to ensure the Department's compliance with the Privacy Act of 1974, and required congressional oversight of such compliance. In addition to information technologies, the Privacy Officer would be responsible for assuring that all forms of technologies employed by DHS are examined to determine their impact and are not employed by DHS to erode citizens' privacy protections.

The Privacy Officer will report to Congress on privacy violations and conduct privacy impact assessments of proposed rules when deemed appropriate by the Secretary. The Committee recommended that the DHS Secretary establish procedures ensuring the confidentiality and accuracy of personally identifiable information. These procedures would require the DHS Secretary to: (1) limit the redissemination of personally identifiable information (such as Social Security numbers) to ensure that it is not used for an unauthorized purpose; (2) ensure the security and confidentiality of such information; (3) protect the constitutional and statutory rights of any individuals who are subjects of such information; and (4) provide data integrity through the timely removal and destruction of obsolete or erroneous names and information. The text of this provision is substantively identical to H.R. 4598, the "Homeland Security Information Sharing Act."

In addition, the amendment contained a clear mandate that nothing in H.R. 5005 be construed to authorize the development of a national identification card or system. Finally, the amendment required the Secretary of DHS to appoint a task force to harmonize the administrative procedures and adjudicative processes of the new Department. These recommendations were adopted by the Select Committee.

Inspector General amendments to H.R. 5005

As introduced, section 710(a) and (b) of H.R. 5005 would allow the Secretary to restrict the activities of the Inspector General (IG) when those activities involve certain information, generally related to national security. Specifically, H.R. 5005 would permit the Secretary to exercise control over the Inspector General's authority to conduct audits or investigations or to issue subpoenas if these activities would require access to information concerning: (1) intelligence, counterintelligence, or counterterrorism matters; (2) ongo-

ing criminal investigations or proceedings; (3) undercover operations; (4) the identity of confidential sources, including protected witnesses; (5) other matters the disclosure of which would, in the Secretary's judgment, constitute a serious threat to the protection of certain persons or property; and (5) other matters that, in the Secretary's judgment, would constitute a serious threat to national security. Section 710(c) requires the Secretary to notify the President of the Senate and the Speaker of the House within 30 days of the exercise of that authority.

The amendment conformed the Secretary's authority and responsibilities more closely to the corresponding provisions relating to the authority and responsibilities of other department heads at the Departments of Defense, Justice, and Treasury and the Central Intelligence Agency. First, the language amended subsection 710(a) to allow the Secretary to restrict the IG's authority when access to "sensitive" information—not just any information—concerning the specified matters is involved. Provisions governing other inspectors general specifically refer to "sensitive" information, not just any information. Second, the amendment alters and expands the reporting requirement in subsection 701(c) to require: (1) the Secretary to notify the IG and provide reasons for the exercise of the authority; (2) the IG to forward the Secretary's notification and reasons to the President of the Senate, the Speaker of the House, and appropriate committees and subcommittees of Congress; and (3) the IG to report to Congress whether he or she disagrees with the Secretary. If there is a disagreement, the amendment requires the IG to explain the reason for the disagreement in his report to Congress.

Establishment of a Deputy IG for civil rights and civil liberties

The amendment also required the Inspector General to appoint a Deputy Inspector General to examine allegations of civil rights abuses, including allegations of racial or ethnic profiling, by employees of the Department of Homeland Security. The Deputy Inspector General must advertise his or her responsibilities and report to Congress on a semi-annual basis regarding his responsibilities.

Enhanced whistleblower protections

The Manager's Amendment contained a sense of the Committee that employees transferred to DHS continue to receive existing whistleblower protections provided that sensitive intelligence or law enforcement information is not compromised. The general whistleblower statute broadly applies to federal employees. However, federal personnel are not protected by this statute if they work in an "excepted service" or are excluded from coverage by the President "based on a determination that [it] is necessary and warranted by conditions of good administration * * *". This statute specifically does not apply to the Federal Bureau of Investigation, Central Intelligence Agency, and other foreign intelligence or counterintelligence agencies. Federal employees who handle sensitive and classified law enforcement and counter-intelligence information have been extended whistleblower protections, but are subject to

special treatment because of the sensitive nature of the information that may be involved in any investigation or complaint brought forward by an employee.

The Committee's amendment ensures that when regulations are implemented by the Department they should reflect the procedures that have been adopted in other agencies to protect such information. Section 730 of the bill as introduced appeared to permit the Secretary to eliminate those protections. In response to Members questions, Governor Ridge testified that the bill was not intended to strip whistleblower protections from employees by moving them to the Department of Homeland Security. The amendment also expressed the sense of the Committee that the protections should be continued in the new Department, but that sensitive law enforcement information and intelligence need to continue to be protected as they are under current law in other agencies.

Additional amendments

Harmonization and rationalization of Department compensation

DHS will incorporate law enforcement personnel from a number of existing agencies. Disparate pay scales and retirement policies among similarly situated law enforcement personnel threatens to erode employee morale and jeopardize the success of the new Department's law enforcement mission. The Committee expresses concern that pay and benefit disparities among law enforcement agencies have resulted in substantial defections from agencies where the pay and benefit package appears to be low to agencies where the pay and benefit packages are perceived to The amendment requires the Secretary of Homeland Security, in consultation with the Director of the Office of Personnel Management, to submit a plan (within 90 days of the establishment of the Department) to the President and Congress to ensure, to the maximum extent practicable, the elimination of disparities in pay and benefits among employees (especially among law enforcement personnel) of the new Department. The Committee was particularly concerned that increased compensation provided to employees of the Transportation Security Administration (TSA) is causing qualified law enforcement personnel from the Secret Service, Capitol Hill Police, and Park Service to migrate to the TSA. This amendment was enacted into law.

Compensation harmonization

The new Department of Homeland Security would incorporate law enforcement personnel from a number of existing agencies. Disparate pay scales and retirement policies among law enforcement personnel who would do similar work within the new Department of Homeland Security threatens to erode employee morale and jeopardize the success of the new Department's law enforcement mission. The Manager's Amendment will require the Secretary of Homeland Security, in consultation with the Director of the Office of Personnel Management, to submit a plan (within 90 days of the establishment of the Department) to the President and Congress to ensure, to the maximum extent practicable, the elimination of dis-

parities in pay and benefits (especially among law enforcement personnel) among employees of the new Department. This amendment was enacted into law.

Legislative History.—On June 18, 2002, President Bush transmitted his legislative proposal to create a Department of Homeland Security to Congress. On June 19, 2002, the House of Representative passed House Resolution 449 to establish a Select Committee on Homeland Security to guide consideration of the President's homeland security proposal. The Select Committee consisted of five Republicans and four Democrats, and was chaired by Majority Leader Richard Armey. Other majority Committee members were: Rep. Tom DeLay; Rep. J.C. Watts, Jr.; Rep. Deborah Pryce; Rep. Rob Portman. The four minority members included: Rep. Nancy Pelosi; Rep. Martin Frost; Rep. Robert Menendez; and Rep. Rosa L. DeLauro.

On June 24, 2002, Majority Leader Armey introduced H.R. 5005, the Homeland Security Act of 2002, which represented the President's homeland security proposal. The bill was referred to several House Committees. On June 26, 2002, the Committee on the Judiciary held a legislative hearing on H.R. 5005. Homeland Security Director Tom Ridge was the sole witness. Several Judiciary Subcommittees, including the Subcommittee on Immigration, Border Security and Claims, Crime, Terrorism, and Homeland Security, Courts, Commercial and Administrative Law, and Courts, the Internet and Intellectual Property also conducted hearings on H.R. 5005.

On July 10, 2002, the Judiciary Committee held a legislative markup on H.R. 5005. Chairman Sensenbrenner and Ranking Member Conyers offered a Managers' Amendment which was reported by the Committee to the Select Committee on Homeland Security. Several additional amendments were also reported by the Committee. The Select Committee aggregated the recommendations of the authorizing committees with jurisdiction over creation of the Department and reported an amended version of the bill to the Full House on July 24, 2002. On July 26, H.R. 5005 as amended passed the House by a vote of 295–135. Differences between House and Senate-passed homeland security legislation were resolved in a compromise bill (H.R. 5710), which passed the House on November 13, 2002, by a vote of 299–121. On November 19, 2002, the Senate passed H.R. 5005 with amendment (H.R. 5710) by a margin of 90–9. The House agreed to these Senate amendments on November 22, 2002. On November 25, 2002, the bill became Public Law Number 107–296 after receiving the signature of the President.

H. Res. 193, requesting that the President focus appropriate attention on the issues of neighborhood crime prevention, community policing, and reduction of school crime

Summary.—H. Res. 193 expressed the sense of the House of Representatives that the President focus attention on the issues of neighborhood crime prevention, community policing, and reduction of school crime by delivering speeches, convening meetings, and directing his Administration to make reducing crime an important priority, specifically by issuing a proclamation calling on the people

of the United States to conduct appropriate ceremonies, activities, and programs to demonstrate support for "National Night Out". Furthermore, H. Res. 193 demonstrated that Congress supports the goals and ideas of "National Night Out", a nationally coordinated community event which attempts to combat crime elements through education, planning, and outreach. National Night Out began in 1984, with 400 communities and 2.5 million people involved. This figure expanded yearly, reaching over 9,500 communities and 32 million people in 1999.

National Night Out provides information, educational materials, and technical assistance for the development of year-long community-police partnerships that can reduce crime, violence, and substance abuse at the community level. Coordinated by local law enforcement and trained volunteers, National Night Out events are designed to engage neighborhoods in local crime and drug-abuse prevention activities through a multitude of local events, such as block parties, cookouts, parades, contests, youth events, and seminars. In addition, as part of National Night Out, individuals participate in Project 365, a program that includes the cleanup of local parks, the removal and prevention of graffiti, the establishment of domestic violence and homeless prevention initiatives, and an increase in the number of Neighborhood Watch groups and crime prevention programming in multifamily housing areas. Through these activities, National Night Out generates community support for crime and drug-abuse prevention activities, as well as a high level of community participation. This opportunity helps to establish a much needed relationship among neighborhood residents and local law enforcement personnel.

Legislative History.—On July 16, 2001, H. Res. 193 was introduced by Representative Stupak of Michigan, and subsequently referred to the Committee on the Judiciary. On July 24, 2001 the Committee ordered reported the bill favorably to the House without amendment by a voice vote. On July 26, 2002 the Committee filed the report, H. Rept. 107–167. On August 2, 2002, the House passed the resolution agreeing without objection.

H. Res. 417, recognizing and honoring the career and work of Justice C. Clifton Young

Summary.—C. Clifton Young has served in public office since 1950, when he first took office as the Washoe County Public Administrator. Two years later, Young was elected as the Representative of Nevada in the United States House of Representatives, where he served for two terms, never missing a vote. Justice Young went on to serve in the Nevada Senate for 14 years prior to being elected to the Nevada Supreme Court in 1984, serving his community in that capacity for 18 more years, with his retirement occurring in the fall of 2002. Throughout his career, Young had remained active in the personal aspects of his life as well. Jane Hempfling, his wife of nearly 50 years, and he have raised their five children together. Additionally, Young was active in the YMCA, United Way, and was elected and served two terms as President of the National Wildlife Foundation.

Legislative History.—On May 14, 2002, H. Res. 417 was introduced by Representative Gibbons of Nevada, and subsequently re-

ferred to the Committee on the Judiciary. On June 19, 2002 the Committee ordered reported the bill favorably to the House without amendment by a voice vote. On July 16, 2002 the Committee filed the report, H. Rept. 107–582. On October 1, 2002, the House passed the bill on motion to suspend the rules and agree to the resolution by voice vote.

H. Con. Res. 225, expressing the sense of the Congress that, as a symbol of solidarity following the terrorist attacks on the United States on September 11, 2001, every United States citizen is encouraged to display the flag of the United States

Summary.—On September 13, 2001, two days after the attacks of 19 hijackers on American soil, Congress passed a symbolic resolution that encouraged Americans to display the flag of the United States. On September 11, 2001, terrorists hijacked and destroyed four commercial aircraft, crashing two of them into the World Trade Center in New York City, and crashing another aircraft into the Pentagon outside Washington, DC. Another plane crashed in a field in Somerset county, just outside of Pittsburgh, Pennsylvania. Thousands of innocent people were killed and injured as a result of those attacks, including the passengers and crew of the four aircraft, workers and visitors in the World Trade Center and the Pentagon, rescue workers, and bystanders.

The resolution established for a period of 30 days after the date the concurrent resolution was passed, that each United States citizen and every community in the Nation is encouraged to display the flag of the United States at homes, places of work and business, public buildings, and places of worship to remember those individuals who have been lost and to show the solidarity, resolve, and strength of the Nation.

Legislative History.—On September 13, 2001, the Speaker of the House, J. Dennis Hastert introduced H. Con. Res. 225. The concurrent resolution was referred to the Committee on the Judiciary and discharged on September 13, 2001. The concurrent resolution was passed by voice vote on September 13, 2001. The Senate agreed to the concurrent resolution by unanimous consent.

H. Con. Res. 227, condemning bigotry and violence against Arab-Americans, American Muslims, and Americans from South Asia in the wake of terrorist attacks in New York City, New York, and Washington, D.C., on September 11, 2001

Summary.—H. Con. Res. 227 declared the sense of the Congress that, in the quest to identify, bring to justice, and punish the perpetrators and sponsors of the terrorist attacks on the United States on September 11, 2001, the civil rights and civil liberties of all Americans, including Arab-Americans, American Muslims, and Americans from South Asia should be protected, while condemning any acts of violence or discrimination against any Americans.

Legislative History.—On September 14, 2001, H. Con. Res. 227 was introduced by Representative Bonior of Michigan, and subsequently referred to the Committee on the Judiciary. On September 15, 2001, the Committee discharged the concurrent resolution to the House without amendment. On that day, the House agreed to the resolution, without objection. On September 26, 2001, the Sen-

ate Judiciary Committee discharged the resolution by unanimous consent, and later that day the Senate agreed to the concurrent resolution without amendment by unanimous consent.

H. Con. Res. 243, expressing the sense of Congress that the Public Safety Officer Medal of Valor should be presented to the public safety officers who have perished and select other public safety officers who deserve special recognition for outstanding valor above and beyond the call of duty in the aftermath of the terrorist attacks in the United States on September 11, 2001

Summary.—H. Con. Res. 243 declared the sense of the Congress that, as the title suggests, the President should award and present a Public Safety Officer Medal of Valor to those public safety officers who were killed and to those select public safety officers who have earned special recognition for outstanding valor above and beyond the call of duty in the aftermath of the terrorist attacks in the United States on September 11, 2001.

Legislative History.—On October 4, 2001, H. Con. Res. 243 was introduced by Representative Crowley of New York, and subsequently referred to the Committee on the Judiciary. On October 30, 2001, the House agreed to the concurrent resolution by a vote of 409–0. On April 18, 2002, the Senate Judiciary Committee discharged the concurrent resolution without amendment and later that day the Senate agreed to the concurrent resolution without amendment by unanimous consent.

S. 320, Intellectual Property and High Technology Technical Amendments Act of 2001

Summary.—Introduced by Senator Orrin G. Hatch, S. 320 remedies miscellaneous technical and clerical drafting errors in the U.S. Code and the Intellectual Property and Communications Omnibus Reform Act (IPCORA), and to clarify provisions in title IV of IPCORA, the "American Inventor's Protection Act" (AIPA). This bill makes these remedial changes in four primary areas: patent law, trademark law, copyright law, and the organization of the U.S. Patent and Trademark Office (PTO).

Legislative History.—On February 14, 2001, the Senate passed S. 320 without amendment by Yea—Nay vote of 98–0. On March 8, 2001, the Committee on the Judiciary met in open session and ordered favorably reported S. 320, amended, by voice vote. On March 14, 2001, the House passed S. 320, as amended, under suspension of the rules, by voice vote. On November 15, 2001, the Senate concurred in the House amendment with an amendment by Unanimous Consent. On November 16, 2001, the message on the Senate action was sent to the House. The provisions of S. 320 were later incorporated into H.R. 2215, the "21st Century Department of Justice Appropriations Authorization Act," which is Public Law 107–273.

S. 1888, to amend title 18 of the United States Code to correct a technical error in the codification of title 36 of the United States Code

Summary.—S. 1888 amends title 18 section 2320(e)(1)(B) of the United States Code to correct a technical error in the codification

of title 36 of the United States Code. The bill strikes "section 220706 of title 36" and inserts "section 220506 of title 36".

Legislative History.—On December 20, 2001, Senator Stevens introduced S. 1888. S. 1888 passed the Senate by unanimous consent on December 20, 2001. On February 5, 2002, Congressman Cannon introduced a similar bill, H.R. 3674, which was referred to the Committee on the Judiciary. S. 1888 was referred to the House Committee on the Judiciary on January 23, 2002. On February 6, 2002, the House passed the bill under suspension of the rules by unanimous consent, clearing the bill for the President. On February 8, 2002, the bill was signed by the President. S. 1888 became Public law 107–140.

OTHER MATTERS OF THE COMMITTEE

H.R. 1, the "No Child Left Behind Act"

Summary.—H.R. 1 establishes extensive reforms and improvements in America's education system. Provisions of the bill limiting civil liability for teachers were sequentially referred to the Committee on the Judiciary. These provisions provide that no teacher in a school shall be liable for harm caused by an act or omission on behalf of the school if the teacher was acting within the scope of employment or responsibilities relating to providing educational services, and limit punitive damages and liabilities for non-economic losses.

Legislative History.—The Committee on the Judiciary discharged H.R. 1 by exchanging letters acknowledging and preserving the jurisdiction of the Committee on the Judiciary, the Committee did not conduct hearings or mark-ups on this legislation. H.R. 1 was introduced by Chairman Boehner on March 22, 2001, was referred to the Committee on Education and the Workforce, and ultimately garnered 84 co-sponsors. While H.R. 1 was favorably reported by the Committee on Education and the Workforce on May 14, 2001, relevant provisions were sequentially referred to the Committee on the Judiciary for a period not later than May 15, 2001. On May 15, 2001 the Committee on the Judiciary discharged H.R. 1 from further consideration. By a vote of 384 ayes to 45 nays, the House of Representatives passed H.R. 1 on May 23, 2001. On June 14, 2001, the Senate approved S. 1, companion legislation, on June 14, 2001 by a vote of 91 ayes to 8 nays. On December 13, 2001 a Conference Report was filed, see House Report 107–334, and was passed by the House of Representatives by a vote of 381 ayes to 41 nays. On December 18, 2001, the Senate passed the Conference Report by a vote of 87 ayes to 10 nays. On January 8, 2002, H.R. 1 was signed by President Bush and became Public Law 107–110.

Energy

H.R. 4, the Securing America's Future Energy Act of 2001

Summary.—H.R. 4 represents the first comprehensive overhaul of federal energy policy in over a decade. The legislation is intended to assure reliable and affordable access to energy, to increase United States energy independence, and to reauthorize federal programs to ensure the same. The House and Senate-passed versions of this legislation contained key differences which ulti-

mately could not be resolved by House and Senate conferees. House legislation reflected the Bush Administration's proposal to secure energy independence by permitting limited oil and gas exploration of the Arctic National Wildlife Refuge (ANWR), while the Senate version did not. The electricity provisions of the Senate-passed H.R. 4 would continue to change regulatory requirements for the wholesale electric market articulated in the Public Utility Holding Company Act (PUHCA), while the House-passed version contained no electricity provisions. Automobile and light truck fuel efficiency standards were also the subject of considerable debate in both Houses. In its version of H.R. 4, the House included language that calls for a reduction of 5 billion gallons in light-duty truck fuel consumption over the period of model years 2004–2010. The Senate version would charge the National Highway Traffic Safety Administration (NHTSA) with development of new Corporate Average Fuel Economy (CAFE) standards using the administrative procedure that, since 1996, the agency had been enjoined by Congress from initiating. Both versions of H.R. 4 include a package of energy tax cuts, primarily tax incentives (or subsidies) for qualifying energy producers and consumers. In addition, several significant provisions were contained only in the Senate-passed bill, including programs to address global climate change, loan and price guarantees for a proposed Alaska natural gas pipeline, a cutoff of oil imports from Iraq, minimum renewable energy content in motor vehicle fuel, and renewable energy requirements for electricity providers. Chairman Sensenbrenner and Representative Lamar Smith (R–TX), were appointed House Judiciary Committee conferees to H.R. 4.

Legislative History.—H.R. 4 was introduced by House Energy and Commerce Chairman Billy Tauzin on July 27, 2001. It was referred to the following House Committees: Energy and Commerce; Science; Ways and Means; Resources; Education and the Workforce; Transportation and Infrastructure; Budget; and Financial Services. On August 2, 2001, H.R. 4 passed the House by a recorded vote of 240–189. On April 25, 2002, the Senate struck all language after the Enacting Clause and inserted its own text of the legislation (S. 517) into H.R. 4, and passed the measure on April 25, 2002. House and Senate conferees met on several occasions (June 27, 2002; July 25, 2002; September 12, 2002; September 19, 2002; September 25, 2002; September 26, 2002; October 2, 2002; and October 3, 2002. Substantial differences between both Houses precluded resolution of outstanding issues before the adjournment of the 107th Congress.

H.R. 1586 and S. 1438, the National Defense Authorization Act for the year 2002

Summary.—H.R. 1586 and S. 1438 authorize appropriations for the Department of Defense for the fiscal year 2002, authorize military construction, and authorize the Department of Energy National Security. Provisions of H.R. 1586 and S. 1438 dealing with claims against the Federal government, rights of action, and Federal Prison Industries were referred to the Committee on the Judiciary.

Legislative History.—The Committee on the Judiciary conducted no hearings or markups on H.R. 2586, S. 1438 or other related legislation, and exchanged letters acknowledging and preserving the jurisdiction of the Committee on the Judiciary. H.R. 2586 was introduced by Chairman Stump on July 23, 2001, and reported by the Committee on Armed Services on September 4, 2001, see House Report 107–194. On August 31, 2001, the Committee on the Judiciary discharged relevant provisions of the bill and exchanged letters acknowledging and preserving the Committee's jurisdiction. On September 25, 2001, the House of Representatives passed H.R. 2586 by a vote of 398 ayes to 17 nays. On September 26, 2001, H.R. 2586 was received in the Senate and on June 18, 2002 was indefinitely postponed by unanimous consent. Companion legislation, S. 1438 was introduced in the Senate on September 19, 2001, and passed by the Senate, as amended, by a vote of 99 ayes to 0 nays. Provisions of S. 1417, S. 1418, and S. 1419 were incorporated as amendments during passage of S. 1438 by the Senate. S. 1438 was received by the House on October 4, 2001, and on October 17, 2001 the House struck all after the enacting clause of S. 1438, inserted lieu there of provisions of H.R. 2586, and passed S. 1438 as amended without objection and insisted on a conference with the Senate. The Senate disagreed on the House Amendment and agreed to the request for a conference. On October 17, 2001, Chairman Sensenbrenner, Congressman Smith, and Ranking Member Conyers were appointed conferees on provisions dealing with claims against the federal government; a right of action; and Federal Prison Industries. A conference on the House Amendment and S. 1438 were conducted on October 31 and November 1, 2001, and on December 12, 2001 the conference report was filed, see House Report 107–333. On December 13, 2001 the House passed the conference report by a vote of 382 ayes to 40 nays and the Senate passed the conference report by a vote of 96 ayes to 2 nays. On December 28, the conference report was signed by President Bush and became Public Law 107–107.

H.R. 718, the "Unsolicited Commercial Electronic Mail Act" and H.R. 1017, the "Anti-Spamming Act of 2001"

Summary.—Each proposal of legislation was introduced to fight the wave of unsolicited e-mails sent to the growing number of users that enjoy the Internet. One such problem is the amount of e-mail pornography distributed to users of the Internet. E-mail pornographers can obtain e-mail addresses from a number of sources, including Internet chat rooms which enables them to send millions of unsolicited pornographic e-mails to adults and children. While the term "spam" is used to encompass a number of different practices, some criminal, some annoying, and some benign. E-mail fraud, e-mail pornography, and e-mail marketing are all often erroneously lumped into the same category.

There are generally two types of fraudulent or deceptive e-mail. The first is e-mail that makes fraudulent claims, such as the typical pyramid or other get-rich-quick scheme which is intended to deceive, cheat, defraud, or swindle consumers. This type of fraud falls directly under existing laws such as section five of the FTC Act or the federal wire fraud statute. In addition, the Computer

Fraud and Abuse Act provides the Federal Government with the statutory authority to investigate and prosecute those involved in damaging computers or accessing them without authorization. The purpose of the legislation was to prevent these types of fraudulent or deceptive e-mail.

A bipartisan approach addressed two specific problems relating to unsolicited commercial electronic mail ("UCE"). First, the legislation makes it illegal to conceal the identity of the sender of the e-mail. This misdemeanor prohibition is necessary because unscrupulous individuals conceal what is known as point-of-origin, routing or header information in order to defeat the preferences and filtering mechanisms employed by Internet service providers ("ISPs") and computer users. Furthermore, those who peddle schemes to defraud individuals, such as get-rich-quick schemes, and transmit pornography via e-mail often conceal the origin of the e-mail in furtherance of their unscrupulous desire to swindle consumers or entice them to purchase pornography over the Internet. There is no legitimate reason to falsify the header information accompanying commercial e-mail.

The second problem addressed was unsolicited pornography sent via e-mail. This problem is addressed amendment offered by Representative Melissa Hart. The provision directs the Attorney General to prescribe marks to be included in all pornographic e-mail. The amendment is modeled after a long-standing postal statute, 39 U.S.C. § 3010, which mandates that marks be included on the envelope of pornographic material sent through the U.S. mail. This provision will allow users to delete pornographic material without viewing its contents and will assist parents in screening or filtering out unwanted pornographic e-mail, thereby protecting children from receiving and viewing pornography contained or accompanying e-mail. In short, a recipient of a pornographic e-mail will now have the ability to utilize technology to automatically do the equivalent of throwing out unopened junk

Legislative History.—H.R. 718 was introduced by Congresswoman Heather Wilson on February 14, 2001. H.R. 718 was referred to the Committee on Energy and Commerce and the Committee on the Judiciary. H.R. 1017 was introduced on March 14, 2002, by Congressman Bob Goodlatte and referred to the Judiciary Committee. The Committee held a legislative hearing on H.R. 718 and H.R. 1017 on May 10, 2001. Testimony was received from The Honorable Heather Wilson, U.S. Representative from the First Congressional District in New Mexico; Mr. Rick Lane, Director, eCommerce & Internet Technology, U.S. Chamber of Commerce; Mr. Marc Lackritz, President, Securities Industry Association; Mr. Paul Misener, Vice President for Global Public Policy, Amazon.com (representing Amazon.com and the National Retail Federation); and Mr. Wayne Crews, Director of Technology Studies, Cato Institute. On March 28, 2001, the Energy and Commerce Committee held a markup on H.R. 718. The Energy and Commerce Committee reported the bill with amendment, by a voice vote. On April 4, 2001, the Energy and Commerce Committee filed H. Rept 107–41 pt. I. On May 23, 2001, the Judiciary Committee held a markup on H.R. 718, and ordered reported the bill amended by voice vote. The Committee filed H. Rept. 107–41 pt. II on June 5, 2001, H.R.

718 was placed on Union Calendar and no further action was taken.

H.R. 2646, the "Farm Security and Rural Investment Act of 2002"

Summary.—H.R. 2646 is comprehensive legislation that provides fiscal policy and certain programs to the agriculture community, some of what the bill addresses are: Federal farm support, nutrition, agricultural trade and food aid, conservation, credit, marketing, rural development, and agricultural research. H.R. 2646 revisits these laws and makes changes to improve upon them. The Judiciary was granted consideration over several sections of the bill, when it was scheduled for conference (see below). In H.R. 2646, the committee has jurisdiction over sections dealing with criminal law, claims, compacts, judicial review, bankruptcy, federal courts, and duties imposed on the Attorney General. On October 4, 2001, Representative Green (WI) raised a point of order against an amendment by Representative Sherwood to permanently authorize and extend the Northeast Interstate Compact. The point of order was sustained due to rule XVI, clause 7, which states the Committee on the Judiciary has jurisdiction over the issue of compacts. Many of the current laws dealing with agriculture are evaluated periodically, revised, and renewed through an omnibus, multi-year farm bill The new law generally supersedes the previous omnibus farm bill, the Federal Agriculture Improvement and Reform Act.

Legislative History.—On July 26, 2001, Representative Larry Combest introduced H.R. 2646. On October 5, 2001, the House passed H.R. 2646, by a vote of 291–120. The Senate passed S. 1731 in lieu with an amendment by a vote of 58–40. On March 7, 2002, the Speaker appointed conferees from the Judiciary Committee: Chairman Sensenbrenner, Green (WI) and Baldwin for consideration of secs. 940–1 of the House bill and secs. 602, 1028–9, 1033–5, 1046, 1049, 1052–3, 1058, 1068–9, 1070–1, 1098, 1098A of the Senate amendment. On May 2, 2002, the House voted, 280 to 141, to approve the conference report on a new, 6-year omnibus farm bill (H.R. 2646; H. Rept. 107–244). The Senate approved the conference report on May 8, 2002 and the President signed, the "Farm Security and Rural Investment Act (FSRIA) of 2002", into law on May 13, 2002 (Pub. Law 107–171).

Terrorism

H.R. 3016, to amend the Antiterrorism and Effective Death Penalty Act of 1996 with respect to the responsibilities of the Secretary of Health and Human Services regarding biological agents and toxins, and to amend title 18, United States Code, with respect to such agents and toxins, to clarify the application of cable television system privacy requirements to new cable services, to strengthen security at certain nuclear facilities, and for other purposes

Summary.—H.R. 3016 responds to two requests from President Bush, to prepare America for its war against terrorism. The first provides for the possession and transfer of select agents posing a bioterrorism threat and the second clarifies the scope of law enforcement's ability to gain access to certain cable communications

information. Provisions dealing with the antitrust laws were referred to the Committee on the Judiciary, and the Committee on the Judiciary ultimately discharged these provisions through an exchange of letters preserving the jurisdiction of both Committees.

Legislative History.—H.R. 3016 was introduced by Chairman Tauzin on October 3, 2001 and referred to the Committee on Energy and Commerce and the Committee on the Judiciary. On October 9, 2001, H.R. 3016 was reported by the Committee on Energy and Commerce, see House Report 107–231 Part I. On October 16, 2001, the Committee on the Judiciary discharged relevant provisions and exchanged letters with the Committee on Energy and Commerce to acknowledge and preserve the jurisdiction of both Committees. On November 6, 2001, the Committee on Energy and Commerce filed a supplemental report to H.R. 3016, see House Report 107–231 Part II.

Immigration / Terrorism

H.R. 1646, the Foreign Relations Authorization Act for Fiscal Years 2002 and 2003

Summary.—H.R. 1646 authorizes appropriations for fiscal years 2002 and 2003 for the Department of State and for the Broadcasting Board of Governors which is responsible for non-military U.S. international broadcasting. The Committee on the Judiciary was appointed conferee on provisions dealing with immigration visas, extradition policy and practice, payment of anti-terrorism judgements, and certain criminal and civil penalties.

Immigration-related provisions included section 231, requiring the Secretary of State to report to the appropriate congressional committees each instance in which a consular post or the Visa Office issued an immigrant or nonimmigrant visa to an alien who is inadmissible to the U.S. based upon terrorist activity, or failed to object to the issuance of an immigrant or nonimmigrant visa to an alien, regardless of any ground of inadmissibility. The report must state the name and nationality of the alien, the issuing post, and a factual statement of the basis for issuing the visa or the failure to object.

Section 232 requires the Secretary of State to direct consular officers to deny visas to any person directly involved with the coercive transplantation of human organs or bodily tissue, unless the Secretary has substantial grounds for believing that the foreign national has discontinued involvement with, and support for, such practices. An exemption is provided if an applicant is a head of state, head of government, or cabinet-level minister, or if the Secretary determines that it would be important to the national interest of the U.S. to do so, and if the Secretary notifies the appropriate congressional committees of the waiver in writing within 30 days of issuing the visa.

Section 233 provides that State Department policy shall be to process each visa application from an immediate relative alien or a fiancé nonimmigrant alien within 30 days of receiving all necessary documents from the applicant and the INS. If the petitioner is not an immediate relative, the Department policy should be to process applications within 60 days of receiving all necessary docu-

ments. Section 243 requires the Secretary of State to submit a detailed report to the appropriate congressional committees on overseas processing of refugees for admission to the U.S., including such information as procedures for identifying particularly vulnerable refugees and the feasibility of resettling refugees based on a lengthy period of residence in a refugee camp.

Legislative History.—H.R. 1646 was introduced by Chairman Hyde on April 27, 2001, referred to the Committee on International Relations, and reported by the Committee on International Relations on May 4, 2001, see House Report 107–57. H.R. 1646 was passed by the House of Representatives on May 16, 2001 by a vote of 352 ayes to 73 nays. On May 17, 2001, H.R. 1646 was received by the Senate and referred to the Senate Committee on Foreign Relations. On May 1, 2002, the Senate Committee on Foreign Relations discharged H.R. 1646 by unanimous consent and the Senate passed H.R. 1646 by unanimous consent with an amendment and insisted on a conference. On September 12, 2002 the House agreed to a motion to disagree with the Senate amendment and agree to a conference by a vote of 382 ayes to 0 nays and the Speaker appointed Chairman Sensenbrenner, Congressman Smith, and Ranking Member Conyers conferees to relevant provisions. While concerns were conveyed between Committee staff over provisions in the jurisdiction of the Committee on the Judiciary, one provision which the Committee on the Judiciary objected to in section 233 of the conference report was not removed. This provision establishes a statutory, 30-day, time limit for processing immediate relative or K–1 visa applications by the State Department. This provision is unnecessary because the State Department already has authority to set administrative deadlines and is misguided because inflexible deadlines in reviewing visa applications will overburden an office that has demonstrated an inability to manage its current workload, and this will inevitably result in the rubber stamping of many visa applications. The conference report to H.R. 1646 was filed in the House on September 23, 2002 and in the Senate on September 24, 2002. On September 25 the House of Representatives passed H.R. 1646 by a voice vote, and on September 26, the Senate passed H.R. 1646 by a voice vote. On September 30, 2002, President Bush signed the conference report which became Public Law 107–228.

H.R. 2581, the "Export Administration Act of 2001"

Summary.—The bill provides a modern, comprehensive framework for the control of United States exports of goods and services with both civilian and military applications. It replaces the expired Export Administration Act of 1979, designed decades ago to limit the military capabilities of the now defunct Soviet Union and its Warsaw Pact allies in cooperation with the Coordinating Committee on Multilateral Export Controls (CoCom). In 1994, CoCom, a system under which the United States or any other country could exercise a unilateral veto over dual-use exports, expired. A replacement regime, the Wassenaar Arrangement, was formed 2 years later, but it permits only post-export notifications of sales of controlled items by its member countries. Provisions of the bill dealing with competition and the antitrust laws were sequentially referred to the Committee on the Judiciary.

Legislative History.—While the Committee on the Judiciary conducted no hearings or mark-ups and ultimately discharged H.R. 2581, the Committee exchanged letters acknowledging and preserving the jurisdiction of the Committee. On July 21, 2001, H.R. 2581 was introduced by Congressman Benjamin Gilman and referred to the Committee on International Relations and the Committee on Rules. On November 16, 2001, the Committee on International Relations reported H.R. 2581, see House Report 107–297 Part I; and the bill was jointly and sequentially referred to: the Committees on Agriculture; Armed Services; Energy and Commerce; Judiciary; Ways and Means; and Intelligence. On March 8, 2002, the Committee on Armed Services reported the bill, see House Report 107–297 Part II, and all other committees with jurisdiction over provisions of the bill discharged the bill. The House Judiciary Committee exchanged letters acknowledging and preserving the jurisdiction of the Committee. On March 8, 2002, the bill was placed on the Union Calender and no additional legislative activity was conducted.

Trade

H.R. 3009, the "Trade Act of 2002"

Summary.—H.R. 3009 as signed into law, incorporates five major bills: Trade Promotion Authority (TPA), Trade Adjustment Assistance (TAA), Andean Trade Promotion Authority (ATPA), Generalized System of Preferences (GSP), and the Customs Border Security Act. TPA grants the President the power to negotiate international trade agreements in consultation with Congress, while allowing Congressional approval or rejection without amendments. TAA extends temporary help to those who may have lost jobs through a trade related circumstance. ATPA and GSP provide benefits to assist Andean, Caribbean, and African regions by expanding existing trade relationships and renewing the Generalized System of Preferences through 2006 while combating the worst forms of child labor and terrorism. The Customs Border Security Act authorizes the United States Customs Service with increased funding for borders and transshipment, and provides civil immunity for good faith and reasonable inspections by customs' agents.

Legislative History.—H.R. 3009 was introduced by Representative Crane on October 3, 2001 and referred to the Committee on Ways and Means. On November 14, 2001, the Committee on Ways and Means reported H.R. 3009, as amended, see House Report 107–290. On November 16, 2001, the House of Representatives passed H.R. 3009 by voice vote and the bill was received in the Senate and referred to the Senate Committee on Finance. On December 14, 2001, the Senate Committee on Finance reported H.R. 3009 with an amendment in the nature of a substitute, see Senate Report 107–126. On May 23, 2002, the Senate passed H.R. 3009, with an amendment, by a vote of 66 ayes to 30 nays. On June 26, 2002, the House agreed to the Senate amendment to H.R. 3009 with another amendment and requested a conference. The Speaker appointed Chairman Sensenbrenner, Congressman Coble, and Ranking Member Conyers conferees on provisions dealing with law enforcement, administrative law, and civil liabilities. Also on June

26, 2002, the Senate disagreed with the House Amendment, agreed to a conference, and appointed conferees. The conference report was filed in the House on July 26, 2002 and in the Senate on July 29, 2002. While recommendations to improve language within the jurisdiction of the Committee on the Judiciary contained in the conference report were submitted to the conference, no changes were made. However, before the conference report was brought up for consideration by the House of Representative on July 27, Chairman Sensenbrenner received a letter from the United States Trade Representative pledging not to undermine U.S. antitrust or competition laws in any future free trade agreements. Shortly thereafter, the conference report was passed by the House of Representatives by a vote of 215 ayes to 212 nays. On August 1, 2002, the Senate passed the conference report by a vote of 67 ayes to 31 nays. On August 6, 2002, President Bush signed the conference report, which became Public Law 107–210.

Bioterrorism

H.R. 3448, the "Bioterrorism Preparedness Act of 2001"

Summary.—H.R. 3448, the "Bioterrorism Preparedness Act of 2001," was introduced on December 12, 2001, and referred to the Committee on Energy and Commerce. This bill would improve the ability of the United States to prevent, prepare for, and respond to bioterrorism and other public health emergencies. Under current law, a person may be punished by a fine or up to 10 years in prison for knowingly possessing a biological agent or toxin of any type or quantity that is not reasonably justified for any peaceful purpose. This offense was created to deter persons from possessing any biological agent or toxin or any quantity of a biological agent that is not absolutely necessary for a legitimate purpose. This provision is included to prevent terrorists from targeting facilities that use biological agents or toxins in their business or from stockpiling biological agents or toxins. This prohibition does not apply to governmental activity authorized under the National Security Act of 1947.

Current law also prohibits possession, receipt or transport of biological agents or toxins by certain categories of persons, many of which are forbidden to own firearms under U.S. criminal laws. Penalties for violation of this section range from a fine to up to 10 years imprisonment or both. Current law also specifies that any alien from a country recognized by the Secretary of State as supporting international terrorism is prohibited from possessing, receiving or transporting a biological agent or toxin.

The House and Senate passed different versions of this legislation. The final Conference substitute included technical changes to 18 U.S.C. § 175b and adopted the House language by providing any person who knowingly possesses a select agent without registering with the Secretary could be fined or imprisoned for up to five years, or both. The Conference substitute also provides that any person who transfers a select agent to any person one knows or has reasonable cause to believe has not registered with the Secretary of Health and Human Services could also be fined or imprisoned up to five years or both.

The Conference substitute also added language which required all persons who possess, use or transfer biological agents that have been listed as agents that pose a threat to agriculture by the Secretary of Agriculture to register with the Secretary of Agriculture. The Conference substitute provided that knowing possession of a biological agent or toxin listed by the Secretary of Agriculture without obtaining a registration is punishable by a fine or up to five years imprisonment, or both. Similarly, transfer of a biological agent or toxin listed by the Secretary of Agriculture to a person one knows or has reasonable cause to believe has not registered with the Secretary is punishable by a fine or up to five years imprisonment or both.

The Conference substitute provides additional conforming and technical amendments including providing a comma in 18 U.S.C. § 175(c); specifically describes the activities restricted persons are prohibited from engaging in under this section; referring to the correct code section for the definition of "alien"; replaces legislative language in section 176(a)(1)(A); modifies the definitions in 18 U.S.C. § 178 for "biological agent", "toxin", and "vector" to make each more accurate; and modifies 18 U.S.C. § 2332a regarding use of weapons of mass destruction to make it clear it refers to use of biological agents or toxins.

Legislative History.—The legislation passed the House on December 12, 2001. The Senate passed a substitute amendment on December 20, 2001. On February 28, 2002, the House disagreed with the Senate amendment and agreed to Conference with the Senate. The Speaker appointed members of the House Judiciary Committee as conferees on Title II. On May 21, 2002, the conference report was filed (107–481). On May 22, 2002 the Conference report was agreed to in the House. On May 23, 2002, the Conference report was agreed to in the Senate. On June 12, 2002, the legislation was signed by the President (P.L. 107–188).

Corporate Accountability

H.R. 3763, the "Sarbanes-Oxley Act of 2002."

Summary.—H.R. 3763, the "Sarbanes-Oxley Act of 2002," was introduced by Rep. Oxley (R–OH) on February 14, 2002. This bill would protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws and increasing the criminal penalties for persons who defraud shareholders of publicly traded companies.

Legislative History.—H.R. 3763 was reported to the House, with amendment, by the Committee on Financial Services on April 22, 2002 (H. Rept. 107–414). On April 24, 2002, H.R. 3763 passed the House by a recorded vote of 334 yeas to 90 nays (roll no. 110). On July 15, 2002, the Senate passed H.R. 3763 with an amendment by voice vote. The Senate insisted on its amendment and requested a conference. On July 17, 2002, without objection the House disagreed to the Senate amendment and agreed to a conference. Conference report H. Rept. 107–610 was filed on July 24, 2002. The provisions of H.R. 5118, the Corporate Fraud Accountability Act of 2002, were incorporated into H.R. 3763 by the conferees. On July 25, 2002, the House agreed to the conference report by a recorded

vote of 423 yeas to 3 nays (roll no. 348). Also on July 25, 2002, the Senate agreed to the conference report by a recorded vote of 99 yeas to 0 nays (recorded voted number: 192). H.R. 3763 was signed by the President on July 30, 2002, and became Public Law 107–204.

H.R. 3951, the Financial Services Regulatory Relief Act of 2002

Summary.—H.R. 3951 improves financial institution regulation by eliminating unnecessary and burdensome requirements, which will enhance ongoing regulatory compliance and the productivity of America's financial institutions.

H.R. 3951 provides the following regulatory improvements for national banks: (1) removes the prohibition on national and State banks expanding across State lines by opening branches; (2) allows the use of subordinated debt instruments to meet eligibility requirements for national banks to benefit from subchapter S tax treatment; (3) eliminates duplicative and costly reporting requirements on banks regarding lending to bank officials; (4) changes the exemption from the prohibition on management interlocks for banks in metropolitan statistical areas from $20 million in assets to $100 million; and (5) streamlines bank merger application regulatory requirements.

H.R. 3951 provides the following regulatory improvements for savings associations: (1) gives savings associations parity with banks with respect to broker-dealer and investment adviser Securities and Exchange Commission (SEC) registration requirements; (2) removes auto lending and small business lending limits and expands business lending limit for Federal thrifts; (3) allows Federal thrifts to merge with one or more of their non-thrift subsidiaries or affiliates, the same as national banks; (4) permits Federal thrifts to invest in service companies without regard to geographic restrictions; and (5) gives Federal thrifts the same authority as national and State banks to make investments primarily designed to promote community development.

H.R. 3951 provides the following regulatory improvements for credit unions: (1) allows privately insured credit unions to apply for membership to the Federal Home Loan Bank system; (2) expands the investment authority of Federal credit unions; (3) permits offering of check cashing and money transfer services to eligible members; (4) increases the limit on investment by Federal credit unions in credit union service organizations from 1 percent to 3 percent of shares and earnings; and (5) raises the general limit on the term of Federal credit union loans from 12 to 15 years.

H.R. 3951 provides the following regulatory improvements for Federal financial regulatory agencies: (1) provides agencies the discretion to adjust the examination cycle for insured depository institutions to use agency resources in the most efficient manner; (2) allows the agencies to share confidential supervisory information concerning an examined institution; (3) modernizes agency record keeping requirements to allow use of optically imaged or computer scanned images; (4) clarifies that agencies may suspend or prohibit individuals charged with certain crimes from participation in the affairs of any depository institution and not only the institution with which the individual is associated; and (5) allows bank exam-

iners to receive credit cards from examined depository institutions if issued under the same terms and conditions as generally offered to the public.

These regulatory improvements provide financial institutions with more resources to conduct the business of lending to consumers and will eliminate outdated and unneeded regulations. Reducing regulatory burden should lower credit costs for consumers and boost the national economy. Provisions of the bill dealing with Federal courts, claims against the United States, and the antitrust laws were sequentially referred to the Committee on the Judiciary.

Legislative History.—H.R. 3951 was introduced by Congresswoman Capito on March 13, 2002. Relevant provisions were referred to the Committees on Financial Services and the Judiciary. On June 18, 2002, the Committee on Financial Services reported, as amended, H.R. 3951 to the House, see House Report 107–516 Part I. On July 17, 2002, the Committee on the Judiciary ordered H.R. 3951 be favorably reported, as amended, to the House by a voice vote. During mark-up on July 17, 2002, amendments offered by Congressman Bachus and Congresswoman Jackson-Lee were adopted by voice vote. The Bachus amendment amends the Clayton Act to exempt credit unions from a redundant premerger notification requirement, and was adopted by voice vote. Provisions of the Hart-Scott-Rodino (HSR) Antitrust Improvements Act of 1976 (15 U.S.C. 18a) already require that certain acquired and acquiring persons—including federally insured credit unions—file an advance merger notification and report form with the Federal Trade Commission (FTC) when the value of the transaction exceeds $50 million. The Jackson-Lee amendment eliminates section 607 of H.R. 3951, which would have amended the Bank Holding Company Act of 1956, 12 U.S.C. Sec. 1849(b), and eliminated an existing minimum 15 day waiting period for bank and bank holding companies to merge with or acquire another bank or bank holding company. Currently, the Bank Holding Act provides a 30 day waiting period, which may be reduced to a minimum 15 days upon a concurrence of the Attorney General and the relevant banking agency. On July 22, 2002, the Committee on the Judiciary reported H.R. 3951 as amended, see House Report 107–516 Part II. H.R. 3951 was placed on the Union Calender but not considered by the House.

Defense

H.R. 4546/S. 1436, the "National Defense Authorization Act for Fiscal Year 2003"

Section 811. Contracting with Federal Prison Industries (FPI)

Summary.—Section 811 of the Department of Defense Authorization provides only limited relief from the monopoly Federal Prison Industries (FPI) enjoys. This section improves on what was done last year by giving the Secretary of the Department of Defense final authority over whether a product meets that agency's needs of timeliness, quality and price and eliminating the requirement for arbitration under Title 18.

Although last year's legislation was intended to require FPI to compete with the private sector for products purchased by the Department of Defense, it did not actually result in competition. The

legislation required a competitive bidding process between FPI and the private sector if FPI did not have a product that met the agency's needs for price, quality and timely delivery. However, FPI disagreed with DOD's assessment of comparability and required DOD to enter into arbitration. DOD did not have the final say as to comparability and was required to arbitrate.

Legislative History.—This legislation was referred to the House Committee on Armed Services on April 23, 2002. The Committee on Armed Services ordered this bill, as amended, favorably reported on May 1, 2002. The Armed Services Committee reported the bill to the House of Representatives on May 3, 2002 (H. Rept. 107–436). A supplemental report was filed by the Committee on Armed Services on May 6, 2002 (H. Rept. 107–436, Part II). The bill, as amended, passed the Committee of the Whole House by recorded vote, 359–58. The Senate struck the house language and substituted the language of S. 2514 as amended on June 27, 2002. Both Houses agreed to a Conference on the legislation. On July 25, 2002, the Speaker appointed conferees from the Committee on the Judiciary for sec. 811 and sec. 1033. The Conference report was filed on November 12, 2002. The conference report was agreed to in the House by voice vote on November 12, 2002. The conference report was agreed to in the Senate on November 13, 2002. The legislation was signed by the President on December 2, 2002 (P.L. 107–314).

OVERSIGHT ACTIVITIES

Pursuant to Rule X, Clause 2(d), the Committee adopted an oversight plan for the 107th Congress. The oversight plan incorporated the matters which the Committee deemed, at the beginning of the Congress, to be worthy of its attention. Some of the matters contained in the oversight plan were addressed in the context of legislative hearings. The following is a list of the oversight hearings held by the full committee. The oversight activities of the subcommittees will be discussed separately.

List of Oversight hearings

United States Department of Justice, June 26, 2001 (Serial No. 37)

Administration's draft of the "Anti-Terrorism Act of 2001", September 24, 2001 (Serial No. 39)

Direct Broadcast Satellite Service and Competition in the Multichannel Video Distribution Market, Decmber 4, 2001 (Serial No. 50)

Restructuring the INS—How the Agency's Dysfunctional Structure Impedes the Performance of its Dual mission, April 9, 2002 (Serial No. 69)

Oversight of implementation of the USA PATRIOT Act

On June 13, 2002, Chairman F. James Sensenbrenner, Jr., and Ranking Member John Conyers Jr., sent a joint letter to Attorney General John Ashcroft, posing 50 questions, many with sub-questions, regarding the implementation of the USA PATRIOT Act, Pub. L. 107–56 (the "Act") , which was enacted into law on October 26, 2001 in the wake of the September 11, 2001 attacks on the World Trade Center, the Pentagon, and on the aircraft that

crashed in Pennsylvania. The Committee's questions sought information primarily related to the use of new investigative tools, information sharing between law enforcement and intelligence officials, and the impact of new immigration provisions. The Committee's letter requested a response by July 9, 2002.

On July 26, 2002, the Department of Justice submitted responses to 28 of the Committee's questions. Of those 28 responses, six responses were delivered to the House Permanent Select Committee on Intelligence ("HPSCI") because, according to the Department of Justice, they contained classified material. On August 26, 2002, the Department of Justice submitted its responses to the remaining questions, and on October 4, 2002, the Department of Justice submitted further responses clarifying and supplementing earlier answers.

Following the submission to HPSCI of answers to questions posed by the Judiciary Committee, the Committee was concerned that it would not have adequate access to those answers to perform meaningful oversight. The Department of Justice asserted that the answers were submitted to HPSCI pursuant to twenty-four years of precedent regarding information relating to the Foreign Intelligence Surveillance Act that was not statutorily required to be provided to the Judiciary Committee. Assistant Attorney General for Legislative Affairs Dan Bryant, accompanied by two Deputy Assistant Attorney Generals, and representatives from the Office of the Deputy Attorney General, the Office of Legal Counsel, the Office of Intelligence and Policy Review, and the Federal Bureau of Investigation, told Committee staff that although the Department of Justice was bound by the precedent, it did not object to Judiciary Committee access to these answers. He suggested that the Committee seek access to these materials through negotiation with HPSCI that could address the equities of the intelligence community beyond the Department of Justice. The Committee held further discussions with HPSCI and the White House regarding those equities.

On October 17, 2002, the Chairman issued an announcement regarding the Department of Justice's responses and the results of the discussions regarding access to the classified answers. The Chairman's announcement included the following statement:

> I am satisfied that the Department of Justice has produced answers that are sufficient for the Committee's oversight and legislative efforts at this time. These responses provide basic information regarding implementation of the USA–PATRIOT Act ("Act") that will permit the Committee to understand how it is working in practice and to continue oversight of the use of these new authorities in the future.
>
> We have also resolved, in consultation with the House Permanent Select Committee on Intelligence ("HPSCI"), the handling of classified material related to the use of surveillance and search authorities under the Foreign Intelligence Surveillance Act ("FISA"), which was substantially amended by the Act. The Judiciary Committee will have reasonable limited access, subject to appropriate security procedures, to FISA information through HPSCI.

The Committee will work with HPSCI in the 108th Congress to structure and formalize this arrangement in the Rules of the House. The House Appropriations and Armed Services Committees currently have access to certain classified materials under House Rules to carry out their responsibilities. Judiciary Committee access to FISA materials reflects the greater cooperation and coordination between law enforcement and intelligence that is at the heart of the USA PATRIOT Act.

Access to these materials is critical to carrying out the Committees responsibilities to ensure that the use of the authorities under the Act (1) is effective at helping to prevent terrorism through effective law enforcement and intelligence investigations, (2) results in the appropriate balance between law enforcement and intelligence investigations, and (3) respects constitutional rights, especially those embodied in the First, Fourth, and Fifth Amendments to the U.S. Constitution.

The Committee's inquiry resulted in the disclosure of the following significant information regarding the use of the authorities in the Act:

Through June 30, 2002, the Department had shared, under section 203 of the Act, grand jury information consisting of foreign intelligence information 40 times from 39 grand juries in 38 districts with other federal officials.

While the Committee's inquiry was pending, the Attorney General issued procedures under sections 203 and 905 for sharing information with intelligence officials from a criminal investigation, including grand jury or Title III wiretap information, that identifies a United States citizen or a lawful permanent resident.

No jurisdiction has reported that a court has found unreasonable the time between the sharing of grand jury information and the report of such sharing required to be filed with the court.

The Committee's review of classified information related to FISA orders for tangible records, such as library records, has not given rise to any concern that the authority is being misused or abused.

Intelligence from Title III criminal electronic, wire, or oral intercepts has been shared with intelligence officials twice.

The authority to serve search warrants for electronic evidence outside the district where the warrant is issued has "appreciably diminished the deluge of search warrant applications" in districts with large numbers of internet service providers, such as the Eastern District of Virginia and the Northern District of California.

The INS has taken serious action to triple the number of Border Patrol agents and Inspectors along the Northern Border as authorized by the Act.

INS has actively advertised in both the broadcast and print media, and has recruited candidates at job fairs, universities and colleges, and military posts across the nation.

The Immigration Officer Academy (IOA) at the Federal Law Enforcement Training Center (FLETC) has conducted training classes six days per week to accommodate additional trainee officers.

The IOA has added 26 Inspector classes, with 24 students per class to handle the additional inspectors. The INS has added five

additional Border Patrol basic training classes to its FY 2002 training schedule, and has shifted training from FLETC's Glynco, Georgia facility to the Border Patrol's satellite facility in Charleston, South Carolina.

The INS is recruiting new Border Patrol agents at a rate of 1,000 agents per month.

The INS has improved its technological capability as authorized by the Act by installing the ISIS surveillance system at 55 Northern Border sites, deploying three new single-engine helicopters to Grand Forks, Spokane, and Swanton, respectively, and deploying 500 infrared scopes for Border Patrol Agents along the Northern Border.

INS inspectors at ports of entry now use FBI criminal history and "Wanted Persons" information from the State Department's CLASS database and has access to 83,000 FBI fingerprint-based records of wanted persons born abroad.

The INS anticipates that it will pay overtime to as many as 1,857 employees this year because section 404 of the Act waived the overtime cap.

Under section 411 of the Act, the Secretary of State, in consultation with the Attorney General, designated 39 organizations as terrorist organizations. The Attorney General has requested that the Secretary of State designate an additional nine organizations under the same provision. Aliens who solicit members or funds for, or who commit acts providing material support to, these organizations, are not admissible to the United States.

The State Department has begun constructing protocols to share criminal and terrorist-related information with foreign governments under section 413 of the Act. For example, a memorandum of understanding with the government of Canada regarding the sharing of visa information is currently under review.

Consular officers are using section 413 of the Act to share visa information in specific cases to further the administration and enforcement of U.S. law.

Under section 414 of the Act, the INS has since established a multi-agency Program Management Office to coordinate the establishment of an integrated Entry Exit Program and to implement fully the integrated entry and exit data system for airports, seaports and land border ports of entry.

Under section 416 of the Act, enrollment into the foreign student monitoring system, known as SEVIS, began on July 1, 2002. By January 30, 2003, all schools that are authorized to accept foreign students must use the system, or they will be unable to accept additional foreign students.

Two aliens have requested extensions under section 422 of the act that allows the INS to extend the lawful status of a nonimmigrant alien disabled as a result of the September 11 attacks or the status of the spouse or child of an alien killed in those attacks.

The Attorney General reported to Congress that the airlines receive terrorist information developed by the Department of Justice to compare against passenger lists.

The Attorney General has concluded that it is feasible for the INS and the Department of state to use FBI biometric (fingerprint) technology at ports of entry and consular offices abroad.

The Office of Inspector General opened nine USA PATRIOT Act civil rights abuse cases.

Oversight of the revisions to the Attorney General's investigative guidelines

In June of 2002, the Committee was scheduled to conduct an oversight hearing on the "Recent Revisions to the Attorney General's Investigative Guidelines" The sole witness at the hearing was to be Honorable John Ashcroft, Attorney General, United States Department of Justice. At the last minute, the hearing was canceled.

The purpose of the hearing was to examine (1) the reasons the Attorney General revised the guidelines, (2) the extent of the revisions, and (3) the consistency of the revisions with the investigative needs of the FBI. The hearing was also to focus on how the balance between protecting civil liberties and protecting public safety may have changed.

The guidelines cover four areas of investigation: (1) Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations as authorized under 28 U.S.C. §§ 509, 510, 533, and 534; (2) Guidelines on Federal Bureau of Investigation Undercover Operations as authorized under 28 U.S.C. §§ 509, 510, and 533; (3) Guidelines Regarding the Use of Confidential Informants as authorized under 28 U.S.C. §§ 509, 510, and 533; and (4) Procedures for Lawful, Warrantless Monitoring of Verbal Communications. The hearing was to focus on the General Crimes, Racketeering and Terrorism Investigations since they are the central set of guidelines governing the initiation and operation of FBI domestic terrorism investigations.

Background and authority for the guidelines

The Federal Bureau of Investigation (FBI) is the primary criminal investigative agency of the Federal Government and is authorized to investigate all crimes against the United States.[67] The general investigative statutory authority for the FBI provides that the Attorney General of the United States "may appoint officials—(1) to detect and prosecute crimes against the United States; (2) to assist in the protection of the person of the President; and (3) to conduct such other investigations regarding official matters under the control of the Department of Justice or the Department of State, as may be directed by the Attorney General."[68]

Since 1976, Attorneys General have maintained investigative guidelines for the FBI to ensure that the FBI initiated investigations for valid criminal law enforcement purposes. The first guidelines were written in the post-Watergate, post-Vietnam War era, when the investigative authority of the FBI was the subject of much critical debate in the public and in Congress. The public developed the impression there was a pervasive, rampant abuse of

[67] 28 U.S.C. § 533(1)
[68] Id.

power by the federal government in general and the FBI in particular. Many have expressed concern that the current revisions to the guidelines would permit a return to those perceived abuses.

During the Administration of President Ford, Attorney General Edward H. Levi developed and promulgated the first guidelines. The guidelines were written to direct the conduct of FBI field agents. The guidelines outline very specific standards and requirements relating to the opening of an investigation, permissible investigative techniques, the scope of an investigation, the duration and reporting requirements of an investigation, and the subject matter and objectives of an investigation.

The September 11, 2002, terrorist attacks on the United States prompted the Department of Justice to conduct a review of existing guidelines and procedures relating to national security and criminal matters. On May 30, 2002, the Attorney General announced that the Department of Justice had revised existing investigative guidelines.

The former guidelines created two categories of FBI investigations: (1) General Crimes Investigations, or (2) Criminal Intelligence Investigations, which was further separated into two categories, either Racketeering Enterprise Investigations (focusing on organized crime)[69] or Domestic Security Investigations (focusing on enterprises attempting to achieve political or social change through force or violence). Under the Guidelines, the FBI was permitted to open a general crimes investigation when "the facts or circumstances reasonably indicate that a federal crime has been, is being, or will be committed," whereas the focus of criminal intelligence investigations was to "determine the size and composition of the group involved, its geographic dimensions, its past acts and intended criminal goals, and its capacity for harm."

Under either a General Crimes Investigation or either type of Criminal Intelligence Investigation, there were two levels of investigation specifically described in the guidelines. The levels of investigation were: (1) Preliminary Inquiries, which could be initiated when "responsible handling required some further scrutiny beyond the prompt and extremely limited checking out of initial leads, and (2) Full Investigations, which could be initiated when "facts or circumstances reasonably indicate[70] that a federal crime has been, is being or will be committed."

Revisions to the guidelines

According to the Department of Justice, the revised guidelines, follow the old guidelines in (1) the classification levels for investigative activity; (2) the classification of the types of investigations; (3)

[69] In 1994, Attorney General Reno revised the Racketeering Enterprise Investigations section with essentially the same revision to the Terrorism Enterprise Investigations section now implemented by Attorney General Ashcroft. The section of the guidelines at issue dealt with Racketeering Enterprise Investigations involving violence, narcotics, or systemic public corruption. Prior to the change by Attorney General Reno, the guidelines required that only the Director or designated Assistant Director could authorize such an investigation. The 1994 revision by Attorney General Reno gives authority to the Supervisory Agent in Charge (SAC) to authorize this type of investigation. The Attorney General still receives notification of a racketeering investigation but the notification is from the Section Chief of the Organized Crime/Drug Intelligence Section.

[70] The investigative standard of "reasonable indication" is substantially lower than probable cause, but there must be an objective, factual basis for initiating the investigation, and a mere hunch is insufficient.

the standards to initiate investigative activity; and (4) identification of authorized investigative techniques.[71]

The following is a summary of the changes to the Guidelines:

Through changes in the preamble and a new introduction, the revised guidelines explicitly establish protection of the United States and the American people from terrorism as the highest priority and central mission of the FBI.

Introduction & Part I: Directs the FBI to fully utilize authorized, lawful methods to prevent terrorism. Emphasizes early intervention and prevention—including fully employing authorized methods in preliminary inquiries to prevent terrorism, even before information warranting a full investigation has been obtained, and undertaking investigation even where no present crime exists but facts or circumstances reasonably indicate that terrorist offenses will be committed in the future. Provides extensive guidance and illustration concerning the use of authorized techniques in the investigation of existing or potential terrorist offenses, and concerning circumstances warranting the conduct of criminal intelligence investigations of groups that aim to engage in terrorism.

Parts I, II.B(4), IV: Retains the principle that inquiries and investigations are to be no more intrusive than necessary, but directs that the FBI shall not hesitate to use any authorized lawful technique, even where intrusive, where the intrusiveness is warranted by the seriousness of threatened terrorist crimes or the strength of the information indicating their existence or potential commission.

Parts I, II.B(3)–(6): Strengthens preliminary inquiries in several ways to promote early intervention and prevention where there is a possibility of existing or future terrorist activity, including:

Adding express language authorizing the use of preliminary inquiries to determine whether the basis exists for initiating criminal intelligence investigations of groups involved in terrorism ("terrorism enterprise investigations");

Lengthening the basic authorized duration of preliminary inquiries from 90 days to 180 days;

Allowing the duration of a preliminary inquiry to be extended to up to a year without the need for FBI Headquarters approval; and

Allowing mail covers (lawful, but previously prohibited by policy) in preliminary inquiries.

Replacing language discouraging more intrusive techniques in preliminary inquiries with language emphasizing instead that such methods are to be used where warranted by the seriousness of or strength of the information relating to potential terrorism crimes.

Part III.B: Extends the authority to carry out criminal intelligence investigations of groups involved in terrorism ("terrorism enterprise investigations") to reflect the full scope of the concepts of terrorism and terrorism offenses under the USA PATRIOT ACT. This includes:

Allowing such investigations in relation to criminal enterprises that aim to commit any of the offenses included in the

[71] The introduction of the Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations (as revised May 30, 2002).

Act's list of the crimes (18 U.S.C. 2332b(g)(5)(B)) that are most likely to be committed by terrorists and their supporters;

Extending the basic authorization and renewal period for terrorism enterprise investigations from 180 days to a year; and

Reducing the approval level for initiation and renewal of terrorism enterprise investigations from FBI Headquarters to Special Agent in Charge (with notice to FBI Headquarters).

Part VI: Provides clear authorizations and governing principles for a number of important counterterrorism activities, supplementary to the authority to carry out investigative activity (checking of leads, preliminary inquiries, and full investigations) in particular cases, including the following:

Operating and participating in counterterrorism identification, tracking, and information systems, such as the Foreign Terrorist Tracking Task Force;

Visiting places and events which are open to the public, on the same terms and conditions as members of the public generally, for the purpose of detecting or preventing terrorist activities;

Carrying out general topical research, such as searching online under terms like "anthrax" or "smallpox" to obtain publicly available information about substances that may be used in bioterrorism attacks;

Surfing the Internet as any member of the public might do to identify (e.g.) public sites and forums in which bomb making instructions are openly traded or disseminated, and observing information open to public view in such sites and forums to develop leads concerning terrorist activities; and

Preparing general reports and assessments relating to terrorism in support of strategic planning and investigative operations.

Alleged problems with the old guidelines

According to the Department of Justice, there were three serious problems with the old guidelines: (1) The previous guidelines emphasized investigation and prosecution of past crimes; (2) FBI Headquarters was responsible for making decisions without adequate information from the field, while the field agents were responsible for analysis without having adequate analytical capability; and (3) The old guidelines' lack of clarity deterred the use of lawful and permissible investigative techniques to investigate crimes committed by affiliates of political and religious organizations.[72]

According to DOJ, the revised guidelines would rectify these problems by:

Enhancing information gathering

By allowing the FBI, independent of a specific criminal investigation, to conduct online research. Under the old guidelines, there was no clear basis that allowed the FBI to search the Internet to

[72] May 30, 2002 Fact Sheet, Attorney General's Guidelines: Detecting and Preventing Terrorist Attacks.

identify websites that provide bomb-making instructions or plans for cyber attacks or even websites that trade in child pornography. The revisions would allow such searches.

Allowing the FBI to use commercial data mining services that businesses use to assess threats against them. A data mining service collects and analyses information on various topics, such as threats to computer systems. The FBI had clear authority to use this type of information with a particular investigation, but could not otherwise use this tool for a threat assessment. The revisions would allow data mining.

Using Collected Information in the Earliest Stages to Investigate Groups Suspected of Terrorism by allowing agents to use information collected in preliminary inquiries[73] to determine whether a broader investigation should be conducted of groups involved in terrorism. The old guidelines only permitted the use of such information to justify investigating an individual crime. The revisions would allow for the use of such information to determine whether an investigation should be conducted in terrorism enterprise investigations.[74]

Removing the Administrative Impediments to Effective Criminal Intelligence Investigations by expanding the scope of criminal intelligence investigations, lengthening their authorization periods, and ease the approval and renewal requirements.

Allowing the FBI to Have Normal Public Access to Public Places by clarifying that FBI agents may enter any public place that is open to other citizens, unless they are prohibited from doing so by the Constitution or federal law, for the specific purpose of detecting or preventing terrorism.

Enhancing FBI Headquarters' Intelligence-gathering and Analysis Capability by allowing the collection and retention of information from all lawful sources, while prohibiting the maintenance of files on citizens on the basis of constitutionally protected activities.

Increasing Decisionmaking Authority in the Field by allowing Special Agents in Charge to approve and renew terrorism enterprise investigations and extending time periods for keeping a preliminary inquiry open.

Clarifying that Investigations of Suspected Terrorists Will Proceed on a Neutral Basis by providing that the same investigative procedures and techniques can be used to investigate suspected terrorists with ties to religious and political groups as the procedures and techniques used to conduct other investigations.

Post-hearing review of documents and information relating to competitive imbalance in Major League Baseball

At the Committee's December 6, 2001 hearing, the Commissioner of Major League Baseball ("MLB") submitted a bound compilation of documents supporting his written testimony. This compilation included:

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[73] Preliminary inquiries are where agents gather information to determine whether there is enough evidence to merit an full investigation.

[74] Terrorism Enterprise Investigations cover "investigations of enterprises that seek to further political or social goals through activities that involve force or violence, or that otherwise aim to engage in terrorism or terrorism-related crimes." III(B) of the Attorney Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations.

A summary of post season games won by Payroll Quartile, 1995–2001, showing that 82.1% of the post season games were won by teams with the largest payroll quartile. Commissioner Selig testified that those teams with the highest paid players win the most post season games.

The cumulative operating income (loss) by MLB club, 1995–2001, that showed only the Cleveland Indians and the New York Yankees with a cumulative operating income during those six years. The figures showed a total cumulative loss of $1.38 Billion for the six year period, and an average loss per team of $46 million.

The 2001 income (loss) by club from MLB operations after sharing, compared with the income (loss) from operations after sharing and interest, for each MLB club, with a total loss of $519 million for 2001.

A graph of total MLB club debt from 1993 through 2001, showing the debt increasing from $593 million in 1993 to $3.1 billion in 2001.

A graphic presentation of average local revenue by club for the years 1995–2001, from the teams with the least local revenue (Montreal and Minnesota) to those with the greatest local revenue (Cleveland and the New York Yankees).

The Report of the Independent Members of the Commissioner's Blue Ribbon Panel on Baseball Economics (July, 2000)

MLB's updated supplement to the Report of the Independent Members of the Commissioner's Blue Ribbon Panel on Baseball Economics (December, 2001). This supplement contained primarily updated data and analysis of average payroll and post season performance, industry revenues, local revenues, central MLB fund revenues, club payrolls, club competitiveness, club profitability, and club debt.

A consolidated pro forma financial performance forecast for each MLB club in 2002.

A summary of financial information provided to the Baseball Players Union.

The Committee staff as well as Members examined the documents, and found that, although, a great detail of financial information was presented in them, important details were not included. Consequently, a detailed list of questions were sent to the Commissioner after the hearing. Committee staff conducted a thorough review of all documents provided by MLB, including responses to the post hearing questions.

Economic issues in the baseball market that affect competitive balance

Members raised important questions in the hearing about which the witnesses were either divided in their views or were unable to present convincing information. The following material reflects further review of major issues raised by Members at the hearing:

Economic structure of Major League Baseball
Revenue Sharing alternatives
MLB market structure in relation to smaller cities
Are most MLB clubs really losing money?
Stadium Financing benefits to MLB club owners
MLB owner tax benefits

The Committee reviewed MLB's lack of competitive balance that permits a subset of teams to continually win more games. The Commissioner of MLB detailed that competitive imbalance in his testimony before the House Judiciary Committee on December 6, 2001. That testimony was based upon data developed in the July 2000 report of the Blue Ribbon Panel on Baseball Economics.[75] Many contend that the fundamental cause of the imbalance is the financial disparity between MLB clubs. Gross revenue prior to payment or receipt of revenue sharing monies in 2000 ranged from the New York Yankees' $197.1 million to the Montreal Expos' $34.9 million, a 5.6 to 1 advantage in gross resources for the wealthiest franchise relative to the poorest franchise.[76] That range was narrowed to a high of $175.9 million (Yankees) and a low of $60.1 million (Montreal) after revenue sharing, reducing the resource advantage of the richest team relative to the poorest team to 2.9 to 1.

The question facing the Congress is whether MLB's protection from antitrust laws has helped to create the current financial disparities, or whether the actions of the club owners and of the player's union together have led to this situation. It remains unclear whether removing the antitrust protections would compel behavioral changes by both club owners and players that would benefit the public who value baseball as a popular and unique American pastime.

Testimony at the hearing contended that the resource disparity and the competitive imbalance created by that disparity are detrimental to the financial health of MLB. The essence of a professional sports league is competition; even the best teams need to have teams to compete against. When fans know before the season starts that the odds of their team participating in championship play are akin to winning their state lottery, interest, attendance, and TV viewership of games wane. In effect, demand for the product declines, a situation that is not in the interest of any team in the league because all teams share equally in broadcast rights to nationally televised games and to some extent in about 20 percent of locally-raised revenue (primarily ticket sales and local broadcast rights). The Commissioner maintains that only two teams have managed to earn a cumulative operating profit over the seven year period from 1995 through 2001.[77] It is not clear, however, whether that assertion is true, or if true, relevant to the issue of competitive balance.

Wealthier teams have higher player payrolls which enable them to hire more skilled players. The owners' preferred solution was to place a cap on player salaries that would prevent the wealthier teams from using their greater resources to purchase players. Such a strategy would likely be an effective way to restore some degree of competitive balance. Of course, the players object to this strategy because the proposed solution would reduce their incomes and transfer the reduced salaries to the owners. Even worse from the players' perspective, if the increased competitive balance succeeded

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[75] Major League Baseball, *The Report of the Independent Members of the Commissioner's Blue Ribbon Panel on Baseball Economics,* July 2000.

[76] Paul Kagan Associates, Inc., *Kagan's The Business of Baseball: 2001,* November 2000.

[77] *Testimony of Allan H. (Bud) Selig,* House of Representatives, Committee on the Judiciary, December 6, 2001, p. 3–4, chart 2.

in increasing demand for MLB, the increased income would also go disproportionately to the owners. The players' objections carried the day; no cap was placed on their salaries (although a "luxury tax" was imposed on payroll above a certain amount).

Despite uncapped player salaries, the growth in player payroll from 1995 through 1999 (61 percent) did not keep pace with the growth in total revenue (101 percent). As a result, player payroll as a share of total revenue declined from 67 percent to 53.5 percent. (See tables 28 and 29 in the Blue Ribbon report.) That decline clearly did not result from restraint among the wealthier clubs; the Yankees' player payroll grew from $58.17 million in 1995 to $92.4 million in 1999, while the Minnesota Twins' payroll barely changed, from $15.36 million in 1995 to $15.8 million in 1999.

Thus, the problem remains: how can MLB increase competitive balance? The potential solutions can be divided into two broad categories. The first category focuses on redistributing revenue among the teams, what is generally referred to as revenue sharing. The second category focuses on the structure of the MLB market and the lack of business competition (as opposed to on-field competition) among the teams.

Revenue sharing

Revenue sharing as defined by MLB involves the sharing of locally-generated revenue, most importantly ticket and broadcast revenue. MLB currently shares 20 percent of local revenue, with 75 percent of that revenue distributed equally among the clubs and the remaining 25 percent distributed among the clubs whose local revenue is below the industry average. This structure has two significant economic effects.

First, teams near the average local revenue prior to revenue sharing face potentially high marginal tax rates on their local income. Why try to raise an additional $1 million of local revenue if it will put your team above the average local revenue and move you out of recipient status to donor status?

Second, the average revenue sharing receipt for the 14 recipient teams in 2000 was $11 million, too small to enable many small-market teams to be competitive even if they used the entire amount to supplement their player payroll. Some teams, notably Montreal and Minnesota, appear to have substituted much of their revenue sharing money for local revenue in the financing of player payroll, thereby minimizing their losses.

According to the Blue Ribbon Panel, high marginal tax rates for some clubs can be avoided entirely by substantially increasing the portion of local revenue to be shared and then distributing the revenue equally among the teams. This structure would make the marginal tax rate on local revenue constant for every dollar of additional local revenue and would provide an incentive to raise local revenue without regard to donor/donee status.

The Blue Ribbon Panel recommends correcting the substitution problem by setting a minimum player payroll of $40 million. An alternative (or complementary) strategy would be to require each club to achieve a level of local revenue consistent with its market potential in order to receive its full allotment of revenue sharing. Revenue potential is obviously related to population, the income of

that population, broadcast rights, and the degree to which the physical capital costs of a stadium can be shifted from the team to federal, state, and local taxpayers.

Of course, decreasing the disparity in financial resources of teams prior to revenue sharing would allow MLB to achieve a given amount of competitive balance (defined as the range between the highest and lowest gross team revenue) with less revenue sharing or to achieve more competitive balance with the same amount of revenue sharing. That is one of the benefits of contraction. Had the Montreal and Minnesota clubs been eliminated through "contraction," and had the revenue sharing received by those two teams been distributed equally among the other 12 teams that received revenue sharing payments, the range of gross team revenue would have narrowed to $175.9 million to $75.2 million.

A tax on player payroll above some set amount would constrain the wealthier teams and improve competitive balance. The problem here is how the tax can be structured so that the tax revenue does not go into the owners' pockets, a situation that is unacceptable to the players. A structure must be designed to ensure that the revenue is used for player salaries by the teams not subject to the tax. Even if such a solution were devised, it might still prove to be unacceptable to the players' union because it would mean that player salaries are redistributed from the stars (whose salaries are set by the wealthy teams who tend to be the marginal buyers) to the less talented players. Acceptability would depend upon the relative control those groups of players have over union policies.

Additional revenue sharing—although MLB does not categorize it as revenue sharing—occurs through league-wide sharing of income from contracts for nationwide television broadcasts and for the sale of merchandise. To the extent a television network's payment reflects a greater value placed on the ability to televise a game including the Yankees, Dodgers, or Cubs, or even to televise games to those large-market audiences when their teams are not playing, the equal distribution of revenue among the clubs already reflects some revenue sharing by the wealthier clubs. A similar effect results from merchandise sales.

Market structure

It is useful to reiterate that the focus of the discussion is how to achieve competitive balance by reducing the financial disparities among the teams. In most industries, financial disparities tend to be diminished over time by competition. When a fast-food franchise is seen to be doing very well in a location, others are induced to open competing fast-food operations. The effect is to reduce demand for the original franchise's services until it is earning a more nearly competitive return from its business. When all fast-food operations in the market are earning competitive returns, the number of franchises tends to stabilize. If demand suddenly falls and that decline is expected to be permanent (perhaps a loss of industry and personal income in the area), some fast-food franchise may close.

The MLB industry is very different, and as a result financial disparities among the teams in MLB tend to persist over time. The price paid for an MLB club reflects the rights to a several future income streams (reduced by revenue sharing agreements) that are

attributable primarily to a variety of intangible assets. The first intangible asset is the monopoly right to operate an MLB club within a given geographic area (or to split monopoly rights in cities with two clubs—New York, Chicago, and Los Angeles. Associated with that right is exclusive control over concessions, parking, sponsorship fees paid by corporations in exchange for what amounts to advertising, and a variety of other relatively minor income sources related to the games. The second intangible asset is the exclusive right to sell the local broadcast (radio and television) of games. The third intangible asset is the right to share in the revenue from MLB television contracts for the nationwide or regional broadcast of selected games. And last but by no means least is the right to purchase some player contracts at below-market prices that result from rules the league has adopted that restrict the ability of players to sell their services to the highest bidder.

In MLB, the differences among clubs in the revenue potential attributable to the first two intangible assets—exclusive rights to sell tickets and local broadcast rights—tend to persist over time. The differences persist because the club confers exclusive rights; each team is a monopoly within its defined geographic area. A precondition to purchasing an MLB club is an agreement not to compete off the field with other MLB club holders.

That non-competition agreement short circuits the forces that would tend to reduce financial disparities among clubs. Were entry into the market unrestricted, a team like Montreal would choose to relocate to an area where it is likely to sell more tickets and receive a higher rights fee for local broadcast of its games, such as the Washington, D.C. area or Portland, OR. That relocation would reduce financial disparities.

Were entry into the market unrestricted, it would be obvious to potential market entrants (those seeking new clubs) that New York City, Los Angeles, and perhaps Chicago are capable of supporting more than two major league teams. Other cities might be capable of supporting a second team. The increase in the supply of teams in those areas would have the effect of reducing ticket revenue and the value of local broadcast rights for the current clubs. In this instance, financial disparities are reduced not by raising the income of the poor teams but by lowering the income of the wealthy teams. (Note that the Blue Ribbon Panel was not explicit when recommending relocation as a solution whether that option included relocation into existing club areas.) Of course, the price that was paid for clubs in those cities reflected an expectation of continued monopoly rights, and the loss of those rights and the attendant reduction of income would represent a capital loss for the club owner. However, the prospect of losing income due to the elimination of monopoly rights has never been considered a defense against antitrust actions.[78] The underlying asset is not eliminated; it would simply have a lower value and somebody would operate the club.

It is interesting to note the existence of another impediment to locating additional clubs in existing major league markets, even if such relocation were permitted by MLB's rules. The vast majority

[78] *Statement of Roger G. Noll, Editor, "Government and the Sports Business,"* Hearings before the House Select Committee on Professional Sports, 94th Congress, 2d Session, September 1976, Part 2, p. 113.

of teams play in publicly owned stadiums and have negotiated an exclusive lease arrangement with the public stadium authority. The cost of entry is considerably higher if the entering team is shut out of the publicly funded stadium and no financially viable alternative exists.

What structure of MLB might promote club locations that act as an instrument to promote competitive balance by reducing financial disparities? Consider an American League and a National League that cooperate only with respect to setting common playing rules and playoff structure, but are entirely independent economic entities. Each league is free to locate clubs in any location, and league competition would over time lead to a diminution in the monopoly profits of the large-market clubs. MLB has been moving in precisely the opposite direction. The leagues now play each other during the regular season, not just in the championship playoffs, and the business activities have become more centralized in the commissioner's office.

Profitability

As noted above, the commissioner claims that only two teams made a cumulative profit over the seven year period from 1995 through 2001. He presented figures at the hearing that showed only the New York Yankees and the Cleveland Indians made a profit in 2001. (See table 30 in his December 2001 supplement to the Blue Ribbon Panel's report.)

One would need more complete financial information on a variety of topics to evaluate the industry's financial health, including: amortization and extension of player contracts and signing bonuses; related party transactions; reserves accumulated for the possibility of a work stoppage; debt and interest payments; and ownership salaries and perks. This information is not publicly available and is controlled by the privately owned MLB clubs.

Increasing club values demonstrates how clubs may be increasing overall investment profits. Enterprises that are expected to lose money consistently in the future have no value and cannot be sold, certainly not at high and rising prices. In contrast, enterprises expected to earn future profits, even if losing money temporarily due to adverse circumstances or poor management, can be sold and may even bring rising prices. A profit-motivated buyer would not pay more for an MLB club than the value of projected future returns, net of costs and taxes, discounted for the delay in accrual of such returns (that is, the present value of all future net returns to his investment).

If MLB clubs are actually losing money over the long term, ownership of a club must be valued for reasons other than turning a profit. Buyers of clubs may, for example, (1) value civic pride, (2) use the team to enhance the profitability of other business ventures, (3) pay for the value of the team in some alternative location, or (4) see themselves improving the management and turning around a club's fortunes. But the fact is, the business enterprise represented by each MLB club is in no danger of ceasing to exist. Society is in no danger of losing MLB; buyers are willing to pay positive amounts for the clubs whether or not the club generates a competitive economic return.

Stadium financing

Finally, stadium financing plays a key role in a team's profitability. All objective economic research shows that a publicly financed stadium is not a good investment for a community because it does not generate enough additional economic activity to pay for itself. In some instances, the research shows that per capita income in the community declines, probably because the money spent on the stadium would have generated more economic activity if spent on some other project.

Communities might decide to subsidize a stadium for non-economic reasons. It might be that the citizens value the public consumption benefits of having a major league team, benefits that do not show up as income for individuals and businesses and therefore are beyond the scope of the economic analyses. It might also be that the political process does not adequately reflect the full range of political preferences, perhaps because the information provided to voters is distorted or misleading.

A good instance of the latter may be the proposal of the former mayor of New York City to build stadiums for the Yankees and the Mets who have no incentive to leave New York. There is not a location in the country to which the Yankees or Mets could move and increase their net income. The most lucrative stadium deal imaginable would be worth less each year to both teams than would the reduction in local broadcast fees and ticket revenue they would suffer by moving from the New York market to any alternative market available to them under MLB's current relocation rules. The value of their clubs would decrease. Here is an instance where New York is the scarce commodity. Thus, there is no added value to paying for a stadium if refusing to pay for the stadium will not cost New York City residents their public consumption benefits (because the teams will not leave the metropolitan area) and if the stadium does not generate a positive increase in private income? One might say that the citizens of New York ought to be able to get the Yankees and Mets to pay New York for the privilege of playing in the city.

But for most communities, substitute communities are available and the monopoly status of MLB gives the league the leverage to charge a community a high price (in terms of stadium subsidy) to acquire a very scarce good whose supply is restricted. When supply is restricted, price tends to rise. If supply were not restricted, even communities for whom substitutes are available could shop among potential club owners for the best stadium deal.

The current situation with respect to stadium financing introduces one more potential source of competitive imbalance. A club that is able to induce its community to provide a stadium at public expense has significantly reduced its capital and operating cost. More of its gross revenue is available to purchase players. In theory, however, stadium financing should work to reduce competitive imbalance. The large-market teams stand to gain relatively little from moving their clubs to small-market locations because the loss of large-market TV and ticket income offsets the value of the small-market stadium subsidy.

In contrast, small-market teams stand to lose relatively little from moving to slightly smaller markets because the small loss of

TV and ticket sales is less likely to offset the value of the stadium subsidy. A well-functioning public decision making process would cause the large-market teams to get less stadium subsidy than the small-market teams (where club relocation is a more realistic threat because the value of the stadium subsidy is large relative to any loss of TV and ticket revenue and public consumption benefits are at risk). Of course, the public decision-making process does not necessarily function well, and it is not clear how the stadium finance issue affects competitive balance. Suffice it to say that substantial subsidies are being provided by federal, state, and local governments.

Review of judicial security

Judicial security is provided by the U.S. Marshals Service to Federal judges and courthouses. In light of pending terrorist trials and related proceedings following terrorist events within the United States judicial security provided by the U.S. Marshals Service has taken on added importance.

Since the first bombing of the World Trade Center in 1993, the Federal judge presiding over the trials of the suspected terrorists has received 24 hour/7 days a week protection at his residence in Manhattan, New York City. This protection has been provided at great expense and has affected the allocation of U.S. Marshal Service personnel resources throughout the country.

Also, in anticipation of the trials of suspected terrorists following the events of 9/11, the Federal courthouse located in Alexandria, Virginia has undergone additional security improvements and enhancements. Security around several other Federal courthouses around the country is being increased by the U.S. Marshal Service as a part of its overall judicial security program.

Committee oversight staff have been briefed by the U.S. Marshal Service on its on-going judicial security plans, including special actions being taken with regard to the detention, movement, and judicial proceedings involving suspected terrorists.

The issue of the allocation of U.S. Marshals Service personnel resources was also the subject of the Committee's oversight activities. Inquiry was made by letter for additional information on the Justice Department's policies and procedures with regard to making decisions on judicial protection, especially the procedures for periodic threat assessments in order to determine the level of security and protection to be provided. Of special interest to the Committee was the involvement of other Federal agencies in that process and the subsequent ability of the U.S. Marshals Service to allocate its resources accordingly. This problem is also aggravated by the creation of the new Transportation Security Administration and the Federal Air Marshal Program which have attracted former U.S. Marshals Service personnel to their ranks.

Oversight of the U.S. Marshals Service will continue, especially with regard to the allocation of personnel and resources for judicial security and its impact on the other missions of the U.S. Marshals Service.

Review of FBI stolen vehicle parts regulations

The Anti Car Theft Act of 1992 (P.L. 103–272) directed the Attorney General to establish and maintain a national database containing the vehicle identification numbers (VINs) of stolen cars and car parts. The database is to be part of the FBI's National Crime Information Center (NCIC). The purpose of maintaining the database was two-fold: (1) to reduce the market for stolen cars and car parts, and (2) to protect consumers from purchasing stolen cars or having stolen parts installed in their cars.

On April 9, 2002, the Justice Department published its proposed rule for public comment. This comment period has been extended until January, 2003.

Following publication of the proposed rule, the Committee received complaints about the proposed rule, especially with regard to the increased costs and regulatory burdens it might impose on many small business owners such as salvage yards, car dismantlers, and auto repair shops.

The Oversight staff has inquired into the status of this rule making and received several briefings from the FBI staff in Clarksburg, West Virginia responsible for this national database program. Of particular interest to the Committee staff is the breadth of the proposed rule and the inconsistent regulatory burden it may impose on some, but not others who are subject to the rule. There is also a broader question about whether new technologies now being used by auto manufacturers in new cars has reduced the need to inspect and report VINs for parts.

The most recent briefing by the FBI indicated that additional information gathering is going to be undertaken by the Criminal Investigation Division (CID) of the FBI, particularly among the law enforcement community. There will also be a reassessment within CID on where stolen car parts falls on the priority list in terms of allocating personnel and resources. There is a January, 2003 time line for these actions.

Oversight of the Office of Crime Victims

The Office of Crime Victims in the Office of Justice Programs (OJP) administers assistance programs for victims of crime. Following the events of September 11th, the Congress appropriated additional funds to be available to those states with victims from terrorist attacks. In response to 9/11, Congress included $68.1 million as a part of the FY 2002 DOD Supplemental Appropriations bill for use by the Office of Victims of Crime to provide counseling services to 9/11 victims.

As of May 2, 2002, $58 million had been disbursed to the states most immediately affected—New York, New Jersey, Virginia, and Pennsylvania. The states sought to use this funding for other purposes that are authorized under the permanent victim assistance statutes, e.g. shelter, lost wages, loss of support, funeral expenses, and mental health counseling. Because of the restriction imposed by Congress on funding for "counseling" only, states were forced to use other annually allocated victim assistance funding.

This unanticipated use of FY 2002 victim assistance funding for 9/11 victims has also caused concern for states because under the statutory formula established for the Crime Victims Fund, the level

of funding in one year is the basis for calculating the funding in subsequent years. Monies deposited into the Fund in excess of the current cap of $550 million per year (FY 2002) may only be rolled over to the anti-terrorism reserve fund if the amounts deposited in the Crime Victims Fund in a fiscal year are 110% of the amounts deposited in the prior year. Because of both the cap ($550 million) and the expenditure of additional funds to meet the needs of the 9/11 victims, future funding will be reduced for the affected states.

Committee staff held several meetings with the Director and staff of the Office of Crime Victims staff in order to monitor the award of both the regular appropriated monies and the additional funds ($68.1 million) that were included in the FY 2002 DOD Supplemental Appropriations bill.

Reorganization of the Office of Justice Programs

In addition to the hearings held by the Subcommittee on Crime, Terrorism, and Homeland Security, senior staff of OJP met with Committee staff to provide the Committee with a better understanding of the reorganization plans being undertaken by the new Administration and at the urging of congressional appropriations committees. For example, at a meeting on May 29, 2002 the Committee staff was informed that OJP had:

Reduced travel expenses by $10 million and $1 million on mail expenses (by purging address lists, etc.).

Implemented a risk-based assessment procedure for monitoring grants and mandating progress reports from grantees.

Initiated more aggressive use of "Operation Close-out" to review and close outstanding grants (i.e grants that have exceeded original grant life or completed grant objectives without spending all of the funds), saving $30 million.

Hired Booz-Allen to help with identifying problem grant areas and to develop a baseline for the GPRA evaluations; also putting performance-based requirements in grant solicitations.

Increased technical assistance and training for grantees.

Moved to consolidate LLEBG grants, most of which are used for overtime pay, into the Byrne Formula grant program (29 categories in Byrne).

Implemented a New Community Capacity Development Program as an attempt to provide outreach to local communities who are eligible for OJP funds, but lack capability of knowing where to go and how to apply for funds.

Established a new Office of Administration to replicate Justice Management Division in DOJ.

Decided that the Office of Comptroller will remain responsible for grant oversight, audits, etc.

Targeted February 2003 for computerization of all OJP grant programs.

In addition, the Committee staff, with the assistance of the Library of Congress, has identified all of the relevant statutory authority for the Office of Justice Programs and the wide range of programs and activities that OJP administers. This work product has been helpful to the Committee staff in its efforts not only to conduct oversight, but also to draft legislative reforms to address major issues that have been identified as requiring reform as a re-

sult of the Committee's oversight activities during the 107th Congress.

Oversight of Department of Justice information technology and systems

As a result of critical reports issued over the last several years by the GAO and the Department of Justice Office of the Inspector General (DOJ OIG), the Committee was very concerned about the effectiveness of Information Technology (IT) operations at the Department of Justice (DOJ) and developed an aggressive oversight program to address those concerns.

The Committee reviewed Department of Justice key systems to determine which systems were most critical to effective law enforcement. The Committee also reviewed GAO studies over the past five years as well as DOJ OIG reports to determine which DOJ agencies had the largest information technology budgets and what problems warranted the immediate attention of the Committee.

The FBI, the INS, and the DOJ Justice Management Division (JMD) had the largest IT budgets and infrastructures and were the subjects of the most critical audit reports. Consequently, Committee oversight efforts were directed at the IT projects and operations of those entities.

FBI Information technology oversight

The Committee assigned staff to examine the FBI's primary systems, including site visits to the FBI's Criminal Justice Information Services Division (CJIS) Center near Clarksburg, West Virginia. CJIS is the largest division in the FBI, with 2,700 employees, plus an average of 200 full time contractors and 300 plus part time contractors. The Center is a secure facility where a majority of the FBI's important IT systems are physically located, including the National Crime Information Center (NCIC) and Integrated Automated Fingerprint Identification System (IAFIS), which are the two largest systems operated by the FBI to support federal, state and local law enforcement. CJIS supports law enforcement in the U.S. with automated information services, with the largest resource allocation going not to the FBI's own agents but to State and local law enforcement.

On April 25, 2001, a letter was sent to the Director of the FBI, requesting detailed information about steps taken by the FBI to address deficiencies and about the bureau's future IT plans. The letter also asked for detailed information regarding internal and external computer security, and pending proposals with the FBI to upgrade key IT systems. The FBI's response was limited to providing the Committee only with an overview briefing document addressing the FBI's Trilogy initiative.

On July 27, 2001, the Chairman and Ranking Member of the Committee, as well as the Chairman and Ranking Member of the Subcommittee on Crime, Terrorism and Homeland Security, sent a letter to Acting FBI Director Tom Pickard expressing their disappointment with the response. This letter provided a detailed list of specific information requests regarding initiatives that will allow FBI systems to share data with the other Department of Justice law enforcement agencies, as well as defined procurement plans

and system requirements reports leading to replacement or upgrade of major investigative systems. The letter also asked for descriptions of planned systems security improvements to protect against national security breaches. The letter also asked for briefings by qualified individuals from the FBI's Information Resource Division to support the Committee's detailed level of inquiry.

On December 20, 2001, the FBI's Information Resources Division provided a detailed response to the Committee's request. The report, which is restricted to Official Use only, described deficiencies of current FBI IT systems, an assessment of the FBI's IT needs, an explanation of steps already undertaken to address deficiencies, and a proposal to upgrade systems in a cost effective manner. The report also included a summary of the FBI's projected time frame to remediate current deficiencies, migrate obsolescent systems to modern platforms, and enhance high priority systems to deliver improved benefits.

At that time, the FBI proposed to provide Congress with a finer level of detail following a standard format, to include desired elements such as function, cost, schedule, risk, description, and linkage to strategic plans.

Subsequently, the FBI has initiated regular briefings to update Committee staff with the Bureau's progress. In particular, the status of the FBI's largest upgrade effort, the Trilogy project has been regularly briefed. The Trilogy Program is a comprehensive upgrade of the FBI's information technology infrastructure and applications. Although the scope of the program follows a five-year schedule, the FBI reported to the Committee staff that progress to date has already resulted in improved information sharing and analysis and upgrades of user investigative applications. The Committee will continue to give the oversight of FBI systems performance and improvement projects a high priority in the 108th Congress.

IDENT/IAFIS integration

The Automated Biometric Identification System/Integrated Automated Fingerprint Identification System (IDENT/IAFIS) project was established to integrate the INS's IDENT system with the FBI's IAFIS system. The objectives of this system integration are to (1) increase the apprehension and effective prosecution of criminal aliens; (2) provide INS with improved identification services; (3) provide state and local law enforcement with access to INS fingerprint data; (4) deliver a real-time connection between the two systems, so that the INS can determine whether an apprehended alien is wanted by law enforcement or has a record in the FBI's Criminal Master File (CMF); (5) to allow law enforcement agencies to obtain all relevant immigration information at the same time as a criminal history response from a single FBI search request.

This project should dramatically improve law enforcement efforts at the federal, state and local levels. Following the September 11th terrorist attacks on the World Trade Center, the Committee recognized that the system integration will, when completed, have a critical importance in supporting efforts to identify suspected terrorists.

The Committee oversight staff met numerous times with the INS, the FBI, and the DOJ Justice Management Division to over-

see the DOJ's management and oversight of the project. Attention was directed toward the actual progress of system integration efforts, the project's budget execution, and especially the slow pace of progress. For example, the integration effort was mandated by Congress in 1998, yet the Engineering/Systems Development Study was not completed until December, 2000. The DOJ JMD management reported to the Committee that although the FY 2002 IDENT/IAFIS budget request anticipated a $28 million expenditure on initial development and deployment, the Department of Justice decided instead to extend the pilot phase of the project which had been ongoing since FY 2000 and expended less than $9 million on it. In short, instead of proceeding with the integration effort, the Department decided to gather more data. The DOJ elected to extend the pilot to gather additional metrics data to be used to support the refinement of the planning and final system design. It also wanted to monitor emerging biometric technologies, in particular, the feasibility of using less than ten rolled prints (known as "n-print"). The Committee is supportive of the use of new fingerprint technologies, and of the potential for modernizing and upgrading both the IDENT system and IAFIS system, as well the as projected positive outcomes of the integration effort.

Of concern to the Committee was the DOJ's reluctance to move ahead aggressively with IDENT/IAFIS project. The DOJ reported to the committee that a criminality study mandated by Congress and completed under the direction of the INS in August, 2001, together with other internal analyses, projected that criminal apprehension would increase dramatically. DOJ articulated that once IDENT/IAFIS was deployed, there would be dramatic increases in apprehension which would increase costs at the INS, the U.S. Marshals Service, the Bureau of Prisons and strain resources at the United States Attorney from the increased prosecutions.

The Committee will be continuing to oversee the IDENT/IAFIS project in the 108th Congress, and will be a examining the DOJ's investigations of biometric technologies for potential application. It will also be meeting with DOJ officials to monitor progress on initiation of the full-scale development and implementation of the integrated system.

Immigration and Naturalization Service (INS) systems

The Committee was keenly attentive to the many problems associated with INS systems. The Committee undertook an extensive series of oversight visits to the INS offices and field locations to view both current systems operations as well as projected system enhancements. The events of September 11, 2001 led the Committee to give priority to oversight of INS's enforcement systems.

Oversight of INS and DOJ Systems Project Management

On November 14, 2001, Chairman F. James Sensenbrenner, Jr., joined by Ranking Member John Conyers, Jr., Chairman of the Subcommittee on Immigration and Claims George Gekas, and that subcommittee's Ranking Member Sheila Jackson Lee, requested a GAO study to determine whether the Immigration and Naturalization Service (INS) was making a serious effort to actually carry out the promises made to the Office of Inspector General of the Depart-

ment of Justice to remedy project control problems. As noted by the Chairman in the study request letter to the GAO, the Committee was concerned that INS' project failures

> may be repeated with respect to a series of troubled and delayed system development efforts by the INS. Despite years of INS management concurring with recommendations in critical audits by the DOJ OIG and the General Accounting Office, I am concerned that INS management is unable or unwilling to impose needed project control reforms. With a current systems budget exceeding $300 million, the Committee is particularly concerned that continued investment in a number of major systems efforts by the INS will not have the desired results. Rather, it appears likely that continued failures will leave the U.S. unable to track or remove alien violators of both criminal and immigration law, identify and remove potential terrorists, or impose fundamental law enforcement controls to the growing tide of aliens unlawfully remaining in this country.

The Committee requested that the General Accounting Office (GAO) include in the study a review of the internal controls for information systems project management in the INS, and also that the GAO look at certain key systems:

Any system to record and monitor use of the Biometric Border Crossing Card and the Biometric Green Card, including the Integrated Card Production System (ICPS);

The Automated Biometric Identification System (IDENT);

The integration of IDENT with the FBI's Integrated Automated Fingerprint Identification System (IDENT/IAFIS);

The entry/exit system described in the DOJ IG's report (to the extent these issues were not addressed by the DOJ IG; and

The Enforcement Case Tracking System (ENFORCE).

Because the DOJ Justice Management Division (DOJ JMD) was directed by Congress to undertake an active management role with regard to the integration of IDENT and IAFIS, the Committee requested a review of DOJ JMD management's oversight of INS systems.

On November 22, 2002, the GAO released its study entitled "Information Technology: Justice Plans to Improve Oversight of Agency Projects." The GAO auditors in this report concluded that the Justice Department failed to properly oversee major IT projects at the Immigration and Naturalization Service. GAO auditors found that Justice's process for overseeing IT investments was severely flawed and that the Justice Department doesn't measure the progress being made on any of the critical information technology projects.

The GAO's study indicated that the Justice Department's Office of Justice Management (JMD) doesn't have enough information to develop useful measures for system development or performance, and consequently lacks the fundamental ability to manage INS' IT projects. This lack of oversight by JMD as documented by GAO's investigation was disturbing to the Committee because of the INS'

poor track record in implementing IT projects and its integral role in homeland security.

The GAO reviewed four INS systems: the Automated I–94 system, which was designed to capture arrival and departure data at some ports of entry but was retired in February because it did not meet mission needs. The Enforcement Case Tracking System, which serves to book persons who are arrested. The Automated Biometric Identification System, which screens aliens on the basis of biometric and other data. The Integrated Card Protection System, which produces three types of identification cards.

The Department of Justice generally agreed with the results of the report and said it would improve its systems management oversight consistent with GAO's recommendations.

Oversight of INS's planning for the Entry/Exit System

Prior to the September 11th terrorist attacks, the Committee was concerned about audit reports of deficiencies in INS information systems and INS operations for monitoring the entry and exit of foreign visitors to the United States. The accuracy and timeliness of information contained in this system (the "I–94 system—see above) affects immigration enforcement, counter terror efforts, criminal law enforcement, prevention of traffic in illegal narcotics and money laundering, and prosecution of international crime syndicates. Consequently, the Committee examined whether the INS's planned replacement system would provide an effective remedy to reported problems.

While it was clear that the INS had, in fact, captured information about all 19 of those directly involved with the September 11 terrorist attack through the existing I–94 system, it was also clear that the information was incomplete. The Committee investigated the status of the "new" I–94 system under development and determined that the project was behind schedule and that the proposed replacement would not address shortcomings of the old system. As a result, the Committee staff met regularly with top INS management, beginning in November, 2001, to review in detail the Agency's plans regarding the I–94 replacement system.

The impact of these regular meetings was that the INS eventually decided to abandon the "new" I–94 system project. The INS also agreed to update the Advance Passenger Information System (APIS) as an interim substitute for the "old" I–94 system. The Committee worked actively with the INS to evaluate cost projections, project scope, and schedule through the first half of 2002.

Information obtained through the earliest meetings with INS in 2001 became the basis for tough requirements in Public Law 107–173, the Enhanced Border Security and Visa Entry Reform Act of 2002 to replace the diverse procedures and information systems employed by the INS and the Customs Service to monitor and control alien visitors with a comprehensive Entry/Exit system that would address alien visitors at all Ports of Entry. (See Legislative activities of Subcommittee on Immigration, Border Security and Claims for details).

Oversight of Entry/Exit System Procurement

Through the course of monthly meetings with the INS regarding the Entry Exit System, it became clear in July 2002 to the Committee that the INS's planned procedure for issuing a Request for Information, to be followed by a Procurement action, had begun to fall behind schedule. The Committee was concerned that delays in the procurement process threatened the Administration's ability to meet deadlines imposed by Congress to improve U.S. Border Security through the system's implementation.

The Enhanced Border Security and Visa Entry Act imposed stringent date requirement in addition to those of the Data Management Improvement Act of 2000, (PL 106–215) which requires that the Attorney General establish an Entry Exit system. As amended, the law requires the Attorney General implement an entry/exit control system, enter the collected data in the system, and provide access to immigration officers at the sea and air ports-of-entry by December 31, 2003, with the 50 largest land ports added by December 31, 2004, and remaining land ports by December 31, 2005. The USA PATRIOT Act added requirements that the system use biometric technology.

Inquiries to the INS and to DOJ's Justice Management Division suggested that the Office of Management and Budget had not provided necessary clearance for the final, updated Request for Information to be issued by the INS. The Committee also received information that suggested that administration officials might intend to change the procurement schedule from a "free and open" competition to one limited to a select number of firms, primarily the major Department of Defense contractors.

Once informed of the apparent source of the delay, the Chairman addressed the Committee's concerns in a letter to OMB Director Mitchell Daniels. On October 17, 2002, Chairman Sensenbrenner requested that Mr. Daniels "provide the necessary permissions immediately to the Department of Justice and the Immigration and Naturalization Service to initiate the procurement process for the Entry/Exit system required by the Act so that the Attorney General and the INS can make every effort to meet the required completion time tables, while maintaining Commissioner Ziglar's commitment on behalf of the federal government to offer full and open competition for any contract awards."

Following the Chairman's request, on November 5, 2002, the INS issued the "final" Request for Information (RFI) which had been stalled. News articles such as one in the November 18th, 2002, Federal Paper entitled "Congress Pressures INS to Move on $2 Billion Technology Project" credited the Chairman's letter with influencing the process.

Oversight of Federal Agency use of biometrics to combat terrorism, improve law enforcement, and enhance border security

The Committee has had a keen historical interest in the employment of biometric identifiers for law enforcement by Federal agencies, including the passage of important legislation regarding the use of fingerprints and photographs in information systems administered by the Federal Bureau of Investigation, the Immigration

and Naturalization Service, the U.S. Customs Service, and the Bureau of Consular Affairs.

Consequently, in considering legislation to address the threats from terrorism, the Committee recognized the importance of using technology to capture biometric data as a means to identity and apprehend terrorists. Investigations by the Committee determined that federal agencies had failed to agree on common technical standards regarding fingerprints, facial images, and other biometric identifiers, with the result that major law enforcement systems had difficulty sharing this information. Specifically, even when it was technically possible for textual information to be transferred among law enforcement agencies, in important instances the systems could not transfer fingerprint information or facial images. In the post 9/11 efforts to apprehend terrorists, it was necessary for the FBI and others assisting in the Counterterror efforts to "fax" tens of thousands of paper documents containing photographs and sometimes fingerprints images to each other. Consequently, the Committee drafted language in the USA PATRIOT Act that required efforts to standardize biometric specifications so that information containing biometric identifiers could be efficiently and reliably exchanged between law enforcement systems.

After the USA PATRIOT Act was passed by the Congress, the Committee investigations continued into the policy, technical, and the agency "turf" issues that impede progress in establishing standards. Committee staff met with all major law enforcement agencies, and examined their law enforcement systems. A very thorough examination was made of the impediments, and it was recognized that there was no Congressional authorization for standards to be established nor a time table for work to be undertaken. Further, there was no established lead agency to coordinate the creation of standards among the federal agencies and industry groups who are stakeholders in such an effort.

The Committee acted promptly to initiate a legislated set of remedies through the Enhanced Border Security and Visa Entry Reform Act which included among a larger set of mandates the following:

In Title II of the ACT, the federal government is required to establish a technology standard to verify identity of non-citizens seeking entry, with the Attorney General and the Secretary of State providing a progress report to Congress by October 2002, and to certify a standard by January 2003.

Biometric standards

Title III of the Act required a comprehensive report by the Attorney General, Secretary of State and the National Institute of Standards and Technology (NIST) to include "deployment of equipment and software to allow biometric comparison and authentication" of machine readable, tamper-resistant visas and "other travel and entry documents that use biometric identifiers,"[79] no later than October 26, 2004.

It also requires that the Attorney General and the Secretary of State shall jointly establish document authentication standards

[79] Public Law 107–172, May 14, 2002, Section 303.

and biometric identifiers standards "from among those biometric identifiers recognized by domestic and international standards organizations."[80]

The intent of these sections of Title III was to mandate that these two federal departments, both of which have critical law enforcement roles in protecting United States citizens at home and abroad, agree on functional standards that will allow their respective information systems to be truly interoperable.

The Committee required interim reports on the standards developments, as well as detailed briefings on the final reports required under this section of Title III, from the Department of Justice and from the Department of State. The Committee also investigated new technologies with regard to their application to improvements in federal fingerprint data capture and authentication. The Committee took an active role in overseeing the actions of the Department of Justice with regard to their required evaluations of biometric technologies leading toward establishing the required biometric standards.

The Committee monitored the results of the meetings of the NIST-hosted standards committees, and worked with appropriators to support the needed funding to establish an organization that could continue to promote the standards. Committee staff met with industry representatives, as well as with meeting participants from the INS and the Bureau of Consular Affairs, to ensure that real progress was being made.

The Committee obtained information that the NIST standards committees were not giving appropriate attention to the technical standards suitable for the durability and tamper proof qualities of the identification cards which transport the biometric identifiers. Consequently, Representative George W. Gekas, Chairman of the Subcommittee on Immigration, Border Security and Claims, sent a letter to Secretary of Commerce Donald Evans making the following request:

> In its response to Section 303, NIST should consider all technologies, including optical memory. The Federal government has issued more than 14 million cards utilizing optical memory. Among these, the Biometric Border Crossing Card and the Permanent Resident Card, both of which are issued by INS, have proven to be secure, tamper-proof smart cards, not subject to damage from magnetic fields or electrical fields. Section 303 also requires NIST to consider the inclusion of biometric identifiers on machine-readable travel documents. Since 32K chip cards can generally hold no more than one biometric identifier, NIST should consider technologies that can accommodate any biometric as the agency develops its response.[81]

The Committee provided a staff member to participate as an advisor to the U.S. delegation participating in the annual plenary meeting of the Technical Advisory Group on Machine Readable Travel Documents of the International Civil Aviation Organization

[80] Ibid

[81] Letter of June 27, 2002, to The Honorable Donald L. Evans, Secretary, U.S. Department of Commerce, from The Honorable George W. Gekas.

(ICAO) in February 2002. The U.S. State Department is the official delegation lead to the Machine Readable Travel Documents division of ICAO from the United States government, with delegation participants also from the INS and the U.S. Customs Service. The technical advisory group on machine readable travel documents meets annually in Montreal PQ at the ICAO headquarters building.

The activities of ICAO are highly relevant to the work conducted by U.S. federal agencies because ICAO establishes international standards under the auspices of the United Nations. Consequently, ICAO is an excellent source of information regarding:

(1) National policy issues and police practices regarding identity source documents such as birth certificates and police certificates among U.S. allies and other nations, because these documents are among the most important documents required for passport and visa issuance to foreign travelers seeking admittance to the United States;

(2) Current advances in identity card technology, including improvements to reduce identity theft, document tampering and counterfeit identity documents such as passports for potential application to legislation addressing problems with U.S. drivers licenses;

(3) Policies and practices of other countries regarding the increasing use of biometric identifiers for identity documentation, and the state of technological capability to effectively store data regarding identifiers and reliably use them to confirm identity in high volume human traffic environments;

(4) The position of the U.S. State Department's Office of Consular Affairs with regard to policy initiatives within ICAO and the international community addressed to improvements in document security and processes for issuing passports and visas;

(5) Issues regrading official travel documents or source identity documents that affect the capability of the United States to improve Border Security and protect U.S. citizens from terrorists entering the United States with bona fide visas, such as nearly all the 9–11 terrorists.

The United States delegation had many interests at the February 2002 meeting. Notable among them were (1) U.S.-initiated updates to specifications for machine readable travel documents; (2) substantial revisions proposed by the Document Content and Format Working Group led by the U.S. to promote better standardization of visas and passports toward faster machine processing and easier human inspector recognition of fraudulent documents; (3) delivery of a major technical review of biometric identifiers, content of which was heavily influenced by the State Department; (4) new security standards for Machine Readable Travel Documents aimed at reducing counterfeit and altered passports and visas; (5) proposed revisions to "Annex 9" of ICAO guidance to improve passport controls; and (6) a proposal for continuing work by the New Technologies Working Group on Encryption, Private/ Public Key Infrastructure (PKI) and Electronic Commerce.

The United States' lead role in establishing standards for newer technologies aimed at improvements to machine readable travel

documents, in particular biometric identifiers, means that often the resulting standards are generally built upon the best of existing U.S. technology. The US is vice chair of the data technologies working group, and ensures that ICAO coordinates its work with industry representatives to the International Standards Organization (ISO) so that there are parallel procedures to establish technology standards that are updated in concert with new ICAO standard revisions and updates.

Biometric comparison and authentication

The Committee has had a historical interest in these subjects, having established the biometric requirements for the special visa for Mexican business visitors to the United States, the Biometric Border Crossing Card.

The Enhanced Border Security and Visa Reform Act, under Title III, required the Attorney General to install readers and scanners at all ports of entry no later than October 26, 2004, which can provide biometric comparison and authentication of U.S. visas and foreign travel documents. The Committee has conducted extensive oversight to ensure that the State Department and the INS are moving forward rapidly to comply with the Act's requirements that such readers will perform reliably and can read the biometric identifiers so that the authentication process for foreign visitors is accurate and complete.

The Committee has required the INS to share details of both the machine testing program and the Agency's procurement plans and schedules on a monthly basis since April 2002, and intends to continue these regular briefings until the scanners, estimated to total roughly 3,000 by the date of the requirement, are in place.

The Committee investigated the programs of the Department of State's Bureau of Consular Affairs with regard to its consideration of biometric identifiers in passports and visas. The Committee investigated the process employed by the Bureau to collect and authenticate data from those Mexican citizen applicants for the Biometric Border Crossing Card, and it's information systems and means for communicating biometric data with the INS so that the INS and Border Patrol can authenticate the cards when they are used as identification for aliens in the U.S.

The Committee has had a particular oversight interest in the Act's requirement under Title III that employment authorization documents issued to refugees and asylees must contain photo and fingerprints beginning in mid-November 2002. It is also conducting oversight with regard to the Act's requirement under Title IV that the INS must be able to verify that the fingerprint on each card matches that of the holder prior to admission by September 30, 2002.

Oversight of the application of the Federal Tort Claims Act

On July 2, 1999, the Bureau of Land Management of the U.S. Department of the Interior ("Interior"), instituted a prescribed burn which subsequently escaped control and destroyed 23 homes, other structures, and 2000 acres of timberland in Trinity County, California (hereinafter referred to as the Lowden Fire).

Interior accepted liability under the Federal Tort Claims Act, once it determined that the wind and moisture conditions exceeded its own agency guidelines for setting a controlled burn. On August 24, 2000, Trinity County filed a claim for damages for the following losses: $6,098.66 for personal property owned by the county, mainly consisting of a Sheriff's vehicle; $19,355.46 for county personnel expenses, mainly consisting of overtime costs for police and medical staff; and $164,947.72 for economic loss resulting from loss of tax revenue.

On December 1, 2000, Interior offered payment in the amount of $6,098.66 for the personal property loss but denied payment for the personnel expenses and loss of tax revenue. In denying the County's, Interior asserted that according to "a line of cases decided by the Ninth Circuit, the mere expenditure of funds by the plaintiff as a result of the Federal Government's negligence does not constitute an 'injury or loss' within the meaning of the Federal Tort Claims Act." On March 15, 2001, Trinity County requested reconsideration of its claim, which has since been denied. On June 5, 2001, Trinity County requested that the Department of the Interior provide case law supporting it's determination.

Analysis of the Federal Tort Claims Act (FTCA)

The common law doctrine of sovereign immunity provides that "the United States cannot be sued without its consent" and that "Congress alone has the power to waive or qualify that immunity." In 1946 the federal government waived its immunity from tort claims by enacting the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671–2680 (2001), in which the United States authorized that tort suits could be brought against itself. The language of the FTCA states that "with exceptions, it makes the United States liable for injuries caused by the negligent or wrongful act or omission of any federal employee acting within the scope of his employment, in accordance with the law of the state where the act or omission occurred." Thus, liability is determined under the law of California in this case.

Moreover, 28 U.S.C. §§ 2674 provides that "the United States shall be liable * * * in the same manner and to the same extent as a private individual under like circumstances." Thus, the federal government is liable to a plaintiff if a private individual would likewise be liable in the state where the tort occurred.

Committee staff reviewed the issue of whether Trinity County's lost tax revenue qualified as loss of property under the FTCA and whether DOJ has maintained a consistent position regarding such losses in FTCA cases. In this case, the DOJ did not consider lost tax revenue as a property loss and, for this reason, declined to allow recovery of these damages under the FTCA.

Trinity County argued that because the loss of tax revenue due to property devaluations should be recoverable as a property loss under the FTCA. According to California law, property must be reassessed as of the date of any change in a property's value. For Trinity County, local property tax revenue is the County's primary source of funding for city services and public schools. The fire resulted in state-mandated property value reassessments, which decreased the value of the land and has led to an erosion of the Coun-

ty's tax base. Trinity County also argued that the loss was foreseeable, as first established in the landmark California case of *Dillon* v. *Legg,* 441 P.2d 912 (1968), and if the resulting harm was foreseeable then the damages are recoverable under a common law tort action in negligence. In this case, Trinity County reasoned that since the California tax statute requires reassessment of real property as of the date a property sustains a change in value, then the resulting loss of tax revenue is a foreseeable direct result of property loss.

Research of case law in California failed to find any cases which directly addressed the issue of recovery for lost tax revenue. It appeared to be a question which has not yet been presented to the California courts. However, there are two conflicting decisions in other jurisdictions which directly address the question of lost tax revenue. In *State of New York* v. *Gen. Elec. Co.,* 199 A.D.2d 595, 595 (1993), the town of Moreau, New York was allowed to recover lost property tax revenue which was caused by the defendant's liability for groundwater contamination.

Conversely, the U.S. District Court in Oregon did not recognize the City of LaGrande's claim for lost tax revenues when it was argued that the diminution in property values caused by the groundwater contamination was responsible for a resulting decrease in the property tax revenues collected by the City. The argument presented by the City of LaGrande is essentially identical to the one Trinity County presented to the DOJ.

There was no evidence that the federal government had ever compensated a jurisdiction in California for lost property tax revenue under the FTCA.

Alternatives for recovery of such damages or other damages not recoverable under the FTCA include a specific appropriation. Research of prior use of special legislation for this purpose found that the Cerro Grande Fire Assistance Act had just such a purpose when it was inserted into the Military Construction Appropriations Act of 2001, Pub. L. 106–246. In May 2000, the National Park Service, under the control and direction of Interior, instituted a controlled burn in Los Alamos County, New Mexico. This burn went out of control and resulted in the destruction of over 400 homes and 200 other structures. The legislation authorized compensation under regulations promulgated by the Federal Emergency Management Agency (FEMA). Absent any revisions to the FTCA, special legislation appears to be the only feasible method to deal with the limitations on claim payments where the federal government accepts liability for a controlled burn, but excludes reimbursement for loss of tax revenue. A second potential alternative for recovery of such damages is the passage of private legislation.

Review of case assignments in Sixth Circuit in racial discrimination case

On June 26, 2002, following the publication of the decision in *Grutter* v. *Bollinger,* 288 F.3d 732 (6th Cir. 2002), Chairman F. James Sensenbrenner, Jr., wrote Sixth Circuit Chief Judge Boyce F. Martin, Jr., concerning the assignment procedures in that case. According to a procedural appendix published with the dissenting opinion of Circuit Judge Danny Boggs, Chief Judge Martin ap-

peared to have (1) substituted himself for another judge on the original appeals panel when such a substitution was required by Sixth Circuit rules to be accomplished at random and (2) failed to circulate the Petition for Initial Hearing en Banc until after two judges had taken senior status, preventing them from participating on the en banc panel. The participation of those judges on the panel could have reversed the outcome of the case.

According to Judge Boggs's procedural appendix, the procedures used to consider the appeal did not conform to Sixth Circuit rules in effect at the time. Those rules required that when a panel considered an interlocutory appeal, that same panel must determine whether subsequent appeals should be considered by the same panel or by a panel of judges selected at random. Id. at 811 (citing 6th Cir. I.O.P. 34(b)(2)). The rule further provided that when the original panel included a district judge, the other two circuit judges must decide whether the district judge should be recalled or whether another judge should be chosen at random from among all judges, unless oral argument has already been scheduled, in which case only those judges scheduled to sit at that time would be included in the draw. Id.

Despite this rule, the appeal in this case was directed to a panel that consisted of Circuit Judges Daughtrey and Moore, who had ruled, along with visiting Senior District Judge Stafford, on an appeal concerning a request to intervene in the district court, and Chief Judge Martin. Judge Moore's concurrence in the case acknowledged that the substitution of Chief Judge Martin for Judge Stafford was not in conformity with 6th Cir. I.O.P. 34(b)(2). Id. at 757. Judge Moore, nevertheless, submitted that Chief Judge Martin had a policy of substituting himself "to avoid inconveniencing" other judges and that that policy "is a matter of common knowledge among the judges of this court." Id. Judge Boggs expressly denied knowledge of any such a policy. Id. at 814.

The Committee was concerned that this apparently secret policy resulted in the failure to circulate for five months appellee's May 14, 2001 petition (and any orders relating to it) asking that the appeal be heard en banc in the first instance. Had the petition been circulated when it was filed or had the June 4, 2001 order holding it in abeyance been circulated to the court, Judges Norris and Suhrenreich, who took senior status on July 1 and August 15, 2001, respectively, could have served on the en banc panel. Indeed, if the petition had been circulated when briefing was completed at the end of July 2001, Judge Suhrenreich could have participated on the en banc panel.

It also appeared that Chief Judge Martin may not have followed the procedure set forth in a December 5, 2001 letter to the other judges for handling such petitions. According to Judge Boggs's dissent, that policy was instituted to deal with pro se petitions (which this was not), and the policy did not apply if the Chief Judge and the clerk agree that the case is unusual. Id. at 812 n.45. The record does not reflect on what basis you and the clerk did not agree that the case was unusual.

Even after the petition was referred by the clerk to the panel—with the Chief Judge substituting himself for Judge Stafford—on August 23, 2001, Chief Judge Martin continued to ignore the re-

quirements of the December 5 policy that the panel either deny the petition and schedule the argument or circulate the petition. Id. at 812. Instead, the panel appears to have made no decision on the petition (that would have been circulated to the rest of the court), but scheduled the argument. Eight days before the scheduled date for the oral arguments, the petition was circulated to the nine active judges of the court without any explanation for the delay and without a recommendation that an en banc hearing ensue. Id. at 813.

The Committees's letter requested the production of certain documents. On July 12, 2002, Chief Judge Martin submitted documents in response to the Committee's request.

On June 18, 2002, Chief Judge Martin met, at his request, with Majority and Minority staff of the House Committee on the Judiciary. Chief Judge Martin informed the staff that he had already gathered the judges of the Sixth Circuit together and agreed to institute certain reforms to the Sixth Circuit's procedures. He said that Judge Boggs's procedural appendix and the Committee's inquiry had made clear to him that there was an appearance that the procedures of the court were prejudicial to the administration of justice. He said he was willing to institute reforms to restore confidence in the court. He agreed to provide the Committee with a summary of reforms related to nonrandom assignment procedures. He said that these reforms are likely to result in great inconvenience and expense because a random draw may require him to fly judges around to appear at hearings.

When asked about the specific allegations in Grutter—that he had substituted himself on the panel on a nonrandom basis—he said that while he did not recall the specific instance, he believed that he had followed the usual procedure when he was substituted at random on an earlier motion in the case, which made him the appropriate third judge on the panel that heard the ultimate appeal. He explained that the Sixth Circuit Internal Operating Procedure 34(b)(2) that mandates the random assignment of the third judge for an "appeal" applies to motions as well. When asked if the other judges understood the rule that way, despite the use of only the word "appeal" in the rule, he said that six did, and Judges Boggs and Batchelder did not.

When asked about the delay in circulating the petition for initial hearing en banc under his December 5, 2001 policy, Chief Judge Martin admitted that the policy had not been implemented properly due to a lack of communication with the Clerk. The policy provided that at the time the briefs are filed, "[t]he panel would also have had the petition for hearing en banc." Chief Judge Martin said that this sentence reflected his intention that the panel already have received the petition itself before the briefs are submitted. Such an interpretation appears to be inconsistent with the previous sentence in the policy that "[o]nce the briefs are in, the case will be assigned to a panel, either a hearing panel or a Rule 34 panel in the ordinary course." This unresolved inconsistency appears to have resulted in the circulation of the petition in Grutter only after the briefs were submitted.

Chief Judge Martin said that he had not noticed that such petitions were now routinely circulated much later in the process (sev-

eral weeks after filing of final briefs, rather than two days after the filing of proof briefs) than they had been prior to his December 5, 2001 policy. But he said that he had had no contact with the Clerk about the petition until after the Clerk circulated the case to the panel on August 23, 2001. Accordingly, he failed to confer with the Clerk about whether the case was "unusual" under the December 5, 2001 policy, which might have resulted in earlier circulation to the court.

During the discussion, he repeatedly referred to lack of active judges on the court—the court had only eight of the 16 authorized judges with six nominations pending. He told us that nonrandom assignment procedures had assisted the court in carrying out its work during a time when he was running the court "by the seat of his pants." He specifically attributed the court's inefficiency right now to the lack of judges.

On August 22, 2002, Chief Judge Martin wrote the Chairman regarding his efforts to reform assignment procedures in the Sixth Circuit. In that letter, Chief Judge Martin again noted the judicial vacancy crisis in the Sixth Circuit: Operating within a circuit as ours with eight vacancies out of sixteen positions, we, of course, have found great difficulty in completing enough panels to operate as a court with eighteen Article III judges available to hear appeals.

He further reported on reforms to the assignment procedures. He explained:

> [T] Circuit Executive randomly select[s] the court and divid[es] it into two sections, then in turn assigns an active judge, a senior judge, and a district judge to a panel prior to advising the clerk's office of the composition of the panel. While the clerk's office is preparing the cases, to be heard in oral argument, they in turn are matching sets of ten oral argument cases to the panels. Whenever disqualifications arise, either the case is remanded to the clerk or the judge on the panel is removed from the panel, and the Circuit Executive, the clerk, and the senior staff attorney draw the next available judge. Clearly, this is not a perfect situation, but it does provide, we believe, an indicia of impartiality and fairness.
>
> In addition, to those items outlined in my previously provided documentation, we have also begun a process where the panel, when a judge disqualifies him or herself, will be reconstituted by the senior staff members as outlined above or disbanded. When that occurs, the cases assigned to the panel will be returned to the clerk for redistribution among other panels. While this does not provide as much efficiency as we have had in the past, it does provide a clearly defined process to avoid any allegation of partiality.

Review of the circumstances surrounding Senior Circuit Judge Richard D. Cudahy's disclosure that a Grand Jury was considering evidence of President Clinton's now admittedly false deposition testimony in Jones v. Clinton

On July 19, 2001, the Chairman and the Chairman of the Subcommittee on Courts, Intellectual Property, and the Internet sought documents from Chief Justice William H. Rehnquist regarding Seventh Circuit Senior Judge Richard D. Cudahy's disclosure that Independent Counsel Robert W. Ray had empaneled a grand jury to consider evidence regarding President William Jefferson Clinton's now admittedly false sworn deposition testimony regarding his relationship with Monica Lewinsky.

This request followed an inquiry by this Committee in the 106th Congress into the circumstances surrounding Judge Cudahy's disclosure. Specifically, in October 2000, shortly after the disclosure, the Committee requested that the Independent Counsel and the judges of the Special Division provide information regarding the incident. As a result of those requests, the Committee learned that the Independent Counsel had first requested that Judge Cudahy recuse himself from matters relating to his office and, when Judge Cudahy refused, referred the matter to Chief Justice Rehnquist for whatever action he deemed appropriate.

Independent Counsel Ray's referral to the Chief Justice cited the District of Columbia Bar Rules of Professional Conduct that require a lawyer practicing in the District of Columbia to inform the "appropriate authority" whenever a lawyer has knowledge that "a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for Office." In response, the Chief Justice expressly disagreed that he was the appropriate authority, but informed Independent Counsel Ray that he "took what [he] believe[d] to be appropriate action."

In response to the Committee's July 19, 2001 letter regarding his actions with respect to Judge Cudahy, Chief Justice Rehnquist provided his August 28, 2000 letter to Judge Cudahy seeking assurances that Judge Cudahy intended to abide by applicable standards relating to the "duties of confidentiality imposed by the statutory provisions governing the work of the [Special Division], the code of Conduct for United States Judges, and the rules governing grand jury secrecy." Judge Cudahy replied that he intended to abide by those standards.

On May 15, 2002, the Chairman and the Chairman of the Subcommittee on Courts, Intellectual Property, and the Internet filed a formal judicial complaint under 28 U.S.C. § 372(c)(1) with the Clerk of the United States Court of Appeals for the Seventh Circuit, requesting that the Chief Judge, pursuant to 28 U.S.C. § 372(c)(4) and (5), convene a special committee of judges to investigate the matter. The letter asked for investigation of the evidence obtained by the Subcommittee that Judge Cudahy's disclosure may constitute (1) a violation of Fed. R. Crim. P. 6(e) prohibiting disclosure of "matters occurring before the grand jury" and (2) a violation of the confidentiality requirements relating to sealed material under the local rules applicable to the Special Division. Moreover, other evidence obtained by the Committee suggested that Judge Cudahy may have made knowingly false statements related to this

matter to the Chief Justice of the United States and this Committee that may constitute violations of 18 U.S.C. § 1001 (prohibiting false statements).

That evidence revealed that Judge Cudahy, following the initial press report that a grand jury had been convened, failed to disclose his responsibility for more than 24 hours, while the Independent Counsel endured a barrage of attacks on national television and in the newspapers by media commentators and government officials on the evening of Vice President Al Gore's acceptance of the formal acceptance of the Democratic Party nomination for President of the United States. Judge Cudahy further appeared to have sought to prevent the initiation of a criminal investigation that would have revealed his role and admitted that he was the source only after he had failed to persuade the other judges on the Court not to seek such an investigation and was threatened with a polygraph test.

Despite the evidence of his delay and efforts to prevent discovery of his responsibility, Judge Cudahy described his admission as "entirely gratuitous, spontaneous and unforced by any other person" in a letter to the Committee and as "voluntary" and "immediate" in a letter to the Chief Justice of the United States. Those statements may constitute criminal violations of 18 U.S.C. § 1001 (regarding false statements).

On May 24, 2002, Circuit Judge Richard A. Posner, sitting in lieu of Chief Judge Flaum who had recused himself, ruled that no the allegations in the complaint did not warrant convening a panel of judges to investigate the matter further. *In re Complaint Against circuit Judge Richard D. Cudahy,* 2002 U.S. App. LEXIS 19735 (7th Cir. 2002). Judge Posner concluded that Judge Cudahy had not violated Fed.R.Crim P. 6(e) because the "subject of the investigation was known by all to be President Clinton." Id. at *9.

Judge Posner rejected the allegation that Judge Cudahy impermissibly disclosed a matter under seal, asserting that he was "unaware of any rule that requires a judge * * * to conceal material merely because a lawyer has stamped 'under seal' on it" and that "judges frequently refuse allow materials that both sides to a lawsuit wish to be sealed, because of the presumption that judicial proceedings are public." Id. at *9–10.

Finally, Judge Posner decided that Judge Cudahy's claim to the Committee that he voluntarily disclosed his responsibility "lack[ed] sufficient plausibility to warrant a further investigation." Id. at *12. He concluded that Judge Cudahy's admission of his responsibility was not the result of the threat of a criminal investigation because "[t]here was no basis for a criminal investigation, since the facts alleged in the complaint show that [Judge Cudahy] did not violate Rule 6(e).

The Committee remains concerned about the effective functioning of the judicial discipline system. The Committee's complaint and the public record included substantial evidence that (1) contrary to Judge Posner's decisions, the public was completely unaware that President Clinton was the subject of a grand jury investigation; (2) the matter was in fact under seal under the rules of the Special Division of the United States Court of Appeals for the District of Columbia Circuit, regardless of what "judges frequently" do; and (3) Judge Cudahy did not disclose his responsibility until

he believed he would have been subjected to a criminal investigation, including a polygraph examination, even if such an investigation might ultimately have resulted in a determination that Rule 6(e) was not violated. The Committee will continue its oversight of the judicial discipline system.

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY [1,5]

LAMAR S. SMITH, Texas, *Chairman*

MARK GREEN, Wisconsin, *Vice Chair*
HOWARD COBLE, North Carolina
BOB GOODLATTE, Virginia
STEVE CHABOT, Ohio
BOB BARR, Georgia
ASA HUTCHINSON, Arkansas [4]
RIC KELLER, Florida
MIKE PENCE, Indiana [6]

ROBERT C. SCOTT, Virginia
ANTHONY D. WEINER, New York [2]
SHEILA JACKSON LEE, Texas
MARTIN T. MEEHAN, Massachusetts
WILLIAM D. DELAHUNT, Massachusetts
ADAM B. SCHIFF, California [3]

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[1] Subcommittee chairmanship and assignments approved January 31, 2001.

[2] Anthony D. Weiner, New York, reassignment from the Subcommittee on Crime to the Subcommittee on Courts, the Internet, and Intellectual Property approved May 23, 2001.

[3] Adam B. Schiff, California, assignment to the Subcommittee approved May 23, 2001.

[4] Asa Hutchinson, Arkansas, resigned from House effective midnight August 6, 2001.

[5] Subcommittee name change from "Crime" to "Crime, Terrorism, and Homeland Security" approved March 20, 2002.

[6] Mike Pence, Indiana, assignment to the Subcommittee approved June 13, 2002.

Tabulation of subcommittee legislation and activity

Legislation referred to the Subcommittee	297
Legislation on which hearings were held	21
Legislation reported favorably to the full Committee	15
Legislation reported adversely to the full Committee	0
Legislation reported without recommendation to the full Committee	0
Legislation reported as original measure to the full Committee	0
Legislation discharged from the Subcommittee	8
Legislation pending before the full Committee	0
Legislation reported to the House	24
Legislation discharged from the Committee	6
Legislation pending in the House	6
Legislation passed by the House	24
Legislation pending in the Senate	20
Legislation vetoed by the President (not overridden)	0
Legislation enacted into Public Law	3
Legislation enacted into Public Law as part of other legislation	6
Days of legislative hearings	18
Days of oversight hearings	14

JURISDICTION OF THE SUBCOMMITTEE

The Subcommittee on Crime, Terrorism, and Homeland Security has jurisdiction over the Federal Criminal Code, anti-terrorism efforts, homeland security, espionage, sabotage, drug enforcement, sentencing, parole and pardons, Federal Rules of Criminal Procedure, prisons, law enforcement and anti-terrorism assistance to state and local governments, and other appropriate matters as referred by the Chairman, and relevant oversight including the U.S. Coast Guard, Customs, U.S. Marshals, Bureau of Prisons, the Department of Homeland Security, the Drug Enforcement Administration, Bureau of Alcohol, Tobacco and Firearms, the Federal Bureau of Investigations, the Office of Justice Programs, and the

Criminal Division of Justice. This report summarizes the highlights of the Subcommittee's activities during the 107th Congress.

LEGISLATIVE ACTIVITIES

PROTECTING THE HOMELAND AND FIGHTING THE WAR ON TERRORISM

H.R. 3209, the "Anti-Hoax Terrorism Act of 2001"

Summary.—Chairman Sensenbrenner, (R–WI) and Congressman Lamar Smith (R–TX) introduced H.R. 3209, the "Anti-Hoax Terrorism Act of 2001," on November 1, 2001. This bill creates criminal and civil penalties for persons engaging in any conduct, with intent to convey false or misleading information, under circumstances where the conveyed information may reasonably be believed and where such information concerns an activity which would constitute a violation of 18 U.S.C. §§ 175 (relating to biological weapons attacks), 229 (relating to chemical weapons attacks), 831 (nuclear attacks) or 2332a (weapons of mass destruction attacks). Under current law, it is a felony to perpetrate a hoax such as falsely claiming there is a bomb on an airplane. It is also a felony to communicate, in interstate commerce, threats of personal injury to another. A gap exists, however, in the current law as it does not address a hoax related to biological, chemical, or nuclear dangers where there is no specific threat.

Because of the tragic September 11, 2001 attacks and the October 2001 anthrax attacks, the public is alarmed and appropriately reporting suspicious activity. Our Nation is on high alert and our law enforcement cannot afford to be distracted with hoaxes. Such hoaxes may not be designed to influence public policy or governments, but are serious threats to the public's safety on many levels and are their own form of terrorism. H.R. 3209 makes it a felony to perpetrate a hoax related to biological, chemical, nuclear, and weapons of mass destruction attacks.

Legislative History.—On November 7, 2001, the Subcommittee on Crime held one hearing on H.R. 3209, the "Anti-Hoax Terrorism Act of 2001." The two witnesses who testified were: James F. Jarboe, Section Chief, Counterterrorism Division, Domestic Terrorism, Federal Bureau of Investigation, and James Reynolds, Chief, Terrorism and Violent Crime Section, Criminal Division, U.S. Department of Justice. On November 14, 2001, the Subcommittee met in open session and ordered favorably reported the bill, H.R. 3209, as amended, by voice vote, a quorum being present. On November 15, 2001, the Committee met in open session and ordered favorably reported the bill with an amendment by voice vote, a quorum being present. The bill was reported to the House on November 29, 2001 (H. Rept. 107–306). The House passed the bill on December 12, 2001, by a recorded vote (roll no. 491) of 423 yeas to 0 nays. No further action was taken on the bill, H.R. 3209, during the 107th Congress.

H.R. 3275, the implementation legislation for the International Convention for the Suppression of Terrorist Bombings and for the International Convention for the Suppression of the Financing of Terrorism

Summary.—Representative Lamar Smith (R–TX) introduced H.R. 3275, the implementation legislation for the International Convention for the Suppression of Terrorist Bombings and for the International Convention for the Suppression of the Financing of Terrorism on November 9, 2001. H.R. 3275 amends title 18 of the United States Code to allow the U.S. to comply with the conditions of the two Conventions.

Title I of the bill covers the International Convention for the Suppression of Terrorist Bombings. The U.S. proposed the International Convention for the Suppression of Terrorist Bombings after the 1996 bombing of the U.S. military personnel in Saudi Arabia. The U.S. signed the treaty on January 12, 1998, and transmitted the treaty on September 8, 1999, to the Senate for its advice and consent to ratification. The Convention entered into force internationally on May 23, 2001. Treaty participants must either prosecute or extradite any person within their jurisdiction who unlawfully and intentionally delivers, places, discharges, or detonates an explosive or other lethal device in, into, or against a place of public use, a state or government facility, a public transportation system, or an infrastructure facility. A Nation is subject to these obligations without regard to the place where the alleged act covered by the Convention took place.

Title II of the bill covers the International Convention for the Suppression of Financing of Terrorism. The United States signed this treaty on January 10, 2000, and transmitted it to the Senate for its advice and consent to ratification on October 12, 2000. This Convention imposes binding legal obligations upon Nations either to prosecute or to extradite any person within their jurisdiction who unlawfully and willfully provides or collects funds with the intent to carry out various terrorist activities. A Nation is subject to these obligations without regard to the place where the alleged act covered by the Convention took place.

On October 23, 2001, the Senate Committee on Foreign Relations held a hearing on the "terrorist bombings" and the "financing terrorism" conventions. President Bush sent Congress a legislative proposal to implement these two treaties on October 26, 2001 (House Document 107–139). These treaties, once ratified, expand the legal framework for international cooperation in the investigation, prosecution, and extradition of persons who engage in bombings and financially support terrorist organizations to fill an important gap in international law.

Legislative History.—On November 14, 2001, the Subcommittee on Crime held a legislative hearing and markup on H.R. 3275. The two witnesses who testified were: Sam Witten, Deputy Legal Adviser, U.S. Department of State and Michael Chertoff, Assistant Attorney General, Criminal Division, U.S. Department of Justice. On November 14, 2001, the Subcommittee on Crime met in open session and ordered favorably reported the bill, H.R. 3275, by voice vote, a quorum being present. On November 15, 2001, the Committee met in open session and ordered favorably reported the bill,

H.R. 3275, with amendment by voice vote, a quorum being present. The bill was reported to the House on November 29, 2001 (H. Rept. 107–307). On December 19, 2001, the bill passed the House by a recorded vote (roll no. 501) of 381 yeas to 36 nays. On June 14, 2002, the bill passed the Senate with an amendment by 83 yeas to 1 nay. On June 18, 2002, the House agreed to the Senate amendment through unanimous consent. On June 25, 2002, the President signed the bill and it became Public Law 107–197.

H.R. 3482, the "Cyber Security Enhancement Act of 2002"

Summary.—Representative Lamar Smith (R–TX) introduced H.R. 3482, the "Cyber Security Enhancement Act of 2002," on December 13, 2001. This legislation increases penalties for cybercrimes to better reflect the seriousness of the crime; enhances law enforcement efforts through better coordination; and makes the Office of Science and Technology (OST) an independent office to serve as the national focal point for law enforcement science and technology efforts. OST will continue to assist in the development and dissemination of law enforcement technology, and to make technical assistance available to Federal, state, and local law enforcement agencies under the approval of the National Institute of Justice.

Terrorists and high-tech vandals use computers and other technology to terrorize and harass businesses, private citizens, and the government. For example, hackers invade the privacy of citizens' homes to program personal computers into "zombie computers." These zombie computers are then used for the denial-of-service attacks that bombard a target site with nonsense data. In February 2000, a denial-of-service attack on Yahoo and other companies cost millions of dollars. These types of attacks not only threaten our economy, but also our public safety. An attack on an emergency service network could prevent prompt responses to people in life threatening situations, causing injury or death.

The Subcommittee on Crime, Terrorism, and Homeland Security held a series of oversight hearings. On May 24, 2001, the Subcommittee heard from three state and local officials on the efforts and needs of the police, the prosecutors, and the state governments to fight cyber crime. The witnesses were Michael T. McCaul, the Texas Deputy Attorney General for Criminal Justice; the Honorable Joseph I. Cassilly, the State's Attorney for Harford County, Maryland and Chairman of the Cyber Crime Committee for the National District Attorneys Association; and Ronald R. Stevens, the Senior Investigator for the Bureau of Criminal Investigation for the New York State Police, Computer Crime Unit. All three testified that they need better resources, training, standards, and equipment.

On June 12, 2001, officials from three federal agencies testified before the Subcommittee. The witnesses were Michael Chertoff, the Assistant Attorney General of the Criminal Division for the Department of Justice; Thomas T. Kubic, the Deputy Assistant Director of the Criminal Investigative Division for the Federal Bureau of Investigation; and James A. Savage, Jr., the Deputy Special Agent in Charge of the Financial Crimes Division for United States Secret Service. The witnesses agreed that Federal laws regarding

the processes and procedures to investigate and prosecute cybercrime were outdated.

Alan Davidson, Associate Director at the Center for Democracy and Technology (CDT), a Washington, DC, non-profit group interested in civil liberties and human rights on the Internet and other new digital media, also testified. He urged the Subcommittee to consider privacy issues when drafting new legislation and updating the law. At the February 12, 2002 legislative hearing on H.R. 3482, the "Cyber Security Enhancement Act of 2002," Mr. Davidson testified that the "[Center for Democracy and Technology (CDT)] commends this committee for holding this hearing, and for the relatively measured approach taken in H.R. 3482. We agree that computer crime and security is a serious problem that requires serious government response."

On June 14, 2001, representatives from the business community testified about the problems they face with cybercrime. The hearing focused on the efforts and concerns of private industry with regard to this issue. The witnesses agreed that sharing information was key to successfully address and prevent cybercrime. Additionally, the witnesses urged Congress to examine stricter penalties for cybercrime.

The three hearings highlighted the threat of cybercrime and cyberterrorism against our citizens and our Nation and the definitive need for legislation. Representative Lamar Smith (R–TX) introduced H.R. 2915, "the Public Safety and Cyber Security Enhancement Act of 2002," on September 20, 2001, to address the concerns brought forth in the hearings. Most of H.R. 2915 was adopted as part of the U.S.A. Patriot Act,[1] the anti-terrorism bill, enacted on October 26, 2001, in response to the September 11th attacks. H.R. 3482, "the Cyber Security Enhancement Act of 2002," responds to the previous hearings and ongoing discussions with law enforcement, industry, and academia representatives on the issues not covered in the U.S.A. Patriot Act.

Legislative History.—The Subcommittee on Crime held one day of hearings on H.R. 3482 on February 12, 2002. The four witnesses who testified were: John G. Malcolm, Deputy Assistant Attorney General, Criminal Division of the Department of Justice; Susan Kelley Koeppen, Corporate Attorney, Microsoft Corporation; Clint Smith, Vice President and Chief Network Counsel of WorldCom; and Alan Davidson, Staff Counsel, Center for Democracy and Technology. On February 26, 2002, the Subcommittee met in open session and ordered favorably reported the bill, H.R. 3482, as amended, by voice vote, a quorum being present. On May 8, 2002, the Committee met in open session and ordered favorably reported the bill, H.R. 3482, as amended, by voice vote, a quorum being present. The bill was reported to the House on June 11, 2002 (H. Rept. 107–497). On July 15, 2002, the bill passed the House by a recorded vote (roll no. 296) of 385 yeas to 3 nays. The bill was incorporated into H.R. 5710, the Homeland Security Act of 2002. On November 13, 2002, H.R. 5710 passed the House by a recorded vote (roll no. 477) of 299 yeas to 121 nays. On November 19, 2002, the Senate incorporated H.R. 5710, as amended in the nature of a substitute,

[1] Pub. L. No. 107–56

and passed H.R. 5005 by 90 yeas to 9 nays. The House agreed to the Senate amendment to H.R. 5005 on November 22, 2002. On November 25, 2002, the President signed the bill and it became Public Law 107–296.

H.R. 4864, the "Anti-Terrorism Explosives Act of 2002"

Summary.—Chairman Sensenbrenner (R–WI), Ranking Minority Member John Conyers (D–MI), and Congressman Lamar Smith (R–TX) introduced H.R. 4864, the "Anti-Terrorism Explosives Act," on June 5, 2002. This bill tightens security for explosive materials and enhances security measures for purchasers and for possessors of explosives. The legislation requires all persons who wish to obtain explosives, even for limited use, to obtain a permit.

Additionally, the legislation expands the list of persons prohibited from receiving explosive materials. The provisions of the bill conform with the list of persons restricted from possessing firearms. The bill requires companies applying for a permit "to possess, use or transfer explosives" to submit a list to the Bureau of Alcohol, Tobacco and Firearms (ATF) of all employees who have responsibility for, or will have possession of, explosive materials to verify that these individuals are not on the list of persons who are prohibited from receiving or possessing explosives. Explosives manufacturers are also required, under this legislation, to provide a sample of their explosives to facilitate the tracking of these materials for ATF. Finally, the bill expands Federal jurisdiction over intentional fires or explosions occurring on Federal property to include institutions or organizations receiving Federal financial assistance.

Legislative History.—The Subcommittee on Crime, Terrorism, and Homeland Security held one hearing on H.R. 4864, the "Antiterrorism Explosives Act of 2002," on June 11, 2002. The three witnesses who testified were: The Honorable Kenneth Lawson, Assistant Secretary of Enforcement, U.S. Department of the Treasury; Bradley A. Buckles, Director, Bureau of Alcohol, Tobacco and Firearms; and J. Christopher Ronay, President, Institute of Makers of Explosives. On June 13, 2002, the Subcommittee met in open session and ordered favorably reported the bill, by voice vote, a quorum being present. On June 19, 2002, the Committee on the Judiciary met in open session and ordered favorably reported the bill, as amended, by voice vote, a quorum being present. The bill was reported to the House on September 17, 2002 (H. Rept. 107–658). This bill was incorporated with minor modifications into H.R. 5710, the Homeland Security Act of 2002. On November 13, 2002, H.R. 5710 passed the House by a recorded vote (roll no. 477) of 299 yeas to 121 nays. On November 19, 2002, the Senate incorporated H.R. 5710, as amended in the nature of a substitute and passed H.R. 5005 by 90 yeas to 9 nays. The House agreed to the Senate amendment to H.R. 5005 on November 22, 2002. On November 25, 2002, the President signed the bill and it became Public Law 107–296.

H.R. 4598, the "Homeland Security Information Sharing Act"

Summary.—Representatives Saxby Chambliss (R–GA), Chairman Sensenbrenner (R–WI), Lamar Smith (R–TX) and Jane Harman,

(D–CA) introduced H.R. 4598, the "Homeland Security Information Sharing Act," on April 25, 2002. With the passage of the U.S.A. Patriot Act,[2] the 107th Congress began to break down the barriers to facilitate information sharing between Federal law enforcement officials and the intelligence community. H.R. 4598, the "Homeland Security Information Sharing Act" continues that effort. This bill requires the President to create procedures to strip out classified information so that state and local officials may receive the information without clearances. The bill also incorporates H.R. 3285, a bill introduced by Representative Anthony Weiner (D–NY) to remove the barriers for state and local officials to share law enforcement and intelligence information with Federal officials.

After September 11, 2001, it was clear that there were serious problems with communications between Federal law enforcement agencies and the intelligence community. The lack of information sharing was one factor that prevented the U.S. intelligence community from appropriately responding to prior warnings about September 11. The Administration and the Congress took immediate action to address this problem by drafting and passing the U.S.A. Patriot Act. The very purpose of the Patriot Act was to improve information sharing for the law enforcement and intelligence communities to combat terrorism and terrorist-related crimes. The Patriot Act, however, did not remove restrictions in sharing homeland security information with states and localities. The country needs a comprehensive information sharing system that includes Federal, state and local law enforcement agencies. Accordingly, H.R. 4598 directs the Administration to establish procedures to share classified and unclassified, but sensitive, homeland security information. The bill also extends provisions in the U.S.A. Patriot Act to state and local officials to cover grand jury information and law enforcement or intelligence surveillance information.

Legislative History.—The Subcommittee on Crime, Terrorism, and Homeland Security held one day of hearings on H.R. 4598, the "Homeland Security Information Sharing Act," on June 4, 2002. The three witnesses who testified were: the Honorable Saxby Chambliss (GA–08); the Honorable Jane Harman (CA–36); and the Honorable John Cary Bittick, President of the National Sheriff's Association. On June 4, 2002, the Subcommittee met in open session and ordered favorably reported the bill, as amended, by voice vote, a quorum being present. On June 13, 2002, the Committee met in open session and ordered favorably reported the bill, H.R. 4598, with amendment, by voice vote, a quorum being present. The bill was reported to the House on June 25, 2002 (H. Rept. 107–534). The House passed the bill on June 26, 2002, by a recorded vote (roll no. 258) of 422 yeas to 2 nays. The bill was incorporated into H.R. 5710, the Homeland Security Act of 2002. On November 13, 2002, H.R. 5710 passed the House by a recorded vote (roll no. 477) of 299 yeas to 121 nays. On November 19, 2002, the Senate incorporated H.R. 5710, as amended in the nature of a substitute, and passed H.R. 5005 by 90 yeas to 9 nays. The House agreed to the Senate amendment to H.R. 5005 on November 22, 2002. On

[2] Pub. L. No. 107–56, 115 Stat. 242.

November 25, 2002, the President signed the bill and it became Public Law 107–296.

ANTI-DRUG EFFORTS

H.R. 4689, the "Fairness in Drug Sentencing Act of 2002"

Summary.—Representative Lamar Smith (R–TX) introduced H.R. 4689, the "Fairness in Drug Sentencing Act," on May 9, 2002. This bill would disapprove an amendment to the Sentencing Guidelines that the United States Sentencing Commission submitted to Congress on May 1, 2002. The Sentencing Commission's proposed amendment creates a drug quantity "cap" for those persons convicted of trafficking in large quantities of drugs if those persons also qualify for a mitigating role adjustment under the existing guidelines. For example, a person convicted of trafficking 150 kilograms or more of cocaine who qualifies for the mitigating role adjustment would have their sentence reduced to the same level as someone who was convicted of trafficking one-half (½) kilogram of cocaine. This would result in the less culpable defendant (one who moved less drugs) unfairly receiving a disproportionately longer sentence than the more culpable defendant (one who moved more drugs).

The Sentencing Commission, in its "Reason for Amendment," states that the current guidelines overstate the culpability of certain drug offenders "who perform relatively low level trafficking functions, have little authority in the drug trafficking organization, and have a lower degree of individual culpability." However, such persons already receive an individual downward adjustment to reflect these facts. This amendment will be nothing short of a windfall for large drug traffickers. It gives drug dealers the incentive to move more drugs, rather than less, and is contrary to the consistent and long-standing congressional intent that drug quantity form the centerpiece of the guidelines in drug sentencing. The greater the drug quantity involved in the trafficking operation, the greater the harm to our Nation.

The intent of Congress has been clear that there be an orderly gradation of sentences based primarily upon the objective criterion of drug quantity. The proposed amendment to "cap" drug quantity is inconsistent with that congressional intent and also with basic notions of fairness. The "mitigating role" participant in a given case whose lower base offense level does not trigger the "cap" (because he moved less drugs) will receive a disproportionately higher sentence than the "mitigating role" participant in another case whose level does trigger the "cap" (because he moved more drugs).

Legislative History.—On May 14, 2002, the Subcommittee on Crime, Terrorism, and Homeland Security held a legislative hearing on H.R. 4689. The four witnesses who testified were: Charles Tetzlaff, General Counsel, United States Sentencing Commission; John Roth, Section Chief, Department of Justice; the Honorable James M. Rosenbaum, Chief Judge, United States District Court, Minneapolis, Minnesota; and William G. Otis, former Assistant U.S. Attorney for the Eastern District of Virginia. On May 14, 2002, the Subcommittee met in open session and ordered favorably reported the bill, H.R. 4689, by voice vote, a quorum being present.

On September 10, 2001, the Committee met in open session and ordered favorably reported the bill, by voice vote, a quorum being present. The bill was reported to the House on October 31, 2002 (H. Rept. 107–769). No further action was taken on H.R. 4689 during the 107th Congress.

H.R. 5334, the "Hometown Heroes Survivors Benefits Act of 2002"

Summary.—H.R. 5334, the Hometown Heroes Survivors Benefits Act of 2002, amends the Omnibus Crime Control and Safe Streets Act of 1968 to provide that a public safety officer who dies as the direct and proximate result of a heart attack or stroke suffered while on duty or within 24 hours after participating in a training exercise or responding to an emergency situation shall be presumed to have died as the direct and proximate result of a personal injury sustained in the line of duty, for purposes of survivor benefits. H.R. 5334 also makes this applicable to deaths occurring on or after January 1, 2002.

Legislative History.—On September 5, 2002 Congressman Etheridge introduced H.R. 5334. On October 9, 2002 the Judiciary Committee ordered reported H.R. 5334 by voice vote. The Judiciary Committee filed H. Rept. 107–786 on November 14, 2002. On November 15, 2002 H.R. 5334 passed the House of Representatives without objection. On November 15, 2002, H.R. 5334 was received in the Senate. No further action was taken on the bill.

H.R. 5519, the "Reducing Americans' Vulnerability to Ecstasy Act of 2002," or the "RAVE Act"

Summary.—H.R. 5519, the "Reducing Americans Vulnerability to Ecstasy Act," was introduced by Lamar Smith (R–TX) on October 1, 2002. This legislation would amend the Controlled Substances Act to prohibit knowingly leasing, renting, or using, or intentionally profiting from, any place (as well as opening, maintaining, leasing, or renting any place, as provided under current law), whether permanently or temporarily, for the purpose of manufacturing, storing, distributing, or using a controlled substance. The bill subjects violators to: (1) a civil penalty of the greater of $250,000 or twice the gross receipts derived from each violation; and (2) declaratory and injunctive remedies. H.R. 5519 also directs the U.S. Sentencing Commission to review and consider amending the Federal sentencing guidelines for offenses involving GHB, a popular club drug, to provide for increased penalties. The bill authorizes appropriations to the Drug Enforcement Administration for: (1) a Demand Reduction Coordinator in each State; and (2) educating youth, parents, and other interested adults regarding drugs associated with raves.

Each year tens of thousands of young people are initiated into the drug culture at "rave" parties or events (all-night, alcohol-free dance parties typically featuring loud, pounding dance music). The trafficking and use of "club drugs", including Ecstasy or MDMA, Ketamine, Rohypnol, and GHB, is deeply embedded in the rave culture. Ecstasy is the most popular of the club drugs associated with raves. Thousands of teenagers are treated for overdoses and Ecstasy-related health problems in emergency rooms each year. The Drug Abuse Warning Network reports that Ecstasy mentions in

emergency visits grew 1,040 percent between 1994 and 1999. Ecstasy damages neurons in the brain which contain serotonin, the chemical responsible for mood, sleeping and eating habits, thinking processes, aggressive behavior, sexual function, and sensitivity to pain. According to the National Institute on Drug Abuse, this can lead to long-term brain damage that is evident 6 to 7 years after Ecstasy use.

Legislative History.—On October 10, 2002, the Subcommittee on Crime, Terrorism, and Homeland Security held one legislative hearing on this bill. The four witnesses who testified were: The Honorable Asa Hutchinson, Administrator, Drug Enforcement Administration; Andrea Craparotta, Investigator, Middlesex County Prosecutor's Office, New Jersey; Judy Kreamer, President, Educating Voices, Inc.; and Graham Boyd, Director, Drug Policy Litigation Project, American Civil Liberties Union. No further action was taken on H.R. 5519 during the 107th Congress.

PROTECTING THE NATION'S MOST VULNERABLE

H.R. 863, the "Consequences for Juvenile Offenders Act of 2001"

Summary.—As in the 106th, juvenile justice reform remained a top priority for the Crime Subcommittee in the 107th Congress. Representative Lamar Smith (R–TX) introduced H.R. 863, the "Consequences for Juvenile Offenders Act of 2001," on March 6, 2001. The bill provides needed resources and flexibility to state and local juvenile justice systems. The legislation seeks to ensure meaningful, proportional consequences for juvenile wrongdoing, starting with the first offense, and intensifying with each subsequent more serious offense. The bill ensures flexibility by providing that a wide range of juvenile justice system activities and services can be supported. From new detention facilities and hiring more judges and probation officers, to juvenile gun courts, drug court programs and accountability-based school safety programs—this bill allows states and localities to strengthen their juvenile justice systems as they see fit.

Specifically, H.R. 863 authorizes the Department of Justice to make grants to states and local governments to strengthen their juvenile justice systems. The bill allows the states and localities flexibility in using the grant funds and provides an illustrative list of possible uses for the grant money. To be eligible for the grant funds, states must have in place or agree to implement a system of graduated sanctions for juvenile offenders within one year of applying for the funds. Under the legislation, the graduated sanctions system will ensure that the sanctions are imposed on juvenile offenders for every offense, that the sanctions escalate in intensity with each subsequent more serious offense, that the courts have flexibility in applying the sanction to address the specific problems of the individual offender, and that the courts consider public safety and victims of crime when applying sanctions. A state or locality can still qualify for a grant even if its system of graduated sanctions is discretionary—not requiring juvenile courts to participate. If the applicant has a discretionary system, then the bill requires that a non-participating juvenile court report at the end of the year why it did not impose graduated sanctions.

Legislative History.—The Subcommittee on Crime held one hearing on H.R. 863, the "Consequences for Juvenile Offenders Act of 2001," on March 8, 2001. The four witnesses who testified were Steve Robinson, Executive Director, Texas Youth Commission; the Honorable Jim Payne, Marion County, Indiana, Juvenile Court; the Honorable Michael Anderegg, Marquette, Michigan Juvenile Court; and Vincent N. Schiraldi, Center on Juvenile and Criminal Justice. On March 21, 2001, the Subcommittee met in open session and ordered favorably reported the bill, H.R. 863, as amended, by voice vote, a quorum being present. On March 28, 2001, the Committee met in open session and ordered favorably reported the bill, H.R. 863, with amendment by voice vote, a quorum being present. The bill was reported to the House on April 20, 2001 (H. Rept. 107–46). On October 16, 2001, the House passed the bill by voice vote. The bill was incorporated into H.R. 2215, the "21st Century Department of Justice Appropriations Authorization Act," which was signed by the President on November 2, 2002, and became Public Law 107–273.

H.R. 1877, the "Child Sex Crimes Wiretapping Act of 2002"

Summary.—Representative Nancy Johnson (R–CT) introduced H.R. 1877, the "Child Sex Crimes Wiretapping Act of 2002," on May 16, 2001. This bill was previously introduced in the 106th Congress as H.R. 3482. H.R. 1877 assists law enforcement officials in investigating certain sex crimes that may involve children. The bill adds four new wiretap predicates under section 2516 of title 18 that relate to sexual exploitation crimes against children. This legislation amends 18 U.S.C. § 2516 to authorize the interception of wire, oral, or electronic communications in the investigation of: (1) the selling and buying of a child for sexual exploitation under 18 U.S.C. § 2251A; (2) child pornography under 18 U.S.C. § 2252A; (3) the coercion and enticement to engage in prostitution or other illegal sexual activity under 18 U.S.C. § 2422; and (4) the transportation of minors to engage in prostitution or other illegal sexual activity and travel with intent to engage in a sexual act with a juvenile under 18 U.S.C. § 2423.

These four new authorities in no way change the strict limitations on how and when wiretaps may be used. Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968[3] that outlines what is, and is not, permissible with regard to wiretaps and electronic surveillance.[4] Title III restrictions go beyond Fourth Amendment constitutional protections and include a statutory suppression rule to exclude evidence that was collected in violation of Title III.[5] Except under limited circumstances, it is unlawful to intercept oral, wire, and electronic communications.[6] Accordingly under the Act, Federal and state law enforcement may

[3] Omnibus Crime Control and Safe Streets Act, 87 Stat. 197 (1968) (codified as amended at 18 U.S.C. §§ 2510–2520 (1970)).

[4] Charles Doyle & Gina Stevens, Congressional Research Service, Library of Congress, Privacy: An Overview of Federal Statutes Governing Wiretapping and Electronic Eavesdropping, at 6 (2001).

[5] 87 Stat. 197, 18 U.S.C. 2510–2520 (1970 ed.).

[6] 18 U.S.C. § 2511.

use wiretaps and electronic surveillance under strict limitations.[7] Congress created these procedures to allow limited law enforcement access to private communications and communication records for investigations while protecting Fourth Amendment rights. In addition to these restrictions, Congress only provided authority to use a wiretap in investigations of specifically enumerated crimes, commonly called "wiretap predicates."[8]

Legislative History.—The Subcommittee on Crime held one hearing on H.R. 1877, the "Child Sex Crimes Wiretapping Act of 2001," on June 21, 2001. Testimony was received from the Honorable Nancy Johnson (R-Conn.); Deputy Assistant Director Francis A. Gallagher of Criminal Investigative Division of the Federal Bureau of Investigation; and James Wardwell, Detective Bureau of the New Britain Police Department, New Britain, Connecticut. On June 21, 2001, the Subcommittee on Crime met in open session and ordered favorably reported the bill, as amended, by voice vote, a quorum being present. On April 24, 2002, the Committee met in open session and ordered favorably reported the bill, H.R. 1877, by a recorded vote of 20–4, a quorum being present. The bill was reported to the House on May 16, 2002 (H. Rept. 107–468). The House passed the bill on May 21, 2002, by a recorded vote of 396 yeas to 11 nays (roll no. 175). The bill was also incorporated into H.R. 5422, the "Child Abduction Prevention Act." No further action was taken on either H.R. 1877 or H.R. 5422 during the 107th Congress.

H.R. 4623, the "Child Obscenity and Pornography Prevention Act of 2002"

Summary.—Representative Lamar Smith (R–TX) introduced H.R. 4623, the "Child Obscenity and Pornography Prevention Act of 2002," on April 30, 2002, to address the April 16, 2002 Supreme Court decision in *Ashcroft* v. *the Free Speech Coalition.*[9] That decision held that two parts of the Federal definition of child pornography in title 18 of the United States Code were overbroad and unconstitutional. Those two provisions are 18 U.S.C. § 2256(8)(B), which defined child pornography to include wholly computer generated pictures that appear to be of a minor engaging in sexually explicit conduct, and 18 U.S.C. § 2256(8)(D), which defines child pornography to include a visual depiction where it is advertised, promoted, or presented, to convey the impression that the material contains a visual depiction of a minor engaging in sexually explicit conduct. This decision did not hold that all virtual child pornography was protected by the First Amendment. The result of this decision, however, is that the Country now faces a proliferation of child pornography. At risk are the prosecutions against child pornographers who are frequently child molesters.[10] In any criminal

[7] 18 U.S.C. § 2518.
[8] 18 U.S.C. § 2516.
[9] 122 S.Ct. 1389 (2002).
[10] Andres E. Hernandex, Psy.D. Federal Bureau of Prisons', Self-Reported Contact Sexual Offenses by Participants in the Federal Bureau of Prisons' Sex Offender Treatment Program: Implications for Internet Sex Offenders. (In November 2000, the Federal Bureau of Prisons released a study on Internet sex offenders who used the Internet to download, trade, and distribute child pornography as well as offenders who lure children for sexual abuse and exploitation. The study examined two groups: those convicted of sexual contact crimes against children and those convicted of nonsexual contact crimes against children. The nonsexual contact crimes

case, the prosecution must prove beyond a reasonable doubt that a crime was committed. A prosecutor would face an impossible burden if a distinction must be proved between virtual child pornography, which may include parts of real children or be completely generated by a computer but indistinguishable from a real child, and child pornography that depicts an actual child or part of an actual child when the child is still identifiable.

To ensure the continued protection of children from sexual exploitation, this legislation addresses the concerns of the Supreme Court by narrowing the definition of child pornography, strengthening the existing affirmative defense, amending the obscenity laws to address virtual and real child pornography that involves visual depictions of pre-pubescent children, establishing new offenses against pandering visual depictions as child pornography, and creating new offenses against providing children obscene or pornographic material.

Legislative History.—The Subcommittee on Crime, Terrorism, and Homeland Security held two days of hearings on H.R. 4623. The three witnesses who testified on May 1, 2002, were: Michael J. Heimbach, Unit Chief, Crimes Against Children Unit, Federal Bureau of Investigation; Ernie Allen, President and Chief Executive Officer for the National Center for Missing & Exploited Children; and Lt. Bill Walsh, with the Dallas Internet Crimes Against Children Taskforce. At the May 9, 2002 hearing, Daniel Collins, Associate Deputy Attorney General, Office of the Attorney General, U.S. Department of Justice testified. On May 9, 2002, the Subcommittee met in open session and ordered favorably reported the bill, H.R. 4623, as amended, by voice vote, a quorum being present. On June 19, 2002, the Committee met in open session and ordered favorably reported the bill, H.R. 4623, with amendment by a recorded vote of 22 to 3, a quorum being present. The bill was reported to the House on June 24, 2002 (H. Rept. 107–526). The House passed the bill on June 25, 2002, by a recorded vote of 413 yeas to 8 nays and 1 present (roll no. 256). No further action was taken on the bill, H.R. 4623, during the 107th Congress.

H.R. 4477, the "Sex Tourism Prohibition Act of 2002"

Summary.—Chairman Sensenbrenner (R–WI) introduced H.R. 4477, the "Sex Tourism Prohibition Improvement Act of 2002," on April 17, 2002. The bill addresses a number of problems related to persons who travel to foreign countries and engage in illicit sexual relations with minors. Current law requires the Federal Government to prove that the defendant traveled to a foreign country with the intent to engage in sex with a minor. H.R. 4477 eliminates the intent requirement where the defendant completes the travel and actually engages in the illicit sexual activity with a minor. The bill

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consisted of those convicted under the child pornography laws and those convicted of traveling to meet a child with the intent to sexually exploit that child. Of the 90 subjects of the study 66 were convicted of crimes that did not include sexual contact. Out of the 66 who were convicted of non-contact crimes, 62 were still related to the sexual exploitation of children through child pornography or traveling to meet a child with the intent to sexually abuse a child. Of the 62, 49 were convicted of child pornography (trading or possessing child pornography) and 13 were convicted for traveling to meet a child. None of those convicted were producers of pornography. Of the 62 convictions for non-contact crimes against children, 76 percent of offenders admitted to sexually abusing or exploiting a child. These offenders admitted to an average of 30.5 victims per offender.)

also criminalizes the actions of sex tour operators by prohibiting persons from arranging, inducing, procuring, or facilitating the travel of a person knowing that such a person is traveling in interstate or foreign commerce for the purpose of engaging in illicit sexual conduct with a minor.

According to the National Center for Missing and Exploited Children, child-sex tourism is an increasing and major component of the worldwide sexual exploitation of children. In Asia alone, there are more than 100 web sites devoted to promoting teenage commercial sex. Because poor countries are often under economic pressure to develop tourism and the sex tourism industry produces a good income, those governments often turn a blind eye toward this devastating problem. As a result, children around the world have become trapped and exploited by the sex tourism industry. This legislation will close significant loopholes in the law that persons who travel to foreign countries seeking sex with children are currently using to their advantage in order to avoid prosecution.

Legislative History.—The Subcommittee on Crime, Terrorism, and Homeland Security held 2 days of hearings on H.R. 4477 and other bills relating to similar issues. The three witnesses who testified on May 1, 2002, were: Michael J. Heimbach, Unit Chief, Crimes Against Children Unit, Federal Bureau of Investigation; Ernie Allen, President and Chief Executive Officer for the National Center for Missing & Exploited Children; and Lt. Bill Walsh, with the Dallas Internet Crimes Against Children Taskforce. On May 9, 2002, the Subcommittee received testimony from Daniel Collins, Associate Deputy Attorney General, Office of the Attorney General, U.S. Department of Justice. On May 9, 2002, the Subcommittee met in open session and ordered favorably reported the bill by voice vote, a quorum being present. On June 19, 2002, the Committee met in open session and ordered favorably reported the bill, as amended, by voice vote, a quorum being present. The bill was reported to the House on June 24, 2002 (H. Rept. 107–525). The House passed the bill on June 26, 2002, by a recorded vote (roll no. 259) of 418 yeas to 8 nays. The bill was also incorporated into H.R. 5422, the "Child Abduction Prevention Act." No further action was taken on either H.R. 4477 or H.R. 5422 during the 107th Congress.

H.R. 2146, the "Two Strikes and You're Out Child Protection Act"

Summary.—H.R. 2146, the "Two Strikes and You're Out Child Protection Act," was introduced by Mark Green (R–WI) on June 13, 2001. This legislation establishes a mandatory sentence of life imprisonment for twice-convicted child sex offenders. H.R. 2146 amends 18 U.S.C. § 3559 of the Federal criminal code to provide for a mandatory minimum sentence of life imprisonment for any person convicted of a "Federal sex offense" if they had previously been convicted of a similar offense under either federal or state law. The bill defines federal sex offense to include offenses committed against a person under the age of 17 and involving the crimes of sexual abuse, aggravated sexual abuse, sexual abuse of a minor, abusive sexual contact, and the interstate transportation of minors for sexual purposes.

According to the United States Department of Justice's Bureau of Justice Statistics, since 1980, the number of prisoners sentenced

for violent sexual assault other than rape increased by an annual average of nearly 15 percent—faster than any other category of violent crime. Of the estimated 95,000 sex offenders in state prisons today, well over 60,000 likely committed their crime against a child under 17. Compounding this growing problem is the high rate of recidivism among sex offenders. A review of frequently cited studies of sex offender recidivism indicates that offenders who molest young girls repeat their crimes at rates up to 25 percent, and offenders who molest young boys, at rates up to 40 percent. Moreover, the recidivism rates do not appreciably decline as offenders age.

Legislative History.—The Subcommittee on Crime held a legislative hearing on H.R. 2146 on July 31, 2001. The four witnesses were: Marc Klaas, founder of Klaas Kids Foundation and advocate for victim's and children's rights; Robert Fusfeld, Probation and Parole Agent for the Wisconsin Department of Corrections Sex Offender Intensive Supervision Team; Polly Sweeney, mother of two victims of a sex offender; and Phyllis Turner Lawrence, Esq., a Victim Assistance and Restorative Justice Consultant. On August 2, 2001, the Subcommittee met in open session and ordered favorably reported the bill, H.R. 2146, with amendment, by voice vote, a quorum being present. On February 27, 2002, the Committee commenced a markup of H.R. 2146 which was continued on March 6, 2002, when the Committee met in open session and ordered favorably reported the bill, H.R. 2146, with amendment, by voice vote, a quorum being present. The bill was reported to the House on March 12, 2002 (H. Rept. 107–373). The House passed the bill on March 14, 2002, by a recorded vote of 382 yeas to 34 nays (roll no. 64). The bill was also incorporated into H.R. 5422, the "Child Abduction Prevention Act." No further action was taken on either H.R. 2146 or H.R. 5422 during the 107th Congress.

H.R. 4679, the "Lifetime Consequences for Sex Offenders Act of 2002"

Summary.—H.R. 4679, the "Lifetime Consequences for Sex Offenders Act of 2002" amends the Federal criminal code to make the authorized term of supervised release after imprisonment for the offenses of sexual abuse, sexual exploitation of children, transportation for illegal sexual activity (generally), and sex trafficking of children any term of years or life.

Legislative History.—H.R. 4679 was introduced on May 8, 2002 by Congressman Gekas. The Committee on the Judiciary held a mark-up session on June 19, 2002. The Committee on the Judiciary ordered H.R. 4679 to be reported amended by a voice vote. The Committee on the Judiciary filed H. Rept. 107–527 on June 24, 2002. On June 25, 2002, H.R. 4679 was passed under a motion to suspend the rules and pass the bill as amended by a vote of 409–3. H.R. 4679 was referred to the Senate Committee on the Judiciary.

H.R. 5422, the "Child Abduction Prevention Act"

Summary.—Chairman Sensenbrenner (R–WI) introduced H.R. 5422, the "Child Abduction Prevention Act" on September 19, 2002. This legislation sends a clear message to any potential child abduc-

tor that they will not escape justice. This legislation provides stronger penalties against kidnapping, ensures lifetime supervision of sexual offenders and kidnappers of children, gives law enforcement the tools it needs to effectively prosecute these crimes, and provides assistance to the community when a child is abducted.

According to the Department of Justice's (DOJ) Office of Juvenile Justice Delinquency Prevention (OJJDP), the number of missing persons reported to law enforcement has increased 468 percent, from 154,341 in 1982 to 876,213 in 2000. Out of those cases, about 3,000 to 5,000 are non-family abductions reported to police each year, most of which are short-term sexually-motivated cases. About 200 to 300 of these cases, or about 6 percent, make up the most serious cases where the child was murdered, ransomed or taken with the intent to keep. Federal Government statistics report that three out of four children who are kidnapped and murdered are killed within 3 hours of their initial abduction. Authorities believe that promptly alerting the general public when a child is abducted by a stranger is crucial to saving their life. To accomplish this, H.R. 5422 authorizes funding for a national AMBER Alert program to help expand the child abduction communications warning network throughout the United States.

For those individuals that would harm a child, H.R. 5422 ensures that punishment is severe and that sexual predators are not allowed to slip through the cracks of the system to harm other children. Specifically, this legislation provides a 20-year mandatory minimum sentence of imprisonment for stranger abductions of a child under the age of 18, lifetime supervision for sex offenders, and mandatory life imprisonment for second time offenders. Furthermore, H.R. 5422 removes any statute of limitations and opportunity for pretrial release for crimes of child abduction and sex offenses. Recognizing the important role that the National Center for Missing and Exploited Children (NCMEC) plays in our Nation's efforts to prevent child abductions, the bill doubles the funding for NCMEC to $20 million through 2004. The NCMEC is the Nation's resource center for child protection and assists parents, children, law enforcement, schools, and communities in recovering missing children. NCMEC also raises public awareness to prevent child abduction, molestation, and sexual exploitation. To date, NCMEC has worked on more than 73,000 cases of missing and exploited children and helped recover more than 48,000 children.

Legislative History.—On October 1, 2002, the Subcommittee on Crime, Terrorism, and Homeland Security held a legislative hearing on H.R. 5422. Testimony was received from Daniel P. Collins, Associate Deputy Attorney General, U.S. Department of Justice; and Ernest E. Allen, President and Chief Executive Officer, National Center for Missing and Exploited Children. On October 1, 2002, the Subcommittee met in open session and ordered favorably reported the bill, H.R. 5422, by voice vote, a quorum being present. On October 2, 2002, the Committee met in open session and ordered favorably reported the bill, H.R. 5422, with amendment, by voice vote, a quorum being present. The bill was reported to the House on October 7, 2002 (H. Rept. 107–723). The House passed the bill on October 8, 2002, by a recorded vote of 390 yeas to 24

nays (roll no. 446). No further action was taken on H.R. 5422 during the 107th Congress.

IMPROVING JUSTICE THROUGH ENHANCED TECHNOLOGY

H.R. 912, the "Innocence Protection Act"

Summary.—Representative William Delahunt (D–MA) introduced H.R. 912, the "Innocence Protection Act of 2001," on March 7, 2001. This bill would provide for post-conviction DNA testing for every Federal and state crime, and not just those crimes where a defendant is facing the death penalty. Defendants in misdemeanor cases would be allowed to petition the courts to have DNA testing done to prove their innocence along with those defendants that are facing the death penalty. The bill establishes a National Commission on Capital Representation to formulate standards specifying the elements of an effective system for providing adequate representation. The Attorney General is directed to withhold prison grant funds to any State that allows for the death penalty and is not in compliance with the standards set forth by the National Commission on Capital Representation. In addition, those States would also be penalized in habeas corpus proceedings. The bill also increases the amount of damages that may be awarded in a case where the defendant proves he was unjustly convicted and imprisoned from $5,000 total to $50,000 for each year of incarceration and up to $100,000 per year if the defendant was sentenced to death.

According to the sponsor of the bill, in more than 80 cases in the United States, DNA evidence has led to the exoneration of innocent men and women who were wrongfully convicted. This number includes at least 10 individuals sentenced to death, some of whom came within days of being executed. In more than a dozen cases, post-conviction DNA testing that has exonerated an innocent person has also enhanced public safety by providing evidence that led to the identification of the actual perpetrator. The purpose of H.R. 912 is to ensure that wrongfully convicted persons have an opportunity to establish their innocence through DNA testing, by requiring the preservation of DNA evidence for a limited period.

Legislative History.—The Subcommittee on Crime, Terrorism and Homeland Security held a legislative hearing on H.R. 912, the "Innocence Protection Act of 2001," on June 18, 2002. The four witnesses who testified were: Hon. Paul A. Logli, State's Attorney, Winnebago Co., IL; Peter J. Neufeld, Esq., Co-Director, Innocence Project, Benjamin N. Cardozo School of Law; Robert A. Graci, Esq., Assistant Executive Deputy Attorney General of Pennsylvania; and Beth A. Wilkinson, Esq., former Federal prosecutor, Oklahoma City bombing case. No further action was taken on H.R. 912 during the 107th Congress.

PROTECTING AND SUPPORTING POLICE

H.R. 1007, the "James Guelff and Chris McCurley Body Armor Act of 2001"

Summary.—Representative Bart Stupak (D–MI) introduced H.R. 1007, the "James Guelff and Chris McCurley Body Armor Act of 2001," on March 13, 2001. This legislation amends title 18 of the

United States Code to prohibit violent felons from purchasing, owning, or possessing body armor. Any person convicted of violating this prohibition is subject to a fine or imprisonment of not more than 3 years, or both. H.R. 1007 also directs the United States Sentencing Commission to provide an appropriate sentencing enhancement for any crime of violence or drug trafficking in which the defendant used body armor. The bill includes a sense of Congress that any sentencing enhancement should be at least two levels. In addition, the language authorizes Federal agencies to donate body armor that is surplus property and in serviceable condition directly to any state or local law enforcement agency. Under the legislation the United States is not liable for any harm occurring in connection with the use or misuse of any body armor donated by the Federal agencies.

H.R. 1007 will ensure that criminals do not have body armor, and that state and local police officers do. The bill is named for Officer James Guelff and Captain Chris McCurley who were killed by gunmen wearing body armor. On November 13, 1994, James Guelff, a highly decorated ten-year veteran of the San Francisco Police Department, responded to a "shots fired" call. Officer Guelff, the first to respond to the scene, returned fire but the bullets could not penetrate the gunman's kevlar vest and bullet-proof helmet, which allowed this one gunman to fire over 200 rounds of ammunition and hold off 120 police officers for over half an hour. Several officers actually ran out of ammunition in their attempt to stop the heavily protected gunman. Officer Guelff was shot several times and died the following morning. Captain Chris McCurley of the Etowah County, Alabama Drug Task Force was murdered in much the same way as Officer Guelff. Captain McCurley was shot and killed by a drug dealer wearing protective body armor when he and another officer were trying to execute a search warrant on October 10, 1997.

Unfortunately, these scenarios are not unique. In 1997, eleven officers were wounded in North Hollywood despite the two perpetrators being hit a total of 33 times by police gunfire. Those two gunmen held off 350 police officers for over an hour. In August of that same year, a gunman wearing a bulletproof vest shot and killed troopers Scott Phillips and Leslie Lord and two civilians in Colebrook, New Hampshire. In July 2000, a kevlar vest and helmet protected gunman murdered Sgt. Todd Stamper in Crandon, Wisconsin. These are just a few examples of many incidents where gunmen prolonged shootouts, fired more rounds of ammunition, and caused more devastation because they were shielded by body armor.

At the same time criminals have body armor, the Department of Justice estimates that 25 percent of state and local police do not. Furthermore, more than 30 percent of the approximately 1,200 officers killed in the line of duty since 1980, could have been saved by body armor. Dying from gunfire is estimated to be 14 times more likely for an officer who does not wear a bulletproof vest. This could be reduced by allowing FBI, DEA, ATF, INS, and U.S. Marshals, just a few of the Federal agencies that have surplus body armor, to donate the surplus to local jurisdictions.

Legislative Hearing.—No hearings were held on H.R. 1007 during the 107th Congress. On July 19, 2001, the Subcommittee on Crime met in open session and ordered favorably reported the bill, H.R. 1007, with amendment, by voice vote, a quorum being present. On July 24, 2001, the Committee met in open session and ordered favorably reported the bill, H.R. 1007, with amendment, by voice vote, a quorum being present. The bill was reported with amendment to the House on August 2, 2001 (H. Rept. 107–193, Part I). The bill was incorporated into H.R. 2215, the "21st Century Department of Justice Appropriations Authorization Act," which was signed by the President on November 2, 2002, and became Public Law 107–273.

H.R. 2624, the "Law Enforcement Tribute Act"

Summary.—Representative Adam Schiff (D–CA) introduced H.R. 2624, the "Law Enforcement Tribute Act," on July 25, 2001. This bill authorizes the Attorney General to make grants to states, units of local government, and Indian Tribes to construct permanent tributes to honor the achievements of United States law enforcement or public safety officers who were killed or disabled in the line of duty. The legislation establishes a program to award grants directly to a state, local government, or Indian tribe for up to 50 percent of the cost of construction of a permanent tribute. The Federal contribution may not exceed $150,000 for any single recipient.

More than 700,000 men and women risk assault, injury, and their lives to serve as law enforcement officers in this country. Each year, one in nine officers is assaulted, one in 25 is injured, and one in 4,400 is killed in the line of duty. Nationwide, 51 law enforcement officers were feloniously killed in the line of duty in the year 2000, compared with 42 in 1999, according to statistics from the Federal Bureau of Investigation (FBI). Additionally, FBI statistics show that 83 officers were accidentally killed in the line of duty in 2000, compared with 65 accidental deaths in 1999. In 1999, 112 firefighters also died in the line of duty.

Legislative Hearing.—No hearings were held on H.R. 2624, the "Law Enforcement Tribute Act." On August, 2, 2001, the Subcommittee on Crime, Terrorism, and Homeland Security met in open session and ordered favorably reported the bill, H.R. 2624, by voice vote, a quorum being present. On April 24, 2002, the Committee met in open session and ordered favorably reported the bill, by voice vote, a quorum being present. The bill was reported to the House on May 14, 2002 (H. Rept. 107–458). The bill was incorporated into H.R. 2215, the "21st Century Department of Justice Appropriations Authorization Act," which was signed by the President on November 2, 2002, and became Public Law No. 107–273.

GENERAL CRIMINAL PROVISIONS

H.R. 1408, the "Financial Services Antifraud Network Act of 2001"

Summary.—H.R. 1408 will coordinate information sharing among 250 financial services agencies around the country as a fraud-fighting tool. H.R. 1408 would link existing antifraud records via a network that may be as simple as a computer search engine.

The bill's purpose is to reduce the amount of money loss due to financial services fraud.

Legislative History.—H.R. 1408 was introduced by Congressman Rogers on April 4, 2001. On October 10, 2001 the Committee on the Judiciary held a mark-up on H.R. 1408 and ordered the bill reported by a voice vote. The Committee on the Judiciary filed H. Rept. 107–192 pt. II on November 16, 2001. On November 6, 2001, H.R. 1408, was passed on a motion to suspend the rules and agree to the bill as amended by a 392–4. On November 7, 2001, H.R. 1408 was referred to the Senate Committee on Banking, Housing, and Urban Affairs. No further action was taken on the bill.

H.R. 2505, the "Human Cloning Prohibition Act of 2001"

Summary.—Representative Dave Weldon (R–FL) introduced H.R. 2505, the "Human Cloning Prohibition Act of 2001," on July 16, 2001. This bill amends Title 18 of the United States Code by establishing a comprehensive ban on human cloning and prohibiting the importation of a cloned embryo, or any product derived from such embryo. Any person or entity that is convicted of violating this prohibition on human cloning is subject to a fine or imprisonment of not more than ten years, or both. In addition, H.R. 2505 provides a civil penalty of not less than $1,000,000 for any person who receives a pecuniary gain from cloning humans. However, H.R. 2505 does not prohibit the use of cloning technology to produce molecules, DNA, cells, tissues, organs, plants, or animals.

The National Bioethics Advisory Commission (NBAC) was ordered to review the legal and ethical issues involved in the cloning of human beings and delivered its recommendations in June of 1997. The NBAC agreed that the creation of a child by somatic cell nuclear transfer is scientifically and ethically objectionable because: (1) the efficiency of nuclear transfer is so low and the chance of abnormal offspring is so high that experimentation of this sort in humans was premature; and (2) the cloning of an already existing human being may have a negative impact on issues of personal and social well being such as family relationships, identity and individuality, religious beliefs, and expectations of sameness.

Currently, no clear regulations exist in the United States that would prevent a private group from attempting to clone a human being. The Food and Drug Administration (FDA) has announced that it has the authority to regulate human cloning, but that authority has been questioned by many experts and remains unclear today. With recent reports that otherwise reputable scientists and physicians plan to produce the first human clone and no clear regulations in place, it has become imperative that Congress act to prevent this ethically and morally objectionable procedure.

Legislative History.—H.R. 2505 is substantially similar to H.R. 1644 which the Subcommittee on Crime held two days of hearings on June 7, 2001, and June 19, 2001. The Subcommittee also heard testimony on a related bill, H.R. 2172, at those hearings. Testimony was received from eight witnesses, representing eight organizations. The witnesses were: Dr. Leon R. Kass, Professor of Bioethics, The University of Chicago; Dr. David A. Prentice, Professor of Life Sciences, Indiana State University; Dr. Daniel Callahan, Director of International Programs for The Hastings Center; Robyn S.

Shapiro, Esq., Professor of Bioethics, the Medical College of Wisconsin; Alex Capron, Esq., Professor of Law and Medicine, University of Southern California, School of Law; Dr. Jean Bethke Elshtain, Professor of Social and Political Ethics, The University of Chicago; Gerard Bradley, Esq., Professor of Law, Notre Dame Law School; Dr. Thomas Okarma, President and CEO of the Geron Corporation. On July 19, 2001, the Subcommittee in open session and ordered favorably reported the bill, H.R. 2505, by voice vote, a quorum being present. On July 24, 2001, the Committee met in open session and ordered favorably reported the bill, H.R. 2505, by a recorded vote of 18 to 11, a quorum being present. The bill was reported to the House on July 27, 2001 (H. Rept. 107–170). The House passed the bill on July 31, 2001, by a recorded vote of 265 yeas to 162 nays (roll no. 304). No further action was taken on the bill, H.R. 2505, during the 107th Congress.

H.R. 2621, the "Consumer Product Protection Act of 2002"

Summary.—Representative Melissa Hart (R–PA) introduced H.R. 2621, the "Consumer Product Protection Act of 2002," on July 25, 2001. This bill would criminalize the unauthorized placement of any writings in consumer product packages before their sale to customers. Both adults and children throughout the country have been subjected to violent, racist, gory, and/or otherwise disturbing materials hidden in tampered with products. This legislation prohibits the unscrupulous from invading products and inflicting their message upon unsuspecting audiences. Moreover, by filling this gap in Federal law, H.R. 2621 will appropriately punish, and likely prevent, individuals whose current activities damage the value of manufacturers' brand names, tarnish companies' well-deserved reputation for safe, high quality products, and violate the integrity of the food that reaches consumers' homes and families.

In the past five years, manufacturers of food products regularly found that grocery stores have received complaints from consumers about hate-filled, pornographic, or political literature being found in groceries. It appears that the literature is being folded and inserted into certain groceries that are packaged in boxes. Cereal boxes, frozen pizza boxes, and macaroni and cheese boxes are among the more frequently tampered product packages. The incidents involve pamphlets espousing racist, anti-Semitic, and white supremacist sentiments. Leaflets have been found that attack African-Americans, praised the Holocaust and encourage the killing of immigrants. For example, one leaflet showed a "coupon" with racial slurs thereon and a demand for African-Americans to go back to Africa.

Legislative Hearing.—The Subcommittee on Crime, Terrorism, and Homeland Security held a legislative hearing on H.R. 2621 on July 26, 2001. The four witnesses who testified were: The Honorable Melissa Hart; Tracey Weaver, a victim; David Zlotnick, Professor at the Roger Williams School of Law; and William Macleod, an industry representative testifying on behalf of the Grocery Manufacturers of America. On July 26, 2001, the Subcommittee met in open session and ordered favorably reported the bill, H.R. 2621, with amendment, by voice vote, a quorum being present. On May 8, 2002, the Committee met in open session and ordered favorably

reported the bill, as amended, by voice vote, a quorum being present. The bill was reported to the House on May 23, 2002 (H. Rept. 107–485). The House passed the bill on June 11, 2002, by voice vote. On October 16, 2002, the Senate passed the bill by unanimous consent with an amendment. The House agreed to the Senate amendment by unanimous consent on November 15, 2002. The President signed the bill on December 2, 2002, and it became Public Law 107–307.

H.R. 1577, the "Federal Prison Industries Competition in Contracting Act of 2001"

Summary.—Representative Peter Hoekstra (R–MI) introduced H.R. 1577, the "Federal Prison Industries Competition in Contracting Act of 2001," on April 24, 2001. This bill fundamentally amends Federal Prison Industries' (FPI) 1934 authorizing statute. The legislation gradually phases out by October 1, 2008, the exclusive right of FPI (deemed "mandatory source") to sell goods to Federal agencies. The bill changes the manner in which FPI sells its products and services to the various Federal departments and agencies. During the phase-out period, FPI is required to provide the agencies with a product that meets its needs at a "fair and reasonable price" in a timely manner.

This legislation establishes new competitive procedures for government procurement of products or services that are offered for sale by FPI. H.R. 1577 requires that FPI sales to its Federal agency customers be made through contracts won on a competitive basis, for both products and services. Like other suppliers to the Federal Government, FPI is required to fulfill its contractual obligations in a timely manner.

Legislative History.—The Subcommittee on Crime, Terrorism, and Homeland Security held one day of hearings on H.R. 1577 on April 26, 2001. During that hearing Representative Peter Hoekstra (MI–2d), the sponsor of H.R. 1577, testified and submitted for the record the printed hearing records from five oversight hearings conducted by the Subcommittee on Oversight and Investigations of the Committee on Education and the Workforce during the 104th, 105th, and 106th Congress. The three other witnesses that testified were: Stephen M. Ryan, Esq., Manatt, Phelps & Phillips, LLP, Washington, D.C.; Michael Mansh, President, Ashland, Sales & Service Company, Philadelphia, Pennsylvania; and Philip W. Glover, President, Council of Prison Locals, American Federation of Government Employees, Johnstown, Pennsylvania. On April 24, 2002, the Committee met in open session and ordered favorably reported the bill, as amended, by voice vote, a quorum being present. The bill was reported to the House on July 16, 2002 (H. Rept. 107–583). No further action was taken on H.R. 1577 in the 107th Congress.

H.R. 3215, the "Combating Illegal Gambling Reform and Modernization Act"

Summary.—Representative Bob Goodlatte (R–VA) introduced H.R. 3215, the "Combating Illegal Gambling Reform and Modernization Act," on November 1, 2001. This bill would modernize

the "Wire Act,[11]" to make it clear that its prohibitions include Internet gambling and would bring the current prohibition against wireline interstate gambling up to speed with the development of new technology. The bill also prohibits a gambling business from accepting certain forms of non-cash payment, including credit cards and electronic transfers, for the transmission of bets and wagers. The bill further provides an additional tool to fight illegal gambling by allowing Federal, state, local and tribal law enforcement officials to seek injunctions against any party to prevent and restrain violations of the Act.

Over the last few years, gambling websites have proliferated on the Internet. The Internet gambling industry's revenues grew from $445 million in 1997 to an estimated $1.6 billion in 2001. Industry analysts estimate that it could soon easily become a $10 billion a year industry. There are currently over 1,400 gambling sites on the Internet, offering everything from sports betting to blackjack. Most of these virtual casinos are organized and operated from tropical off-shore locations, where the operators feel free from both State and Federal interference. Among the most popular locales are Antigua, St. Martin and Costa Rica.

Legislative History.—The Subcommittee on Crime held a legislative hearing on H.R. 3215 on November 29, 2001. The Subcommittee on Crime also heard testimony on a related bill, H.R. 556, at those hearings. The four witnesses that testified were: the Honorable Bob Goodlatte; the Honorable James A. Leach; Timothy A. Kelly, Ph.D., Executive Director, National Gambling Impact Study Commission; and Frank Catania representing the Interactive Gaming Council (IGC). The Department of Justice submitted testimony for the record in support of H.R. 3215. On March 12, 2002, the Subcommittee met in open session and ordered favorably reported the bill, H.R. 3215, with amendment, by voice vote, a quorum being present. On June 18, 2002, the Committee met in open session and ordered favorably reported the bill with amendments by a recorded vote of 18 to 12, a quorum being present. The bill was reported to the House on July 18, 2002 (H. Rept. 107–591, Part I). A supplemental report was filed by the Committee on October 16, 2002 (H. Rept. 107–591, Part II). No further action was taken on H.R. 3215 during the 107th Congress.

H.R. 4757, the "Our Lady of Peace Act"

Summary.—Representative Carolyn McCarthy (D–NY) introduced H.R. 4757, the "Our Lady Of Peace Act," on May 16, 2002. This bill provides states with the tools to comply with the 1968 Gun Control Act by giving states additional funds to automate and share criminal, mental health, and domestic violence restraining order records with the FBI's National Instant Criminal Background Check (NICS) database. Under this legislation, all Federal agencies will transmit relevant records relating to persons disqualified from acquiring a firearm under Federal law to the Attorney General for inclusion in the National Instant Criminal Background Check System, including all records related to immigration status.

[11] 18 U.S.C. 1084

To comply with the grants under this legislation, states must provide more thorough and up-to-date information relating to persons disqualified from acquiring a firearm under Federal law to the Attorney General for inclusion in the NICS. The Attorney General will award grants to states to improve computer systems and ensure accurate reporting, especially with regard to domestic violence and mental health records. Additionally, the legislation establishes a grant program for state courts to assess and improve handling of proceedings related to criminal history dispositions, and temporary restraining orders, as they relate to disqualification from firearms ownership under state and Federal laws.

Legislative History.—No hearings were held on H.R. 4757 in the 107th Congress. On July 23, 2002, the Committee met in open session and ordered favorably reported the bill, H.R. 4757, as amended, by recorded vote of 30–2. The bill was reported to the House on October 15, 2002 (H. Rept. 107–748). On October 15, 2002, the House passed the bill by voice vote. No further action was taken on H.R. 4757 during the 107th Congress.

H.R. 2929, the "Bail Bond Fairness Act of 2001"

Summary.—Representative Bob Barr (R–GA) introduced H.R. 2929, the "Bail Bond Fairness Act of 2001," on September 21, 2001. The bill limits the circumstances for which bail can be forfeited. Bail set by a judge in Federal court typically includes provisions to require a defendant to make all court appearances and meet other conditions, including a requirement that the defendant "break no laws." This bill was drafted in response to a 1995 decision from the Ninth Circuit and would prohibit Federal judges from forfeiting bail bonds except in cases where the defendant actually fails to appear physically before a court as ordered. It would not permit forfeiture when the defendant violates some other condition of release. In other words, it makes bail "appearance-related" rather than "performance-related."

On April 26, 2002, the Committee on Judiciary sent a letter to the Judicial Conference of the United States to inquire about its review of the appropriate circumstances for forfeiture of bail. The Judicial Conference responded that it had reviewed the matter and determined that a change in its policy regarding forfeiture of bail was not appropriate.

Legislative History.—On October 8, 2002, the Subcommittee on Crime, Terrorism, and Homeland Security held one hearing on H.R. 2929, the "Bail Bond Fairness Act of 2001." The two witnesses who testified were: the Honorable Edward Carnes, U.S. Court of Appeals for the 11th Circuit and Chairman, Advisory Committee on Criminal Rules, U.S. Judicial Conference, Secretary, Judicial Conference of the United States; and Stephen H. Kreimer; Executive Director, Professional Bail Agents of the United States. No further action was taken on this bill in the 107th Congress.

H. Res 224, honoring the New Jersey State Law Enforcement Officers Association

Summary.—H. Res. 224 honors the New Jersey State Law Enforcement Officers Association. The legislation recognizes the bravery and honor of the law enforcement officers of New Jersey and

the service those officers provide to the communities that they serve.

Legislative History.—H. Res 224 was introduced by Congressman Ferguson on August 2, 2001. On November 1, 2001, the House passed the resolution without objection.

H. Res. 437, Requesting that the President focus appropriate attention on neighborhood crime prevention and community policing, and coordinate certain Federal efforts to participate in "National Night Out", including by supporting local efforts and neighborhood watches and by supporting local officials to provide homeland security, and for other purposes

Summary.—H. Res 437 is a sign of support for the "National Night Out (NNO). The National Night Out held on August 6, 2002, is widely known as America's night out against crime where people in thousands of communities take to the streets to support their communities. Since 1984, the NNO has promoted neighborhood watch programs and established police community partnerships in the fight against crime.

Legislative History.—On June 6, 2002, Congressman Stupak introduced H. Res. 437. On July 17, 2002 the Judiciary Committee ordered the resolution reported by a voice vote. The Committee on the Judiciary filed H. Rept 107–606. H. Res. 437 was placed on the House Calendar on July 29, 2002.

S. 2431, the "Mychal Judge Police and Fire Chaplains Public Safety Officers" Benefit Act of 2002"

Summary.—S. 2431 and H.R. 3297 addresses the ambiguity under current law in regards to making payments of monetary amounts to survivors of public safety officers who are killed in the line of duty. S. 2431 specifically names chaplains who are in service as being eligible for the same benefits as other public service officers.

Legislative History.—S. 2431 was introduced on May 1, 2002 by Senator Leahy. On May 1, 2002 the Senate Committee ordered reported S. 2431 with an amendment and without a written report. On May 7, 2002 the Senate agreed to S. 2431 by unanimous consent. On June 11, 2002 the House of Representatives passed S. 2431 and H.R. 3297 was laid on the table without objection. H.R 3297 was considered on March 3, 2002, at the Committee on the Judiciary and was ordered to be reported by a voice vote with an amendment. The Committee on the Judiciary filed H. Rept. 107–384 on April 9, 2002. The House of Representatives passed as amended H.R. 3297 by a voice vote. On June 24, 2002 the President signed S. 2431. S. 23431 is Public law 107–196.

OVERSIGHT ACTIVITIES

List of Oversight hearings

Drug Trafficking on the Southwest Border, March 29, 2001 (Serial No. 3)

Reauthorization of the United States Department of Justice—Part I: Criminal Law Enforcement Agencies, May 3, 2001 (Serial No. 29)

Reauthorization of the United States Department of Justice—Part II: Criminal Law Components at Main Justice, May 15, 2001 (Serial No. 29)

Reauthorization of the United States Department of Justice—Part III: Criminal Law Enforcement Agencies, (Serial No. 29)

Fighting Cyber Crime: Efforts by State and Local Officials, May 24, 2001 (Serial No. 33)

Fighting Cyber Crime: Efforts by Federal Law Enforcement, June 12, 2001 (Serial No. 33)

Fighting Cyber Crime: Efforts by Private Business Interests, June 14, 2001 (Serial No. 33)

Ethics of Cloning, June 7, 2001 (Serial No. 40)

Law Enforcement and Community Efforts to Address Crimes Against the Elderly, July 11, 2001 (Serial No. 34)

Office of Justice Programs—Part I: Coordination and Duplication, March 5, 2002 (Serial No. 71)

Office of Justice Programs—Part II: Evaluation and Effectiveness, March 7, 2002 (Serial No. 71)

Office of Justice Programs—Part III: Waste, Fraud and Abuse, March 14, 2002 (Serial No. 71)

Enhancing the Child Protection Laws After the April 16, 2002 Supreme Court Decision, *Ashcroft* v. *Free Speech Coalition,* May 1, 2002 (Serial No. 75)

Risk to Homeland Security from Identity Fraud and Identity Theft (held jointly with the Subcommittee on Immigration, Border Security and Claims), June 25, 2002 (Serial No. 86)

Proposal to Create a Department of Homeland Security, July 9, 2002 (Serial No. 94)

Creation of the Counterintelligence Program for the 21st Century

In March 2001, the President released a directive to create a new program called CI–21 or the Counterintelligence for the 21st century. The FBI Director (Louis Freeh), selected David Szady, a FBI special agent who was the chief of an interagency counterintelligence/ counterespionage from 1997 to 1999 that reported to the CIA and the FBI. The directive stated that the program and Czar are to work to improve the counterintelligence communities ability to meet its mission of identifying, understanding, prioritizing and counteracting the intelligence threats faced by the United States. Judiciary staff met with the newly selected counterintelligence Czar in March 2001.

Creation of the Department of Homeland Security

On July 9, 2002, the Subcommittee on Crime, Terrorism, and Homeland Security held an oversight hearing on the creation of a Homeland Security Department. The hearing focused on the Administration's proposed transfer of the Coast Guard, Customs, FEMA, Secret Service, and Transportation Security Administration to the proposed Department of Homeland Security. The Committee heard testimony from Admiral Thomas H. Collins, Commandant of the United States Coast Guard; the Honorable John W. Magaw, Under Secretary of Transportation for Security for the Transportation Security Administration; the Honorable Robert C. Bonner, Commissioner of the United States Customs Service; and Brian L.

Stafford, Director of the United States Secret Service. The Honorable Joe M. Allbaugh, Director of the Federal Emergency Management Agency, declined to testify.

The hearing was in response to H.R. 5005, the "Homeland Security Act," introduced on June 24, 2002. This bill was the Administration's proposal for the creation of a Homeland Security Department. The bill provided for the creation of a new Department with the primary mission to prevent terrorist attacks within the United States, to reduce the vulnerability of the Nation to an attack, to minimize the damage of an attack, and to assist in the recovery. As a terrorist threat or attack is a criminal event that requires a law enforcement response, the hearing examined the roles of law enforcement agencies the Administration proposed to transfer into the new Department.

The House of Representatives created a temporary House Select Committee to enact H.R. 5005. The bill was referred to 12 standing committees, including the Committee on the Judiciary, which had the bulk of jurisdiction. The Committee on the Judiciary considered and reported the bill favorably with amendment to the Select Committee on July 10, 2002. The House passed the bill by a vote of 295 yeas to 132 nays (roll no. 367) on July 26, 2002. This version contained a substantial number of recommendations from the Subcommittee and Committee on the Judiciary. A compromise bill with the Senate and the White House passed on November 13, 2002, by a recorded vote (roll no. 477) of 299 yeas to 121 nays. This version was H.R. 5710. On November 19, 2002, the Senate passed H.R. 5005 by 90 yeas to 9 nays. H.R. 5005 included a substitute amendment that substituted text essentially the same as H.R. 5710 in H.R. 5005. The House agreed to the Senate amendment to H.R. 5005 on November 22, 2002. On November 25, 2002, the President signed the bill and it became Public Law 107–296.

First Responder Training and Assistance for Terrorist Events

Congress has been debating the best way to coordinate Federal agencies and the state and local first responders[12] in responding to domestic terrorist threats and events. In 1998, the Department of Justice established the National Domestic Preparedness Office which was housed in the FBI, the lead agency for crisis management in such an event.

The National Domestic Preparedness Office (NDPO) was created to serve as a single point of contact and clearinghouse for Federal assistance programs related to weapons of mass destruction[13] (WMD) information. The Federal Emergency Management Agency, the lead agency for consequence management, argued that it should house the coordinating office. The new Administration agreed and on May 8, 2001, the President announced that Vice President Cheney would oversee the development of a coordinated national effort to deal with consequence management for the

[12] First responders are state and local officials, such as law enforcement, and fire and emergency medical services officers that are likely to be first on the scene of a domestic terrorist act.

[13] The United States Government Interagency Domestic Terrorism Concept of Operations Plan defines Weapons of Mass Destruction as "any device, material, or substance used in a manner, in a quantity or type, or under circumstances evidencing an intent to cause death or serious injury to persons or significant damage to property."

counterterrorism threats. The new office, the Office of National Preparedness (ONP), was created in FEMA to deal with consequence management coordination. The President stated that "FEMA would work closely with the Department of Justice, in its lead role for crisis management, to ensure that all facets of our response to the threat from weapons of mass destruction are coordinated and cohesive."

This announcement caused some confusion on the role of the FBI and NDPO in crisis management. Staff of the National Security Council assured Subcommittee staff that the role of the NDPO was not affected. However, the Washington Post reported on May 9, 2001, that Administration officials said "FEMA will assume a role previously played by the FBI's National Domestic Preparedness Office for working with local police, fire and emergency management agencies."

On July 30, 2001, the Subcommittee sent a letter to the Attorney General requesting information as to whether NDPO would be transferred. The Department of Justice responded in the affirmative. The transfer never took place, however. The NDPO did become defunct because of the battle of its programs. This skeleton office was transferred to the Department of Homeland Security in H.R. 5005 that was signed into law on November 25, 2002.

Office of Domestic Preparedness (ODP) was another office within the Department of Justice that is responsible for establishing Federal domestic preparedness programs and activities to assist state and local governments to prepare for and respond to terrorist incidents, including attacks involving weapons of mass destruction.

On January 24, 2002, the President announced FEMA would operate the homeland security first responder initiative. On January 29, 2002, the Committee on the Judiciary sent a letter requesting FEMA respond to a number of questions. The ONP was authorized by Congress to carry out similar responsibilities, including assessment reports of threats and needs of the states and localities as well as training and exercise. The Appropriations Committees provided authorization for these duties through the last few appropriation bills. Moreover, after the September 11, 2001 terrorist attacks this Committee passed and Congress enacted Public Law 107–56, the Patriot Act. Section 1014 of the USA Patriot Act authorized the Office for State and Local Domestic Preparedness Support of the Office of Justice Programs in the Department of Justice to provide State grants that enhance the capability of State and local jurisdictions to prepare for and respond to terrorist acts including events of terrorism involving weapons of mass destruction. The name of this office was changed to the Office of Domestic Preparedness. Public Law 107–273, the "21st Century Department of Justice Appropriations Authorization Act," also authorized the Office of Domestic Preparedness.

The Director of the Office of National Preparedness (ONP) at FEMA stated in a January 30, 2002 letter to the Subcommittee on Crime, Terrorism and Homeland Security that ONP was created to perform duties relative to consequence management. He further stated that FEMA's mission and function in no way interferes with, or compromises the authority of, the Department of Justice or its

various departments or programs to carry out its mission with regard to crisis management.

Through the ongoing meetings and correspondence with FEMA, the Committee found FEMA's response alarming. FEMA determined that a terrorist event was not a law enforcement or crisis management event. FEMA emphatically rejected the need for such training and assured the Committee they would not offer such training. Later in the year, FEMA and the Office of Homeland Security later argued that their was no such distinction between crisis and consequence management. The Office of Homeland Security stated this in its description of its draft legislation to create a new Department.

Law enforcement first responders became immediately concerned that they would lose the vital training and assistance for crisis management. The Subcommittee and Committee believed that the proposed Department of Homeland Security must serve all first responders through integrated training and assistance of both crisis and consequence management.

In a March 13, 2002 letter to the Committee on the Judiciary, the Director of FEMA emphatically stated that FEMA and the Office of National Preparedness within FEMA would not handle crisis management or law enforcement training, technical assistance, exercises and equipment. The Director stated that "While FEMA will coordinate grants and assistance to first responders, it will not assume any law enforcement functions, nor will FEMA provide law enforcement training—training on investigative techniques, evidence collection techniques."

Notable experts, including many in the emergency first responder community, urged the Congress not to give FEMA the governing role in training first responders for terrorist events. Even the Heritage Foundation appeared to have concerns. For example, David Muhlhausen, policy analyst for the Heritage Foundation, in testifying before the Senate Judiciary Committee on March 21, 2002, stated "[g]iven the nation's continuing susceptibility to future terrorist attacks, the [F]ederal government has the responsibility to assist state and local law enforcement in their efforts to detect, prevent, and respond to terrorism. FEMA's traditionally reactive approach to disasters is not well suited for the needs of law enforcement in responding to prospective terrorist threats."

As the National Sheriff's Association testified before the Subcommittee, "[t]he prevention, detection and apprehension of terrorists are law enforcement functions, and it is not appropriate for training and coordination to be assigned to the FEMA regime, where there are no such responsibilities. In the tragic event that there is a terrorist attack, that crisis is also a law enforcement responsibility. Sheriffs and Chiefs of Police are shocked that OMB would propose that FEMA should assume responsibility in these areas, where there is neither experience nor legal authority to act."

In a March 8, 2002 letter to the Subcommittee on Crime, Terrorism and Homeland Security the International Brotherhood of Police Officers (IBPO) stated that it "is concerned that FEMA does not have the experience or understanding that a law enforcement agency has when investigating terrorism."

Additionally, the Police Executive Research Forum (PERF), a national organization of police executive professionals, that serves more than 50 percent of the country's population, explained that while it respects and values FEMA's role in disaster mitigation, it was troubled about FEMA assuming a new role in training in antiterrorism efforts by state and local law enforcement. PERF explained:

> [t]he mission of FEMA and its area of expertise are based on disaster response and mitigation. While law enforcement, firefighting, emergency medical services, and HAZMAT agencies could all be first responders to a critical incident, the role of law enforcement is unique in its crisis prevention, detection activities, and apprehension of suspects. Police agencies have primary responsibility for local intelligence gathering, public safety and maintaining public order before and during a crisis. They do this through combinations of community policing, criminal investigation, and emergency response. All of this must be done while meeting the day-to-day demands of a local police department. These efforts require [F]ederal support that is based on extensive experience and knowledge of local police operations and challenges. * * * The knowledge that comes from this experience cannot be easily transferred to an agency that is relatively new to law enforcement issues.
>
> FEMA's experience and expertise have traditionally been in other areas of public safety and welfare than law enforcement. They have little history of effective partnership with local law enforcement on proactive efforts.

In the Committee's FY 2003 Views and Estimates, the Committee stated that it was "concerned that FEMA is not the appropriate agency for these responsibilities." A terrorist attack is a criminal event, not a natural disaster. Yet in the FY 2003 budget, the Office of Management and Budget proposed transferring the Office of Domestic Preparedness out of the Department of Justice and into FEMA.

On April 11, 2002, Chairman Sensenbrenner sent a letter to the President expressing strong opposition to this proposal. The Chairman stated transferring ODP's function to FEMA would "leave a gaping hole in our nation's counterterrorism efforts" because there would be no training for crisis management. The Chairman stated that "[i]t would eliminate an effective grant-making office, which currently offers the only integrated program that provides needed funds for training, equipment and technical assistance to state and local law enforcement first responders for crisis management and consequence management in the event of a terrorist attack or planned attack."

On May 20, 2002, the Committee wrote Chairman Young of the Appropriations Committee commending him for continuing the funding of ODP and its first responder programs as part of the 2002 Supplemental Appropriation.

On July 10, 2002, the Judiciary Committee reported out its recommendation to the House Select Committee for the creation of a new Department of Homeland Security. Committee recommended

that only the Office for National Preparedness in FEMA would be transferred. In conjunction with FEMA's Office of National Preparedness, the Committee recommended that the Justice Department's Office for Domestic Preparedness be transferred to create a central office within the new Department for Federal, state, and local training and coordination. This office would ensure a coordinated Federal, state, and local response in crisis and consequence management to a terrorist threat or attack.

For the above reasons, the Committee on the Judiciary adamantly opposed FEMA's lead role in the training of first responders. Due to the oversight of this Committee, the training of first responders under the new Department of Homeland Security will be placed under the law enforcement division of the new Department that carries out border security and other law enforcement functions. In fact, the Office of National Preparedness was moved out of FEMA and placed into the law enforcement division of the new Department of Homeland Security.

Drug Trafficking on the Southwest border

On March 29, 2001, the Subcommittee on Crime held an oversight hearing on drug trafficking on the Southwest border of the United States. The four witnesses were: the Honorable Donnie R. Marshall, Administrator, Drug Enforcement Administration, U.S. Department of Justice; John Varrone, Assistant Commissioner, Office of Investigations, U.S. Customs Service; Mike Scott, Chief of Criminal Law Enforcement, Department of Public Safety, Austin, TX; the Honorable W. Royal Furgeson, Jr., Judge, U.S. District Court for the Western District of Texas.

According to the Drug Enforcement Administration (DEA), the ever-increasing legitimate cross-border traffic and commerce between the U.S. and Mexico has brought with it a significant increase in narcotics trafficking at the U.S./Mexico border in the last several years. Several international organized crime groups have established elaborate smuggling infrastructures on both sides of the border, which has made the Southwest border the smuggling corridor of preference for the flow of marijuana, cocaine, heroin, and methamphetamine. The latest figures show that about 63 percent of all U.S. drug seizures (representing over 76 percent of the total weight seized) occur along the Southwest border and that number threatens to increase as Mexico-based drug trafficking organizations grow even more powerful. This hearing examined not only the increased drug trafficking, but also the effects that the increase has had on the safety of the surrounding communities and the overwhelming burden imposed on the judicial districts along the border.

Narco-terrorism

On December 4, 2001, the Subcommittee staff met with the DEA to discuss the relationship between narcotics trafficking and terrorism. According to the DEA, illegal drug production in Mexico, Columbia, Thailand, and Afghanistan funds terror and represents a clear and present danger to our national security. During this meeting the DEA briefed the staff on its strategy in dealing with drugs and terrorism. That strategy is to focus on DEA's priorities;

to develop intelligence to a greater extent; and to develop international cooperation. The Subcommittee continues to conduct oversight over the DEA's role in dealing with the issue of narco-terrorism.

OxyContin

Beginning on May 9, 2001, the Subcommittee staff met with the DEA on numerous occasions to discuss the issue of drug diversion relating to the prescription medication OxyContin. OxyContin is a trade name product for the generic narcotic oxycodone. It is a synthetic drug that acts exactly like morphine and is prescribed for moderate to high pain relief associated with injuries, arthritis, lower back pain and terminal cancer pain. OxyContin was approved by the Food and Drug Administration in 1995 and was seen as a breakthrough drug in dealing with the treatment of pain.

What makes OxyContin unique is that it contains a time release mechanism that allows for a slow release of the narcotic oxycodone over a twelve hour period. A patient can take one pill and receive a steady release of pain reliever over a long period of time, rather than suffer the common "roller-coaster" of pain effect that shorter duration pain relievers are subject to. There is a highly significant problem with the time release mechanism of which the DEA says the manufacturer was aware. The time release mechanism is destroyed if you simply break up the pill or dissolve it in water. This is why the packaging makes it very clear that the pills must be swallowed whole. When you crush the pill you are left with a highly addictive pile of pure morphine that can be snorted or injected.

Opiate abusers have quickly learned the ease of converting the tablets from a safe medication for the chronic treatment of pain to a suitable substitute for heroin. Drug abuse treatment centers, law enforcement personnel, and pharmacists have recently reported a sudden increase in the abuse of OxyContin across the country and among all ethnic and economic groups. The number of emergency department episodes involving OxyContin abuse have doubled from 3,190 episodes in 1996 to 6,429 episodes in 1999.

Drugs such as OxyContin are diverted in a variety of ways including pharmacy diversion, "doctor shopping," and improper prescribing practices by physicians. Pharmacy diversion occurs when individuals working in pharmacies take products directly from the shelves, or when people make fraudulent prescriptions. The most widely used diversion technique at the street level is doctor shopping.

DEA has had two separate meetings with the manufacturer concerning this problem. DEA officials present at those meetings say that the company has expressed a willingness to cooperate, however, correspondence received from the company following those meetings makes clear that the company feels that they are producing a lawful product, is operating within FDA guidelines, and believes that there have been no deaths attributable to OxyContin. The Subcommittee continues to conduct oversight over the DEA's handling of the problem of the diversion of OxyContin.

Medical marijuana

On July 11, 2002, the Subcommittee staff met with the DEA to discuss the issue of "medical marijuana." State laws in Oregon, Alaska, Hawaii, and California allow medical use of marijuana under specified conditions. All four states require a patient to have a physician's recommendation to be eligible for medical marijuana use. Alaska, Hawaii, and Oregon established state-run registries for patients and caregivers to document their eligibility to engage in medical marijuana use; and require physician documentation of a person's debilitating condition to register. However, under Federal law, marijuana is still classified as a Schedule I drug and is therefore still illegal.

DEA addressed some of the serious difficulties associated with "medical marijuana" programs. Specifically, DEA discussed the inherent conflict between state laws permitting the use of marijuana and Federal laws that do not; the potential for facilitating illegal trafficking; the impact of such laws on cooperation among Federal, state, and local law enforcement; and the lack of data on the medicinal value of marijuana. DEA further discussed that the use of the phrase "medical marijuana" implicitly accepts a premise that is contrary to existing federal law.

DEA has been aggressive in enforcing Federal drug laws relating to the sale and distribution of marijuana in states that have passed contrary laws. For example, on February 12, 2002, the DEA raided "medical marijuana clubs" in San Francisco, confiscating 8,300 plants, a handgun and a shotgun and arresting three men who allegedly provided the marijuana. The Subcommittee continues to conduct oversight over the DEA's enforcement of federal drug laws.

Protecting Seniors from fraud

On April 30, 2001, the Subcommittee on Crime staff met with the FBI to discuss the Nation's problem with crimes against seniors. Currently, there are 34.5 million Americans over the age of 65 and that number is expected to double by 2030. Seniors are frequently targets of frauds and scams, purse snatching, pick pocketing, theft of checks from the mail and crimes in long-term care settings.[14] Con artists set up sophisticated investment scams and steal life savings. For example, there is the lottery fraud, where a caller offers the senior a percentage of a lottery ticket for a price promising that it is easier to win the lottery in another country. After the senior pays for the ticket, the con will call back claiming the senior won and that for the senior to receive the money he or she must pay thousands in taxes. Another common fraud scheme is the Bank Examiner Fraud. Here, a caller claims to be a "bank examiner" and tells the senior his or her checking or savings account has had some unusual withdrawals. The "bank examiner" will then say that the bank is investigating a dishonest teller who is allegedly making withdrawals from the senior's account. Someone posing as law enforcement will then ask the senior to help by catching the teller in the act. The senior is asked to withdraw

[14] TRIAD: reducing crime against the elderly (4th ed.) P. 15.

money and give it to the examiner for marking and recording serial numbers.

This meeting lead to the July 11, 2001 Subcommittee oversight hearing on law enforcement and community efforts to address crimes against seniors. The four witnesses that testified at the hearing were: Joseph Pollock, the Sheriff of Burnet, Texas; Susan Reed, the District Attorney of Bexar County Courthouse in San Antonio Texas; Frank Donaghue, the Chief Deputy Attorney General and the Director of the Bureau of Consumer Protection of the Pennsylvania Office of Attorney General; and Michele J. Bruno, State Director of Triad Program, Office of the Attorney General in Richmond, Virginia.

The states and communities with the support of the Federal Government have lead the effort against such crime. For instance, the National Association of Attorneys General (NAAG) have worked with Federal, state and local law enforcement and communities addressing crimes against the elderly ranging from health care abuse to telemarketing scams to sweepstakes problems. Last fall, the State Attorneys General reached settlements with two sweepstakes companies regarding claims that those companies disseminated promotional material which claimed consumers had won when they had not.[15]

Another federally supported state and communities effort is TRIAD. In 1988, the American Association of Retired Persons, the International Association of Chiefs of Police and the National Sheriffs Association signed a cooperative agreement to reduce crime against seniors and to improve law enforcement services to the elderly. This agreement is known as TRIAD and works to connect senior citizens with police and sheriff departments. A volunteer council called SALT (Seniors and Law Enforcement Together) is organized for each local TRIAD. The local SALT Council determines what services or programs the TRIAD will offer, recruits volunteers, and oversees the results.

The "Protecting Seniors from Fraud Act"[16] was enacted on November 22, 2000, and authorized appropriations to the Attorney General for fiscal years 2001 through 2005 for TRIAD programs. Among other things, that law directed the Secretary of Health and Human Services, acting through the Assistant Secretary of Health and Human Services for Aging, to provide to the Attorney General of each State and to publicly disseminate in each State (including to area agencies on aging) information designed to educate senior citizens and raise awareness about the dangers of fraud, including telemarketing and sweepstakes fraud. Additionally, the law required the Attorney General to: (1) conduct a study to assist in developing new strategies to prevent and otherwise reduce the incidence of crimes against seniors; and (2) include as part of each National Crime Victimization Survey statistics related to crimes targeting or disproportionately affecting seniors, crime risk factors for seniors, and specific characteristics of the victims of crimes who are seniors.

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[15] Consumer Protection Report: (Sept. 2000) 1.
[16] Pub. L. No. 106–534.

In response to the hearing and to ensure the implementation of the Act, the Subcommittee on Crime sent a letter to the Department of Health and Human Services on July 11, 2001, requesting a status report on the Department's implementation of this bill. The Department responded on September 19, 2001, stating that the Administration on Aging (AoA) is implementing this law through its existing programs and networks. In this letter, the Secretary of Health and Human Services reported:

> The AoA administers Older American Act (OAA) formula grants for state activities designed to protect seniors from abuse, neglect, and exploitation. These include efforts to train law enforcement officials, develop and distribute education materials, conduct public awareness campaigns, and create community coalitions.
>
> The AoA provides comprehensive consumer protection information on its web site. It also funds the National Center on Elder Abuse and five national legal resource centers. These organizations provide the public with information on consumer scams. They also share fraud information with other professionals. For example, three of the legal resource centers participate in a quarterly conference call with the National Association of Attorneys General.
>
> On May 2001, the National Consumer Law Center (NCLC) used OAA funds to produce and disseminate the enclosed document, "What To Do If You've Become The Victim Of Telemarketing Fraud." Next year NCLC will produce an elder fraud brochure, two fact sheets for seniors, and two for advocates. The center will disseminate these materials to State Attorneys General, senior legal services providers, and senior centers.

Additionally, the Subcommittee sent a letter to the Department of Justice on July 11, 2001, requesting the status of its compliance. The Department of Justice responded on August 22, 2001. In compliance with the law, the Department's Bureau of Justice Statistics (BJS) now reports the levels and rates of violent and property crimes against persons age 65 or older. BJS recently published "Crimes Against Persons Age 65 or Older, 1992–97." This report does not include fraud data, however. The Department's National Institute for Justice (NIJ) is working with BJS to determine if fraud data may be obtained through the National Incident Based Reporting System.

Reauthorization of the United States Department of Justice

In preparation for H.R. 2215, the "21st Century Department of Justice Appropriations Authorization Act" the legislation that reauthorizes the programs within the Department of Justice. On May 3 and May 15, 2001, the Subcommittee on Crime held two oversight hearings on the reauthorization of the United States Department of Justice. Specifically, the Subcommittee held one hearing on the criminal law enforcement components (the Federal Bureau of Investigation, the Drug Enforcement Administration, the Bureau of Prison, and the United States Marshal Service) of the Justice Department that comprise the largest portion of the Department, em-

ploying the largest number of employees and accounting for most of the Department's budget. All of these divisions fall within the oversight and legislative jurisdiction of the Subcommittee on Crime. Because of the wide breadth of the Department of Justice's activities, the Subcommittee held a second hearing on the criminal law components of the Department of Justice that are not its direct law enforcement agencies—the Criminal Division, the Office of Justice Programs (OJP), and the Community Oriented Policing Services office (COPS).

Office of Justice Programs

The Subcommittee on Crime held three oversight hearings on the Office of Justice programs on March 5, March 7, and March 14, 2002. The Office of Justice Programs (OJP) is the primary grant-making office within the Department of Justice. The programs that OJP currently operates were authorized by various crime bills throughout the past two decades. Although these grant programs provide a vital resource for state and local law enforcement agencies, studies on the effectiveness of these grants have been inconclusive. Additionally, some of the programs at OJP overlap or duplicate other programs at OJP, at other Department of Justice offices (e.g., COPS) and at other agencies.

At a March 5, 2002 hearing, witnesses testified on how duplication and lack of coordination in OJP various grant programs prevent OJP from effectively achieving its core mission of delivering Federal crime funds to state and local units of government. The four witnesses were: the Honorable Deborah Daniels, Assistant Attorney General, Department of Justice Office of Justice Programs; the Honorable Laurie Robinson, former Assistant Attorney General, Office of Justice Programs; Dr. Nolan Jones, National Governor's Association; and Ralph Kelley, Commissioner, Kentucky Department of Juvenile Justice.

The witnesses at the March 7, 2002 hearing testified on how OJP's programs are evaluated for effectiveness. The four witnesses were: Dr. Laurie Ekstrand, Director, Justice Issues, General Accounting Office; David Muhlhausen, Policy Analyst, Heritage Foundation; Sheriff John Cary Bittick, President of the National Sheriffs Association; and The Honorable David B. Mitchell, Executive Director National Council of Juvenile and Family Court Judges.

On March 14, 2002, the Subcommittee on Crime held the third hearing at which witnesses testified on the administration of Federal law enforcement grants by the Office of Justice Programs (OJP), the principal grant-making arm of the Justice Department, as well as the Community Oriented Policing Services (COPS) Program. Those witnesses were: Glenn A. Fine, Inspector General of the Department of Justice; Tracy Henke, OJP Principal Deputy Assistant Attorney General; Carl Peed, Director of the COPS Office; and Bonnie Campbell, Esq., Former Director, Violence Against Women Office, OJP.

These hearings pointed out the need for continued oversight of OJP, especially in light of the President's FY 2003 Budget proposal to redirect Federal law enforcement funding into counter-terrorism and homeland security. By examining certain COPS and OJP grants some consider to be wasteful or ineffective, the Sub-

committee seeks ways to ensure that Federal law enforcement funds will have a more direct and measurable impact on crime.

To prepare for these hearings, the Subcommittee on Crime sent a letter to the Office of Justice Programs (OJP) asking for information regarding coordination, duplication, and evaluations of effectiveness at OJP. Additionally, the Subcommittee sent two letters directing General Accounting Office (GAO) to perform studies on programs within the Office of Justice Programs. The first GAO letter sent on January 25, 2002, requested that the GAO review the effectiveness of the Weed and Seed programs. The second letter sent on February 8, 2002, requested that the GAO review the evaluations being performed by the National Institute of Justice. These studies will be completed during the 108th Congress.

Federal Bureau of Investigation: Criminal Justice Information Services (CJIS)

On February 21, 2001, the Subcommittee on Crime staff met with the Criminal Justice Information Services (CJIS) at FBI headquarters in Washington, D.C. The CJIS Advisory Panel advises the FBI with respect to programs administered on behalf of the U.S. criminal justice community and is located in Clarksburg, West Virginia. To meet its mission to reduce criminal activity, CJIS provides timely and relevant criminal justice information to the FBI and to qualified law enforcement, criminal justice, civilian, academic employment, and licensing agencies concerning individuals, stolen property, criminal organizations and activities and other law enforcement-related data. CJIS has six components: (1) Fingerprint Identification System; (2) National Crime Information Center (NCIC); (3) National Instant Criminal Background Check System; (4) Law Enforcement On-Line; (5) Uniform Crime Reporting; and (6) other systems determined by the FBI Director to have some relationship to the above programs.

The primary function of the CJIS Division is to provide fingerprint identification services and to maintain a national criminal history repository. This is very important in the war against terrorism. On July 28, 1999, CJIS implemented the new integrated automated tool—the Integrated Automated Fingerprint Identification System (IAFIS). IAFIS has three parts which have automated much of the existing work flow and manual processes and eliminated the need to process and retain paper fingerprint cards. IAFIS can process up to 62,500 ten-print fingerprint searchers (i.e. rolled paper prints) and 635 latent fingerprint (i.e. one left at the scene of a crime) search.

The National Crime Information Center (NCIC) is a nationwide computerized information system accessed by more than 80,000 law enforcement and criminal justice agencies at all levels of government. The Uniform Crime Reporting/National Incident-Based Reporting System (NIBRS) is a nationwide cooperative effort of city, county, and state law enforcement agencies to report data on crimes. There are eight crimes in the Crime Index: murder, nonnegligent manslaughter, forcible rape, robbery, aggravated assault, and property crimes of burglary, larceny-theft, motor vehicle theft, and arson.

Another component, the National Instant Criminal Background Check System (NICS) was established as a result of the Brady Act, which in 1998 required the Federal Firearms Licensees (FFL) to initiate a background check on all persons who attempt to purchase a firearm. The FBI established the NICS operation center to enforce the provisions of the Brady Act and to manage, operate and support NICS. The NICS mission is to ensure the timely transfer of firearms to individuals who are not specifically prohibited under Federal law and to deny the transfer to those who are prohibited from possessing or receiving a firearm.

Law Enforcement On-Line (LEO), is a national interactive computer communications. LEO provides a state-of-the-art Intranet to link all levels of law enforcement nationwide. LEO offers real-time chat capability, news groups, distance learning, and articles on law enforcement issues, to name a few. Additionally, CJIS runs other systems related to the above programs.

On February 21, 2002, the staff of the Subcommittee on Crime, Terrorism, and Homeland Security traveled to CJIS in West Virginia. In particular the Subcommittee concentrated on the FBI Operations Center-NICS. Subcommittee staff met examiners who perform NICS instant background checks for federally licensed firearms dealers. The meetings provided the Subcommittee with firsthand knowledge of the instant check system and the appeal process for firearms purchases and assisted in the drafting of legislation. FBI personnel also highlighted the types of technology available at the center to perform background checks and fingerprint identifications, which are a concern after the terrorist attacks of 2001. Specifically, the FBI described its effort to integrate their biometric technology with other Federal agencies and with the states.

Computer hacking issues

On March 22, 2001, the Subcommittee staff met with the FBI to discuss the growing threat of computer hacking to the Nation's economy and security. This meeting provided invaluable information that the Subcommittee used in drafting various cyber crime provisions enacted in the 107th Congress.

FBI reorganization

On October 23, 2001, the Subcommittee staff met with the FBI Director Robert Mueller for a briefing on the proposed reorganization of the FBI. At that meeting the FBI explained that due to the 9–11 attacks and terrorism threat that terrorism was now the FBI's number one priority and that the reorganization was based on these new priorities.

FBI Academy/Hostage Rescue Team

On April 17, 2002, the Subcommittee staff toured the FBI Academy at Quantico, Virginia, to review FBI training efforts. Staff were also briefed on the FBI training for state and local law enforcement and on the Hostage Rescue Team's work.

Implementation of USA Patriot Act information sharing requirements

On September 30, 2002, the Subcommittee and Committee staff met with the Department of Justice, the FBI and the CIA to discuss the implementation of the information sharing provisions of the USA Patriot Act. The Committee continues to conduct oversight over these and other Patriot Act provisions.

FBI outdated technology issues

In April and May of 2001, the Subcommittee staff met with the FBI to discuss concerns that the FBI computer systems are slow, unreliable, and obsolete.

Problems with document retrieval on Oklahoma City

The Subcommittee also met with the FBI and DOJ on the belated production of documents related to the Oklahoma City case. On April 25, 2001, the Committee on the Judiciary sent an oversight letter to the Justice Department regarding this problem and urged the FBI and DOJ to take steps to upgrade their information technology systems. The Chairman of the Subcommittee on Crime issued a public statement on May 11, 2001, expressing further concern after problems developed in the Timothy McVeigh case relating to inaccurate record keeping. Subcommittee staff also met with the FBI to discuss these issues and concerns. In March 2002, the Office of Inspector General (OIG) issued a report that found that the FBI's failures to disclose numerous documents related to the case in a timely manner were due to a number of causes including:

> individual mistakes made by FBI employees, the FBI's cumbersome and complex document-handling procedures, agents' failures to follow FBI policies and directives, inconsistent interpretations of FBI policies and procedures, agents' lack of understanding of the unusual discovery agreement in this case, and the tremendous volume of material being processed within a short period of time. The OIG concluded that the FBI's computer systems—although antiquated, inefficient, and badly in need of improvement—were not the chief cause of the failures.

Missing equipment at the FBI

In July, the Subcommittee learned that the FBI could not account for 449 firearms and 184 laptops. On July 17, 2001, the Attorney General directed that the Department of Justice's Inspector General would conduct a Department-wide review. The Immigration and Naturalization Service and the Bureau of Prisons had similar problems. The reviews are examining the inventory of Federal law enforcement equipment that may pose a danger to the public (*i.e.,* missing guns) or a threat to national security (*i.e.,* missing laptops). The OIG is conducting three separate reviews and in August 2002 reported its findings on the Bureau of Prisons. That report recommends that the Bureau of Prisons improve their controls.

The Committee sent a letter on July 12, 2001 to the Department of Justice requesting specific information on the missing equip-

ment. Of the 449 weapons, 265 are reported lost and 184 are reported stolen. Ninety-one of those weapons were training weapons that are inoperative. The weapons that were stolen were from automobile trunks, home burglaries, and armed robberies. One of the stolen guns was used in a murder in Detroit, Michigan. Of the 184 laptops, 13 were stolen and 171 were reported lost. Of the 171 reported lost one contained and three others may have contained classified information. Since July 17, 2001, one of the three laptops that may contain classified information has been found. None of the stolen computers contained classified information. These computers could also contain law enforcement sensitive information.

On July 24, 2001, the FBI briefed Members of the Committee on the Judiciary on the "lost and stolen weapons and laptops." A hearing was not requested because the FBI and Department of Justice were in the middle of reviewing the situation. The informal briefing allowed the FBI and the attending Judiciary Members to participate in an informative open dialogue on the problem. These questions solicited answers that demonstrated to the FBI and the Department of Justice that they needed to resolve a few more issues. In response to the briefing, the Committee sent a letter on August 2, 2001, requesting additional information from the Department of Justice.

Secret Service oversight: Counterfeiting

On August 15, 2001, staff of the Subcommittee on Crime met with the special agents of the Unites States Secret Service's counterfeiting divisions. The meeting provided staff with knowledge of the new counterfeiting problems related to computer technology and dollarization. "Dollarization" throughout the world will increase overseas counterfeit activities of U.S. currency. Dollarization is when another country adopts the U.S. dollars as its own currency. This has already happened in such countries as Guatemala, Ecuador and Panama. The Committee on the Judiciary expressed its support for the establishment of four foreign offices in regions where increased liaison, training and other services to foreign financial institutions and law enforcement agencies are necessary to prevent the manufacturing of counterfeit U.S. currency and financial crimes victimizing U.S. financial institutions in the FY 2003 Views and Estimates. Counterfeiting is a serious threat to the Nation's security as it undermines our financial structure and assists criminals such as drug traffickers and terrorists in financing their activities.

Electronic crime task forces

On May 30, and August 18, 2001, staff of the Subcommittee on Crime traveled to New York City to meet with the special agents of United States Secret Service's New York Electronic Crimes Task Force. At these meetings, the staff learned about the operations of the task force. The meetings provided the staff with firsthand knowledge of sensitive law enforcement efforts and cases carried out by the Secret Service. Bob Weaver, the Special Agent in Charge of the Unit, highlighted the types of technology and crime that are occurring. The evidence and technology reviewed by staff were destroyed in the September 11, 2001 terrorist attacks. These meet-

ings allowed the staff an opportunity to determine whether to suggest authorizing a national network of electronic crime task forces based on the New York task force. This national network was authorized in Public Law 107–56, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA Patriot Act) of 2001.

ATF/Gun Issues: Gun shows

On January 11, and 12, 2002, staff from the Subcommittee on Crime attended a gun show with Americans for Gun Safety in Richmond, Virginia. The purpose of the trip was to afford the Subcommittee staff an opportunity to experience a gun show firsthand and receive a briefing from the Americans for Gun Safety's position on the "gun show loophole." Americans for Gun Safety (AGS) is a non-partisan, not-for-profit advocacy organization that supports the right of individuals to own firearms and urges responsibility in keeping guns out of the hands of criminals and children. Overall, this gun show did not present any evidence that the "gun show loophole" is a major problem that needs to be addressed by legislation.

ATF New York Office

On August 14–16, 2002, staff of the Subcommittee on Crime, Terrorism, and Homeland Security and the Judiciary Committee traveled to New York City to learn about the operations of the ATF in New York. The ATF took staff to a platform on the building next the World Trade Center site, which overlooks the site. Several New York ATF agents described the events of 9–11 from their perspective inside Tower 7 and the rescue and cleanup efforts. We were shown much of the destruction from that day including other buildings and the damage each sustained. Communications, evacuations and response efforts after the attack were discussed. In addition, the differences between this investigation and the investigation of the 1993 World trade Center were described.

Staff of the Subcommittee on Crime, Terrorism, and Homeland Security were briefed on the ATF National Response Team facility in Red Hook, N.Y., which consists of a large, emergency response vehicle and trained specialists in arson, explosives and bio-weapons. The primary mission of the ATF National Response Teams is to assist state and local fire and police agencies. The teams are trained to assist local fire investigators in the investigation of suspected crime sites, e.g. car bombings or arson to cover up other crimes. Evidence extraction and preservation is key to subsequent stages of investigations and prosecutions.

In the afternoon, Paul Browne, Deputy Commissioner of the New York Police Department briefed us on the added security precautions that have been taken since 9/11 especially with regard to certain bridges and buildings that have been the subject of intelligence reports provided to the NYPD by Federal agencies. Additionally, counsels were given a tour of the new offices of the New York Field Division of ATF and briefed us on the transition and the great assistance that GSA and the appropriation by Congress of emergency supplemental funding provided. We were also briefed on the ATF Crime Gun Center (Center) operated out of the New York

Field Division offices. The Center compiles crime gun information that is used primarily for assisting state and local police agencies to solve crimes, deploy additional resources to areas where crime weapons are recovered, and proactive investigations and arrests of Federal firearms licensees (FFLs) who may be engaged in illegal firearms trafficking. The Center compiles data such as the number of crime guns traced to an FFL in a 1-year time frame, time to crime information, numbers of firearms stolen, multiple gun sales by a dealer to one individual, and the number of unsuccessful traces by a particular FFL trends.

Ballistics imaging

On November 8, 2002, staff from the Subcommittee on Crime, Terrorism, and Homeland Security visited the ATF's Ballistics Imaging Center in Rockville, Maryland, and it's weapons library in Washington, D.C. to learn about how bullets and casings are entered into the system and matched to guns and to learn about the various types of weapons that are banned in the United States.

Dog training

On April 2, 2002, staff from the Subcommittee on Crime toured the Bureau of Alcohol, Tobacco and Firearms and the U.S. Customs Service canine training center in Front Royal, Virginia, to learn about the training program for bomb sniffing and drug sniffing dogs that these two agencies employ, respectively.

Explosives

On August 29, 2002, staff of the Subcommittee on Crime, Terrorism, and Homeland Security traveled to Fredericksburg, VA, with the Bureau of Alcohol, Tobacco and Firearms for a demonstration of the different types of explosives and the damage each can cause.

Bureau of Prisons

On November 21, 2002, staff from the Subcommittee on Crime, Terrorism, and Homeland Security toured the Federal Correctional Institute (FCI) at Fairton, New Jersey, to learn about the conditions and the opportunities for education, skills training and counseling the prisoners receive. FCI Fairton houses prisoners classified at both medium security and minimum security levels.

United States Sentencing Commission: Crack/powder cocaine penalty ratios

On January 17, 2002, the United States Sentencing Commission (the Commission) published in the Federal Register a request for public comment regarding proposed amendments to the U.S. Sentencing Guidelines regarding penalties for crack cocaine. Under the current statutory scheme and sentencing guidelines, there is a 100–1 differential between powder and crack cocaine that triggers a 5- and 10-year mandatory minimum sentence. For example, someone trafficking 5 grams of crack cocaine would receive the same 5 year mandatory minimum sentence as someone trafficking 500 grams of powder cocaine. On March 29, 2002, the Sub-

committee sent a letter to the Commission objecting to any change to the current Federal sentencing policy and guidelines.

The Subcommittee noted in that letter and in meetings with the staff of the Commission that Congress's decision to differentiate crack cocaine from powder cocaine in the penalty structure was deliberate and the Commission appropriately followed those directives in implementing the drug penalty guidelines in 1989. Crack is more addictive than powder cocaine; it accounts for more emergency room visits; it is most popular among juveniles; it has a greater likelihood of being associated with violence; and crack dealers have more extensive criminal records than other drug dealers and tend to use young people to distribute the drug at a greater rate.

On April 15, 2002, in a letter to the Subcommittee, the Commission stated that they were persuaded by the reasoning of the Subcommittee's March 29, 2002 letter and therefore decided not to promulgate an amendment to the Sentencing Guidelines. The Commission would instead make a recommendation to Congress for a change to the crack/powder cocaine penalty ratios.

Racial profiling

The Subcommittee has had several meetings with the Department of Justice with regard to the issue of racial profiling and possible legislation such as H.R. 2074, a bill introduced by Representative John Conyers, Jr., that seeks to address the issue. The Subcommittee has expressed two important points to the Department with regard to the issue of racial profiling: (1) Racial profiling is prohibited under current law; and (2) H.R. 2074 would undermine legitimate law enforcement and have a disproportionate effect on minority communities.

Racial profiling, as any reasonable person understands it—intentional police action against a person based solely upon that person's race—is already prohibited under the Constitution's Equal Protection Clause of the Fourteenth Amendment, see *Whren* v. *United States,* 517 U.S. 806, 813 (1966), as well as existing criminal and civil statutes.

Title 18 U.S.C. §§ 241 and 242 are criminal provisions already available to prosecute Federal, state and local police officials who target persons solely because of race or ethnicity. The Courts have consistently ruled that the Constitution does not prohibit police from routinely taking race into account, as long as race is only one of several factors considered and it is not done for the purpose of harassment. See, *United States* v. *Weaver,* 966 F.2d 391, 394 (8th Cir.1992). H.R. 2074 would prohibit investigative agencies from using both historical and practical experience to focus an investigation. It would also prohibit the use of case-specific information from informants or cooperators in cases where criminals were using persons of particular races or ethnicity to further the criminal enterprise. The Subcommittee will continue to conduct oversight of the Department of Justice and its enforcement of the Federal laws prohibiting racial profiling.

Newport News Courthouse

On April 17, 2002, the Subcommittee sent a letter to the Administrative Office of the United States Courts expressing its concern about the proposed transfer of the U.S. Magistrate Judge in Newport News, Virginia, along with a majority of the clerk's office personnel, to Norfolk, Virginia. The concern of the Subcommittee was that this transfer was inconsistent with case load requirements. The Newport News Division handled a third of the criminal work in addition to a fourth of the civil work of the combined Newport News and Norfolk Division offices. Since the U.S. Attorneys office had increased its presence in Newport News and the Federal Public Defender had similar plans, it did not seem to be a coordinated action by the Court and the Subcommittee sought justification for the relocation.

In a letter dated April 25, 2002, Judge Rebecca Beach Smith of the United States District Court of the Eastern District of Virginia stated that the decision was a thoughtful action taken in an effort to best serve the growing Norfolk and Newport News dockets with the limited judicial resources available to the Courts. Additionally, Judge Smith informed the Subcommittee that the federal court facility in Newport News is in an extremely deteriorating condition, which poses grave security concerns for the court and the public. The Subcommittee will continue to monitor the effect the transfer of the Magistrate has on the courts of the Norfolk Division.

New Jersey speed violation survey

On April 23, 2002, the Subcommittee wrote to Attorney General Ashcroft concerning press reports that the Department of Justice may have attempted to suppress or delay the public release of a December 13, 2001 final report by the Public Services Research Institute entitled "Speed Violation Survey of the New Jersey Turnpike: Final Report, December 13, 2001." That report reflected that Black motorists in New Jersey were much more likely than White or Hispanic motorists there to exceed the lawful speed limits on the New Jersey Turnpike. This is currently an ongoing oversight matter.

Misleading testimony before the subcommittee

On May 14, 2002, the Subcommittee held a legislative hearing on the bill, H.R. 4689, the "Fairness in Sentencing Act of 2002." This bill would disapprove of an amendment to the Sentencing Guidelines submitted by the United States Sentencing Commission to Congress that would create a drug quantity "cap" for those persons convicted of trafficking in large quantities of drugs if those persons also qualify for a mitigating role adjustment under the existing guidelines. One of the witnesses that testified at the hearing was the Honorable James M. Rosenbaum, Chief Judge, U.S. District Court, District of Minnesota. Judge Rosenbaum testified against the bill and advocated strongly that the Sentencing Commission's amendment to cap the base offense level for those trafficking in large quantities of drugs was very much needed to bring equity to the Federal sentencing system.

In describing those persons who would be affected by the Sentencing Commission's amendment, he testified: "they are the

women whose boyfriends tell them, 'A package will be coming by mail or from a package delivery service in the next 2 weeks. Keep it for me, and I'll give you $200, or maybe I'll buy you food for the kids.' Or they are drug couriers who either swallow, wear, or drive drugs from one place to another. And they frequently have no idea what they are carrying or receiving, and if they have an idea of what, they usually don't know how much." Throughout his testimony, Judge Rosenbaum described drug cases in his courthouse in which defendants with minor roles in drug organizations were subject to prison terms of a decade or more. He also described how the Sentencing Commission's amendment to the guidelines would lessen those sentences.

Following the hearing, the Subcommittee submitted additional written questions to Judge Rosenbaum on May 22, 2002, in order to ascertain, among other things, the actual cases to which Judge Rosenbaum referred during his testimony. After receiving the May 22, 2002 letter, Judge Rosenbaum contacted Subcommittee Chairman Lamar Smith by telephone and asked that the Chairman agree to permit the Judge to limit his response to "publicly available information." The Chairman agreed that the Judge's initial response could be so limited. Thereafter, Judge Rosenbaum responded to the Subcommittee's May 22, 2002 letter on June 6, 2002. Along with his response, Judge Rosenbaum conveyed copies of nine Judgment and Commitment Orders, which reveal some, but by no means all, of the information sought by the Sub-committee. Both in his June 6, 2002 response, and thereafter, Judge Rosenbaum declined, however, to answer certain questions posed to him by the Subcommittee relevant to his testimony, even for the cases over which he personally presided.

The Subcommittee was able to determine, through pre-sentence investigation reports and transcripts of sentencing proceedings, that Judge Rosenbaum inaccurately represented the sentences of the defendants in the examples he offered as evidence that the amendment to the guidelines was necessary. For example, Judge Rosenbaum said a woman he identified as "MGA" was in court after she received $2,000 for agreeing to accept a package of drugs. He stated that her guideline range was 57 to 71 months, or five to seven years, after reductions for role, acceptance and other factors. According to the Judge, under the proposed change, her range would instead be 37 to 46 months, or three to four years. However, Judge Rosenbaum never explained that the woman was actually sentenced to six months of work release.

At a meeting on November 7, 2002, with representatives of the Administrative Office of the United States Courts, Committee staff stated that it was the opinion of the Committee that Eighth Circuit Chief Judge David Hansen should initiate a complaint against Judge Rosenbaum for consideration by the Circuit Council. In a letter dated December 4, 2002, Judge Hansen stated he is disinclined to exercise his statutory discretion to initiate a complaint against Judge Rosenbaum at this time. Judge Hansen noted that one of the cases used by Judge Rosenbaum is still on appeal and that Judge Rosenbaum has yet to respond to the Subcommittee's October 16, 2002 letter requesting additional information. Judge Hansen stated

that he thinks it is "advisable to await his response before I decide what action, if any, is merited under the discipline statute."

SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW [1]

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JERROLD NADLER, New York
TAMMY BALDWIN, Wisconsin
ANTHONY D. WEINER, New York
MAXINE WATERS, California

[1] Subcommittee chairmanship and assignments approved January 31, 2001.
[2] Melissa A. Hart, Pennsylvania, removal from the subcommittee approved June 13, 2002.
[3] Mike Pence, Indiana, assignment to the subcommittee approved June 13, 2002.

Tabulation of subcommittee legislation and activity

Legislation referred to the Subcommittee	63
Legislation reported favorably to the full Committee	10
Legislation reported adversely to the full Committee	0
Legislation reported without recommendation to the full Committee	0
Legislation reported as original measure to the full Committee	0
Legislation discharged from the Subcommittee	1
Legislation ordered tabled in the Subcommittee	1
Legislation pending before the full Committee	1
Legislation reported to the House	8
Legislation discharged from the Committee	4
Legislation pending in the House	2
Legislation passed by the House	10
Legislation pending in the Senate	3
Legislation vetoed by the President	0
Legislation enacted into public law	7
Legislation enacted into public law as part of another bill	2
Legislation on which hearings were held	10
Days of legislative hearings	6
Days of oversight hearings	9

JURISDICTION OF THE SUBCOMMITTEE

The Subcommittee on Commercial and Administrative Law has legislative and oversight responsibility for the Independent Counsel statute, the Legal Services Corporation, the Office of Solicitor General, the U.S. Bankruptcy Courts, the Executive Office for the U.S. Trustees of the Department of Justice, the Executive Office of United States Attorneys, and the Environment and Natural Resources Division of the Department of Justice. The Subcommittee's legislative responsibilities include administrative law (practice and procedure), regulatory flexibility, State taxation affecting interstate commerce, bankruptcy law, bankruptcy judgeships, legal services, Federal debt collection, the Contract Disputes Act, the Federal Arbitration Act, and interstate compacts.

LEGISLATIVE ACTIVITIES

ADMINISTRATIVE LAW AND REGULATORY REFORM

The Subcommittee has jurisdiction over the Administrative Procedure Act[1] and related legislation. In addition, the Subcommittee has responsibility for matters affecting privacy rights. Administrative law provides the framework for accountability of administrative agencies, including agency rulemaking, adjudicatory proceedings, and judicial review.

H.R. 5005, the "Homeland Security Act of 2002" (Pub. L. No. 107–296)

Summary.—On June 6, 2002, President George W. Bush announced his proposal to create a Cabinet-level Department of Homeland Security and provide for the transfer of numerous governmental entities from various Federal agencies into a single unit devoted to domestic security protection. At the request of the Administration, implementing legislation was subsequently introduced on June 24, 2002 as H.R. 5005, the "Homeland Security Act of 2002," by Majority Leader Dick Armey together with 113 original cosponsors.

H.R. 5005 was intended to respond to the terrorist attacks of September 11, 2001. These attacks and the apparent breach of national security which permitted their occurrence starkly documented the dangers threatening the security of our nation in the twenty-first century. Given these developments and the unprecedented challenges presented by constantly evolving technological advances, H.R. 5005 represented an important legislative response. It also presented issues with respect to whether one integrated authority dedicated to ensuring the safety and security of our nation's homeland would be an effective response and how to craft the administrative implementation of this new agency so its components would function in a cohesive and operationally functional manner.

Under the President's proposal, 22 existing governmental units consisting of approximately 170,000 employees will be integrated into one agency—the Department of Homeland Security—organized into four divisions. Each division, in turn, will be headed by a Senate-confirmed Under Secretary. The creation of such a comprehensive Federal agency presented important issues concerning administrative law and procedure as well as privacy concerns.

Legislative History.—On July 9, 2002, the Subcommittee conducted a hearing on the administrative law, adjudicatory issues, and privacy ramifications related to the creation of the proposed Department of Homeland Security presented by H.R. 5005. Witnesses included: Mark Everson, Deputy Director for Management at the Office of Management and Budget nominee, appearing on behalf of the Administration; Professor Jeffrey Lubbers of American University Washington College of Law; and Professor Peter Swire of Ohio State University Moritz College of Law.

The hearing provided an opportunity to explore issues relating to how the divergent rulemaking and adjudicative processes of the various governmental units being integrated into the Department

[1] 5 U.S.C. §§ 551–59, 701–06, 1305, 3105, 3344, 5372, 7521 (2001).

of Homeland Security would be harmonized and whether Congressional review of the constituent entities comprising the Department of Homeland Security would be affected. The potential impact on personal privacy with respect to information sharing authorized under the President's proposal between the Department and other law enforcement agencies was also explored at the hearing.

In addition, the hearing highlighted the privacy ramifications presented by the creation of this new Federal agency. For example, section 201 of H.R. 5005 (as originally introduced) specified the primary responsibilities of the Under Secretary for Information Analysis. In pertinent part, it stated that this officer would be responsible for "making recommendations for improvements in policies and procedures governing the sharing of law enforcement, intelligence, and other information relating to homeland security within the Federal government and between such government and State and local government personnel, agencies, and authorities." Given the nature of the Department's authority in this regard, witnesses were extensively queried about the privacy impact of regulations and the possible need for the appointment of a privacy officer.

As a result of this hearing, the Subcommittee made various recommendations with respect to the proposed legislation. At the Committee's mark up of H.R. 5005 on July 10, 2002, several of Subcommittee Chairman Barr's amendments reflecting these recommendations were adopted. As passed by the Committee, the bill would require the appointment of a privacy officer to ensure the Department's compliance with the Privacy Act of 1974 and permit congressional oversight of such compliance. In addition to information technologies, this officer would be responsible for assuring that all forms of technologies, including surveillance systems such as the Carnivore Project, do not erode citizens' privacy protections. This officer would report to Congress on privacy violations and conduct privacy impact assessments of proposed rules when such assessment is deemed appropriate by the Secretary. The bill, as amended by the Committee, also would direct the Secretary to establish procedures ensuring the confidentiality and accuracy of personally identifiable information. The text of this provision is substantively identical to H.R. 4598, the Homeland Security Information Sharing Act. Further, the bill contains a clear mandate that it not be construed to authorize the development of a national identification system or card. Finally, the bill includes provisions intended to better effectuate the administrative procedures and adjudicative processes of the new Department, including the appointment of a task force on administrative procedure. For a discussion of the subsequent disposition of H.R. 5005, see the Full Committee section of this report.

H.R. 4561, the "Federal Agency Protection of Privacy Act"

Summary.—H.R. 4561, the "Federal Agency Protection of Privacy Act," was intended to help safeguard privacy rights of Americans. While existing Federal statutes protect against the disclosure of information already obtained by the Federal government, the Federal Agency Protection of Privacy Act would have provided the public with prospective notice and an opportunity to comment on how proposed Federal rules might affect personal privacy before they be-

come binding regulations. The bill would have required rules noticed for public comment by Federal agencies to be accompanied by an initial assessment of the rule's impact on personal privacy interests, including the extent to which the proposed rule provided notice of the collection of personally identifiable information, the type of personally identifiable information to be obtained, and the manner in which this information would be collected, maintained, protected, transferred, or disclosed by the Federal government. The bill also would have required a final rule to be accompanied by a final privacy impact analysis detailing how the issuing agency considered and responded to privacy concerns raised by the public during the comment period and explaining whether the agency considered less burdensome alternatives. H.R. 4561, in addition, contained a provision for judicial review to ensure agency compliance with its requirements.

Legislative History.—Subcommittee Chairman Bob Barr (R–GA) (for himself and six original cosponsors) introduced H.R. 4561 on April 24, 2002. H.R. 4561 attracted strong bipartisan support as evidenced by its 43 cosponsors representing a broad cross-section of the political spectrum.

The Subcommittee held a legislative hearing on H.R. 4561 on May 1, 2002. Although witnesses who testified at the hearing represented an ideologically-diverse range of viewpoints, each one expressed strong support for the legislation. Witnesses who testified included: Lori Waters on behalf of the Eagle Forum; Gregory Nojeim, representing the American Civil Liberties Union; James Harper on behalf of Privacilla.com and Progress & Freedom Foundation; and Edward Mierzwinski, representing the United States Public Interest Group.

On July 9, 2002, the Subcommittee ordered H.R. 4561 favorably reported without amendment by voice vote. Thereafter, the Committee ordered the bill favorably reported without amendment by voice vote on September 10, 2002. The Committee reported H.R. 4561 on September 30, 2002 as H. Rept. 107–701. On October 7, 2002, the House passed H.R. 4561 by voice vote under suspension of the rules. The bill was received by the Senate on the following day, but was not acted upon prior to the conclusion of the 107th Congress.

H.R. 3995, the "Housing Affordability for America Act of 2002"

Summary.—H.R. 3995, the "Housing Affordability for America Act of 2002," improves access to affordable housing for more Americans by amending specified laws related to housing and community opportunity. The vast majority of H.R. 3995 was referred to the Financial Services Committee, while Title VIII of the bill, pertaining to housing affordability impact analyses, was the only portion referred to the Judiciary Committee. Title VIII requires agencies, when promulgating any proposed or final rule for notice and comment, to issue a housing impact analysis when that rule has a significant economic impact on housing affordability. "Significant," as it applies to impact, is defined as increasing consumers' cost of housing by more than $100,000,000 per year.

Title VIII directs an agency, when publishing general notice of a proposed rulemaking, to prepare and make available for public

comment an initial housing impact analysis which describes and, where feasible, estimates the extent to which the proposed rule would increase the cost or reduce the supply of housing or land for residential development. Agencies must also prepare a final housing impact analysis when promulgating a final rule. Each final housing impact analysis must summarize and assess the issues, analyses and alternatives to the proposed rule raised during the comment period, and must state any changes made in the proposed rule as a result of such comments. The final housing impact analysis must also describe and estimate the extent of the rule's impact on housing affordability.

Title VIII of H.R. 3995 includes procedures for the exemption from these reporting requirements when a proposed or final rule does not have a significant deleterious impact on housing affordability. The initial housing impact analysis may be delayed or waived upon publication in the Federal Register of a certification and written finding by the head of the respective agency that the final rule is being promulgated in response to an emergency. A final housing impact analysis may be delayed, but not waived, for a period of not more than 180 days after the date of publication in the Federal Register of a final rule. In such instances, the head of the agency must publish in the Federal Register a certification and written finding that the final rule is being promulgated in response to an emergency.

Legislative History.—H.R. 3995 was introduced on March 19, 2002 by Representative Marge Roukema (R–NJ) (for herself and 23 original cosponsors). During the 106th Congress, the House overwhelmingly passed H.R. 1776, the "American Homeownership and Economic Opportunity Act of 2002," a bill containing language nearly identical to title VIII. In addition, title VIII of H.R. 3995 is virtually identical to H.R. 2753, the "Housing Affordability Assurance Act," which was introduced by Representative Mark Green (R–WI) on August 2, 2001, and referred to the Judiciary Committee. The Committee took no action on that bill.

Given the limited nature of its jurisdiction over the bill, the Subcommittee did not conduct hearings on H.R. 3995.[2] On July 16, 2002, the Subcommittee ordered favorably reported H.R. 3995, without amendment, by voice vote. On July 23, 2002, the Judiciary Committee met in open session and ordered favorably reported H.R. 3995 without amendment by voice vote. On September 4, 2002, title VIII of H.R. 3995 was reported by the Judiciary Committee as H. Rept. 107–640, pt. I. On September 17, 2002, H.R. 3995 was reported by the Committee on Financial Services as H. Rept. 107–640, pt. II. Prior to the adjournment of the 107th Congress, there was no further consideration of H.R. 3995.

BANKRUPTCY

Under the Constitution, Congress is given the power to promulgate "uniform Laws on the subject of Bankruptcies throughout the

[2] The Subcommittee on Housing and Community Opportunity of the Financial Services Committee conducted hearings on the remaining portions of the bill on April 10, 23, and 24, 2002. The Housing Affordability for America Act of 2002: Hearings on H.R. 3995 Before the Subcomm. on Housing and Community Opportunity of the House Comm. on Financial Services, 107th Cong. (2002).

United States[.]"[3] The Subcommittee has jurisdiction over bankruptcy legislation and bankruptcy judges.

H.R. 188, H.R. 256, H.R. 1914, H.R. 2870, H.R. 2914, H.R. 4167, H.R. 5348 and H.R. 5472, to extend the period of time for which chapter 12 of title 11 of the United States Code is reenacted (Pub. L. Nos. 107–8, 107–17, 107–170, 107–171, 107–377)

Summary.—Chapter 12 is a specialized form of bankruptcy relief available to a "family farmer with regular annual income," as defined in the Bankruptcy Code.[4] This form of bankruptcy relief permits eligible family farmers, under the supervision of a bankruptcy trustee, to reorganize their debts pursuant to a repayment plan. The special attributes of chapter 12 make it better suited to meet the particularized needs of family farmers in financial distress than other forms of bankruptcy relief, such as chapter 11 (business reorganization) and chapter 13 (individual reorganization). It was enacted on a temporary seven-year basis as part of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986[5] in response to the farm financial crisis of the early 1980's. It has subsequently been extended eight times.

During the 107th Congress, eight bills were introduced to either extend chapter 12 or make it a permanent component of the Bankruptcy Code. In addition, similar provisions were included in omnibus legislation.

Legislative History.—The first bill introduced in the 107th Congress that pertained to chapter 12 was H.R. 188. This bill, introduced by Representative Nick Smith (R–MI) on January 3, 2001, would have made chapter 12 a permanent component of the Bankruptcy Code. Thereafter, Mr. Smith introduced H.R. 256 on January 30, 2001, a bill to retroactively reenact and extend chapter 12 for eleven months until June 1, 2001. Chapter 12 had previously elapsed as of July 1, 2000.[6]

In light of the noncontroversial nature of the bill, H.R. 256 was held at the full Committee, which marked up the bill and ordered it favorably reported by a vote of 24 to 0 on February 12, 2001 without amendment. The bill was reported by the Committee on February 26, 2001 as H. Rept. 107–2. On February 28, 2001, H.R. 256 was considered under the suspension of the rules and passed by a vote of 408 to 2. It thereafter passed the Senate on unanimous consent without amendment on April 26, 2001. The bill was signed into law on May 11, 2001 as Public Law 107–8.

On May 17, 2001, Representative Smith (for himself and Representative Tammy Baldwin (D–WI)) introduced H.R. 1914, to extend chapter 12 for four additional months. Given the imminent expiration date of chapter 12, the bill was considered under suspension of the rules and agreed to by the House by a vote of 411 to 1 without amendment on June 6, 2001. As passed by the House, the bill extended chapter 12 for three additional months until October 1, 2001. H.R. 1914 was received in the Senate on the following

[3] U.S. Const. art. I, § 8, cl. 4.
[4] 11 U.S.C. §101(19) (2001).
[5] Pub. L. No. 99–554, 100 Stat. 3124 (1986).
[6] During the 106th Congress, the House passed H.R. 4718 on June 22, 2000 to extend chapter 12 for an additional three months until October 1, 2000, but the Senate failed to act on this bill and chapter 12 accordingly expired as of July 1, 2000.

day and passed by unanimous consent without amendment on June 8, 2001. Thereafter, the bill was signed into law on June 26, 2001 as Public Law 107–17.

Over the ensuing months, three additional bills were introduced further extending chapter 12. On September 10, 2001, Representative Baldwin introduced H.R. 2870, which would have extended chapter 12 for six additional months to April 1, 2002. On September 20, 2001, Representative Smith introduced H.R. 2914, which also would have extended chapter 12 until April 1, 2002. Neither the Subcommittee nor the Committee considered these bills in light of the subsequent introduction of H.R. 4167 by Chairman F. James Sensenbrenner on April 11, 2002. H.R. 4167, which retroactively extended chapter 12 for eight additional months until June 1, 2002, was considered by the House under the suspension of the rules and passed by a vote of 407 to 3 without amendment on April 16, 2002. The bill was received in the Senate on the following day and passed by unanimous consent without amendment on April 23, 2002. H.R. 4167 was subsequently signed into law on May 7, 2002 as Public Law 107–170.

A provision further extending chapter 12 until January 1, 2003 was included in the conference report on H.R. 2646, the "Farm Security and Rural Investment Act of 2002."[7] This legislation was signed into law on May 13, 2002 as Public Law 107–171.

On September 9, 2002, Representative Baldwin introduced H.R. 5348, the "Family Farmers and Family Fishermen Protection Act of 2002," a bill providing for the permanent enactment of chapter 12 and extending its protections to family fishermen. Neither the Subcommittee nor the Committee considered this bill in light of the introduction of H.R. 5472, the "Protection of Family Farmers Act of 2002," by Chairman Sensenbrenner on September 26, 2002. H.R. 5472 further extends chapter 12 from December 31, 2002 to July 1, 2003. It was passed by the House under suspension of the rules without amendment on October 1, 2002 by voice vote. The bill was received in the Senate on the following day. The Senate subsequently passed H.R. 5472 without amendment on unanimous consent on November 20, 2002. This legislation was signed into law on December 19, 2002 as Public Law 107–377.

H.R. 333, the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2002"

Summary.—Representative George W. Gekas (R–PA) (for himself and 56 original cosponsors) introduced H.R. 333, the "Bankruptcy Abuse Prevention and Consumer Protection Act," on January 31, 2001. H.R. 333 represented the culmination of more than five years of intensive Congressional consideration of comprehensive bankruptcy reform legislation.

Legislative History.—As introduced, H.R. 333 was virtually identical to the conference report on H.R. 2415, the "Gekas-Grassley Bankruptcy Reform Act of 2000,"[8] which passed the House in the

[7] H. Rep. No. 107–424 (2002).

[8] H. Rep. No. 106–970 (2000). The only differences were H.R. 333's title and the deletion of section 1224 (pertaining to the Bankruptcy Administrator Program) from the conference report,

Continued

106th Congress by voice vote on October 12, 2000, and passed the Senate on December 7, 2000 by a vote of 70 to 28. On December 19, 2000, the conference report on H.R. 2415 was pocket-vetoed by President Clinton.

In the preceding two Congresses, as well as the 107th Congress, bankruptcy reform legislation received overwhelming bipartisan support. In the 105th Congress for example, the House passed legislation similar to H.R. 333 on two occasions by veto-proof margins.[9] The Senate passed this legislation by a vote of 97 to 1. The House again in the 106th Congress passed bankruptcy reform legislation by a veto-proof margin[10] and adopted the conference report by voice vote. The Senate thereafter passed the conference report by a vote of 70 to 28.

H.R. 333 consisted of a comprehensive package of reform measures pertaining to both consumer and business bankruptcy cases. The purpose of the bill was to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and by ensuring that the system is fair for both debtors and creditors. It was introduced in response to several developments affecting bankruptcy law and practice. One development has been the continuing surge in bankruptcy filings. According to the Administrative Office of the United States Courts, bankruptcy filings as of 2002 exceeded 1.5 million, which "broke all records" and represented the "largest number of cases ever filed" in any one-year period.[11] Since 1996, when bankruptcy filings first exceeded one million, filings as of June 2002 increased by 150 percent.[12]

Coupled with this development was the release of a privately funded study, which estimated financial losses in 1997 resulting from bankruptcy exceeded $44 billion, a loss equal to approximately $400 per each American household.[13] This study projected that even if the growth rate in personal bankruptcies slowed to only 15 percent over the next three years, the American economy would have to absorb a cumulative cost of more than $220 billion.[14]

The consumer bankruptcy provisions of H.R. 333 were intended to enhance recoveries for creditors and include protections for consumer debtors. With respect to creditors, H.R. 333's principal provisions consisted of needs-based bankruptcy relief, general protections for creditors, and protections for specific types of creditors. The bill's debtor protections included heightened requirements for those professionals and others who assist consumer debtors in connection with their bankruptcy cases, expanded notice requirements for consumers with regard to alternatives to bankruptcy relief, re-

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as this provision was previously enacted into law. Federal Courts Improvement Act of 2000, Pub. L. No. 106–518, 501, 114 Stat. 2410, 2422 (2000).

[9] On June 10, 1998, the House passed H.R. 3150, the "Bankruptcy Reform Act of 1998," by a vote of 306 to 118. 144 Cong. Rec. H4442 (daily ed. June 10, 1998). Thereafter, the House passed the conference report on H.R. 3150 by a vote of 300 to 125 on October 9, 1998. 144 Cong. Rec. H10239–40 (daily ed. Oct. 9, 1998).

[10] On May 5, 1999, the House passed H.R. 833, the "Bankruptcy Reform Act of 1999," by a vote of 313 to 108. 145 Cong. Rec. H2771 (daily ed. May 5, 1999).

[11] Administrative Office of the U.S. Courts News Release, Bankruptcy Cases Total Over 1.5 Million for First Time—Personal Bankruptcy and Quarterly Filings Hit Historic Highs (Aug. 14, 2002).

[12] Id.

[13] Bankruptcy Reform Act of 1998: Hearings on H.R. 3150 Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary, 105th Cong. 147 (1998).

[14] Id.

quired participation in debt repayment programs for consumers before they may be eligible to be debtors in bankruptcy, mandatory consumer financial management education for debtors, and heightened disclosures in connection with credit card solicitations, monthly billing statements, and related matters.

The heart of H.R. 333's consumer bankruptcy reforms was the implementation of a mechanism to ensure that consumer debtors repay their creditors the maximum that they can afford. This income/expense mechanism, variously referred to as the "needs-based test" or "means test," articulated objective criteria so that debtors and their counsel could self-evaluate their eligibility for relief under chapter 7 (a form of bankruptcy relief where the debtor generally receives a discharge of his or her personal liability for most unsecured debts). Certain expense allowances were localized and a debtor's special circumstances were recognized, including episodic losses of income. Parties in interest, such as creditors, were empowered under H.R. 333 to move for dismissal of chapter 7 cases for abuse. These reforms were not intended to affect consumer debtors lacking the ability to repay their debts and deserving of an expeditious fresh start.

With regard to business bankruptcy reforms, H.R. 333 addressed the special problems that small business debtors present by instituting a variety of time frames and enforcement mechanisms to identify and weed out those cases not likely to reorganize. It also required more active monitoring of these cases by United States Trustees and the bankruptcy courts. In addition, H.R. 333 included provisions dealing with business bankruptcy cases in general. With regard to single asset real estate debtors, H.R. 333 eliminated the monetary cap from the Bankruptcy Code's definition applicable to these debtors and made them subject to the small business provisions of the bill. The small business and single asset real estate provisions of H.R. 333 were largely derived from consensus recommendations of the National Bankruptcy Review Commission. Many of these recommendations received broad support from those in the bankruptcy community, including various bankruptcy judges, creditor groups, and the Executive Office for United States Trustees.

Other business provisions in H.R. 333 related to the treatment of certain financial contracts under the banking laws as well as under the Bankruptcy Code. In addition, H.R. 333 responded to the special needs of family farmers by making chapter 12 of the Bankruptcy Code, a form of bankruptcy relief available only to eligible family farmers, permanent.

H.R. 333, in addition, contained several provisions having general impact with respect to bankruptcy law and practice. Under H.R. 333, certain appeals from final bankruptcy court decisions would be heard directly by the court of appeals for the appropriate circuit. Another general provision of H.R. 333 required the Executive Office for United States Trustees to compile various statistics regarding chapter 7, 11 and 13 cases, to make these data available to the public, and to report annually to Congress on the data collected. Other general provisions included an allowance of shared compensation with bona fide public service attorney referral programs.

The Judiciary Committee began its consideration of comprehensive bankruptcy reform early in the 105th Congress. On April 16, 1997, the Subcommittee conducted a hearing on the operation of the bankruptcy system that was combined with a status report from the National Bankruptcy Review Commission. This would be the first of 17 hearings that the Subcommittee and the Committee would hold on the subject of bankruptcy reform over the ensuing years. Ten of these hearings were devoted solely to consideration of H.R. 333 and its predecessors, H.R. 3150, the Bankruptcy Reform Act of 1998, which was considered during the 105th Congress, and H.R. 833, the Gekas-Grassley Bankruptcy Reform Act, which was considered during the 106th Congress. Over the course of these hearings, nearly 130 witnesses, representing nearly every major constituency in the bankruptcy community, testified. With regard to H.R. 833 alone, testimony was received from 66 witnesses, representing 23 organizations, with additional material submitted by other groups. In fact, the Subcommittee's inaugural hearing on H.R. 833 was held jointly with the Senate Subcommittee on Administrative Oversight and the Courts on March 11, 1999.[15] This marked the first time in more than 60 years that a bicameral hearing was held on the subject of bankruptcy reform.

During the 107th Congress, the Committee held two days of hearings on H.R. 333 on February 7 and 8, 2001. Testimony was received from eight witnesses, representing seven organizations. During the course of the first hearing, the Committee received testimony from Kenneth Beine on behalf of the Credit Union National Association who explained how the current bankruptcy system impacts small business entrepreneurs and non-profit businesses. The Committee also received testimony from R. Bruce Josten on behalf of the U.S. Chamber of Commerce, who described the current consumer bankruptcy law's adverse impact on businesses. In addition, the Committee heard from Phillip Strauss, a professional with more than 25 years of experience in child support enforcement. Speaking on behalf of the California District Attorneys Association and the California Family Support Council, Mr. Strauss described the ways in which H.R. 333 would help ensure payment of these obligations. George Wallace, the final witness appeared on behalf of The Coalition for Responsible Bankruptcy Laws. He explained the differences between the version of the bill as reported by the Committee in the 106th Congress and H.R. 333.

The second day of hearings provided a different perspective. The witnesses included Charles Trapp, who was a former chapter 7 debtor. He was joined by Ralph Mabey, who appeared on behalf of the National Bankruptcy Conference and Professor Karen Gross of New York Law School. The final witness was Damon Silvers, who testified on behalf of the AFL–CIO. Although each of these witnesses acknowledged that H.R. 333 did make needed improvements to current bankruptcy law, they questioned the efficacy of certain provisions of the proposed legislation.

On February 14, 2001, the Committee met in open session and ordered favorably reported H.R. 333 with amendment by a recorded

[15] Bankruptcy Reform: Joint Hearing Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary and the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary, 106th Cong. (1999).

vote of 19 to 8. The legislation, as reported by the Committee, included two amendments offered by Chairman Sensenbrenner which conformed: (1) the fee allocation percentage in section 325 of the bill with that specified under Section 406(b) of the Judiciary Appropriations Act; and (2) a statutory cross reference necessitated by the enactment of the Commodity Futures Modernization Act of 2000. On February 26, 2001, the Committee filed its report on H.R. 333 as H. Rept. 107–3, pt. 1.

The House, under a rule making certain amendments in order, thereafter passed H.R. 333, as amended, on March 1, 2001 by a vote of 306 to 108. Among the principal changes to the bill occurring as the result of floor action was the inclusion of a provision permitting a debtor to deduct public school expenses up to a specified amount as an allowable expense under the means test and a provision treating public and private school expenses equally. In addition, the bill as passed by the House included a provision restricting the disclosure of the name of a debtor's child in a bankruptcy case.

H.R. 333 was received in the Senate on March 5, 2001. On July 12, 2001, cloture was invoked by a vote of 88 to 10. Thereafter, the Senate struck all of H.R. 333's language after its enacting clause and substituted the text of S. 420, as amended. H.R. 333, as amended, was then passed by the Senate in lieu of S. 420 by a recorded vote of 82 to 16 on July 17, 2001. The Senate then insisted on its amendment and requested a conference.

On July 31, 2001, Chairman Sensenbrenner asked unanimous consent that the House disagree to the Senate amendment to H.R. 333. His motion was granted without objection. The House then considered a motion to instruct conferees offered by Representative Tammy Baldwin (D–WI). The instructions, which required the managers on the part of the House to agree to title X of the Senate amendment to H.R. 333 (relating to family farmers and family fishermen), was agreed to by voice vote.

The following Members from the Committee on the Judiciary were appointed as conferees for the consideration of the House bill and the Senate amendment: Chairman Sensenbrenner, Henry Hyde (R–IL), George Gekas (R–PA), Lamar Smith (R–TX), Steve Chabot (R–OH), Bob Barr (R–GA), Ranking Member John Conyers (D–MI), Rick Boucher (D–VA), Jerrold Nadler (D–NY), and Mel Watt (D–NC). The following Members from the Committee on Financial Services were appointed as conferees for consideration of sections 901–906, 907A–909, 911, and 1301–1309 of the House bill, and sections 901–906, 907A–909, 911, 913–4, and title XIII of the Senate amendment: Mike Oxley (R–OH), Spencer Bachus (R–AL), and John LaFalce (D–NY). The following Members from the Committee on Energy and Commerce were appointed for consideration of title XIV of the Senate amendment, and modifications committed to conference: Billy Tauzin (R–LA), Joe Barton (R–TX), and John Dingell (D–MI). The following Members from the Committee on Education and the Workforce were appointed for consideration of section 1403 of the Senate amendment: John Boehner (R–OH), Mike Castle (R–DE), and Dale Kildee (D–MI). The conference committee formally met on three occasions: November 14, 2001, April

23, 2002, and May 22, 2002. The conference report was filed on July 26, 2002 as H. Rept. 107–617.

The conference report differed from the House-passed version of H.R. 333 in several respects. New provisions included section 204, concerning the preservation of certain claims and defenses upon sale of predatory loans; section 205, requiring the General Accounting Office to study and report on the reaffirmation agreement process; sections 231 and 232, relating to the protection of personally identifiable information, section 329, clarifying the treatment of postpetition wages and benefits; section 330, providing for the nondischargeability of debts incurred through violations of laws relating to the provision of lawful goods and services; section 331, requiring the entry of a debtor's discharge to be delayed during pendency of certain proceedings; section 446, specifying the duties of a debtor who is a plan administrator for an employee benefit plan; section 447, requiring the appointment of committee of retired employees, under certain circumstances; sections 1004 through 1006, providing additional protections to family farmers; section 1007, allowing certain family fishermen to be eligible for bankruptcy relief under chapter 12 of the Bankruptcy Code; section 1234, pertaining to the filing criteria for involuntarily commenced bankruptcy cases; and section 1235, making certain Federal election law fines and penalties nondischargeable.

In addition, the conference report on H.R. 333 deleted several provisions from the House-passed version of this legislation. These include section 907A, which dealt with securities and commodity broker liquidation; section 912, pertaining to asset-backed securitizations; and section 1310, concerning the enforceability of certain foreign judgments.

Further, the conference report modified several provisions of the House-passed version of H.R. 333. These included modifications to section 102, which clarified who was included as the debtor's immediate family, a provision with respect to additional education expenses; a provision permitting the debtor, under certain circumstances, to include an allowance for housing and utilities in excess of the specified amount; a provision allowing a debtor to exclude from the income component of the needs-based test payments to victims of international or domestic terrorism; a modified version of the safe harbor from dismissal for abuse based on ability to repay with respect to consideration of the income of the debtor's spouse; a provision permitting a chapter 13 debtor to include a special allowance for health insurance, under certain circumstances; and revisions pertaining to the imposition of sanctions against a debtor's counsel.

Other sections reflecting substantive modifications included section 202, clarifying the priority of payment for domestic support obligations; section 224, requiring the $1 million maximum for certain exempt retirement funds to be automatically adjusted for inflation; section 233, clarifying that a debtor may be required to disclose the name of a minor child under certain circumstances; section 307, clarifying that if the effect of the domiciliary requirement for exemptions renders the debtor ineligible for any exemption, the debtor may elect to claim Federal exemptions; and section 308, specifying that the homestead exemption includes real or personal

property claimed as homestead property, and extending the reachback period from 7 to 10 years for the purpose of reducing a debtor's homestead exemption to the extent it is attributable to any portion of any property that the debtor fraudulently disposed of during such period. Section 311, was substantively modified with respect to the types of eviction proceedings excepted from the automatic stay and the procedure with respect to such. Section 312 was modified with respect to the time periods during which subsequent discharges were prohibited from being granted.

The conference report also contained a modified version of section 313, pertaining to the definition of household goods and antiques; section 316, concerning the mandatory dismissal of a bankruptcy case, under certain circumstances; section 322, pertaining to the allowability of homestead exemptions; section 438, relating to chapter 11 plan confirmation deadlines; section 439, concerning the termination of the automatic stay; section 441, pertaining to the grounds for dismissal or conversion of a chapter 11 case; section 708, concerning the nondischargeability of certain debts in a chapter 11 case; section 910, dealing with the measure of damages for certain terminated financial contracts; section 1224 (renumbered as section 1223), providing for the authorization of additional bankruptcy judgeships; and section 1234 (renumbered as section 1233) concerning expedited appeals of bankruptcy court decisions. In addition, section 1401 was revised with respect to when certain provisions concerning the treatment of homestead exemptions become effective.

On July 26, 2002, the Committee on Rules reported H. Res. 506 providing for the consideration of the conference report on H.R. 333. On unanimous consent, however, the resolution was laid on the table on September 12, 2002. Thereafter, the Rules Committee reported H. Res. 606 providing for consideration of the conference report on H.R. 333 on November 13, 2002. The resolution was not agreed to by a vote of 172 to 243 on November 14, 2002.

Later that day, Representative Gekas moved that the House agree with an amendment to the Senate amendment to H.R. 333. The motion consisted of replacing the text of the Senate amendment with the text of H.R. 5745, which was introduced by Representative Gekas on November 14, 2002. H.R. 5745 was virtually identical to the conference report on H.R. 333 except that it did not include section 330, providing for the nondischargeability of debts incurred through violations of laws relating to the provision of lawful goods and services; and section 1223, authorizing the appointment of additional bankruptcy judgeships. In addition, the text included various technical revisions. The House agreed with an amendment to the Senate amendment to H.R. 333 by a vote of 244 to 116. The Senate received the bill the following day, but did not act upon it prior to the end of the 107th Congress.

STATE TAXATION AFFECTING INTERSTATE COMMERCE

The right of States to tax economic activities within their borders is a key aspect of Federalism rooted in the Constitution and long recognized by Congress. At the same time, the authority of States to lay and collect taxes is subject to various constitutional limitations. First, the Commerce Clause prohibits States from assessing

taxes which unduly burden interstate commerce. Second, the Due Process clause prohibits States from taxing those who lack a "substantial nexus" with the taxing State. Finally, the Privileges and Immunities clause prevents States from assessing taxes which discriminate against nonresidents. During the 107th Congress, the Subcommittee considered a number of bills that bear directly on State taxes affecting interstate commerce.

Electronic commerce

The Internet and information technology (IT) industries comprise an increasingly vital component of U.S. economic health. Internet retail sales continue to accelerate at an impressive rate. While some forecasts estimate Internet retail sales could reach $300 billion annually,[16] these claims have yet to materialize.

Contrary to the widespread impression that the Internet is a tax-free haven, electronic commercial transactions do not escape all State and local taxes. Telecommunications channels such as telephone lines, wireless transmissions, cable, and satellites are subject to State and local taxes. Electronic merchants are required to pay State and local income, licensing, franchise, business activity and other direct taxes. In addition, physically-present electronic merchants are required to collect and remit all applicable sales and use taxes for all intrastate transactions. In short, online transactions are subject to nearly all taxes imposed on traditional, brick and mortar enterprises. The only substantive difference between the tax treatment of online and traditional retailers is a State's authority to require nonresident electronic merchants to collect and remit sales and use taxes.

In 1998, Congress passed the Internet Tax Freedom Act[17] (ITFA) to help address the emerging challenges associated with Internet commerce. The ITFA imposed a three-year moratorium on both Internet access taxes and multiple and discriminatory taxes on electronic commerce. The bill also created a 19-member Advisory Commission on Electronic Commerce to examine, among other things, the effect of State and local taxes on Internet commerce. While a majority of Commissioners recognized the need to move toward national uniform treatment of electronic commerce, no consensus on the taxing status of the Internet was achieved.

H.R. 1552, the "Internet Tax Nondiscrimination Act" (Pub. L. No. 107–75)

Summary.—H.R. 1552 preserves and promotes the commercial potential of the Internet by protecting electronic commerce from multiple or discriminatory State and local taxes. H.R. 1552 accomplishes this purpose by extending the ITFA moratorium on multiple and discriminatory taxes on electronic commerce until November 1, 2003. It also maintains for two years the authority of States to collect Internet access taxes if these taxes were generally imposed and collected before October 1, 1998.

Legislative History.—H.R. 1552 was introduced by Representative Christopher Cox (R–CA) on April 25, 2001. As introduced, the

[16] See, *e.g.,* Clayton W. Shan, Taxation of Global E-Commerce on the Internet: The Underlying Issues and Proposed Plans, 9 Minn. J. Global Trade 233, 235 (2000).
[17] 47 U.S.C. § 151 (1998).

bill would have extended the ITFA moratorium on multiple or discriminatory taxes for an additional five years.

On June 26, 2001 the Subcommittee held a hearing on H.R. 1552 at which the following witnesses testified: James S. Gilmore, III, Governor of the State of Virginia and Chairman of the Advisory Commission on Electronic Commerce; Representative Cox; Robert Comfort, Vice President for Tax and Tax Policy, Amazon.com; and John Engler, Governor of the State of Michigan, on behalf of the National Governors Association. Additional information was submitted by the Internet Tax Fairness Coalition and by Frank Julian, Operating Vice President of Federated Department Stores, Inc.

On August 2, 2001, the Subcommittee ordered favorably reported H.R. 1552 without amendment by voice vote. On October 10, 2001, the Committee ordered favorably reported H.R. 1552, with an amendment, by voice vote. The Committee reported the bill, as amended, as H. Rept. 107–240. The amendment limited the extension of the ITFA moratorium on multiple or discriminatory taxes on electronic commerce until November 21, 2003. On October 16, 2001, H.R. 1552, as amended, passed the House under suspension of the rules by voice vote without amendment. On November 15, 2001, H.R. 1552 passed the Senate by voice vote without amendment. It was signed into law by President Bush on November 28, 2001 as Public Law 107–75.

H.R. 1675, the "Internet Tax Nondiscrimination Act"

Summary.—H.R. 1675 would have: (1) permanently extended the ITFA's moratorium on multiple and discriminatory taxes on electronic commerce; (2) permanently extended the ban on Internet access taxes; and (3) abolished the ITFA's exemption which permitted a handful of States to continue collecting taxes on electronic commerce if those were widely imposed at the time the ITFA was originally enacted.

Legislative History.—H.R. 1675 was introduced by Representative Christopher Cox (R–CA) on May 2, 2001. On June 26, 2001, the Subcommittee held a hearing on the bill at which the following witnesses testified: James S. Gilmore, III, Governor of the State of Virginia and Chairman of the Advisory Commission on Electronic Commerce; Representative Cox; Robert Comfort, Vice President for Tax and Tax Policy, Amazon.com; and John Engler, Governor of the State of Michigan, on behalf of the National Governors Association. Additional information was submitted by the Internet Tax Fairness Coalition and by Frank Julian, Operating Vice President of Federated Department Stores, Inc. H.R. 1675 received no further Subcommittee consideration.

H.R. 1410, the "Internet Tax Moratorium and Equity Act"

Summary.—H.R. 1410 would have: (1) amended the ITFA's moratorium on multiple and discriminatory electronic taxes until December 31, 2005; (2) continued to allow States that imposed Internet access taxes before passage of the ITFA to continue to do so; (3) expressed the sense of Congress that States and localities should work together to develop a uniform streamlined sales and use tax system defining goods and services; and (4) stated that a joint comprehensive study should be undertaken to determine the

cost of collecting and remitting State and local sales and use taxes under such a streamlined system. Furthermore, H.R. 1410 would have authorized States to enter into an Interstate Sales and Use Tax Compact if: at least twenty States approved the Compact; Congress consented to the Compact within 120 days after it was submitted to Congress; and the Compact would be formed before January 1, 2006. States entering into the Compact would then have been permitted to collect sales and use taxes on nonresident sellers that conduct more than $5 million in gross annual sales. Finally, the bill would have specifically exempted franchise taxes, income taxes, licensing taxes, and any other State taxes from the scope of its coverage.

Legislative History.—H.R. 1410 was introduced by Representative Ernest Istook (R–OK) and eleven cosponsors on April 4, 2001. On July 18, 2001, the Subcommittee held a hearing on H.R. 1410 at which the following witnesses testified: Representative Istook; Grover Norquist, President of Americans for Tax Reform and member of the Advisory Commission on Electronic Commerce; Frank Julian, Operating Vice President and Tax Counsel, Federated Department Stores, Inc., testifying on behalf of the Direct Marketing Association and Internet Tax Fairness Coalition; and Jon W. Abolins, Chief Tax Counsel and Vice President for Tax and Government Affairs, TAXWARE International, Inc. The bill received no further consideration by the Subcommittee.

H.R. 4869, the "Satellite Radio Freedom Act," and H.R. 5429, the "Satellite Services Act"

Summary.—H.R. 4869, the "Satellite Radio Freedom Act" and H.R. 5429, the "Satellite Services Act," reflect two approaches to provide a burgeoning telecommunications technology with an exemption from the collection or remittance of local income and business taxes. H.R. 4869 and H.R. 5429 were introduced by Representative Tom Davis (R–VA) on June 5, 2002 and September 23, 2002, respectively.

H.R. 4869 would exempt digital audio radio service (DARS) providers from taxes or fees by local taxing authorities. DARS is a direct-to-customer, satellite-delivered subscription service providing continuous radio programming across the country in digital quality and without interruption or fading. H.R. 4869 would not exempt providers from local taxation in those jurisdictions in which DARS providers maintain a land-based "repeater," or transmission apparatus. Charges subject to State taxes would be sourced to the customer's place of primary use; for other purposes, charges would be sourced to the customer's home or business address.

Subsequent to the introduction of H.R. 4869, Mr. Davis introduced an alternative bill, H.R. 5429, which exempts from the collection or remittance of local taxation "direct-to-subscriber satellite service providers," a class broader than solely DARS. Direct-to-subscriber satellite services are those which currently broadcast by satellite directly to the service subscriber as well as future services operating in the same manner. The bill's preemption extends to those localities in which providers maintain a terrestrial repeater. Both H.R. 4869 and H.R. 5429 preserve State authority to impose taxes on their respective service providers and would not prevent

a local taxing jurisdiction from receiving tax revenue collected by a State.

The bills would achieve parity with Section 602 of the Telecommunications Act of 1996,[18] wherein "direct-to-home" (DTH) satellite services receive an exemption from local taxation and fees. DTH, also known as "direct-broadcast satellite video services," encompasses satellite television services whose consumers are equipped with satellite receivers located at their premises. Similar to DTH services, direct-to-subscriber satellite services, including satellite radio, are delivered via satellite directly to consumers equipped with satellite receivers. Because these national services utilize little to none of the public rights-of-way or physical facilities of a community to transmit their signals, the administrative burdens associated with the collection and remittance of taxation to thousands of local jurisdictions are considered unnecessary and undue. Direct-to-subscriber satellite services are excluded from the scope of the exemption under the Telecommunications Act because that exemption applies only to DTH services. H.R. 4869 and H.R. 5429 would achieve parity of treatment between DTH and direct-to-subscriber satellite services. The bills promote the development of technology while respecting reasonable concepts of State and local taxing prerogatives.

Legislative History.—On September 25, 2002, the Subcommittee held a hearing on H.R. 4869 and H.R. 5429. Witnesses testifying at the hearing were: Representative Davis, sponsor of H.R. 4869 and 5429; Andrew Wright, president of the Satellite Broadcasting and Communications Association; Nicholas Miller, a partner with the law firm of Miller & Van Eaton, P.L.L.C., on behalf of the National League of Cities, the TeleCommunity Alliance, and the United States Conference of Mayors; and Arthur Rosen, Chairman of the Coalition for Fair and Rational Taxation and a partner with the law firm of McDermott, Will & Emery. The witnesses discussed the reasons for their support/opposition to the concept of a local tax exemption for satellite-delivered services; in addition, the hearing allowed the Members to assess the two approaches offered by H.R. 4869 and H.R. 5429. A number of questions were presented to witnesses following the hearing. Their responses became part of the formal hearing record. The Subcommittee took no further action on either H.R. 4869 or H.R. 5429.

H.R. 2526, the "Internet Tax Fairness Act of 2001"

Summary.—H.R. 2526 would have permanently banned all Internet access taxes while prohibiting multiple or discriminatory taxes on electronic commerce. In addition, the legislation would have created a bright-line physical presence nexus requirement for States to collect business activity taxes on multistate enterprises.[19] The genesis of the physical-presence-nexus portion of the bill is the Supreme Court's ruling in *Quill Corp.* v. *North Dakota,* which invali-

[18] Pub. L. No. 104–104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.) (1996).

[19] H.R. 2526 defined business activities taxes as those imposed or measured by net income, a business license tax, a franchise tax, a single business tax or a capital stock tax, or any similar tax or fee imposed by a State or locality on an a business for the right to conduct business within the taxing jurisdiction which is measured by the amount of such business or related activity.

dated State efforts to compel out-of-State sellers to collect and remit sales and use taxes without the existence of a physical presence or other "substantial nexus."[20] While the Court established in *Quill* a physical presence threshold for the collection of sales taxes, it did not fully articulate a coherent basis for determining when a nonresident business enterprise has a sufficient economic presence to justify the imposition of business activity taxes. As a result, the degree of connection or nexus necessary to justify the imposition of business activity taxes has been the result of costly and protracted litigation between State taxing authorities and multistate businesses.

Most States and some local governments levy a range of business activities taxes on companies that either operate or conduct business activities within their jurisdictions. With the exception of Michigan, Nevada, South Dakota, Washington, and Wyoming, all States and the District of Columbia levy general corporate income taxes. H.R. 2526 would reduce the uncertainties—and litigation costs—surrounding business activity taxes by establishing a bright-line physical presence requirement for States and localities as a prerequisite to collect such taxes on multistate businesses. The bill also lists those conditions which would not meet the "substantial physical presence" threshold sufficient to warrant the imposition of business activity taxes upon a nonresident enterprise.

Legislative History.—H.R. 2526 was introduced by Representative Bob Goodlatte (R–VA) on July 17, 2001. On September 11, 2001, the Subcommittee held a hearing on H.R. 2526. Testimony was received from the following witnesses: Arthur Rosen, Chairman of the Coalition for Fair and Rational Taxation and partner with the law firm of McDermott, Will & Emery; Stanley Sokul, Member of the Advisory Commission on Electronic Commerce and Principal of Davidson & Company; Fred Montgomery, Director of State and Local Tax of Sara Lee Corporation; and June Summers Haas, Commissioner of Revenue of the Michigan Department of Treasury.[21]

The Subcommittee held a mark up of H.R. 2526 on July 17, 2002. The bill was reported by voice vote with an amendment in the nature of a substitute offered by Subcommittee Chairman Barr. The amendment struck the title and Internet tax language contained in H.R. 2526 and renamed the bill the "Business Activity Tax Modernization Act of 2002." There was no further consideration of H.R. 2526 by the Committee prior to the conclusion of the 107th Congress.

[20] 504 U.S. 298, 311 (1992).

[21] The hearing was adjourned prematurely due to the events surrounding the terrorist attacks on the Pentagon and other sites; however testimony in oral and written form was received from the witnesses.

ADDITIONAL LEGISLATION PERTAINING TO STATE TAXATION AFFECTING INTERSTATE COMMERCE

H.R. 2559, to amend chapter 90 of title 5, United States Code, relating to Federal Long-Term Care Insurance (Pub. L. No. 107–104)

Summary.—The Long-Term Care Security Act of 2001 (LTCSA)[22] established a program under which qualified Federal personnel (including postal and other civilian employees and military personnel), retirees receiving an annuity, and certain family members may purchase long-term care insurance from one or more private insurance carriers at a group discount. "Long-term care" refers to a broad range of supportive, medical, personal, and social services designed for individuals who are limited in their ability to function independently on a daily basis. While the legislation contained broad preemption language, it did not explicitly prohibit States and localities from taxing LTCSA insurance premiums. H.R. 2559 makes the LTCSA more consistent with analogous programs under which insurance is offered to Federal employees, and makes enrollment in the LTCSA program more affordable to potential enrollees, by amending the LTCSA to exempt premiums under the program from State and local taxes. The bill also expands coverage to include retired government personnel who are not yet receiving annuity payments but are entitled to a deferred annuity under Federal retirement programs.

Legislative History.—Introduced by Representative Joe Scarborough (R–FL) on July 18, 2001, H.R. 2559 remedies this perceived oversight by amending LTCSA to exempt its premiums from State and local taxes. On October 3, 2001, the Committee ordered favorably reported the bill without amendment by voice vote. The Committee filed its report on H.R. 2559, H. Rept. 107—235, pt. I. The bill passed the Senate on December 17, 2001 and was signed into law by President Bush on December 27, 2001 as Public Law 107–104.

FEDERAL ARBITRATION ACT

During the 107th Congress, the Subcommittee considered legislation pertaining to the Federal Arbitration Act.[23]

H.R. 1296, the "Motor Vehicle Franchise Contract Arbitration Fairness Act of 2001"

Summary.—H.R. 1296 would have amended the Federal Arbitration Act to make arbitration clauses in certain sales and service contracts enforceable only if parties to the contract consent in writing to arbitrate the dispute after the controversy in question arises. A bill similar to H.R. 1296 was passed by the House during the 106th Congress.[24]

Legislative History.—H.R. 1296, the "Motor Vehicle Franchise Contract Arbitration Fairness Act of 2001," was introduced by Representative Mary Bono (R–CA) on March 29, 2001 (for herself and 33 original co-sponors). During the 106th Congress, legislation

[22] Pub. L. No. 106—265 (2001).
[23] 9 U.S.C. §§1–14 (1998).
[24] H.R. 543, 106th Cong. (1999).

similar to H.R. 1296 was considered by the Subcommittee and passed by the House.[25] Although the Subcommittee took no action on the bill during the 107th Congress, legislation substantively identical to H.R. 1296 was passed into law as part of H.R. 2215, the "21st Century Department of Justice Appropriations Authorization Act," as a free-standing provision and not as an amendment to the Federal Arbitration Act. H.R. 2215 was signed by the President on November 2, 2002 as Public Law 107–273.

INTERSTATE COMPACTS

Article I, section 10, clause 3 of the United States Constitution provides that "No State shall, without the consent of Congress * * * enter into any Agreement or Compact with another State, or with a foreign power." The Subcommittee considered a number of interstate compacts during the 107th Congress.

H.R. 3180, to provide the consent of Congress to certain amendments to the New Hampshire-Vermont Interstate School Compact (Pub. L. No. 352)

Summary.—H.R. 3180 provides congressional consent to certain amendments in the New Hampshire-Vermont Interstate School Compact of 1969. Specifically, the bill provides participating interstate school districts with the option of choosing "Australian balloting" to incur debt to support school construction.[26] Last year, the Vermont and New Hampshire State legislatures passed legislation adopting these proposed changes. The proposed amendments make these decisions a matter of local prerogative and do not dictate a State-wide or Federal approach to resolving these questions.

Originally approved by Congress in 1969, the New Hampshire-Vermont Interstate School Compact was established to increase educational opportunities and to promote administrative efficiency by encouraging the formation of interstate school districts across the New Hampshire-Vermont State line.[27] In 1978, Congress consented to a number of amendments to the original Compact.[28] These amendments clarified the terms of the Compact to ensure that participating interstate school districts would receive support from their States commensurate with their respective contributions. The 1978 revisions also clarified the procedures by which amendments to the articles of agreement among interstate school district members could be approved.

Legislative History.—H.R. 3180 was introduced by Representatives Charles Bass (R–NH) and Bernard Sanders (I–VT) on October 30, 2001. The Subcommittee held a hearing and mark up on H.R. 3180 on March 6, 2002. Representative Bass testified at the hear-

[25] See, e.g., Fairness and Voluntary Arbitration Act: Hearing on H.R. 534 Before the Subcomm. on Commercial and Admin. Law of the House Comm on the Judiciary, 106th Cong. (2000).

[26] This paper ballot system was first adopted in the Australian State of Victoria in 1856 and in the remaining Australian States over the next several years. The paper ballot system thereafter became known as the "Australian ballot." New York became the first American State to adopt the paper ballot for Statewide elections in 1889. As of 1996, paper ballots were still used by 1.7% of the registered voters in the United States. They are used as the primary voting system in small communities and rural areas, and quite often for absentee balloting in other jurisdictions. See Federal Election Commission, available at *http://www.fec.gov/pages/paper.htm* (last visited Mar. 1, 2002).

[27] Pub. L. No. 91–21, 83. Stat. 14 (1969).

[28] Pub. L. No. 95–536, 92 Stat. 2035 (1978).

ing. The bill was reported by the Subcommittee without amendment by voice vote on March 6, 2002. On May 8, 2002, the Committee ordered H.R. 3180 favorably reported by voice vote. The bill was reported as H. Rept. 107–478. On June 25, 2002, H.R. 3180 passed the House under suspension of the rules by a vote of 425 to 0. The measure passed the Senate on November 20, 2002 and was signed into law on December17, 2002 as Public Law 107–352.

H.R. 2054, to provide the consent of Congress to a proposed change in the Utah-Nevada State boundary

Summary.—H.R. 2054 would have given the prior consent of Congress to an anticipated compact between Utah and Nevada regarding a change in the boundaries of those States. The area involved relates to the city and surrounding area of Wendover, Utah, which would be, under an agreement between the two States, part of Nevada.

The City of Wendover, Utah and West Wendover, Nevada sit astride the Utah-Nevada State boundary. While the two communities of Wendover, Utah and West Wendover, Nevada are divided only by a line painted across the street, they are vastly different. West Wendover is a thriving city with liberal alcohol laws, legalized gambling, and a vibrant tax base. The town's casinos attract more than 300,000 visitors a month, and its population has more than doubled in the past decade to about 5,000 permanent residents. Wendover, Utah, however, is quite different. In Wendover, gambling is illegal, and many of the 1,500 residents live in mobile homes and work at casinos located across the State line. Wendover's motels and businesses have a difficult time competing with their Nevada neighbors, and a steady erosion in Wendover's local tax base, coupled with costly duplication of government services, makes the efficient delivery of quality public services difficult to provide.

For some time the Wendover communities have been considering ways to bridge the economic divide between themselves. State and local officials have considered shifting the State boundary in order to incorporate Wendover into Nevada. This solution would involve moving the State line approximately three miles into Utah and, in the process, shifting approximately 10,000 square acres from Utah to Nevada. On September 7, 2001, the City Councils of Wendover and West Wendover agreed that their citizens should have a vote on whether the State line should be moved to allow the communities to unite. The two councils, meeting jointly on the Nevada side of the border, agreed to ask Congress to condition its consent to the proposed boundary change upon passage of local referenda. H.R. 2054 would facilitate State efforts to redraw the Nevada-Utah State line by removing Federal obstacles to a boundary change that takes place in a manner consistent with conditions contained in the bill.

H.R. 2054 gave congressional consent to a proposed border change if: (1) the compact is consented to by both State legislatures within a specified period after the date of the enactment of the legislation; (2) the compact does not conflict with Federal law; (3) the agreement does not change the boundary of any other State; (4) the amount of land transferred is not more than 10,000 acres; and (5)

the primary purpose of changing the boundaries of Utah and Nevada is to ensure that lands located within the municipal boundaries of the City of Wendover-Utah, including the municipal airport, shall be located within the boundaries of Nevada. Further, H.R. 2054 would have required that Nevada and Utah enter into this agreement no later than December 31, 2006, and that the affirmation of Wendover, Utah and West Wendover, Nevada be demonstrated by a majority vote taking place on the issue of boundary movement.

Legislative History.—H.R. 2054 was introduced by Representative James Hansen (R–UT) on June 5, 2001. The Subcommittee held a hearing and mark up of H.R. 2054 on March 6, 2002. Representative Hansen, Chairman of the House Resources Committee, testified in support of its passage. The Subcommittee favorably reported H.R. 2054 by voice vote without amendment. On May 8, 2002, the Committee ordered reported the bill favorably to the House, with an amendment, by voice vote. On May 16, 2002, the Committee filed the report as H. Rept. 107–469. On June 11, 2002, the House passed the bill as amended under suspension of the rules by voice vote without amendment. The Senate took no action on this bill prior to the conclusion of the 107th Congress.

H.R. 1448, to clarify the tax treatment of bonds and other obligations issued by the government of American Samoa

Summary.—Like most States and localities, American Samoa issues government bonds to fund a variety of public projects. However, its bond raising activities are very limited. Relevant sections of the Internal Revenue Code exclude interest from State and local bonds from Federal taxation. This exemption specifically applies to the "District of Columbia and any possession of the United States."[29] This definition, however, does not explicitly encompass United States territories. Bonds issued by other U.S. territories and possessions such as Guam and Puerto Rico are exempt from Federal, State, and local taxes.

H.R. 1448 provides that bonds issued by American Samoa are exempt from Federal, State, and local income taxes. As introduced, H.R. 1448 extended this exemption to a variety of bonds, including "private activity bonds," municipal bonds used either entirely or partially for private purposes and which enjoy Federal tax-exempt status.

Legislative History.—H.R. 1448 was introduced by Representative Eni F.H. Faleomovaega (D–AS) on April 4, 2001. On March 6, 2002, the Subcommittee held a hearing and mark up on the bill. An amendment in the nature of a substitute offered by Subcommittee Chairman Barr to limit the tax exemption to government-issued bonds was reported by voice vote. H.R. 1448 passed the House under suspension of the rules on September 24, 2002, but the Senate failed to consider the bill prior to the conclusion of the 107th Congress.

[29] 48 U.S.C. §103(c)(2) (2001).

LITIGATION REFORM

Hearing on health care litigation reform and H.R. 4600 the "Help Efficient, Accessible, Low-cost, Timely Healthcare Act"

On June 12, 2002, the Subcommittee held a hearing to examine the impact of excessive litigation on patients' access to health care. The following witnesses testified at the hearing: Donald J. Palmisano, Secretary-Treasurer of the American Medical Association; Joanne Doroshow, Executive Director of the Center for Justice & Democracy; Danielle Walters, Executive Vice President of Californians Allied for Patient Protection; and Lawrence E. Smarr, President of the Physician Insurers Association of America.

Much of the witnesses' testimony included a discussion of some or all aspects of H.R. 4600, the "Help Efficient, Accessible, Low-cost, Timely Healthcare Act," introduced by Representative James Greenwood (R–PA) (together with nine original cosponsors) on April 25, 2002.

The hearing explored the causes of this current health care crisis, its effects on health care providers and patients' access to health care, and the success of the approach to address these problems undertaken by California more than 25 years ago. Virtually unscathed by the effects of the current medical professional liability insurance crisis, Californians have enjoyed the protection of highly successful health care litigation reforms that have made health care delivery more accessible and cost-effective in their State.

California's Medical Injury Compensation Reform Act (MICRA), which was signed into law by Governor Jerry Brown in 1976, has proved immensely successful in increasing access to affordable medical care in California. MICRA's reforms include a $250,000 cap on non-economic damages; limits on contingency fees lawyers can charge so that more money goes to victims and less to lawyers; authorization for defendants to introduce evidence showing the plaintiff received compensation for losses from outside sources in order to prevent double recoveries; and authorization for courts to require periodic payments for future damages, instead of lump sum awards, in order to prevent bankruptcies in which plaintiffs would receive only pennies on the dollar.

Premiums in California, adjusted for inflation, are lower than what they were before that State implemented its health care litigation reforms. Insofar as those premiums have risen at all since then, they are rising at much smaller rates than elsewhere in the nation.

Along with restricting access to insurance by physicians and to health care by patients, the mere threat of potentially limitless and bankrupting litigation also causes doctors to engage in "defensive medicine"—the sometimes harmful and certainly wasteful prescription of medically unnecessary medicine, and the performance of unnecessary tests simply to reduce liability exposure. In this way, the current, unregulated medical tort system can force doctors to practice bad medicine. It also discourages improvements in the delivery of medical care, by deterring doctors from freely discussing errors or potential errors due to a fear of litigation. Defensive medicine also wastes billions of dollars a year in taxpayer funds, by directing

money to medically unnecessary prescriptions and tests in Federally-funded programs.

The Committee marked up H.R. 4600 on July 23, 2002 and September 10, 2002, and ordered it reported favorably as amended by voice vote. The Committee filed its report on September 25, 2002 as H. Rept. 107–693, pt. I. On September 26, 2002, the House passed H.R. 4600 by a vote of 217 to 203. The Senate failed to act on the bill prior to the conclusion of the 107th Congress.

OVERSIGHT ACTIVITIES

List of oversight hearings

Executive Orders and Presidential Directives, March 22, 2001 (Serial No. 10)

Reauthorization of the United States Department of Justice: Executive Office for United States Attorneys, Civil Division, Environment and Natural Resources Division, Executive Office for United States Trustees, and Office of the Solicitor General, May 9, 2001 (Serial No. 15)

Settlement Agreement by and among the United States of America, the Federal Communications Commission, NextWave Telecom, Inc., and certain affiliates, and Participating Auction 35 Winning Bidders, December 6, 2001 (Serial No. 56)

The Alabama-Coosa-Tallapoosa River Basin Compact and the Apalachiola-Chattahoochee and Flint River Basin Compact, December 19, 2001 (Serial No. 54)

Legal Services Corporation, February 28, 2002 (Serial No. 66)

Administrative and Procedural Aspects of the Federal Reserve Board/Department of the Treasury Proposed Rule Concerning Competition in the Real Estate Brokerage and Management Markets, May 16, 2002 (Serial No. 77)

Litigation and its Effect on the Rails-to-Trails Program, June 20, 2002 (Serial No. 90)

Hearing on executive orders and presidential directives

The executive order is the best known instrument by which Presidents implement policy and manage the affairs of the executive branch. Most executive orders and other presidential directives are routine and unremarkable. Sometimes, however, the substance of an executive order may be controversial or may exceed the scope of the President's statutory or constitutional authority. Executive orders that lack a statutory or constitutional predicate implicate the separation of powers doctrine and tend to disturb the balance of powers enumerated to the legislative and executive branches under the Constitution.

The Property Clause of the Constitution provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States."[30] The Supreme Court has broadly interpreted this provision, holding that Congress has sovereign authority to make laws pertaining to all aspects of Federal land management.[31] The Antiquities Act of 1906 grants the President the power to declare

[30] U.S. Const. art. IV, § 3, cl. 2.
[31] *Kleppe* v. *New Mexico,* 426 U.S. 540, 547 (1976).

national monuments by "public proclamation."[32] However, the Act is not a blank grant of authority. Under the Act, the President is required to specifically designate the "archeological, historic or scientific" interest of withdrawn land. Moreover, when making designations under the Antiquities Act, the President is explicitly required to reserve the "smallest area compatible with the proper care and management of the objects to be protected."[33]

Since its passage, the Antiquities Act has been used by successive Presidents to designate nearly 70 million acres of Federal land. It has been repeatedly challenged in Federal court, with little success. In 1908, the scale of President Theodore Roosevelt's designation of the Grand Canyon was challenged unsuccessfully.[34] In 1943, Wyoming unsuccessfully challenged President Roosevelt's designation of the Jackson Hole National Monument.[35] Legal challenges to President Carter's 1978 decision to withdraw millions of acres of Federal land in Alaska under the Antiquities Act also proved unavailing.[36]

During his eight years in office, President Clinton used the Antiquities Act to establish 19 national monuments spanning more than five million acres. With one exception, all of these designations were made during the final year of his term. For example, on January 11, 2000, President Clinton proclaimed three national monuments and enlarged a fourth. The largest of these, the Grand Canyon-Parashant National Monument in Arizona, encompasses 1.02 million acres of Federal land and nearly 30,000 acres of private land. The Agua Fria National Monument, located within 40 miles of Phoenix, Arizona, contains over 71,000 acres of Federal land and nearly 1,500 acres of private land. On April 15, 2000, President Clinton proclaimed the Giant Sequoia National Monument, which extends over 380,00 acres of public and private land in California. Two months later, President Clinton declared another four national monuments, including the Canyons of the Ancients National Monument (Colorado), the Cascade-Sikouyou National Monument (Oregon), the Hanford Reach National Monument (Washington), and the Ironwood Forest National Monument (Arizona). Finally, on November 9, 2000, President Clinton withdrew an additional 300,000 acres of land in Arizona when he declared the Vermilion Cliffs National Monument. All of these designations took place after little or no prior consultation with affected communities.

On March 22, 2001, the Subcommittee conducted a hearing which examined the historical, statutory, constitutional, and administrative aspects of Executive Orders and other presidential directives.[37] The hearing focused on the surge of Clinton-era environmental proclamations issued under the purported authority of the Antiquities Act of 1906 and examined steps Congress might take to address executive decrees that exceed the President's constitutional or statutory authority. Testimony was received from the fol-

[32] 16 U.S.C. § 431 (1996).
[33] Id.
[34] *Cameron* v. *United States,* 252 U.S. 450 (1920).
[35] *Wyoming* v. *Franke,* 58 F. Supp. 890 (D. Wy. 1945).
[36] *Anaconda Copper Co.* v. *Andrus,* Case No. A79–161 CIV (D. Ala. 1980).
[37] Executive Orders and Presidential Directives: Hearing Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary, 107th Cong. (2001).

lowing witnesses: House Resources Committee Chairman Jim Hansen (R–UT); Bruce Fein, former Associate Deputy Attorney General under the Reagan Administration and constitutional law expert; Todd Gaziano, Director of the Center for Legal and Judicial Studies at the Heritage Foundation; and Professor Kenneth Mayer from the University of Wisconsin-Madison.

Oversight hearing on the reauthorization of the United States Department of Justice: Executive Office for United States Attorneys, Civil Division, Environment and Natural Resources Division, Executive Office for United States Trustees, and Office of the Solicitor General

Pursuant to House Rules, the Judiciary Committee has jurisdiction over the functions of the Department of Justice ("Department" or "DOJ"). The Subcommittee on Commercial and Administrative Law has jurisdiction over the following components of the Department of Justice: Executive Office for United States Attorneys, the Civil Division, the Environment and Natural Resources Division, the Executive Office for United States Trustees, the Office of the Solicitor General of the United States, and any other areas which may be assigned to it by the Chairman.

On May 9, 2001, the Subcommittee held a reauthorization oversight hearing on the components of the Department of Justice within the Subcommittee's jurisdiction. The purpose of the hearing was to examine the budget and policy priorities within the respective divisions, and focus on the efforts to address any needed improvements.

The witnesses from the Department of Justice who testified at the hearing were: Mark Calloway, Acting Director, Executive Office for United States Attorneys; Stuart Schiffer, Acting Assistant Attorney General, Civil Division; John Cruden, Acting Assistant Attorney General, Environment and Natural Resources Division; and Martha Davis, Acting Director, Executive Office of United States Trustees. The Solicitor General's Office also submitted a statement for the record.

On August 7, 2001, the Honorable Bob Barr, Chairman of the Subcommittee on Commercial and Administrative Law, sent a letter to the Department of Justice requesting additional information relating to each of the five components of the DOJ within the Subcommittee's area of jurisdiction. On November 14, 2001, the Department sent the Subcommittee its responses.

(a) The Executive Office for United States Attorneys

The Subcommittee's examination of DOJ's budget priorities for programs within the responsibility of the United States Attorneys included questions as to whether adequate resources were being devoted to support those responsibilities. The Subcommittee also inquired into how well the EOUSA coordinates and supports the activities of the United States Attorneys. The Subcommittee also explored the effect of the so-called McDade Amendment on the United States Attorneys' conduct of undercover sting operations.

(b) Civil Division

The Civil Division's requested increase of approximately $7.3 million for Fiscal Year (FY) 2003 is primarily comprised of expenditures for compensation-related adjustments ($4.6 million), rent ($1.6 million), and health insurance premiums ($.3 million). It also includes expenditures for lease expirations in the amount of $654,000. The areas of inquiry during the hearing focused on the ways in which the Civil Division can maximize its resources. Among the areas of inquiry at the hearing, the question of whether Civil Division attorneys should be transferred from Main Justice to United States Attorneys Offices in the field and if there is any duplication or overlap between the Civil Division and the United States Attorneys.

These areas of inquiry will also be further explored by the GAO in the EOUSA study requested by the Subcommittee and described later.

(c) Environment and Natural Resources Division (ENRD)

The Subcommittee examined with the witnesses and in follow-up questions the priorities of ENRD in its efforts to balance the enforcement of environmental laws with the legitimate concerns of private land owners and businesses. The sufficiency of government appraisals of land values during takings proceedings was also explored. Following up on this issue, the Subcommittee held an oversight hearing on the Rails-to-Trails program in June 2002, which is described later.

(d) The Executive Office for United States Trustees

The Subcommittee reviewed the preparedness of U.S. Trustees to handle the impact on the bankruptcy system if the Bankruptcy Abuse Prevention and Consumer Protection Act of 2001 were to pass. Specifically, the Subcommittee examined the efforts to prevent bankruptcy abuse with a focus on identifying those who file for Chapter 7 protection but have the means to fund a Chapter 13 repayment plan.

The Subcommittee also examined efforts by the U.S. Trustees Program to coordinate its bankruptcy anti-fraud program with U.S. Attorneys, the FBI, and other law enforcement agencies. Finally, the Subcommittee looked at the success of the U.S. Trustees Program's automation initiative, a costly program intended to facilitate the handling of bankruptcy filings to reduce the considerable administrative expenses faced by the agency.

(e) Office of the Solicitor General (OSG)

The Subcommittee examined the criteria utilized by the OSG in determining which issues to appeal, the relationship between the OSG and other areas of the DOJ with regard to control of appellate matters, improving efficiency, and general administrative matters.

Oversight of the Executive Office of United States Attorneys (EOUSA)

The Department of Justice Appropriations Act for 2002 was passed by the House on July 18, 2001. An appropriation was included for more than $1.3 billion in salaries and expenses for U.S.

Attorneys' offices, including the Executive Office for U.S. Attorneys ("EOUSA") in the main office of the Department of Justice in Washington, D.C.

In appropriating these funds, Congress relied on information provided by the DOJ, for which there was little correlation to DOJ's Strategic Plan and Performance Plan, as required by the Government Performance and Results Act (GPRA). In fact, DOJ's Strategic Plan and Performance Plan both suggest an allocation of resources by the U.S. Attorneys toward law enforcement goals, yet fail to describe how that effort will be managed to achieve the desired results.

Chairman F. James Sensenbrenner, Jr., Subcommittee Chairman Bob Barr, and the respective ranking Members John Conyers and Melvin Watt, were concerned by the lack of specifics regarding DOJ's performance goals for the U.S. Attorneys' Offices and the apparent absence of measurable performance targets. Also of concern was how DOJ management communicates the need for U.S. Attorneys to develop meaningful performance objectives and case management so DOJ's law enforcement goals can be better met. On September 24, 2001, they requested the General Accounting Office ("GAO") prepare a report to address the application of GPRA requirements as well as a results-oriented management of costs and human resources in the Executive Office for U.S. Attorneys and the U.S. Attorneys' offices.

The report will address how and to what degree the management of the financial budget and human resources are directed to achieving specific performance goals. It will also describe the methods used to identify and communicate the GPRA goals pertaining to the U.S. Attorneys' offices and describe to what degree objectives stated in DOJ's Strategic Plan and Performance Plan are applied to evaluate the performance of individual Assistant U.S. Attorneys. The report will also describe and evaluate how the budget is actually developed by EOUSA and to what extent actual budget execution follows the proposed use of funds contained in DOJ's submissions in support of the appropriation request.

As part of the study, the GAO was asked to identify how strategies are used to achieve performance goals and determine if the goals can be measured against actual results. For example, as points of comparison, does EOUSA establish baseline performance standards based on measurable criteria, such as statistical reductions in crime? Are there measurable goals, and do those goals challenge management or are they easily attained through routine performance? Are there annual goals that support long term objectives? Do human resource management policies and practices link to DOJ performance goals and, if so, how do they contribute to the achievement of those goals?

With regard to EOUSA's budget planning and execution processes, the report will describe whether management applies performance consequences in allocation of budget and human resources. It will also describe how management allocates funding toward meeting DOJ's defined performance goals. For example, does the budget process take into account the impact of technology, and how will the proposed information technology investments contribute to achieving performance goals? How does the agency meas-

ure and allocate its human capital toward achieving performance goals? How do the requested budget amounts relate to the achievement of specific performance goals?

The report will identify the direction provided by EOUSA to U.S. Attorneys and oversight, if any, undertaken by EOUSA, OJP, or other offices within DOJ to determine if U.S. Attorneys are fulfilling their responsibilities under OJP grant programs. There are programs within the Office of Justice Programs (OJP) requiring U.S. Attorneys to take a significant role in directing the use of appropriated grant funding, such as operation "Weed and Seed." And finally, the report will include GAO's recommendations for improving DOJ's management of the GPRA plan preparation and implementation.

On October 23, 2001, the GAO formally accepted the Subcommittee's request as work within the scope of their authority. On January 30, 2002, Subcommittee staff met with the GAO EOUSA team assigned to complete the study in an effort to clarify the request and receive approval by the Subcommittee to proceed and on June 12, 2002, the formal scope and methodology was presented to the Subcommittee. The final report on the management of EOUSA and U.S. Attorney's Offices will be issued by February 28, 2003.

Joint hearing with the Subcommittee on Courts, the Internet, and Intellectual Property on the Settlement Agreement by and among the United States of America, the Federal Communications Commission, NextWave Telecom, Inc., and certain affiliates, and Participating Auction 35 Winning Bidders

For approximately six years, NextWave Telecom Inc. and certain of its affiliates have been involved in a contentious dispute with the Federal Communications Commission (FCC) concerning the ownership of personal communications services (PCS) spectrum licenses that NextWave acquired in an auction conducted by the FCC in 1996. The Communications Act of 1934 gives the FCC exclusive regulatory authority over the radio spectrum, including the issuance of licenses and construction permits. In 1993, the Act was amended to permit the FCC to sell licenses and construction permits through a competitive bidding process. Intended to promote economic opportunity for "designated entities" (i.e., qualified small businesses, rural telephone companies, and businesses owned by members of minority groups and women), the legislation permitted successful bidders to pay for their licenses in installments. The legislation also authorized the FCC to retain auction revenues as offsetting collections.

Beginning in 1996, the FCC held a series of PCS license auctions pursuant to this legislation. The licenses offered for sale at these auctions were divided into "blocks." The "C-block" licenses were offered exclusively to designated entities such as NextWave, which successfully bid approximately $4.7 billion for 63 C-block licenses. After initial payment of a $474 million deposit, NextWave consummated the transaction in February of 1997 by executing $4.26 billion in promissory notes to the Federal government payable over ten years.

Subsequent to these auctions, however, the market value of the C-block licenses plummeted, which interfered with the ability of

some licensees to obtain funding for their purchases and operations. Due to the depressed C-block market, NextWave was unable to obtain adequate financing to fund its promissory note obligations to the FCC. It subsequently filed for bankruptcy relief under chapter 11 of the Bankruptcy Code on June 8, 1998. Other than the deposit, NextWave made no further payments to the FCC. Approximately 20 other C-block licensees also filed for chapter 11 bankruptcy relief. During the pendency of the bankruptcy case, the FCC cancelled NextWave's licenses and reauctioned them.

In response to the issues presented by the NextWave bankruptcy case and the actions of the FCC, the Subcommittee held an oversight hearing regarding the limits on governmental regulatory powers under the Bankruptcy Code on April 11, 2000.[38] Specifically, the hearing examined the exception to the automatic stay as codified in section 362(b)(4) of the Bankruptcy Code as applied to certain types of regulatory powers exercised by governmental entities. Witnesses at the hearing included representatives from the Justice Department and the FCC as well as panelists presenting views from the bankruptcy community perspective. The general tenor of the testimony and comments of participating Subcommittee Members was that the current law with respect to the exception from the automatic stay clearly did not apply to actions by governmental regulators that were inherently attempting to collect monetary obligations.

In November of 2001, the FCC, NextWave and certain other parties entered into an agreement intended to resolve the issues raised by the disputed ownership of NextWave's licenses. The settlement agreement, in essence, provided for the transfer of the licenses by NextWave to the FCC, which, in turn, would convey them to the successful reauction bidders. Under the terms of the settlement agreement, NextWave, in exchange for transferring the licenses to the FCC, would have received from the Federal government an approximate cash payment of $6.5 billion. In addition, the Federal government would have made a cash payment directly to the Internal Revenue Service on behalf of NextWave in the approximate amount of $3 billion. Pursuant to the settlement agreement, NextWave would have paid the Federal government $180 million in addition to the deposit it previously paid. As a result of this settlement, the United States Government would have received net proceeds of approximately $10 billion. The settlement was premised on the enactment of legislation approving the settlement and authorizing the appropriation of $9.55 billion to implement it, among other provisions. The proposed legislation also contained provisions for expedited judicial review and limitations on jurisdiction of actions taken pursuant to the settlement agreement. These provisions substantially altered regular court procedures and should be carefully reviewed.

On December 6, 2001, the Subcommittee, in conjunction with the Subcommittee on Courts, the Internet, and Intellectual Property, held an oversight hearing on a proposed settlement agreement that NextWave, the FCC and certain other parties entered into on No-

[38] Oversight Hearing on the Limits on Regulatory under the Bankruptcy Code Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary, 106th Cong. (2000).

vember 26, 2001. Witnesses who testified at the hearing included Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, and Jody Hunt, Counsel to the Deputy Attorney General, on behalf of the Department of Justice; John A. Rogovin, Deputy General Counsel of the FCC; Donald Verrilli, General Partner, Jenner & Block, on behalf of NextWave; and Stephen M. Roberts on behalf of Eldorado Communications, LLC. The hearing allowed Members to assess whether legislation was necessary to implement this settlement agreement, the basis of the allocation of the reauction proceeds, and whether the legislation would affect other pending bankruptcy cases. In addition, it provided an opportunity to examine whether the proposed legislation violated the Bankruptcy Clause of the U.S. Constitution in light of the fact that it specifically provided relief to parties in a pending bankruptcy case.[39]

Subsequent to this hearing, Representative Billy Tauzin (R–LA) (for himself and three original cosponsors) introduced H.R. 3484, the "Prompt Utilization of Wireless Spectrum Act of 2001," on December 13, 2001. The bill was not considered by the Committee prior to the conclusion of the 107th Congress.

Hearing on the Alabama-Coosa-Tallapoosa River Basin Compact and the Apalachicola-Chattahoochee and Flint River Basin Compact

On December 19, 2001, the Subcommittee conducted a hearing on the status of two interstate compacts that the Congress approved during the 105th Congress. The compacts provided for the creation of respective commissions to develop a formula allocating waters from various river basins among the signatory States. The Alabama-Coosa-Tallapoosa (ACT) River Basin Compact[40] involved Georgia and Alabama, while the Apalachicola-Chattahoochee and Flint (ACF) River Basin Compact[41] involved Georgia, Alabama and Florida. Congressional consent is required for such agreements and compacts in order to determine whether they work to the detriment of another State, and to ensure they do not conflict with Federal law or Federal interests.

Testifying at the hearing were: Newt Gingrich, Chief Executive Officer of the Gingrich Group and the former Speaker of the United States House of Representatives; Lindsay Thomas, former United States Representative from Georgia and then Federal Commissioner of the ACT and ACF River Basin Commissions; Jerome C. Muys, President of Muys and Associates; and George William Sherk, (the latter two witnesses being experts in water resources and allocation law).

The issue of water use in the southeast United States has a considerable history. Alabama, Florida and Georgia have for some time been negotiating over the waters of the ACF River Basin. Concerned with the potential impact of a proposed reallocation of storage from Federal reservoirs in Georgia, Alabama filed suit in 1990 in Federal district court to prevent the U.S. Army Corps of

[39] The Constitution provides that "[t]he Congress shall have the power * * * [t]o establish * * * *uniform* Laws on the subject of Bankruptcies throughout the United States[.]" U.S. Const. art. I, § 8, cl. 4 (emphasis added).

[40] Pub. L. No. 105–104 (1997).

[41] Pub. L. No. 105–105 (1997).

Engineers from reallocating storage without completing adequate environmental assessments. Florida later joined Alabama in the suit. Thereafter, the three States and the Corps of Engineers, seeking to negotiate and resolve the issue, agreed that a comprehensive study should be conducted by a partnership of the three States and the Federal government.

The waters from the ACF and ACT River Basins are extremely important to the economic vitality of the entire region. The ACF and ACT River basins affect more than 22,000 square miles in Georgia, comprising 39 percent of the land mass of that State. Within Alabama, the figure is more than 17,000 square miles and 34 percent of the State's land mass. Florida's affected area is more than 2,000 square miles representing four percent of the State. The ACF River Basin intertwines the three States in a cause and effect commonality of interests. Two droughts in the 1980's created significant water shortages in the ACF River Basin and led to disputes and litigation about water allocation in the basins from Federally owned and operated flood control projects. The increased need for drinking water, as well as water for agricultural and industrial uses, have affected the availability of fresh water flowing downstream into Apalachicola Bay in Florida. As a result, salinity, sedimentation, and pollutant levels have increased, posing a threat to marine life in the bay, especially oyster beds.[42] In 1992, the three States adopted a Memorandum of Agreement committing themselves to: (1) a partnership which involved a "live-and-let-live" understanding on water use and management in ACF Basin; (2) conducting a joint comprehensive study of water resource issues; (3) achieving a long-term water management agreement among the partners; and (4) placing the lawsuit in an inactive status. The ACF Compact, together with a virtually identical compact concerning the ACT River Basin, was negotiated from September through December 1996 by the States and the Federal government.

During the 105th Congress, the Subcommittee held a hearing on H.J. Res. 91 and 92, approving the compacts that were subsequently adopted by the Congress.[43] Testifying at the hearing were members of Congress and representatives from the Department of Justice and the participating States. Since the adoption of the compacts, the commissions created under them have continued to meet and negotiate in an effort to develop mutually agreeable water allocation formulas with the potential for a successful outcome varying from month to month.

In conducting the hearing during the 107th Congress, the Subcommittee sought to determine the progress of the parties and encourage an outcome which the Congress had anticipated would be achieved when it approved the compacts. The Subcommittee also examined relevant water law issues in order to lay a better foundation for consideration of the final agreements into which the States may ultimately enter. Moreover, the Subcommittee determined that continued review of the ACT and ACF compacts would be helpful in assessing how well States can balance such water rights

[42] Apalachicola-Chattahoochee-Flint River Basin Compact; Alabama-Coosa-Tallapoosa River Basin Compact: Hearing on H.J. Res. 91 Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary, 105th Cong. (1997) (statement of Rep. F. Allan Boyd).
[43] *Id.*

issues with Federal interests in coming to ultimate allocation agreements.

Subsequent to the hearing, the Subcommittee presented additional questions to the witnesses and engaged in oversight of the progress of the States, but took no further legislative action.

Oversight of the Legal Services Corporation

A priority of the Subcommittee during the 107th Congress was oversight of the Legal Services Corporation. The Subcommittee was concerned about whether the Legal Services Corporation ("LSC" or the "Corporation"), and its grantees, comply with statutory mandates passed by Congress in 1996. Congressional oversight of the LSC and its grantees' compliance with these mandates is an essential element of ensuring that funding for legal services for the poor is not diverted to other unauthorized uses that violate Congressional mandates. Any unlawful diversion of resources to prohibited activity would frustrate Congressional objectives and deprive many needy individuals of the legal representation that Congress intended to fund.

The Subcommittee initiated an oversight investigation in January of 2002 and has completed an extensive review of LSC documents, the hearing record of a Subcommittee on Commercial and Administrative Law oversight hearing of February 28, 2002,[44] interviews with LSC staff and confidential sources, and other records obtained by the Subcommittee. Following the February 28, 2002 hearing, the Subcommittee submitted further record questions to LSC President John N. Erlenborn on April 4, 2002.[45] President Erlenborn provided the LSC's responses and documents to the Subcommittee on May 8, 2002.[46]

Development and background of the Legal Services Corporation

The Legal Services Corporation Act of 1974 (the "Act") was originally intended to provide funding for legal representation of the indigent in our society. Since the earliest days of the program, however, the Legal Services Corporation was the subject of concerns that federal tax dollars would be used to promote a political and ideological agenda, instead of providing important legal services to the neediest Americans.[47] In response to over a decade of complaints, and in an effort to protect the integrity of the program, Congress passed significant restrictions, which were included in

[44] This Subcommittee held two other oversight hearings since the 1996 restrictions were enacted: the first hearing was two months after the restrictions were effective, and the second hearing was after the General Accounting Office issued a highly critical report of the case counting numbers reported to Congress. Legal Services Corp.: Hearing Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary, 104th Cong., (June 26, 1996) and Legal Services Corporation: Hearing Before the Subcomm. on Commercial and Admin. Law Before the House Comm. on the Judiciary, 106th Cong. (Sept. 29, 1999).

[45] Letter from Hon. Bob Barr, Chairman, Subcomm. on Commercial and Admin. Law, and Hon. Jeff Flake, Vice-Chairman, Subcomm. on Commercial and Admin. Law, to John N. Erlenborn, President, LSC (Apr. 4, 2002) (on file with the Subcomm. on Commercial and Admin. Law).

[46] Letter from John N. Erlenborn, President, Legal Services Corp., to Hon. Bob Barr, Chairman, Subcomm. on Commercial and Admin. Law (May 8, 2002) (on file with the Subcomm. on Commercial and Admin. Law). It should be noted the LSC produced to the Subcommittee many unnecessary and unrequested documents. For example, pages H–01939 to H–02127 provided the Subcommittee with unrequested U.S. Census Bureau documents that were unrelated and irrelevant to the substance of questions asked in section H of the Subcommittee's April 4, 2002 letter.

[47] Kenneth F. Boehm, The Legal Services Program: Unaccountable, Political, Anti-Poor, Beyond Reform and Unnecessary, 17:2 ST. Louis U. Pub. L. Rev. 328 (1998).

the Fiscal Year ("FY") 1996 Commerce, Justice, and State, the Judiciary, and Related Agencies appropriations legislation.[48] Many of these restrictions directed the Board to promulgate federal regulations in order to implement the statute effectively.[49] The Subcommittee is concerned that Congressional reforms have been diluted by the Board's implementation of weak, unworkable, and unenforceable regulations.

Ensuring accountability of the LSC for compliance with the restrictions is made more difficult because the LSC, although funded by Congressional appropriation, is a nonprofit corporation,[50] not a federal agency subject to the laws applicable to federal agencies, their employees, and third parties who deal with them.[51]

The LSC has not been reauthorized since 1980. In 1995, this Subcommittee held an extensive series of hearings on the reauthorization of the LSC.[52] Following those hearings, the House Judiciary Committee reported legislation to the full House that would have replaced the LSC with a program of block grants administered by individual states.[53] This legislation was never voted on by the full House.

Congress followed this effort in 1996 with the passage of the most sweeping reforms since 1974, enumerating restrictions on the types of cases LSC grantee attorneys could pursue. Under current restrictions, LSC grantees may not:

(1) Engage in partisan litigation related to redistricting;

(2) Attempt to influence regulatory, legislative, or adjudicative action at the federal, state, or local level;

(3) Attempt to influence oversight proceedings of the LSC;

(4) Initiate or participate in any class action suit;

(5) Represent certain categories of aliens, except that non-federal funds may be used to represent aliens who have been victims of domestic violence or child abuse;[54]

(6) Conduct advocacy training on a public policy issue or encourage political activities, strikes, or demonstrations;

(7) Claim or collect attorney's fees;

(8) Engage in litigation related to abortion;

(9) Represent federal, state, or local prisoners;

(10) Participate in efforts to reform a federal or state welfare system;[55]

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[48] Omnibus Consolidated Rescissions and Appropriations Act, Pub. L. No. 104–134, 110 Stat. 1321–50 (1996). These restrictions include, among others, prohibitions on class actions, collection of attorney's fees, rulemaking, participation in lobbying or political activities, litigation on behalf of prisoners, representation of drug-related public housing evictions, and representation of certain categories of aliens.

[49] Legal Services Corp. Act, Pub. L. No. 93–355 § 1006(b)(A) (1974).

[50] The LSC replaced the Office of Legal Services by amending the Economic Opportunity Act of 1964 a major part of President Lyndon B. Johnson's "War on Poverty." Legal Services Corp. Act, Pub. L. No. 93–355 § 2 (1974). In doing so however, Congress created an office that, unlike the Office of Economic Opportunity, is independent of the Executive Branch. For example, by law the LSC budget is submitted directly to Congress. 42 U.S.C. § 2996(d) (2001).

[51] Boehm, supra note 4, at 322.

[52] Rauthorization of Legal Services Corporation: Hearings Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary, 104th Cong. (1995).

[53] The Legal Aid Act of 1995, H.R. 2277, 104th Cong. (1995); H.R. REP. NO. 104–255 (1995).

[54] In 1997, a narrow exception to the 1996 regulations was added to provide that, under certain conditions, non-LSC funds could be used for representation of undocumented aliens who are battered. Departments of Commerce, Justice, and State, the Judiciary and Related Agency Appropriations, 1998, Pub. L. 105–119 § 502, 111 Stat. 2440–2510 (1997).

[55] On February 28, 2001, the U.S. Supreme Court held in the case of *Legal Services Corp.* v. *Velazquez,* 121 S. Ct. 1043 (2001), that an LSC funding restriction related to welfare reform violates the First Amendment rights of LSC grantees and their clients and is thereby unconstitu-

(11) Represent clients in eviction proceedings if they have been evicted from public housing because of their own illegal drug-related activities; or

(12) Solicit representation of clients.

Internal controls over the Corporation

The legal authority regulating the LSC and its grantees, include the Legal Services Corporation Act of 1974, the congressional restrictions incorporated through the budget process since 1996, and the LSC regulations, which are promulgated by the LSC Board and published in the Federal Register. Since the LSC was not organized as a federal agency, LSC is subject only to those federal laws expressly enumerated by Congress as applicable to the LSC, including the Government in the Sunshine Act and the Freedom of Information Act.[56]

The LSC has two divisions intended to ensure LSC, its employees, and its grantees comply with all applicable laws and regulations, including the specific restrictions passed by Congress in 1996. Those divisions are the Office of Compliance and Enforcement (the "OCE") and the Office of Inspector General (the "OIG"). If any other individual or entity discovers a violation of the LSC Act by an LSC grantee, there is no private right of action to enforce the Act.[57] Similarly, LSC employees and its grantees are not protected by the Whistleblower Protection Act for reporting waste, fraud, or abuse of federal laws or resources, nor are they protected from retaliation and discrimination for whistleblowing provided by the newly enacted Notification and Federal Anti-discrimination and Retaliation Act ("No FEAR").[58] Finally, any failure by the LSC, including its Board of Directors, to enforce congressional restrictions is not subject to judicial review.[59]

LSC's oversight responsibilities with respect to its grantees include establishing guidelines so grantees will properly determine the eligibility of clients on the basis of certain specified factors,[60]

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tional. The Supreme Court agreed with the Second Circuit Court's ruling that, by prohibiting LSC-funded attorneys from litigating cases that challenge existing welfare statutes or regulations, Congress had improperly prohibited lawyers from presenting certain arguments to the courts, which had the effect of distorting the legal system and altering the traditional role of lawyers and advocates for their clients. Id. Although this statutory restriction was struck down, it is important to realize the Court implicitly approved the other congressional restrictions when it refused to hear arguments why all the restrictions should be overturned. See id.

[56] Legal Services Corp. Act, Pub. L. No. 93–355 § 1005(f) and (g) (1974).

[57] *Grassley* v. *Legal Services Corp.,* 535 F. Supp. 818 (S. D. Iowa 1982).

[58] Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 ("No FEAR"), Pub. L. No. 107–174, 116 Stat. 566 (2002). No FEAR is intended to fight discrimination and retaliation at federal agencies by forcing agencies that discriminate or retaliate pay the costs associated with their actions, rather than those costs being paid by the general federal judgment fund.

[59] *Regional Mgmt. Corp.* v. *Legal Services Corp.,* 186 F.3d 457 (4th Cir. 1999); see also *Lindquist* v. *Bangor Mental Health Inst.,* 770 A.2d 616, 619 (Me. 2001) (noting Congress' amendment to the LSC Act prohibiting courts from inquiring into client eligibility questions in individual cases); *Milbourne* v. *Mid-Penn Consumer Disc. Co.,* 108 B.R. 522, 544 (Bankr. E.D. Pa. 1989) (remarking that Motion to Disqualify debtor's legal services program counsel was misplaced). By reference to 42 U.S.C. § 2996e(b)(1)(B) (2002), the court observed that the only recourse for lender appeared to be through the administrative channels of LSC. Id.

[60] These include:

(i) the liquid assets and income level of the client,

(ii) the fixed debts, medical expenses, and other factors which affect the client's ability to pay,

(iii) the cost of living in the locality, and

Continued

and ensuring grants and contracts provide the most economical and effective delivery of legal assistance to persons in both urban and rural areas.[61] In addition, LSC's enabling legislation mandates various restrictions with respect to the activities of grantees;[62] namely proscriptions against engaging in certain types of litigation[63] and prohibitions against engaging in specified lobbying activities.[64]

The LSC's Inspector General ("IG") is subject to the Inspector General Act of 1978,[65] which requires the LSC IG to report to the President of LSC, and in turn, the President should then report to Congress, whenever the IG becomes aware of particularly serious or flagrant problems, abuses, or deficiencies relating to the administration of programs and operations of such establishment.

Oversight hearing of the Legal Services Corporation

On February 28, 2002, the Subcommittee held an oversight hearing in an effort to examine compliance by Legal Services grantees with the congressionally mandated restrictions and the Board of Directors' role in the monitoring the activities of the Corporation and its grantees.

The witnesses who testified at the oversight hearing were the following: the Honorable Edwin Meese III, Chairman, Center for Legal and Judicial Studies, Heritage Foundation; the Honorable John M. Erlenborn, President, Legal Services Corporation; Kenneth F. Boehm, Chairman, National Legal and Policy Center; and L. Jonathan Ross, Chairman, Standing Committee on Legal Aid and Indigent Defendants, American Bar Association.

Testimony was received to address the following questions:

(1) Has an effective system of competition been implemented by the LSC, as directed by Congress in 1996, resulting in the promotion of competition among potential grant recipients to deliver the best service, at the best price, to the truly needy?

The 1996 congressional reforms specifically changed the Act to require LSC grantees to compete for their grants.[66] This reform was passed in response to critics of LSC who charged that LSC grantee attorneys produced substandard work, engaged in controversial litigation, received their LSC funding regardless of work quality, and that renewal of grant funding had become, in essence, an entitlement. The LSC Board of Directors then promulgated regulations implementing a system of competition,[67] as required by

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(iv) such other factors as relate to financial inability to afford legal assistance, which may include evidence of a prior determination that such individual's lack of income results from refusal or unwillingness, without good cause, to seek or accept an employment situation. 42 U.S.C. § 2996f(a)(2)(B) (2001).

[61] 42 U.S.C. § 2996f(a)(3) (2001).

[62] These restrictions include restrictions against lobbying, political activities, class actions, except under certain restrictions, and cases involving abortion, school desegregation, and draft registration or desertion from the military. 42 U.S.C. §§ 2996f(b)(8)–(10) (2001).

[63] See e.g., 42 U.S.C. § 2996e(d)(5) (2001) (restrictions on representation of class actions).

[64] See e.g., 42 U.S.C. § 2996e(c)(2) (2001).

[65] Inspector General Act of 1978, 5 U.S.C. app. 3 § 8G(a)(2).

[66] § 503 of Pub. L. 104–134 states:

(a)(1) Not later than April 1, 1996, the Legal Services Corporation shall implement a system of competitive awards of grants and contracts for all basic field programs.

(f) No person or entity that was previously awarded a grant or contract by the Legal Services Corporation for the provision of legal assistance may be given any preference in the competitive selection process.

[67] 45 C.F.R. § 1634 (2001).

the 1996 law.[68] The hearing and follow-up questions explored the competition mandate. The Subcommittee remained concerned about the implementation of the mandate and, on May 7, 2002, requested the GAO explore the issue further.

(2) What has been the role of the Board of Directors in working towards a solution for American farmers, plagued by frivolous and expensive lawsuits by the migrant and seasonal worker community? In addition, The Erlenborn Commission Report, essentially allows LSC lawyers to represent any alien who has ever worked in the U.S. at any time. What is the implementing regulation resulting from the findings of the Commission?

Extensive questioning about the findings of the Erlenborn Commission occurred at the hearing but without a satisfactory resolution to the issue. In addition to a series of follow up records questions sent to the Corporation, Subcommittee counsel attended a negotiated rulemaking session of 45 C.F.R. § 1626, involving representation of undocumented aliens by LSC-funded attorneys. The Subcommittee's concerns about the findings of the Erlenborn Commission remain and the negotiated rulemaking process and final rule will be closely monitored during the 108th Congress.

(3) Is there a renewed or continuing effort by LSC grantees to set up "mirror corporations" to handle restricted cases, in violation of the "physically and financially separate" requirement of the federal regulations?

In the 1980s the LSC grantees sought to evade the 1974 statutory restrictions, by setting up closely affiliated but not legally distinct entities. Typically, the legal services group would provide a subgrant to another group, that would then engage in the restricted activities.[69] This strategy was commonly referred to as setting up "mirror corporations."[70] However, this strategy was not available in the 1990's because LSC interpreted its regulations to require subgrantees to comply with LSC restrictions imposed by Congress.[71]

The Subcommittee was concerned about evidence that new similar strategies had been developed to circumvent the restrictions. The hearing and the Subcommittee follow-up questions included extensive questioning in this area, which remains an area of concern to the Subcommittee.

(4) How accurate are the case reporting statistics the LSC is currently reporting to Congress since a 1999 GAO report critical of LSC case reporting?

Prior to 1998, critics contend, inadequate recordkeeping requirements precluded effectively auditing LSC grantee's files to determine if the cases they were handling were both (1) client eligible, as required by the LSC Act, and (2) cases violating the restrictions. Congress added a provision to the 1998 appropriations bill, requiring basic information be recorded by grantees.[72] LSC grantees are now required by statute to keep records of each case they handle with the following information: name and full address of each party

[68] Omnibus Consolidated Rescissions and Appropriations Act, Pub. L. No. 104–134, Stat. 1321–50 (1996).
[69] Id.
[70] Id.
[71] Id.
[72] § 505(b) of Pub. L. No. 105–119, 110 Stat. 2440–2510.

to the action, cause of action, and name and address of the court and the assigned case number. On March 7, 2002, the Subcommittee requested the GAO conduct a formal follow-up review of their 1999 findings in this area.

First request to the GAO to complete a study concerning the LSC

In September 1999, the General Accounting Office issued a report to Congress entitled "Legal Services Corporation: More Needs To Be Done To Correct Case Service Reporting Problems." This report resulted from a May 1999 request from several Members of Congress that GAO review the accuracy of LSC's case handling statistics for Fiscal Year (FY) 1997. The 1999 congressional request to GAO for this report resulted from significantly inaccurate and inflated annual, nation-wide case handling statistics, which were reported to Congress in 1997 incorrectly indicating the LSC's grantees served 1.9 million clients. In the report, the GAO concluded "we do not believe that LSC's efforts to date have been sufficient to resolve the case reporting problems that occurred in 1997." In addition, the GAO made seven specific recommendations to the President of the Legal Services Corporation in order to resolve the problems.

LSC President Erlenborn testified that the error rate in FY 1999 had dropped to 11 percent, and, even more dramatically in FY 2000, to five percent. These figures were derived from audits by LSC's staff in conjunction with self-inspection by the grantees. Mr. Erlenborn further stated to the Subcommittee that "all of those things that the GAO recommended the Corporation do to get accurate figures, we have accomplished." In light of GAO's earlier work on this subject, the Subcommittee requested that GAO prepare a report on the following areas:

(1) LSC's response to GAO's 1999 report;

(2) LSC's implementation of GAO's recommendations;

(3) The practical outcome of the alleged changes by the LSC, in terms of accuracy and error rates in FYs 1999, 2000 and 2001;

(4) The accuracy of recent case reporting to Congress; and

(5) Problems with GAO or OIG access to records since 1999.

The report will also include GAO's further recommendations for improving case reporting accuracy and provide notification to Congress of any other problems or issues which arise during the course of the investigation.

Development of additional information post-hearing

On April 5, 2002, Subcommittee Chairman Bob Barr and Vice-Chairman Jeff Flake sent an extensive twenty-one page follow up letter to LSC President John Erlenborn. The questions pertained to the following areas:

(1) The Erlenborn Commission;

(2) The LSC Inspector General's Office and Its Functions;

(3) Access to Records;

(4) Lobbying by LSC Grantees;

(5) LSC Regulations, including Alien Representation and Financial Eligibility;

(6) Program Integrity and Mirror Corporations;

(7) State Planning and Reconfiguration of LSC State Programs;

(8) Competition for LSC Funds;

(9) Case Overcounting;

(10) Litigation against the LSC; and

(11) Class Action Lawsuits.

On April 5 and 6, 2002, Subcommittee counsel attended the LSC Board meeting held in Washington, D.C. The Board's agenda included Board consideration and action on a new policy defining audit compliance by LSC grantees to case file records, described in a policy document titled "LSC's Access Protocol." At the last minute, the new Access to Records Protocol was stricken from the agenda and instead issued by Presidential directive the week following the Board meeting. Elimination of Board consideration thwarted any public discussion and a recorded transcript of the proceedings.

After the issuance of the "Access Protocol," Subcommittee staff requested meetings with LSC staff. The first meeting took place on April 23, 2002 with the LSC 's President, General Counsel, and Director of Congressional Affairs to discuss the newly issued Access Protocol. At that meeting, LSC staff was questioned about its records retention policy and possible shredding of documents. The Corporation could not provide the Subcommittee with the records retention policy but indicated that all documents would be retained.

The next meeting was held on April 30, 2002 with LSC's IG and General Counsel. During this meeting, the Subcommittee received information about auditors who could not gain access to case file records. Upon examination of the additional information received by the Subcommittee, a second request was made to the GAO for a study of the LSC. The scope of GAO's investigation of the LSC was expanded and is to address the following specific areas:

(1) Has the Legal Services Corporation process and practice of conducting State Planning, resulted in the use of LSC funds to support work for persons who are restricted from receiving assistance by LSC programs? If so, to what extent have LSC resources been used to support restricted activities?

(2) Has the Legal Services Corporation required its programs/grantees to coordinate and work with non-LSC programs conducting prohibited work, as part of the creation of State Justice Communities? If so, has such coordinated work utilized federally funded Corporation or LSC grantee staff time, or any other federal resources?

(3) Have LSC funds been used, in any way, to establish and support services for persons, or groups of persons, who are prohibited by statute from receiving federal funds?

(4) Has the creation of larger program service areas, and many statewide service areas, resulted in anti-competitive conditions?

(5) Has the creation of "State Justice Communities" resulted in discouraging competition for grants instead of encouraging competition?

(6) Since the congressional mandate for competition was prescribed by Congress in 1996, has competition occurred? If not, what does GAO recommend for promoting competition for federal grants?

In addition to reporting to the Subcommittee on prior access issues, the GAO is expected to analyze how the recently issued policy will affect future access to records requests from the grantees/programs.

Oversight hearing on litigation relating to the Rails-to-Trails Program

On June 20, 2002, the Subcommittee held an oversight hearing entitled "Litigation and its effect on the Rails-to-Trails Program." Testimony was received from the following witnesses: Thomas L. Sansonetti, Assistant Attorney General, Environment and Resources Division, U.S. Department of Justice; Nels Ackerson, Chairman, The Ackerson Group, Chartered; Andrea Ferster, General Counsel, Rails-to-Trails Conservancy; and Tom Murphy, Mayor, the City of Pittsburgh.

The hearing examined the effect of the 1983 Amendments[73] to the National Trails System Act (NTSA),[74] more commonly known as the "Rails-to-Trails" program. The program permitted the conversion of land from abandoned railroad tracks, previously conveyed to the federal government for railroad use, into recreational trails. The Subcommittee was concerned that the transfer of land created by the 1983 Amendments has created significant litigation involving the Environment and Natural Resources Division (ENRD) of the Department of Justice (DOJ), due to the large number of landowners who are asserting Fifth Amendment takings claims against the federal government for the conversion of their reversionary interests in the railroad easements without compensation.

The Subcommittee was also concerned with the potential budget impact of substantial awards to the plaintiffs in such litigation that the Congressional Budget Office (CBO) did not contemplate in its original cost estimate of zero federal dollars for the program. In one case alone, *Presault* v. *U.S.,*[75] compensation and attorneys' fees amounted to more than $1.4 million. Recent DOJ statistics indicate there are 19 such cases pending in the ENRD, a figure which includes over 5,000 plaintiffs. The potential explosion of litigation could require Congress to consider a significant allocation of federal resources, including both staff and judgement costs, to the ENRD to address the effects of the program.

The hearing examined whether landowners, whose property rights have been affected by the rails-to-trails conversions, have been fairly compensated by the federal government. The hearing did not dispute benefits of this program, but rather focused on whether landowners have a legitimate claim against the federal government for a Fifth Amendment taking. In addition, the hearing examined the process whereby the government, through the ENRD of the DOJ, handles this type of litigation with landowners.

The hearing also explored the role of the complex and expensive litigation in delaying payment to landowners and the possibility that future litigation could involve filings by large classes of plain-

[73] Pub.L. No. 98–11, Title II, § 208 (March 28, 1983), 97 Stat. 48.
[74] 16 U.S.C. § 1241–1251 (2000).
[75] *Presault* v. *U.S.,* 100 F.3d 1525 (1996).

tiffs. Finally, possible legislative and administrative remedies to address the costly complex litigation were explored.

Federal legislation

In 1922, Congress passed 43 U.S.C. § 912, providing some guidance on how federally granted rights-of-way should be handled upon abandonment for railroad purposes. Until that time, the common law for the disposition of the right-of-ways after abandonment was the abutting property owner, whether the government or the successor in title to the government, received the right-of-way free and clear. The new federal statute asserted if the right-of-way was within the boundary limits of a municipality, then the right-of-way went to the municipality free and clear, otherwise it went to the abutting property owner.

Although the National Trails Systems Act was originally enacted in 1968,[76] the Rails-to-Trails Program was not created until 1983 when Congress amended section 8(d) of the NTSA.[77] This so-called "rails-to-trails" statute provides that a railroad that ceases operations along a particular route may negotiate with a State, municipality, or private group prepared to assume financial and managerial responsibility for the right-of-way.

If the parties reach agreement, the land may, subject to Interstate Commerce Commission (ICC)[78] terms and conditions, be transferred to the trail operator for interim trail use notwithstanding whatever reversionary interests may exist in the property under state law. An important source of the current problem can be found in the legislative history of the Senate Committee on Energy and Natural Resources, which states: "[T]he key finding of this amendment is that interim use of a railroad right-of-way for trail use, when the route itself remains intact for future railroad purposes, shall not constitute an abandonment."[79] Further language in the Senate Committee Report finds "(t)his provision will protect railroad interests by providing that the right-of-way can be maintained for future railroad use even though service is discontinued and tracks removed, and by protecting the railroad interests from any liability or responsibility in the interim period."[80] This language has led the DOJ to contend the railroad land is never abandoned and is always waiting further use and therefore, there is no reversionary property interest and no compensable taking.

Notwithstanding this position, the U.S. Court of Appeals for the Federal Circuit, in an en banc decision, found that a taking had occurred in the 1996 case *Presault* v. *U.S.,*[81] relying on state court determinations that the interest conveyed by the property owner was an easement and that conversion to the non-railroad use entitled the previous landowner to assert a reversionary interest. The

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[76] The National Trails System Act of 1968 was intended by the Congress to be a generic measure through which the outdoor recreation opportunities of America could be expended by the development of a nationwide program to establish and maintain trails of various kinds. H.R. Rep. No. 98–28, at 1 (1983).

[77] 16 U.S.C. § 1247(d)(2000).

[78] The ICC was succeeded by the Surface Transportation Board (STB) as the body responsible for issuance of Certificates of Interim Trail Use (CITU). The CITU allows the interested party to begin the process of conversion of the rail to a trail.

[79] S. Rep. No. 98–1, at 9 (1983).

[80] Id at 10.

[81] *Presault* v. *U.S.,* 100 F. 3d 1525 (1996).

Court held the reversionary property owner is entitled to just compensation from the federal government for a Fifth Amendment taking.[82] The Court found such takings are properly classified as physical takings, and not the rather complicated regulatory takings, and therefore, just compensation is due to the landowner from the U.S. government. In practical terms, this stage of litigation is also extremely complicated since land appraisals and determinations of the types of interest originally conveyed must be made on a case-by-case basis.

Hearing on administrative and procedural aspects of the Federal Reserve Board/Department of the Treasury proposed rule concerning competition in the real estate brokerage and management markets

The Gramm-Leach-Bliley Act[83] (GLBA) was enacted into law in 1999 and became effective a year later. Its purpose was to deregulate financial institutions and expand the permissible range of activities in which they could offer services. GLBA permitted banks, insurance companies, and securities firms to not only interact with one another, but to offer a range of previously prohibited financial services. Many of its supporters believed that "by tearing down the legal barriers between commercial banking, investment banking, and insurance, [GLBA] would lead to dramatic new efficiencies, the rise of huge financial conglomerates, exciting new financial products and substantial savings to consumers."[84] In relevant part, the measure allows "'financial holding companies" to engage in any activity that is financial in nature or incidental to such financial activity * * * [or is] complementary to a financial activity and does not pose a substantial risk to the safety or soundness of depository institutions or the financial system generally."[85] The ambiguity of this section has produced considerable uncertainty.

On January 3, 2001, the Federal Reserve Board and Treasury Department noticed for public comment a proposed rule that would enable commercial banks to compete in the real estate brokerage and management markets.[86] If finalized, the proposed rule would have the effect of transforming the definition of "financial activity" to include a range of services heretofore considered "commercial" in nature. This departure from existing policy, which was not articulated in the text or legislative history of GLBA, would permit Federally-chartered banks, subsidiaries and financial services to enter the real estate brokerage and management market; an arena long reserved under State law to realtors and other "commercial" businesses.

Financial services organizations such as the American Bankers Association, the Financial Services Roundtable, and the New York Clearing House Association were the most vocal supporters of expanding the definition of "financial activity" to include real estate

[82] Id.

[83] Pub. L. No. 106–102, 113 Stat. 1338 (1999) (codified in scattered sections of 12, 15, 16, 18 U.S.C.).

[84] The Federal Reserve Bank of St. Louis, One Year After Gramm-Leach-Bliley: Are We Modern Yet? (2001), available at: http: //www.stls.frb.org/publications/cb/2001/a/pages/p3–article.html (last visited Apr. 26, 2002).

[85] Gramm-Leach-Bliley Act, 12 U.S.C. § 1843(k)(i) (2000).

[86] Bank Holding Companies and Change in Bank Control, 66 Fed. Reg. 307–14 (proposed Jan. 3, 2001) (to be codified at 12 C.F.R. pt. 225).

brokerage and management. Proponents contend that large commercial banks will be able to offer a range of services to potential homebuyers, which will spur competition by creating complementary financial/brokerage services by these financial institutions. Those who favor the proposed rule further contend that consumer protections will not suffer if this rule is finalized. Finally, proponents insist that Congress completely delegated its authority to determine what institutions are financial in nature under the GLBA.[87]

The National Association of Realtors (NAR) has become the most vocal opponent of the proposed rule. NAR, which counts over 900,000 realtors among its membership, asserts the proposed rule is inconsistent with existing law, violates the Administrative Procedure Act, and would further hasten consolidation in the financial industry and stifle competition in this market. Currently, several thousand real estate brokerage and management firms compete in this market, and NAR contends they would be replaced by large commercial banks with access to low interest Federal Reserve prime lending rates.[88] Opponents also contend real estate brokerage and management are historically and fundamentally commercial in character. They assert real estate brokerage is not incident to banking, but that banking is incident to real estate brokerage, and that the proposed rule violates this widely-accepted precept.

While H.R. 3424, the "Community Choice in Real Estate Act," was introduced during the 107th Congress to reverse this proposal, the rule raises a number of administrative law questions concerning the process by which it was proposed. For example, was the rule proposed in compliance with congressional statutes pertaining to the regulatory process? Was the proposed rule consistent with the agencies' organic statutes and the implementing legislation upon which it was predicated? Did the proposed rule implicate the "nondelegation doctrine," which limits congressional authority to delegate legislative power to agencies? Have agencies provided proper deference to congressional intent?

On May 16, 2002, the Subcommittee conducted a hearing to help answer these questions and to consider the possibility of subsequent legislative remedies to ensure agency compliance with congressional intent. The following witnesses testified at the hearing: Sheila Bair, Assistant Secretary, United States Department of Treasury; Martin Edwards, Jr., President of NAR; and Mr. Edward Yingling, Executive Director, American Bankers Association. At the hearing, Secretary Bair defended the legal validity of the proposed rule. She testified that GLBA provided the regulatory agencies (Department of Treasury and Federal Reserve Board) with broad authority to define activities commercial activities. Secretary Bair also repeatedly stressed that the rule in question was a proposal, rather than a finalized regulation. Mr. Yingling also defended the validity of the proposed rule. However, Martin Edwards challenged the legal validity of the rule, citing what he considered to be grave

[87] See American Bankers Association, Banks and Real Estate Brokerage Dispelling the Misrepresentations of the Real Estate Industry, http://www.aba.com/Press+Room/brokerage 050101.htm (last visited Apr. 30, 2002).

[88] See Steve Cook, NAR Letters Argue Against Proposed Rule to Allow Banks Into Real Estate (May 1, 2001), available at: http://nar.realtor.com/news/2001REleases/May/56.htm; Steve Cook, NAR President Testifies Against Bankers Entering Real Estate (May 2, 2001).

administrative and procedural defects associated with its formulation and notice. A number of detailed questions were submitted to witnesses following the hearing. Their responses to these questions became a part of the formal hearing record.

SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY [1]

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STEVEN R. ROTHMAN, New Jersey [2]
TAMMY BALDWIN, Wisconsin
ANTHONY D. WEINER, New York [3]

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[1] Subcommittee chairmanship and assignments approved January 31, 2001.

[2] Steven R. Rothman, New Jersey, resigned from the Committee effective February 7, 2001.

[3] Anthony D. Weiner, New York, reassignment from the Subcommittee on Crime to the Subcommittee on Courts, the Internet, and Intellectual Property approved May 23, 2001.

[4] Asa Hutchinson, Arkansas, resigned from the House effective midnight August 6, 2001.

[5] Joe Scarborough, Florida, resigned from the House effective September 6, 2001.

[6] Darrell E. Issa, California, and Melissa A. Hart, Pennsylvania, assignments to the subcommittee approved November 15, 2001.

Tabulation of subcommittee legislation and activity

Public:	
Legislation referred to the Subcommittee	64
Legislation on which hearings were held	4
Legislation reported favorably to the full Committee	6
Legislation reported adversely to the full Committee	0
Legislation reported without recommendation to the full Committee	0
Legislation reported as original measure to the full Committee	0
Legislation discharged from the Subcommittee	2
Legislation pending before the full Committee	0
Legislation reported to the House	11
Legislation discharged from the Committee	1
Legislation pending in the House	0
Legislation passed by the House	12
Legislation pending in the Senate	1
Legislation vetoed by the President (not overridden)	0
Legislation enacted into Public Law	3
Legislation enacted into Public Law as part of other legislation	11
Days of legislative hearings	4
Days of oversight hearings	22
Private:	
Legislation referred to the Subcommittee	1
Legislation on which hearings were held	0
Legislation reported favorably to the full Committee	0
Legislation discharged from the Subcommittee	0
Legislation pending before the full Committee	0
Legislation reported to the House	0
Legislation discharged from the Committee	0
Legislation pending in the House	0
Legislation passed by the House	0

Tabulation of subcommittee legislation and activity—Continued

Legislation pending in the Senate	0
Legislation enacted into Private Law	0

JURISDICTION OF THE SUBCOMMITTEE

The Subcommittee has legislative and oversight responsibility for (1) the intellectual property laws of the United States (including authorizing jurisdiction over the Patent and Trademark Office of the Department of Commerce and the Copyright Office of the Library of Congress); and (2) Article III Federal courts (including authorizing jurisdiction over the Administrative Office of the United States Courts, the Judicial Conference of the United States, and the Federal Judicial Center); the Federal Rules of Evidence and Civil and Appellate Procedure; and judicial discipline and misconduct.

LEGISLATIVE ACTIVITIES

COURTS

H.R. 1203, Ninth Circuit Court of Appeals Reorganization Act of 2001

Summary.—Introduced by Representative Michael K. Simpson, H.R. 1203 amends chapter 3 of title 28, United States Code, to divide the Ninth Judicial Circuit of the United States into two circuits. On July 23, 2002, the Subcommittee held a hearing on H.R. 1203. Testimony was received from the following witnesses: The Honorable Mary M. Schroeder, Chief Judge, U.S. Court of Appeals for the Ninth Circuit; The Honorable Alan G. Lance, Attorney General, State of Idaho; The Honorable Diarmuid F. O'Scannlain, Judge, U.S. Court of Appeals for the Ninth Circuit; and the Honorable Sidney R. Thomas, Judge, U.S. Court of Appeals for the Ninth Circuit. No further action was taken on the bill.

H.R. 2048, to require a report on the operations of the State Justice Institute (Pub. L. No. 107–179)

Summary.—Introduced by Representative Howard Coble, H.R. 2048 requires the Attorney General, in consultation with the State Justice Institute (SJI, "the Institute"), to submit a report to the House and Senate Committees on the Judiciary regarding the effectiveness of the Institute in fulfilling its missions, which include providing funds to improve the quality of justice in state courts, facilitating enhanced coordination between state and federal courts, and developing solutions to common problems faced by all courts. The report would be done in consultation with SJI, and would be due not later than October 1, 2002.

Legislative History.—On July 16, 2001, the Subcommittee was discharged from further consideration of H.R. 2048. On July 24, 2001, the Committee met in open session and ordered favorably reported H.R. 2048, without amendment, by voice vote. HR. 2048 was reported by the Committee to the House on August 2, 2001 (H. Rept. 107–189). On September 5, 2001, the House passed H.R. 2048 under suspension of the rules, by voice vote. On December 13, 2001, H.R. 2048 was reported favorably to the Senate by Senator

Leahy. On May 20, 2002, the President signed H.R. 2048 and it is Public Law 107–179.

H.R. 2336, to make permanent the authority to redact financial disclosure statements of judicial employees and judicial officers (Pub. L. No. 107–126)

Summary.—Introduced by Representative Howard Coble, H.R. 2336 extends for 4 years, through December 31, 2005, the authority of the Judicial Conference of the United States to redact financial disclosure statements of judicial employees and judicial officers where the release of the information could endanger the filer or his or her family.

Legislative History.—On October 2, 2001, the Subcommittee was discharged from further consideration of H.R. 2336. On October 3, 2001, the Committee met in open session and ordered favorably reported H.R. 2336 without amendment by voice vote. H.R. 2336 was reported by the Committee to the House on October 12, 2001 (H. Rept. 107–239). On October 16, 2001, the House passed H.R. 2336 under suspension of the rules, by voice vote. On December 7, 2001, H.R. 2336 was reported favorably to the Senate by Senator Lieberman (S. Rept. 107–111). The Senate passed H.R. 2336, amended, on December 11, 2001. On December 20, 2001, the House agreed to the Senate amendments under suspension of the rules. The President signed H.R. 2336 on January 16, 2002, and it is Public Law 107–126.

H.R. 2522, Federal Courts Improvement Act of 2001

Summary.—Introduced by Representative Howard Coble, by request, H.R. 2522 contains several provisions that are needed to improve the Federal Court System. The bill affects a wide range of judicial branch programs and operations. It addresses judicial financial administration, judicial process improvements, judiciary personnel administration, and benefits and protections.

Legislative History.—On July 26, 2001, the Subcommittee held a hearing on H.R. 2522. Testimony was received from the Honorable Deanell R. Tacha, Chief Judge, United States Court of Appeals for the Tenth Circuit. Nearly all of the provisions in H.R. 2522 were later incorporated into H.R. 4125, the "Federal Courts Improvement Act of 2002."

H.R. 3892, Judicial Improvements Act of 2002

Summary.—Introduced by Representative Howard Coble, H.R. 3892 reorganizes and clarifies the existing statutory mechanism that allows individuals to file complaints against Article III judges. These reforms will offer more guidance to circuit chief judges when evaluating individual complaints, while providing individuals with more insight as to the disposition of their cases. The overall reorganization will make the process of learning about and filing a complaint more user-friendly.

Legislative History.—The Subcommittee conducted an oversight hearing on judicial misconduct on November 29, 2001. Testimony was received from the following witnesses: The Honorable William L. Osteen, U.S. District Judge for the Middle District of North Carolina; Professor Arthur D. Hellman, Professor of Law, Univer-

sity of Pittsburgh School of Law; Michael J. Remington, Partner, Drinker Biddle & Reath LLP; and Douglas T. Kendall, Executive Director, Community Rights Counsel. On March 20, 2002, the Subcommittee met in open session and ordered favorably reported H.R. 3892, amended, by voice vote. On April 24, 2002, the Committee met in open session and ordered favorably reported the bill H.R. 3892, as amended, by voice vote. H.R. 3892 was reported by the Committee to the House on May 14, 2002 (H. Rept. 107–459). On July 22, 2002, the House passed H.R. 3892, as amended, under suspension of the rules, by voice vote. H.R. 3892 was reported favorably to the Senate, amended, by Senator Leahy on July 31, 2002. The provisions of H.R. 3892 were later incorporated into H.R. 2215, the "21st Century Department of Justice Appropriations Authorization Act," which is Public Law 107–273.

H.R. 4125, Federal Courts Improvement Act of 2002

Summary.—Introduced by Representative Howard Coble, H.R. 4125 contains several provisions that are needed to improve the Federal Court System. The bill affects a wide range of judicial branch programs and operations. It addresses judicial financial administration, judicial process improvements, judiciary personnel administration, and benefits and protections.

Legislative History.—On May 2, 2002, the Subcommittee met in open session and ordered favorably reported H.R. 4125, amended, by voice vote. On September 10, 2002, the Committee met in open session and ordered favorably reported H.R. 4125, as amended, with additional Full Committee amendments by voice vote. H.R. 4125 was reported by the Committee to the House on September 30, 2002 (H. Rept. 107–700). On October 1, 2002, the House passed H.R. 4125, as amended, under suspension of the rules by a recorded vote of 370 yeas and 21 nays. No further action was taken on the bill.

INTELLECTUAL PROPERTY

Copyrights

H.J. Res. 116, Consumer Technology Bill of Rights

Introduced by Representative Christopher Cox, H.J. Res. 116 recognizes the rights of consumers to use copyright protected works. No action was taken on the resolution.

H.R. 614, Copyright Technical Corrections Act of 2001

Introduced by Representative Howard Coble, H.R. 614 amends title 17, United States Code, to make technical corrections. The provisions of H.R. 614 were later incorporated into S. 320.

H.R. 615, Intellectual Property Technical Amendments Act of 2001

Introduced by Representative Howard Coble, H.R. 615 makes technical corrections in the patent, copyright, and trademark laws. The provisions of H.R. 615 were later incorporated into S. 320.

H.R. 2724, Music Online Competition Act of 2001

Introduced by Representative Chris Cannon, H.R. 2724: (1) expands the current exemption from license fees for in-store sampling

of sound recordings by "brick and Mortar" music retailers to include online sampling; (2) expands the current exemption from copyright fees for broadcasters' "server" or ephemeral copies to also exempt the multiple server copies webcasters use to accommodate different bit rates, formats, and caching; (3) provides for direct payment to artists of receipts from statutory licensing of sound recordings; (4) amends the Copyright Act to address the difficulties digital media companies have experienced in attempting to use the statutory license by instructing the Copyright Office to implement an electronic filing system and collect the fees; and (5) exempts the copying of sound recordings and works included in sound recordings that is incidental to the operation of a device in the course of lawful use of the work and permits the owners of lawfully acquired digital phonorecord deliveries to make an archival copy. No action was taken on the bill.

H.R. 5057, Intellectual Property Protection Act of 2002

Introduced by Representative Lamar Smith, H.R. 5057 amends the Federal criminal code to prohibit trafficking in a physical authentication feature that: (1) is genuine but has been tampered with or altered without the authorization of the copyright owner to induce a third party to reproduce or accept distribution of a phonorecord, a copy of a computer program, a copy of a motion picture or other audiovisual work, or documentation or packaging, where such reproduction or distribution violates the rights of the copyright owner; (2) is genuine but has been or is intended to be distributed without the authorization of the copyright owner and not in connection with the lawfully made copy or phono-record to which it was intended to be affixed or embedded by the copyright owner; or (3) appears to be genuine but is not. It also authorizes an injured copyright owner to bring a civil action in an appropriate U.S. district court. No action was taken on the bill.

H.R. 5211, to amend title 17, United States Code, to limit the liability of copyright owners for protecting their works on peer-to-peer networks

Introduced by Representative Howard L. Berman, H.R. 5211 amends Federal copyright law to protect a copyright owner from liability in any criminal or civil action for impairing, with appropriate technology, the unauthorized distribution, display, performance, or reproduction of his or her copyrighted work on a publicly accessible peer-to-peer file trading network, if such impairment does not, without authorization, alter, delete, or otherwise impair the integrity of any computer file or data residing on the computer of a file trader. No action was taken on the bill.

H.R. 5285, Internet Radio Fairness Act

Introduced by Representative Jay Inslee, H.R. 5285 declares that the July 8, 2002, determination by the Librarian of Congress of rates and terms for the digital performance of sound recordings and ephemeral recordings shall not apply to transmissions and ephemeral recordings by a small business, small organization, or small governmental jurisdiction (small entities). It further declares that the first determination of terms and rates of royalty payments

made after enactment of this Act shall apply to transmissions made by small business concerns during the period between the enactment of the Digital Millennium Copyright Act and the date provided for in that determination. It also amends Federal copyright law to declare that, except in the case of a motion picture or other audiovisual work, it is not a copyright infringement for a transmitting organization entitled to transmit to the public a performance or display of a work, under a license or transfer of the copyright, or for a broadcast radio station licensed by the Federal Communications Commission that makes a broadcast transmission of a sound recording in a digital format on a nonsubscription basis, to make one or more copies or phonorecords of that work, if each copy or phonorecord is: (1) retained and used solely by the transmitting organization that made it; and (2) used solely for the purpose of making the transmitting organization's own transmissions or for purposes of archival preservation or security. No action was taken on the bill.

H.R. 5469, to suspend for a period of 6 months the determination of the librarian of Congress of July 8, 2002, relating to rates and terms for the digital performance of sound recordings and ephemeral recordings (Pub. L. No. 107–321)

Summary.—Introduced by Representative F. James Sensenbrenner, Jr., H.R. 5469 suspends royalties due from noncommercial webcasters for the digital performance of sound recordings for six months and from small commercial webcasters for 30 days. At the end of the specified periods, all royalties shall be due under the then applicable rates. The legislation also authorizes SoundExchange to negotiate a global settlement agreement with small webcasters on behalf of copyright owners and performers. It also permits nonprofit agents designated to distribute statutory royalties to artists and labels to deduct from royalties the reasonable costs of collection and distribution and the licensing or enforcing of statutory rights, including costs incurred in rate setting arbitration proceedings. Agents designated to distribute statutory royalties to featured artists are required to pay such royalties directly to those artists.

Legislative History.—On October 7, 2002, the Committee on the Judiciary was discharged from further consideration of the bill. On October 7, 2002, the House passed H.R. 5469, amended, under suspension of the rules, by voice vote. On November 14, 2002, the Senate passed H.R. 5469, amended, by unanimous consent. On November 15, 2002, the House agreed to the Senate amendment and passed H.R. 5469 by unanimous consent. The President signed H.R. 5469 on December 4, 2002, and it is Public Law 107–321.

H.R. 5522, Digital Choice and Freedom Act of 2002

Introduced by Representative Zoe Lofgren, H.R. 5522 amends title 17, United States Code, to safeguard the rights and expectations of consumers who lawfully obtain digital entertainment. No action was taken on the bill.

H.R. 5544, Digital Media Consumers' Rights Act of 2002

Introduced by Representative Rick Boucher, H.R. 5544 amends the Federal Trade Commission Act to provide that the advertising or sale of a mislabeled copy-protected music disc is an unfair method of competition and an unfair and deceptive act or practice. No action was taken on the bill.

S. 487, Technology, Education, and Copyright Harmonization Act of 2001

Summary.—Introduced by Senator Orrin G. Hatch, S. 487 revises Federal copyright law to extend the exemption from infringement liability for instructional broadcasting to digital distance learning or distance education. The Copyright Act contains provisions outlining permissible uses of copyrighted material for educational purposes, such as fair use and other educational exemptions from copyright infringement. These provisions were written more than 20 years ago, however, prior to the advent of digital technologies. Accordingly, S. 487 updates the Copyright Act by appropriately striking a balance between the rights of copyright owners and the ability of users to access copyrighted material via the Internet and other media for educational pursuits. The legislation makes three basic changes to current law: (1) it eliminates the current eligibility requirements for the distance learning exemption that the instruction occur in a physical classroom or that special circumstances prevent the attendance of students in the classroom; (2) it clarifies that the distance learning exemption covers the transient or temporary copies that may occur through the automatic technical process of transmitting material over the Internet; and (3) it amends the Copyright Act to allow educators to show reasonable and limited portions of dramatic literary and musical works, audiovisual works, and sound recordings, in addition to the complete versions of non-dramatic literary and musical works which are currently exempted.

Legislative History.—On June 5, 2001, S. 487 was reported favorably to the Senate, amended, by Senator Hatch (S. Rept. 107–31). On June 7, 2001, the Senate passed S. 487, as amended, with additional floor amendments. On June 18, 2001, S. 487 was referred to the Subcommittee. On June 27, 2001, the Subcommittee held a hearing on S. 487. Testimony was received from the following witnesses: The Honorable Marybeth Peters, Register of Copyrights, Copyright Office of the United States, The Library of Congress; Allan Robert Adler, Vice President, Legal & Government Affairs, Association of American Publishers, Inc; and John C. Vaughn, Executive Vice President, Association of American Universities. On July 11, 2001, the Subcommittee met in open session and favorably reported S. 487, without amendment, by a recorded vote of 12 yeas and 0 nays. On July 17, 2002, the Committee met in open session and favorably reported S. 487 without amendment, by voice vote. On September 25, 2002, the Committee reported S. 487 to the House (H. Rept. 107–687). The provisions of S. 487 were later incorporated into H.R. 2215, the "21st Century Department of Justice Appropriations Authorization Act," which is Public Law 107–273.

PATENTS

H.R. 740, Patent and Trademark Office Reauthorization Act

Summary.—Introduced by Representative Howard Coble, H.R. 740 amends Federal patent law to authorize fees collected for Patent and Trademark Office services or materials to be available until expended for Office activities. (Currently, such fees are available only to the extent and in the amounts provided in advance in appropriations Acts.) The provisions of H.R. 740 were later incorporated into H.R. 2047.

H.R. 1866, to amend title 35, United States Code, to clarify the basis for granting requests for reexamination of patents

Summary.—Introduced by Representative Howard Coble, H.R. 1866 clarifies the basis for the U.S. Patent and Trademark Office (PTO) to determine whether the request for the reexamination of a patent should be granted.

Legislative History.—On May 22, 2001, the Subcommittee met in open session and ordered favorably reported H.R. 1866, amended, by voice vote. On June 20, 2001, the Committee met in open session and ordered favorably reported H.R. 1866, as amended, with an additional Full Committee amendment, by voice vote. On June 28, 2001, the Committee reported H.R. 1866 to the House (H. Rept. 107–120). On September 5, 2001, the House passed H.R. 1866, as amended, under suspension of the rules, by voice vote. The provisions of H.R. 1866 were later incorporated into H.R. 2215, the "21st Century Department of Justice Appropriations Authorization Act," which is Public Law 107–273.

H.R. 1886, to amend title 35, United States Code, to provide for appeals by third parties in certain patent reexamination proceedings

Summary.—Introduced by Representative Howard Coble, H.R. 1886 repeals a prohibition which bars judicial review of certain patent inter partes reexamination decisions. The legislation permits the third-party requester in an inter partes reexamination to appeal the decision by the U.S. Patent and Trademark Office (PTO) to the U.S. Court of Appeals for the Federal Circuit.

Legislative History.—On May 22, 2001, the Subcommittee met in open session and ordered favorably reported H.R. 1886, without amendment, by voice vote. On June 20, 2001, the Committee met in open session and ordered favorably reported H.R. 1886, without amendment, by voice vote. On June 28, 2001 the Committee reported H.R. 1886 to the House (H. Rept. 107–121). On September 5, 2001, the House passed H.R. 1886 under suspension of the rules, by voice vote. The provisions of H.R. 1886 were later incorporated into H.R. 2215, the "21st Century Department of Justice Appropriations Authorization Act," which is Public Law 107–273.

H.R. 2047, Patent and Trademark Office Authorization Act of 2002

Summary.—Introduced by Representative Howard Coble, H.R. 2047 authorizes the Patent and Trademark Office (PTO) to retain all of the user fee revenue it collects in fiscal year 2002 for agency operations. In addition, PTO is to earmark a portion of this rev-

enue to address problems relating to its computer systems, and to develop a 5-year strategic plan to establish goals and methods by which the agency can enhance patent and trademark quality while reducing application pendency.

On June 7, 2001, the Subcommittee held an oversight hearing on: "The Operations of the United States Patent and Trademark Office, Including Review of Agency Funding." Testimony was received from the following witnesses: The Honorable Nicholas Godici, Acting Undersecretary of Commerce for Intellectual Property and Acting Director of the U.S. Patent and Trademark Office; Ronald E. Myrick, Chief Intellectual Property Counsel, General Electric Capital Services, on behalf of Intellectual Property Owners (IPO); Nils Victor Montan, Vice President, Senior Intellectual Property Counsel, Warner Brothers, on behalf of the International Trademark Association (INTA); and Ronald J. Stern, President, Patent Office Professional Association (POPA).

Legislative History.—On June 14, 2001, the Subcommittee met in open session and ordered favorably reported H.R. 2047, amended, by voice vote. On July 24, 2001, the Committee met in open session and ordered favorably reported H.R. 2047, as amended, with additional full Committee amendments, by voice vote. On August 2, 2001, the Committee reported H.R. 2047 to the House (H. Rept. 107–190). On November 6, 2001, the House passed H.R. 2047, as amended, under suspension of the rules, by voice vote. On June 26, 2002, H.R. 2047 passed the Senate, amended. The provisions of H.R. 2047 were later incorporated into H.R. 2215, the "21st Century Department of Justice Appropriations Authorization Act," which is Public Law 107–273.

H.R. 5119, Plant Breeders Equity Act of 2002

Summary.—Introduced by Representative Darrell E. Issa, H.R. 5119 amends Federal patent law to declare that no plant patent application shall be denied, nor shall any issued plant patent be invalidated, on the grounds that the invention was described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year before the date of the U.S. patent application, unless the invention was described in a printed publication in this or a foreign country more than ten years before the date of the U.S. patent application.

Legislative History.—On September 19, 2002, the Subcommittee held a hearing on H.R. 5119. Testimony was received from the following witnesses: The Honorable James A. Toupin, General Counsel, U.S. Patent and Trademark Office; Vincent E. Garlock, Deputy Executive Director, American Intellectual Property Law Association (AIPLA); Craig J. Regelbrugge, Senior Director, Government Relations, The American Nursery & Landscape Association; and Peter T. DiMauro, Ph.D., Director, PatentWatch Project, International Center for Technology Assessment. No further action was taken on the bill.

OVERSIGHT ACTIVITIES

List of oversight hearings

Internet Corporation for Assigned Names and Numbers (ICANN), New global Top Level Domains (gTLDs), and the Protection of Intellectual Property, March 22, 2001 (Serial No. 8)
Business Method Patents, April 4, 2001 (Serial No. 5)
United States Copyright Office, May 2, 2001 (Serial No. 6)
Patents: Improving Quality and Curing Defects, May 10, 2001 (Serial No. 9)
Music on the Internet, May 17, 2001 (Serial No. 12)
Operations of the United States Patent and Trademark Office, Including Review of Agency Funding, June 7, 2001 (Serial No. 16)
Whois Database: Privacy and Intellectual Property Issues, July 12, 2001 (Serial No. 23)
Market Power and Intellectual Property Litigation, November 8, 2001 (Serial No. 42)
Operations of Federal Judicial Misconduct and Recusal Statutes, November 29, 2001 (Serial No. 45)
Settlement Agreement by and among the United States of America, the Federal Communications Commission, NextWave Telecom, Inc., and Certain Affiliates, and Participating Auction 35 Winning Bidders (Held jointly with the Subcommittee on Commercial and Administrative Law), December 6, 2001 (Serial No. 56)
Digital Millennium Copyright Act Section 104 Report, December 12 and 13, 2001 (Serial No. 52)
Federal Trademark Dilution Act, February 14, 2002 (Serial No. 53)
Patent Law and Non-Profit Research Collaboration, March 14, 2002 (Serial No. 60)
United States Patent and Trademark Office—Operations and Fiscal Year 2003 Budget, April 11, 2002 (Serial No. 64)
Accuracy and Integrity of the Whois Database, May 22, 2002 (Serial No. 70)
Consumer Benefits of Today's Digital Rights Management (DRM) Solutions, June 5, 2002 (Serial No. 72)
Copyright Arbitration Royalty Panel (CARP) Structure and Process, June 13, 2002 (Serial No. 78)
Patent Reexamination and Small Business Innovation, June 20, 2002 (Serial No. 79)
Unpublished Judicial Opinions, June 27, 2002 (Serial No. 82)
United States Patent and Trademark Office: Fee Schedule Adjustment and Agency Reform, July 18, 2002 (Serial No. 92)
Piracy of Intellectual Property on Peer-to-Peer Networks, September 26, 2002 (Serial No. 103)

Review of operations of the United States Copyright Office

On May 2, 2001, the Subcommittee held an oversight hearing to review the administrative activities and the funding and expenditures of the Copyright Office to ensure that it is utilizing its resources effectively. Testimony was received from The Honorable Marybeth Peters, Register of Copyrights, Copyright Office of the United States, The Library of Congress.

The Copyright Office is a division in the Library of Congress. It performs several functions aside from its primary responsibility to examine and register copyright claims. These other functions include: maintaining records regarding transfers and terminations of copyright, administering the Copyright Arbitration Royalty Panel, providing information to the public about copyright law and registration procedures, providing technical assistance to the Congress, assisting the domestic and international copyright community in copyright protection and collecting works to be deposited in the Library of Congress. The Copyright Office funds roughly two-thirds of its operations through fee receipts and the balance through appropriations.

Register Peters provided the Subcommittee with an overview of two operational improvement initiatives underway at the Office—information technology planning and business process reengineering. She also provided a detailed review of FY 2000 operational activities and ongoing work; the legislative and policy assistance provided to the Legislative and Executive branches by the Office; recent and ongoing rulemakings; and litigation in which the Office is involved. Finally, she explained the FY 2002 budget request, citing several reasons for the need for an increased appropriation.

Review of the Operations of the United States Patent and Trademark Office including Review of Agency Funding

On June 7, 2001, the Subcommittee held an oversight hearing on: "The Operations of the United States Patent and Trademark Office, Including Review of Agency Funding." Testimony was received from the following witnesses: The Honorable Nicholas Godici, Acting Undersecretary of Commerce for Intellectual Property and Acting Director of the U.S. Patent and Trademark Office; Ronald E. Myrick, Chief Intellectual Property Counsel, General Electric Capital Services, on behalf of Intellectual Property Owners (IPO); Nils Victor Montan, Vice President, Senior Intellectual Property Counsel, Warner Brothers, on behalf of the International Trademark Association (INTA); and Ronald J. Stern, President, Patent Office Professional Association (POPA).

The purpose of the hearing was to review the general operations of the U.S. Patent and Trademark Office (PTO). The agency generates its funding by imposing statutory user fees on individuals and businesses which file for patent and trademark protection in the United States. Since congressional appropriators have consistently diverted a percentage of PTO revenue to other programs over the past decade, the Subcommittee explored the extent to which this budget practice has created administrative problems at the agency and for its users.

Nicholas Godici elaborated on the increased agency workload, and described various "e-government" initiatives which the USPTO is developing to enhance productivity. Ronald Myrick emphasized that implementation of electronic filing was an imperative given the rise of application pendency rates; and voiced his support for H.R. 2047, which would require the development of a detailed Strategic Business Plan by USPTO. Nils Montan concurred with Mr. Myrick's points while articulating his opposition to a recent effort

by the Department of Commerce to implement a hiring freeze at USPTO. Ronald Stern voiced his displeasure with the ongoing practice of fee diversion, and stated his belief that USPTO would benefit from additional examiner hires who should be permitted to spend more time reviewing applications.

Review of Operations of the Federal Judicial Misconduct and Recusal Statutes

The Subcommittee conducted an oversight hearing on Judicial Misconduct on November 29, 2001. Testimony was received from the following witnesses: The Honorable William L. Osteen, U.S. District Judge for the Middle District of North Carolina; Professor Arthur D. Hellman, Professor of Law, University of Pittsburgh School of Law; Michael J. Remington, Partner, Drinker Biddle & Reath LLP; and Douglas T. Kendall, Executive Director, Community Rights Counsel. The hearing reviewed the operations and effectiveness of the Code of Conduct for U.S. judges, which governs Federal judicial misconduct, including the so-called "disability and discipline" act (28 U.S.C. § 372 (c)), and two recusal measures (28 U.S.C. § 144 and § 455). Specifically, the purpose was to determine whether the affected judicial committees, judicial councils, and the Judicial Conference accord appropriate consideration to those complaints brought before them; the general willingness of judges to police their colleagues and recuse themselves from cases when necessary; whether appropriate disciplinary measures are taken when warranted; and any other possible misuse or abuse of these statutes which might compromise the integrity of and public confidence in the Federal judiciary.

Judge William L. Osteen testified that judges do not neglect their ethical obligations by attending private education seminars. He further testified that over the past few years the relative number of reported problems regarding judges recusal practices were small, and that nevertheless, the judiciary has taken numerous steps to correct those problems which were identifiable. Professor Arthur Hellman recommended that the Judicial Conduct and Disability Act of 1980 should be amended to explicitly recognize the authority of the chief judge to conduct a limited inquiry into the validity of the complaint as well as the ability to dismiss the complaint if the limited inquiry demonstrates that the allegations lack any factual foundation or are conclusively refuted by objective evidence. Section 372(c)(3)(A) should more fully specify other bases for dismissal that can be identified on the face of a complaint, and the Act should be amended to permit petitions for review to be considered by a standing or rotating panel of the judicial council, rather than by the entire council. In order to ensure that judicial conflict of interests are properly dealt with, all federal courts should post on their web sites conflict lists for all judges of that court. 28 U.S.C. § 46(c) should be amended to make clear that recused judges are not counted as part of the majority for purposes of this statute. Michael J. Remington approved the 1980 Act in its current structure but felt that the public and practicing bar were largely unaware of its existence. He stated that the Committee should examine whether any of the National Commissions' recommendations have continuing merit, necessitating statutory or administrative implemen-

tation, and that the issue must be taken in context with an understanding of the informal methods utilized in the areas of judicial misconduct and disqualification. Douglas T. Kendall stated that the Judicial Conference should enact reforms that prevent the appearance of impropriety currently stemming from private judicial seminars; that there should be more effective penalties to enforce judges' disclosure obligations and the ban on ruling in cases in which a judge owns stock; that judges should be required to maintain an up-to-date "recusal list" available to litigants (without advance notification of the judge) at the clerk's office; and unless there is a threat to a particular federal judge, that financial disclosure forms should be made immediately unavailable to those requesting review.

In response to issues brought forth in this hearing, Chairman Coble introduced H.R. 3892, the "Judicial Improvements Act of 2002." The legislation proposes to reorganize the Judicial Conduct and Disability Act of 1980 by recodifying it as a new chapter of title 28 of the U.S. Code, and clarifies the responsibilities of a circuit chief judge in making initial evaluations of a complaint. The testimony of Professor Hellman and Mr. Remington were critical in the drafting of H.R. 3892. See H.R. 3892 above for legislative history.

Review of the United States Patent and Trademark Office: Operations and Fiscal Year 2003 Budget

On April 11, 2002, the Subcommittee held an oversight hearing on: "The United States Patent and Trademark Office: Operations and Fiscal Year 2003 Budget." Testimony was received from the following witnesses: The Honorable James Rogan, Undersecretary of Commerce for Intellectual Property and Director of the U.S. Patent and Trademark Office; Michael K. Kirk, Executive Director, American Intellectual Property Law Association (AIPLA); Colleen Kelley, National President, National Treasury Employees Union (NTEU); and John K. Williamson, President, Intellectual Property Owners (IPO).

The Administration's fiscal year 2003 budget requested a 21-percent increase in the operating budget of the Patent and Trademark Office (PTO), funded primarily through a one-year 19.3-percent surcharge on patent fees and a 10.3-percent surcharge on trademark fees. This budget also signaled that the Administration plans to develop a major fee-restructuring proposal to fund future PTO operations. The primary purpose of the hearing was to encourage PTO Director Rogan to release, present, and defend his strategic plan for the agency; and to elicit comments from the user community about the relative merits of the plan. Such compliance will enable the Committee to make informed judgments as to the development of policy initiatives that will assist PTO in fulfilling its missions.

Director James E. Rogan noted a sharp increase in the volume and complexity of his agency's workload. He emphasized his intention to conduct a top-to-bottom review of the USPTO with the goal of increasing productivity and efficiency. Michael Kirk announced his continued support for H.R. 2047 and the development of a USPTO Strategic Business Plan. He further restated the general

"user group" opposition to fee diversion. Mr. Kirk's views were essentially reiterated by John Williamson. Colleen Kelley discussed the need for greater agency funding of the agency and NTEU opposition to efforts to privatize or contract-out certain USPTO functions.

Review of the Copyright Arbitration Royalty Panel (CARP) structure and process

As part of the 1976 Copyright Act Amendments, Congress acknowledged the need for the government to oversee the royalty rate-making and distribution process by creating the Copyright Royalty Tribunal (CRT). By 1993, Congress, the Copyright office, and rate-making participants believed that greater efficiencies could be realized under a different system which led to the creation of the CARP. Once more, the rate-making participants and the Copyright office lodged complaints about the CARP's overall ineffectiveness, thus prompting the Subcommittee to conduct an oversight hearing on the process and structure of the CARP (Copyright Arbitration Royalty Panel) on June 10, 2002. Testimony was received from the following witnesses: Michael J. Remington, Attorney-at-Law and Partner, Drinker Biddle & Reath, LLP; Robert A. Garrett, Attorney-at-Law and Partner, Arnold & Porter; R. Bruce Rich, Attorney-at-Law, Weil, Gotschal & Manges, LLP; and The Honorable Marybeth Peters, Register of Copyrights and Associate Librarian for Copyright Services, Copyright Office of the United States, The Library of Congress.

Michael J. Remington made the following recommendations: the current CARP system should be reformed to include a permanent panel of salaried administrative law judges supported by a professional staff; a small claims process should be created; costs should be further reduced and fiscal accountability should be added to the process; various administrative improvements should be promoted; and there should be a continuance of vigorous oversight by the legislature. Robert Alan Barrett advocated maintaining the current structure of the CARP while focusing on "revising" the process. Among the various alternative measures that he championed were, achieving cost savings without eliminating evidentiary hearings, and allowing the parties to choose how much underlying documentation should accompany their written testimony. R. Bruce Rich stated that regardless of what construct was chosen, reform of the CARP should be focused upon hiring panelists who possess an understanding of macroeconomics and basic principles of antitrust law; the ability to assimilate facts concerning multiple media marketplaces; the ability evaluate complex statistical and economic data put forth by the parties' experts; and, the ability to sift through and properly evaluate record evidence, including making judgements on issues such as witness credibility. Marybeth Peters testified that the CARP system should be revised so as to allow the Copyright Office and the Library to hire full-time employees; and that consideration should be given to whether the Register should have discretion to assign additional copyright work to the Copyright office-based decision makers during these periods of inactivity.

Review of unpublished judicial opinions

On June 27, 2002, the subcommittee conducted an oversight hearing on unpublished judicial opinions in an attempt to ascertain whether the use of limited publication/non-citation rules is constitutional; whether the varying rules within the circuits as to limited publication/non-citation rules should be uniform; what precedential effect non-published opinions should be given; and what level of access the public is entitled to with regard to non-published opinions. Testimony was received from the following witnesses: Professor Arthur Hellman, Professor of Law, University of Pittsburgh School of Law; Kenneth Schmier, Chairman, Committee for the Rule of Law; the Honorable Alex Kozinski, Judge, United States Court of Appeals for the Ninth Circuit; and the Honorable Samuel A. Alito, Jr., Judge, United States Court of Appeals for the Third Circuit; and Chair, Advisory Committee on the Federal Rules of Appellate Procedure.

Professor Arthur Hellman testified that, at minimum, courts should allow attorneys to cite unpublished dispositions; and that, when an unpublished disposition is closely on point, an opinion clarifying the law on that issue should be published. In addition, Professor Hellman stated that he would not favor a national rule on the precedential status of unpublished opinions and that he considered the rule under advisement by the Advisory Committee at the time of the hearing to be favorable. Kenneth J. Schmier testified that all cases should be decided by written decisions which set forth the prevailing party and why that party prevailed so as to ensure adherence to the doctrine of stare decisis. Judge Alex Kozinski took the position that each court should be entitled to independently address the issues of non-citation/non-publication according to its own customs and needs. Judge Samuel Alito, Jr. stated that while the justification for the creation of the concept of unpublished opinions was originally grounded in equity, the concept might no longer be viable. For example, technological advances (the Internet) provide greater access to opinions.

Review of the United States Patent and Trademark Office: Fee Schedule Adjustment and Agency Reform

On Thursday, July 18, 2002, the Subcommittee held an oversight hearing on: "The U.S. Patent and Trademark Office: Fee Schedule Adjustment and Agency Reform." Testimony was received from the following witnesses: The Honorable James Rogan, Undersecretary of Commerce for Intellectual Property and Director of the U.S. Patent and Trademark Office; Kathryn Barrett Park, Executive Vice President, International Trademark Association (INTA); Michael K. Kirk, Executive Director, American Intellectual Property Law Association (AIPLA); and Charles P. Baker, Chair, Intellectual Property Law Section, American Bar Association. The purpose of the hearing was to provide James E. Rogan, Director of the U.S. Patent and Trademark Office (PTO), with the opportunity to present and defend his "21st Century Strategic Plan" for the agency. The testimony and questioning focused on Director Rogan's request that Congress enact a new fee schedule to subsidize PTO operations beginning in fiscal year 2003. Given that PTO is completely funded through the imposition of user fees, the hearing also gave organiza-

tions representing the interests of inventors and trademark owners an opportunity to critique the plan, especially the proposed fee schedule.

Director James E. Rogan described and defended the general contents of the June 3, 2001, USPTO Strategic Business Plan, developed in response to Subcommittee requests and the text of H.R. 2047. The other witnesses—Michael Kirk, Charles Baker, and Kathryn Barrett Park—praised portions of the Plan, including certain work-sharing and employee-evaluation procedures. However, they also criticized other provisions, most especially the proffered fee schedule, which included some increases described as "punitive."

SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY, AND CLAIMS [1,2]

GEORGE W. GEKAS, Pennsylvania, *Chairman*

DARRELL E. ISSA, California
MELISSA A. HART, Pennsylvania
LAMAR S. SMITH, Texas
ELTON GALLEGLY, California
CHRIS CANNON, Utah, *Vice Chair*
JEFF FLAKE, Arizona

SHEILA JACKSON LEE, Texas
BARNEY FLAKE, Massachusetts
HOWARD L. BERMAN, California
ZOE LOFGREN, California
MARTIN T. MEEHAN, Massachusetts
J. RANDY FORBES, Virginia [3]

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[1] Subcommittee chairmanship and assignments approved January 31, 2001.

[2] Subcommittee name change from "Immigration and Claims" to "Immigration, Border Security, and Claims" approved June 13, 2002.

[3] J. Randy Forbes, Virginia, assignment to the subcommittee approved June 13, 2002.

Tabulation of subcommittee legislation and activity

Public:	
Legislation referred to the Subcommittee	201
Legislation on which hearings were held	3
Legislation reported favorably to the full Committee	15
Legislation reported adversely to the full Committee	0
Legislation reported without recommendation to the full Committee	0
Legislation reported as original measure to the full Committee	0
Legislation discharged from the Subcommittee	3
Legislation pending before the full Committee	4
Legislation reported to the House	10
Legislation discharged from the Committee	3
Legislation pending in the House	2
Legislation passed by the House	11
Legislation pending in the Senate	1
Legislation vetoed by the President (not overridden)	0
Legislation enacted into Public Law	13
Days of legislative hearings	3
Days of oversight hearings	17
Private:	
Claims:	
Legislation referred to the Subcommittee	25
Legislation on which hearings were held	0
Legislation reported favorably to the full Committee	6
Legislation pending before the full Committee	0
Legislation reported to the House	6
Legislation discharged from the Committee	0
Legislation pending in the House	1
Legislation passed by the House	5
Legislation pending in the Senate	1
Legislation enacted into Private Law	3
Immigration:	
Legislation referred to the Subcommittee	56
Legislation on which hearings were held	0
Legislation reported favorably to the full Committee	3
Legislation pending before the full Committee	0
Legislation reported to the House	3
Legislation discharged from the Committee	0
Legislation pending in the House	0
Legislation passed by the House	3
Legislation pending in the Senate	0
Legislation enacted into Private Law	3

JURISDICTION OF THE SUBCOMMITTEE

The Subcommittee on Immigration, Border Security and Claims has legislative and oversight jurisdiction over matters involving: immigration and naturalization, admission of refugees, border security, treaties, conventions and international agreements, claims against the United States, federal charters of incorporation, private immigration and claims bills, and other appropriate matters as referred by the Chairman of the Judiciary Committee.

PUBLIC LEGISLATION ENACTED INTO LAW

IMMIGRATION

H.R. 1452, the Family Reunification Act of 2002

Summary.—Prior to enactment of the Antiterrorism and Effective Death Penalty Act of 1996 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, permanent resident aliens who were domiciled in the United States for seven continuous years and were subject to deportation could seek discretionary "212(c)" relief from deportation, unless they had been convicted of one or more aggravated felonies and had served for such felonies terms of imprisonment of at least five years. AEDPA rescinded judicial review of final orders of deportation based on the commission of certain crimes (including aggravated felonies), requiring the detention of any alien convicted of an aggravated felony upon release from incarceration, making aliens who have been convicted of certain crimes (including any aggravated felonies) ineligible for 212(c) relief, and expanding the number of crimes considered aggravated felonies under the Immigration and Nationality Act. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 refined these reforms. "212(c)" relief was repealed. In its place, deportable permanent residents could seek "cancellation of removal"—discretionary relief from removal by an immigration judge—if the alien: (1) has been an alien lawfully admitted for permanent residence for not less than 5 years; (2) has resided in the United States continuously for 7 years after having been admitted in any status; and (3) has not been convicted of any aggravated felony. IIRIRA defined "term of imprisonment" as including a period of incarceration or confinement, regardless of any suspension of the imposition or execution of the imprisonment. IIRIRA also defined continuous residence to end when the alien was served a notice to appear at a removal proceeding or when the alien has committed certain crimes making him inadmissible or removable (including aggravated felonies).

A number of cases have arisen in which the deportation of legal permanent resident aliens under the 1996 laws seemed harsh. The first category of such hardship cases involves permanent residents who were brought legally to the U.S., when still young children and now face deportation to countries that they no longer even remember, let alone to which they have any ties or speak the language. The second category involves permanent residents who committed crimes well before 1996 that were reclassified as aggravated felonies in that year. Some of these aliens have fully reformed, raised families and become productive members of their communities in

the ensuing years. The third category involves aliens who have committed relatively minor crimes. Since an aggravated felony is now defined to include any crime of theft or violence for which an alien is sentenced to one year or more of prison, or any drug trafficking offense (regardless of whether any jail sentence is imposed), crimes such as shoplifting, drunk driving, and very low- level drug trafficking can carry with them mandatory deportation for permanent residents.

H.R. 1452 was designed to strike an appropriate and fair balance on the issue of relief from deportation for legal permanent resident aliens. It would have retained the beneficial reforms from 1996 while letting a select group of legal permanent residents request discretionary relief from deportation. Because of concerns about the willingness of some immigration judges to grant relief from deportation profligately if given the ability, the bill would have provided that only the Attorney General or Deputy Attorney General could grant the relief provided.

The bill would have set forth four avenues of relief from removal for permanent residents who have been convicted of a crime. None of those four forms of relief would have been available to aliens who had engaged in, or are likely to engage in, terrorist activity or have been convicted of murder, rape, or sexual abuse of a minor:

• First, a non-violent aggravated felon would have been able to seek relief if he: (1) had been a permanent resident for at least 5 years; (2) had resided in the U.S. continuously for at least seven to 10 years; (3) was convicted in connection with a single scheme of misconduct for which the alien received a sentence of four years or less, or two schemes of misconduct for which the alien received a sentence of four years or less, but was never actually imprisoned; and (4) was not an organizer or leader of the aggravated felony or felonies. If the alien has served jail time in connection with any other offense, he would not have been eligible for this relief. In addition, the criminal prosecutor would have been able to block such relief if the alien failed to provide the prosecutor with all information he possesses about the offense.

• Second, an alien convicted of a violent aggravated felony would have been able to seek relief under the same standards, except that the requirement of not having been sentenced to more than four years would have been reduced to more than two years, and the crime could not have resulted in serious bodily injury or death.

• The third form of relief in H.R. 1452 provided that an alien who legally arrived in the U.S. before age 10 would have been able to seek relief if the alien had: (1) been a permanent resident for at least five years; (2) has resided in the U.S. continuously for at least seven years after having arrived in the U.S.; and (3) had not been imprisoned for aggravated felonies arising out of more than two patterns of criminal misconduct.

• Fourth, an alien who legally entered the U.S. before age 16 would have been able to apply for relief in the same manner as those aliens who arrived before the age of 10, except that such aliens were barred from relief if they committed any aggravated felony within their first seven years in the U.S.

The bill would have provided that an alien who was made ineligible for relief by the 1996 immigration legislation, but who would

be eligible for one of these four forms of relief, could move to reopen his case within one year of the Attorney General's issuance of regulations. While aliens who have already been deported could move to reopen to apply for relief, those aliens would have had to apply from abroad and could only reenter the United States if they were actually granted relief.

The bill also would have provided that an immigration judge could release a permanent resident from detention if the alien could demonstrate that he or she was prima facie eligible for one of the four forms of relief, would not pose a danger to persons, property, or national security, and would likely appear at all future proceedings.

Finally, the bill would have ceased to have effect as of the later of three years after the date on which a final rule implementing the bill was promulgated, or December 31, 2005.

Legislative History.—On April 4, 2001, Representative Barney Frank introduced H.R. 1452. On July 23, 2002, the Judiciary Committee ordered H.R. 1452 reported, as amended, by a vote of 18–15. On November 14, 2002, the Judiciary Committee reported H.R. 1452 (H. Rept. 107–785). No further action was taken on H.R. 1452 in the 107th Congress.

H.R. 1885, the Section 245(i) Extension Act of 2001

Summary.—Section 245(i) of the Immigration and Nationality Act allows aliens who are eligible for immigrant visas, but who are illegally in the U.S., to adjust their status with the INS in the U.S. upon payment of a $1,000 penalty. In the absence of section 245(i), illegal aliens must pursue their visa applications abroad. Those who have been illegally present in the U.S., for a year would be barred from reentry for 10 years, pursuant to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. The Legal Immigration Family Equity Act of 2000 allowed illegal aliens who were in the U.S. as of December 21, 2000, and who had immigrant visa petitions filed on their behalf by April 30, 2001, to utilize section 245(i). However, aliens eligible to utilize this provision may not have had the four month window to apply that the Act contemplated. The INS did not issue implementing regulations until March 2001 and many aliens claimed to have difficulty procuring the services of immigration lawyers in time to apply.

H.R. 1885, as it passed the House, would have allowed illegal aliens to utilize section 245(i) as long as they had immigrant visa petitions filed on their behalf within 120 days of its enactment. The bill retained the LIFE Act's requirement that aliens must have been in the U.S. as of December 21, 2000, so as not to encourage further illegal immigration into the U.S. It also would have required that eligible aliens must have entered into the family or business relationships qualifying them for green cards by April 30, 2001, the original filing deadline. This requirement was designed to ensure that there would not be a wave of sham marriages designed purely to procure immigrant visas. Numerous news articles had reported that many thousands of illegal aliens rushed to get married to U.S. citizens to beat the April 30 deadline.

Legislative History.—On May 17, 2001, Subcommittee on Immigration and Claims Chairman George Gekas introduced H.R. 1885.

On May 21, 2001, the House passed H.R. 1885 under suspension of the rules by a vote of 336–43. On September 6, 2001, the Senate passed H.R. 1885 as amended by unanimous consent. No further action was taken on H.R. 1885 in the 107th Congress. See H. Res. 365.

H.R. 2277, to provide for work authorization for nonimmigrant spouses of treaty traders and treaty investors (Public Law 107–124)

Summary.—E visas are available for treaty traders and investors. An E visa is available to an alien who: is entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national, and the spouse and children of any such alien if accompanying or following to join him: (1) solely to carry on substantial trade, including trade in services or trade in technology, principally between the United States and the foreign state of which he is a national; or (2) solely to develop and direct the operations of an enterprise in which he has invested * * * a substantial amount of capital.

Alien employees of a treaty trader or treaty investor may receive E visas if they are coming to the U.S. to engage in duties of an executive or supervisory character, or, if employed in a lesser capacity, if they have special qualifications that make the services to be rendered essential to the efficient operation of the enterprise. The alien employee would need to be of the same nationality as the treaty trader or investor. E visas are issued directly by the State Department (requiring no preliminary petition to the INS). Visa recipients can stay in the U.S. for as long as they maintain their status.

While prior law allowed spouses (and minor children) to come to the U.S. with the E visa recipients, spouses were not allowed to work in the U.S. H.R. 2277 allows the spouses of E visa recipients to work in the United States while accompanying the primary visa recipients.

Legislative History.— On June 21, 2001, Subcommittee on Immigration and Claims Chairman George Gekas introduced H.R. 2277. On June 27, 2001, the Subcommittee on Immigration and Claims reported H.R. 2277 to the Judiciary Committee by a voice vote. On July 24, 2001, the Judiciary Committee ordered H.R. 2277 reported by a voice vote. On August 2, 2001, the Judiciary Committee reported H.R. 2277 (H. Rept. 107–187). On September 5, 2001, the House passed H.R. 2277 under suspension of the rules by a voice vote. December 13, 2001, the Senate Judiciary Committee ordered H.R. 2277 reported and reported H.R. 2277 without a written report. On December 20, 2001, the Senate passed H.R. 2277 by unanimous consent. On January 16, 2002, the President signed H.R. 2277 into law (Public Law 107–124).

H.R. 2278, to provide for work authorization for nonimmigrant spouses of intracompany transferees (Public Law 107–125)

Summary.—L visas are available for intracompany transferees. A visa is available to an alien who: Within 3 years preceding the time of his application for admission into the United States, has been

employed continuously for 1 year by a firm * * * or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse and minor children of any such alien if accompanying him.* * *

The visas are good for up to 5 years for aliens admitted to render services in a capacity that involves specialized knowledge and for up to 7 years for aliens admitted to render services in a managerial or executive capacity.

To make the L visa program more convenient for established and frequent users of the program, "blanket" L visas are available. If an employer meets certain qualifications—it (1) is engaged in commercial trade or services; (2) has an office in the U.S. that has been doing business for at least 1 year; (3) has three or more domestic and foreign branches, subsidiaries, or affiliates; and (4) has received approval for at least 10 L visa professionals during the past year or has U.S. subsidiaries or affiliates with annual combined sales of at least $25 million or has a U.S. workforce of at least 1,000 employees—it can receive pre-approval for an unlimited number of L visas from the INS. While prior law allowed spouses (and minor children) to come to the U.S. with the L visa recipients, spouses were not allowed to work in the U.S. H.R. 2278 would allow the spouses of L visa recipients to work in the United States while accompanying the primary visa recipients.

Additionally, prior law required that a beneficiary of a L visa have been employed for at least 1 year overseas by the petitioning employer. H.R. 2278 allows aliens to qualify for L visas after having worked for 6 months overseas for employers if the employers have filed blanket L petitions and have met the blanket petitions' requirements.

Legislative History.—On June 21, 2001, Subcommittee on Immigration and Claims Chairman George Gekas introduced H.R. 2278. On June 27, 2001, the Subcommittee on Immigration and Claims reported H.R. 2278 to the Judiciary Committee by a voice vote. On July 24, 2001, the Judiciary Committee ordered H.R. 2278 reported by a voice vote. On August 2, 2001, the Judiciary Committee reported H.R. 2278 (H. Rept. 107–188). On September 5, 2001, the House passed H.R. 2278 under suspension of the rules by a voice vote. On December 13, 2001, the Senate Judiciary Committee ordered H.R. 2278 reported and reported H.R. 2278 without a written report. On December 20, 2001, the Senate passed H.R. 2278 by unanimous consent. On January 16, 2002, the President signed H.R. 2278 into law (Public Law 107–125).

H.R. 3030, the Basic Pilot Extension of 2001 (Public Law 107–128)

Summary.—The Immigration Reform and Control Act of 1986 made it unlawful for employers to knowingly hire or employ aliens not eligible to work and required employers to check the identity and work eligibility documents of all new employees. If the documents provided by an employee reasonably appear on their face to be genuine, the employer has met its document review obligation. If a new hire produces the required documents, the employer is not

required to solicit the production of additional documents and the employee is not required to produce additional documents. In fact, an employer's request for more or different documents than are required, or refusal to honor documents that reasonably appear to be genuine, shall be treated as an unfair immigration-related employment practice if made for the purpose or with the intent of discriminating against an individual because of such individual's national origin or citizenship status.

The easy availability of counterfeit documents has made a mockery of IRCA. Fake documents are produced by the millions and can be obtained cheaply. In response to the deficiencies of IRCA, title IV of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 instituted three employment eligibility confirmation pilot programs for volunteer employers that were to last for 4 years. Under the basic pilot, the proffered Social Security numbers and alien identification numbers of new hires are checked against Social Security Administration and INS records in order to weed out documents containing counterfeit numbers and real numbers used by multiple individuals and thus to ensure that new hires are genuinely eligible to work. Operation of the basic pilot program commenced in November 1997 and was set to expire in November 2001.

Businesses and trade associations participating in the basic pilot program reported to the Judiciary Committee that the program has been a great success and that they favored a 2–year extension. They wrote that the pilot program "enhance[s] the current * * * employment verification process by providing employers with greater assurances that they are not hiring unauthorized aliens and by establishing larger obstacles to aliens seeking to work illegally." H.R. 3030 extends the operation of the basic pilot program for an additional two years.

Legislative History.—On October 4, 2001, Representative Tom Latham introduced H.R. 3030. On November 1, 2001, the Subcommittee on Immigration and Claims reported H.R. 3030 to the Judiciary Committee by a voice vote. On November 15, 2001, the Judiciary Committee ordered H.R. 3030 reported by a voice vote. On November 30, 2001, the Judiciary Committee reported H.R. 3030 (H. Rept. 107–310, Part I), and the Committee on Education and the Workforce was discharged from consideration of H.R. 3030. On December 11, 2001, the House passed H.R. 3030, as amended, under suspension of the rules by a voice vote. On December 20, 2001, the Senate passed H.R. 3030 by unanimous consent. On January 16, 2002, the President signed H.R. 3030 into law (Public Law 107–128).

H.R. 1892, the Family Sponsor Immigration Act of 2002 (Public Law 107–150)

Summary.—INS regulations provide for automatic revocation of an immigrant visa petition when the petitioner dies, "unless the Attorney General in his or her discretion determines that for humanitarian reasons revocation would be inappropriate." However, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 requires that when a family member petitions for a relative to receive an immigrant visa, the visa can only be granted if the

petitioner signs a legally binding affidavit of support promising to provide for the support of the immigrant. Obviously, if the petitioner has died, he or she can obviously not sign an affidavit. Thus, even in cases where the Attorney General feels a humanitarian waiver of the revocation of the visa petition is warranted, under prior law, a permanent resident visa could not be granted because the affidavit requirement was unfulfilled.

The consequences are severe for a beneficiary when his or her petitioner dies before the beneficiary has adjusted status or received an immigrant visa. If no other relative can qualify as a petitioner, then the beneficiary would lose the opportunity to become a permanent resident. If another relative can file an immigrant visa petition for the beneficiary, the beneficiary would still go to the end of the line if the visa category was numerically limited.

H.R. 1892 provides that in cases where the petitioner has died and the Attorney General determines for humanitarian reasons that revocation of the petition would be inappropriate, a close family member other than the petitioner would be allowed to sign the necessary affidavit of support. Eligible family members of beneficiaries would include spouses, parents, grandparents, mother and fathers-in-law, siblings, adult sons and daughters, adult son and daughters-in-law and grandchildren. In order to sign an affidavit of support, the family member would need to meet the general eligibility requirements needed to be an immigrant's sponsor. He or she would need to be a citizen or national of the United States or an alien who is lawfully admitted to the United States for permanent residence, be at least 18 years of age, be domiciled in a State, the District of Columbia, or any territory or possession of the United States, and demonstrate the means to maintain an annual income equal to at least 125% of the Federal poverty line.

Legislative History.—On May 17, 2001, Representative Ken Calvert introduced H.R. 1892. On June 6, 2001, the Subcommittee on Immigration and Claims reported H.R. 1892 to the Judiciary Committee, as amended, by a voice vote. On June 26, 2001, the Judiciary Committee ordered H.R. 1892 reported, as amended, by a voice vote. On July 10, 2001, the Judiciary Committee reported H.R. 1892 (H. Rept. 107–127). On July 23, 2001, the House passed H.R. 1892 under suspension of the rules by a vote of 379–0. On December 13, 2001, the Senate Judiciary Committee ordered H.R. 1892 reported, as amended, and reported H.R. 1892 without a written report. On December 20, 2001, the Senate passed H.R. 1892, as amended, by unanimous consent. On February 26, 2002, the House passed H.R. 1892, as amended, by the Senate by a vote of 404–3. On March 13, 2002, the President signed H.R. 1892 into law (Public Law 107–150).

H.R. 1840, eligibility for in-country refugee processing in Vietnam (Public Law 107–185)

Summary.—H.R. 1840 amends section 255 of Title II, the Department of State Authorities and Activities, of the "Admiral James W. Nance and Meg Donovan Foreign Relations Authorization Act, Fiscal Years 2000 and 2001," contained in H.R. 3194, the "Consolidated Appropriations Act for FY2000" (Public Law 106–113), to extend eligibility for refugee status of unmarried sons and daughters

of certain Vietnamese refugees. H.R. 1840 extends the time period that the State Department and the INS have to process eligible adult, unmarried sons and daughters through fiscal year 2003. It also removes the date of April 1, 1995, imposed by the McCain Amendment (Section 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997, Division A of H.R. 3610, Public Law 104–208), so that the cases of sons and daughters processed after April 1, 1995, are adjudicated in the same manner as those cases processed prior to that date. The Act permits the INS to reconsider cases that were previously denied for failure of proof of family relationship, rather than just those cases that were denied based on the issue of co-habitation with the principal alien. Finally, the Act expands eligibility to adult, unmarried sons and daughters whose principal parent has died, but whose surviving parent is maintaining a residence in the United States or is awaiting departure formalities from Vietnam.

Legislative History.—On May 15, 2001, Representative Tom Davis introduced H.R. 1840. On June 27, 2001, the Subcommittee on Immigration and Claims reported H.R. 1840 to the Judiciary Committee, as amended, by a vote of 6–3. On October 10, 2001, the Judiciary Committee ordered H.R. 1840 reported, as amended, by a voice vote. On October 29, 2001, the Judiciary Committee reported H.R. 1840 (H. Rept. 107–254). On October 30, 2001, the House passed H.R. 1840 under suspension of the rules by a voice vote. On May 10, 2002, the Senate passed H.R. 1840 by unanimous consent. On May 30, 2002, the President signed H.R. 1840 into law (Public Law 107–185).

H.R. 3231, The Barbara Jordan Immigration Reform and Accountability Act

Summary.—The INS has been a beleaguered bureaucracy for decades. Congress has increased the INS's budget, hoping that additional resources were what was needed to solve the agency's shortcomings. The INS's budget increased from $1.4 billion in fiscal year 1992 to $5.5 billion in fiscal year 2002. Notwithstanding this budgetary expansion, the INS's performance has not improved. Most Members of Congress have grown increasingly frustrated with the agency's poor performance in both immigration services and enforcement.

The magnitude of the INS's problems is extraordinary—it had a backlog of 4.9 million applications and petitions at the end of fiscal year 2001, forcing aliens trying to play by the rules to wait in limbo for years. The Census Bureau estimates that at least eight million undocumented aliens reside in the U.S. Over 300,000 criminal and deportable aliens ordered removed by immigration judges have absconded. Much of the INS's failure stems from the conflict between its enforcement and service missions. The INS is unable to adequately perform either of its missions. Rather, the agency appears to move from one crisis to the next, with no coherent strategy of how to accomplish both missions successfully.

The Immigration Act of 1990 established the U.S. Commission on Immigration Reform (CIR) to review and evaluate our immigration system. The CIR, chaired by the late Barbara Jordan, concluded that the INS suffered from mission overload. The Commission ex-

plained that the INS must give equal weight to more priorities than any one agency can handle. The Commission stated that "[i]mmigration law enforcement requires staffing, training, resources, and a work culture that differs from what is required for effective adjudication of benefits or labor standards regulation of U.S. businesses."[1] Such a system is set up for failure and, with such failure, further loss of public confidence in the immigration system.

On the issue of structural and management reform, the CIR found that the current structure for the administration of the immigration law was problematic. In fact, the CIR found that "no one agency is likely to have the capacity to accomplish all of the goals of immigration policy equally well."[2] Also, the CIR stated that the system compounded the problems of fragmentation, redundancy and delay. To resolve these problems, the CIR recommended the dismantling of the INS.

The INS has reorganized itself numerous times in just the last two decades. However, if one glances at the current organizational chart of the INS, it is clear how dysfunctional the agency's structure is, even after these numerous internal reorganizations over the years. In response to the CIR's recommendations, several INS restructuring proposals were offered by Members of Congress, think tanks, and policy experts. The Fiscal Year 1998 Commerce, Justice, State Appropriations Conference Report required the Clinton Administration to review the recommendations of the CIR on restructuring, reorganizing and managing the immigration responsibilities of the INS. The INS rejected the CIR's recommendations and presented its own restructuring plan in April 1998. The proposal called for splitting INS's enforcement components from its service components, but leaving both within the INS. The proposal would have eliminated the current INS structure of over 30 district and 3 regional offices and created new Service and Enforcement areas. The plan was to have approximately 6 to 12 Immigrant Service Areas and 6 to 12 Enforcement Areas nation-wide, each with a separate chain of command reporting to an Executive Associate Commissioner at INS Headquarters. The Commissioner would maintain control over both branches. However, the INS under Commissioner Meissner never strongly pursued its own restructuring plan.

A handful of INS restructuring bills were introduced and considered during the 105th and 106th Congresses. The plans ranged from duplicating the CIR's recommendation to legislating the Meissner restructuring plan, from creating totally separate enforcement and service agencies, to putting both agencies under the control of an Associate Attorney General. However, no bill moved beyond the Subcommittee level.

H.R. 3231 would have dismantled the INS and restructured the agency into a better, more manageable structure (for a discussion of the enacted version of INS restructuring legislation, see the discussion of H.R. 5710). H.R. 3231 was intended to break the INS into smaller, more manageable pieces that concentrated on very

[1] U.S. Commission on Immigration Reform, Becoming an American: Immigration and Immigrant Policy, 1997 Report to Congress 148.
[2] Id.

different missions—administering immigration benefits and enforcing immigration laws. By separating immigration services from enforcement, managers would no longer have been pulled in two directions and both bureaus would have made significant improvements in fulfilling their respective statutory missions. The Bureau of Citizenship and Immigration Services (BCIS), led by an expert in government benefits, could have concentrated on improving immigration services and reducing adjudication backlogs for legal immigrants. Likewise, the Bureau of Immigration Enforcement (BIE), led by a law enforcement professional, would have been an agency with a true enforcement mission: denying admission to aliens who should be kept out of the U.S., and apprehending and removing aliens along the border and in the interior who were deportable. Each bureau would have had a distinct mission, would have been able to craft its own policies, and would have had its own budget and its own dedicated employees who could not have been shifted to the other agency. No longer would service have been sacrificed for the sake of enforcement, or enforcement for the sake of service, as has happened so often in the past. Both functions are equally important and were treated as such in this legislation.

H.R. 3231's creation of an Associate Attorney General in the Department of Justice who would have handled only immigration affairs would have raised these issues to the level and attention that they deserve in the Department of Justice. This would also have created more accountability for the actions taken by the bureaus than currently exists in the INS. The Associate Attorney General would have been responsible for overseeing the work of, and supervising, the directors of the BCIS and the BIE, coordinating the administration of national immigration policy and the operations of the two bureaus and reconciling conflicting policies of the bureaus, and allocating and coordinating resources in the shared support functions for the two bureaus through the Office of Shared Services. The day-to-day immigration operations would have been run and managed independently within each immigration bureau.

The following narrative will more fully describe the provisions of H.R. 3231—

The Associate Attorney General would have had to have had at least five years of experience in managing a large and complex organization. There would have been established a position of Policy Advisor for the Associate Attorney General for Immigration Affairs to advise the Associate Attorney General on all immigration and naturalization policy matters. While policies specific to immigration services and enforcement would have generally been made in each respective bureau by the bureau's Chief of Policy and Strategy, the Policy Advisor in the Associate Attorney General's office would have coordinated and reconciled any inconsistent policies that arose between the two bureaus.

The bill would have established a position of General Counsel for the Associate Attorney General for Immigration Affairs to act as the principal legal advisor to the Associate Attorney General. While the directors of the bureaus may have had legal advisors, such legal advisors would have remained accountable for implementing and complying with the specialized legal advice, opinions, determinations, and regulations given by the General Counsel regarding

legal matters that affected the Office of the Associate Attorney General or the bureaus.

H.R. 3231 would have established the position of Chief Financial Officer for the Associate Attorney General for Immigration Affairs, who would have been responsible for managing the finances of the Office of Associate Attorney General for Immigration Affairs and the two bureaus, collecting payments, fines, and debts for the two bureaus, and coordinating budget and financial management issues with the bureaus. While the budgets for immigration services and enforcement would have been formulated and executed in each respective bureau by the bureau's chief budget officer, the CFO in the Associate Attorney General's office would have coordinated budget and financial issues that affected both bureaus.

The bill would have established a position of Director of the Office of Shared Services for the Associate Attorney General for Immigration Affairs to be responsible for the allocation and coordination of resources involved in shared support functions for the two bureaus, including facilities management, information resources management, such as computer databases and information technology, records and file management and forms management.

The bill would have established an Office of the Ombudsman in the Office of the Associate Attorney General for Immigration Affairs who would have reported directly to the Associate Attorney General and must have had a background in customer service and immigration law. The functions of the Ombudsman would have been: (1) assisting individuals and employers in resolving problems with the BCIS; (2) identifying areas in which individuals and employers have problems in dealing with the BCIS; (3) proposing changes in the administrative practices of the BCIS to mitigate identified problems; and (4) identifying potential legislative changes appropriate to mitigate such problems.

H.R. 3231 would have established the Office of Professional Responsibility and Quality Review in the Office of Associate Attorney General for Immigration Affairs. The Director of the Office of Professional Responsibility and Quality Review would have conducted investigations of non-criminal allegations of misconduct, corruption, and fraud involving any employee of the Office of the Associate Attorney General for Immigration Affairs or the two bureaus that were not subject to investigation by the Justice Department's Office of the Inspector General; inspected the operations of the Associate Attorney General's office and the two bureaus; provided assessments of the quality of the operations of the office and bureaus as a whole and each of their components; and provided an analysis of the management of the Associate Attorney General's office and the two bureaus.

The bill would have established an Office of Children's Affairs within the Office of the Associate Attorney General for Immigration Affairs. The Office of Children's Affairs would have been headed by a Director, who would have reported to the Associate Attorney General for Immigration Affairs. The bill would have transferred the functions with respect to the care and placement of unaccompanied alien children that had been exercised by the INS Commissioner, to the Director of the new Office of Children's Affairs. The new Office would have been responsible for coordinating and imple-

menting the law and policy for unaccompanied alien children who came into the custody of the Department of Justice; making placement determinations for all unaccompanied alien children apprehended by the Attorney General or who otherwise came into the custody of the Department of Justice; identifying and overseeing the infrastructure and personnel of facilities that housed unaccompanied alien children; annually publishing a state-by-state list of professionals or other entities qualified to provide guardian and attorney services; maintaining statistics on unaccompanied alien children; and reuniting unaccompanied alien children with a parent abroad, where appropriate. H.R. 3231 would not have altered or affected substantive immigration law with regard to unaccompanied alien children in the United States.

H.R. 3231 would have transferred all functions, personnel, infrastructure, and funding of the Office of Immigration Litigation from the Assistant Attorney General, Civil Division, to the Associate Attorney General for Immigration Affairs. The Associate Attorney General could have, in his discretion, charged his General Counsel with such functions, or transferred the functions elsewhere within the Office of the Associate Attorney General for Immigration Affairs.

Regardless of any other provision of law, H.R. 3231 would have permitted the Associate Attorney General for Immigration Affairs to impose disciplinary action, including termination of employment, under the same policies and procedures applicable to FBI employees, upon any employee of the Office of the Associate Attorney General for Immigration Affairs or the bureaus who willfully deceived the Congress or agency leadership on any matter.

H.R. 3231 would have established the Bureau of Citizenship and Immigration Service in the Justice Department. The bureau would have been headed by a Director, who would report directly to the Associate Attorney General for Immigration Affairs and must have had at least 10 years professional experience in adjudicating government benefits or services, at least five of which must have been years of service in a managerial capacity or in a position affording comparable management experience. The bureau director would have established citizenship and immigration services policies for the bureau, overseen the administration of such policies and advised the Associate Attorney General on any policy or operation of the BCIS that might have affected the BIE, including potentially conflicting policies or operations, met regularly with the Ombudsman to correct serious service problems identified by the Ombudsman, and established procedures for a formal response to any recommendations submitted in the Ombudsman's annual report to Congress. The bureau director would also have designated an official to administer student visa programs and the foreign student tracking system. The Director would have provided any information collected by the tracking system to the Director of the BIE necessary to enforce immigration laws.

The bill would have transferred from the INS Commissioner to the Director of the BCIS the following functions, and all personnel, infrastructure, and funding given to the Commissioner in support of such functions prior to the abolishment of the INS: (1) adjudications of nonimmigrant and immigrant visa petitions; (2) naturaliza-

tion petition adjudications; (3) asylum and refugee application adjudications; (4) service center adjudications; and (5) all other immigration benefit adjudications under the Immigration and Nationality Act.

The bill would have established an Office of Citizenship in the BCIS, headed by the Chief. The Chief would have promoted instruction and training on citizenship responsibilities for aliens interested in becoming naturalized citizens of the United States, including the development of educational materials.

H.R. 3231 would have created sectors of the BCIS, headed by sector directors and located in appropriate geographic locations. Sectors would have been responsible for directing all aspects of the BCIS' operations within their assigned geographic areas of activity. Sector directors would have provided general guidance and supervision to the field offices of the BCIS within their sectors.

The bill also would have established field offices in the BCIS, headed by field directors, who may have been assisted by deputy field directors. Field offices would have been responsible for assisting the Director of the BCIS in carrying out the Director's functions. Field directors would have been subject to the supervision and direction of their respective sector director, while field directors outside of the United States would have been subject to the supervision and direction of the bureau director. All field directors would have been accountable to, and received their authority from, the Director of the BCIS to ensure consistent application and implementation of citizenship and immigration services policies and practices nationwide.

The bill would have established service centers, headed by directors and responsible for assisting the bureau director in carrying out the director's functions that could have been effectively carried out at remote locations. Service center directors would have been subject to the general supervision and direction of their respective sector director, except that all service center directors would have been accountable to, and received their authority from, the bureau director, to ensure consistent application and implementation of citizenship and immigration services policies and practices nationwide.

Regardless of any other law, the Director of the BCIS would have been authorized to transfer or remove any sector director, field director, or service center director, in the bureau director's discretion.

H.R. 3231 would have established the BIE in the Justice Department, headed by a director who would have reported directly to the Associate Attorney General for Immigration Affairs and must have had a minimum of at least 10 years professional experience in law enforcement, at least five of which must have been years of service in a managerial capacity. The bureau director would have established immigration enforcement policies for the bureau; overseen the administration of such policies; and advised the Associate Attorney General on any policy or operation of the BIE that might have affected the BCIS, including potentially conflicting policies or operations.

The bill would have transferred from the INS Commissioner to the Director of the BIE the following functions, and all personnel, infrastructure, and funding given to the Commissioner in support

of such functions prior to the abolishment of the INS: (1) the Border Patrol program; (2) the detention and removal program; (3) the intelligence program; (4) the investigations program; and (5) the inspections program.

The bill would have established sectors of the BIE, headed by sector directors and located in appropriate geographic locations. Sectors would have been responsible for directing all aspects of the BIE's operations within their assigned geographic areas of activity. Sector directors would have provided general guidance and supervision to the field offices of the BIE within their sectors.

The bill also would have established field offices in the BIE, headed by field directors, who may have been assisted by deputy field directors. A BIE field office would have been required to be situated in at least every city where there would be situated a BCIS field office so that the two bureaus would have communicated with each other, could share files of aliens who might have faced action from both bureaus, and so that the BCIS could easily have brought any suspected application fraud to the BIE for investigation or other necessary immigration enforcement action. Field offices would have been responsible for assisting the Director of the BIE in carrying out the Director's functions. Field directors would have been subject to the supervision and direction of their respective sector director, while field directors outside of the United States would have been subject to the supervision and direction of the bureau director.

The bill would have permitted the BIE to establish Border Patrol Sectors, headed by chief patrol agents, who may have been assisted by deputy chief patrol agents. Border Patrol sectors would have been responsible for the enforcement of the Immigration and Nationality Act within their assigned geographic areas of activity, unless a power and authority was required to be exercised by a higher authority or had been exclusively delegated to another immigration official or class of immigration officer.

Regardless of any other law, the Director of the BIE would have been authorized to transfer or remove any sector director, field director, or chief patrol officer, in the bureau director's discretion. H.R. 3231 would have established an Office of Policy and Strategy in each bureau, headed by a Chief. Each Chief would have consulted with bureau personnel in the field and (1) established national immigration enforcement or services policies and priorities; (2) performed policy research and analysis on immigration enforcement or services issues; and (3) coordinated immigration enforcement or services policy issues with the Chief of Policy and Strategy in the other bureau and the Associate Attorney General for Immigration Affairs through the Policy Advisor for the Associate Attorney General's Office, as appropriate.

The bill would have permitted the position of a Legal Advisor for each bureau to provide legal advice for the bureau's director and the bureau's employees. The bill would have established the position of a Chief Budget Officer for each bureau. The CBOs would have formulated and executed the budget of each bureau according to the needs of the bureau. The CBO would have reported to the bureau director and provided information to, and coordinated reso-

lution of relevant issues with, the CFO for the Associate Attorney General for Immigration Affairs.

H.R. 3231 would have established the Office of Congressional, Intergovernmental, and Public Affairs in each bureau headed by a Chief. The Chiefs would have provided enforcement or citizenship and immigration services information to the Congress, including information on specific constituent cases relating to their respective mission, served as liaisons with other Federal agencies on enforcement or citizenship and immigration services issues, and responded to inquiries from the media and general public on enforcement or citizenship and immigration services issues.

The bill would have established within the Justice Department's Bureau of Justice Statistics an Office of Immigration Statistics, headed by a director who would have been appointed by the Attorney General and reported to the Director of Justice Statistics. The director would have been responsible for maintaining all immigration statistical information of the Office of the Associate Attorney General for Immigration Affairs, the BCIS, the BIE, and EOIR.

The director would also have been responsible for establishing standards of reliability and validity for immigration statistics collected by the Office of the Associate Attorney General, the BCIS, the BIE, and EOIR. While this new Office of Immigration Statistics would have maintained all immigration statistics, the Office of the Associate Attorney General, the BCIS, BIE and EOIR, each would have given the Office of Immigration Statistics statistical information from the operational data systems controlled by each respective component.

H.R. 3231 would have required the Associate Attorney General for Immigration Affairs to ensure that the databases of the Office of the Associate Attorney General and those of the bureaus were integrated with each other and with the databases of EOIR to permit the electronic docketing of each case by date of service upon an alien of the charging document, and the tracking of the status of any alien throughout the alien's contact(s) with the United States immigration authorities, regardless of whether the entity with jurisdiction of the alien was the BCIS, the BIE, or EOIR.

The bill would have authorized such appropriated sums as were necessary to (1) abolish the INS; (2) establish the Office of the Associate Attorney General for Immigration Affairs, the BCIS, the BIE, and their components, and the transfers of functions required under H.R. 3231; and (3) carry out any other duty related to the reorganization of the immigration and naturalization functions that is necessary by H.R. 3231. The amounts appropriated would have had to remain available until expended. The Associate Attorney General for Immigration Affairs would have been designated as the principal person in the Department of Justice to appear before the House and Senate Appropriations Committees regarding appropriation requests, unless the Attorney General otherwise designated.

The bill would also have established a separate account in the general fund of the United States Treasury known as the "Immigration Reorganization Transition Account." All appropriated amounts mentioned above, in addition to amounts otherwise generated or reprogrammed, would have been deposited into this transition account.

H.R. 3231 would have established separate accounts in the U.S. Treasury for appropriated funds and other deposits available for the BCIS and the BIE. It would also have required the Director of the Office of Management and Budget to separate the budget requests for the two bureaus to ensure that the two bureaus are funded to the extent necessary to fully carry out their respective functions. Fees imposed for a specific service, application, or benefit would have to have been deposited into the appropriate account for the bureau with jurisdiction over the function to which the fee related. No fee could have been transferred between the BCIS and the BIE.

The bill would also have ended the policy of using a portion of fees paid by visa applicants to cover the costs of adjudication of asylum applications. In addition, H.R. 3231 would have authorized such sums as were necessary to process refugee, asylum, and adjustment of status for refugees applications.

H.R. 3231 would have required the Attorney General to report to the Committees on Appropriations and the Judiciary of both the House of Representatives and the Senate on the proposed division and transfer of funds, as well as the division of personnel among the Office of the Associate Attorney General for Immigration Affairs and the two bureaus. The bill would also have required the Attorney General to submit to the same Committees an implementation plan to carry out H.R. 3231.

The bill would have required the Attorney General to report to the Appropriations and Judiciary Committees of both chambers on plans to improve immigration services and immigration enforcement. The Attorney General must also have submitted to Congress a report to ensure a prompt and timely response to emergent, unforeseen, or impending changes in applications for immigration benefits, including the amount of immediate funding that would be needed to respond to such unforeseen changes.

The last report that would have been required of the Attorney General related to the cost effectiveness of interior checkpoints. H.R. 3231 would have required the Attorney General to establish an internet-based system that would permit individuals and employers with immigration applications filed with the Attorney General to have access to online information about the processing status of the application. The bill would also have required the Attorney General to conduct a feasibility study on giving applicants the ability to file applications on-line. The bill would have required the Attorney General to establish an advisory committee to assist the Attorney General in establishing the tracking system and conducting the study.

H.R. 3231 would have authorized the Attorney General, after submitting a strategic restructuring plan to the appropriate congressional committees, to make voluntary separation incentive payments to certain employees to help carry out the strategic restructuring plan.

Finally, the bill would have permitted the Attorney General to conduct a five-year demonstration project for the purpose of determining whether changes in the employee disciplining policies or procedures would have resulted in improved personnel management. The demonstration project would had to have encouraged the

use of alternative means of dispute resolution, whenever appropriate, and the expeditious, fair, and independent review of any action would have been required. Non-managers or supervisors would not have been included within the project. However, an aggrieved employee within a labor organization could have elected to participate in the demonstration project's complaint procedure in lieu of any negotiated grievance procedure.

Legislative History.—On November 6, 2001, Chairman F. James Sensenbrenner, Jr., introduced H.R. 3231. The Judiciary Committee held one day of hearings: "Restructuring the INS-How the Agency's Dysfunctional Structure Impedes the Performance of its Dual Mission" on April 9, 2002. Testimony was received from The Honorable James W. Ziglar, Commissioner of the INS; Richard J. Gallo, President of the Federal Law Enforcement Officers Association; Dr. Susan F. Martin, Director for the Institute for the Study of International Migration at Georgetown University; and Mr. Lawrence Gonzalez, Washington Director of the National Association of Latino Elected and Appointed Officials Educational Fund. On April 10, 2002, the Judiciary Committee ordered H.R. 3231 reported, as amended, by a vote of 32 to 2. On April 19, 2002, the Judiciary Committee reported H.R. 3231 (H. Rept. 107–413). On April 25, 2002, the House passed H.R. 3231, as amended, by a vote of 405–9. No further action was taken on H.R. 3231 in the 107th Congress. See H.R. 5005 and H.R. 5710.

H.R. 3375, Embassy Employee Compensation Act

Summary.—On August 7, 1998, agents of Osama bin Laden orchestrated near simultaneous vehicular bombings of the US Embassies in Nairobi, Kenya, and Dar Es Salaam, Tanzania. These terrorist incidents cost the lives of over 220 persons and wounded more than 4,000 others. Twelve American employees of the federal government and their family members were among those killed. H.R.3375 would have provided compensation for the United States citizens who were victims of these bombings on the same basis as compensation is provided to victims of the terrorist-related aircraft crashes on September 11, 2001.

On September 22, 2001, the September 11th Victim Compensation Fund of 2001 was established as part of Public Law 107–42. That fund created a compensation program, administered by the Attorney General through a Special Master for any individual who was injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001. The program makes payments for physical harm, economic losses and noneconomic losses, such as physical and emotional pain or loss of enjoyment of life. In the case of a deceased individual, relatives of that individual may be compensated. Punitive damages may not be awarded. Additionally, any award under the Fund will be reduced by any other amount of compensation the claimant has received or is entitled to receive as a result of their injury or death.

H.R. 3375 would have directed the Attorney General to provide compensation for American citizen victims of the United States Embassy bombings through the Special Master appointed to administer the September 11th Victim Compensation Fund.

Legislative History.—On November 29, 2001, Representative Roy Blunt introduced H.R. 3375. On April 24, 2002, the Judiciary Committee ordered H.R. 3375 reported by a voice vote. On May 20, 2002, the Judiciary Committee reported H.R. 3375 (H. Rept. 107–477). On May 21, 2002, the House passed H.R. 3375 under suspension of the rules by a vote of 391–18. No further action was taken on H.R. 3375 in the 107th Congress.

H.R. 4558, the Irish Peace Process Cultural and Training Program extension (Public Law 107–234)

Summary.—H.R. 4558 amends the Irish Peace Process Cultural and Training Program Act (Public Law 105–319) to extend the program one year, until 2006. The program allows adults between the ages of 18 and 35 years old who live in disadvantaged areas in Northern Ireland and designated border counties of Ireland suffering from sectarian violence and high unemployment to enter the United States to develop job skills and conflict resolution abilities in a diverse, cooperative, peaceful, and prosperous environment, so that they can return to their homes better able to contribute toward economic regeneration and the Irish peace process.

Legislative History.—On April 23, 2002, Representative James Walsh introduced H.R. 4558. On May 2, 2002, the Subcommittee on Immigration and Claims reported H.R. 4558 to the Judiciary Committee by a voice vote. On July 17, 2002, the Judiciary Committee ordered H.R. 4558 reported by a vote of 31–0. On July 22, 2002, the Judiciary Committee reported H.R. 4558 (H. Rept. 107–596, Part I). On July 22, 2002, the House passed H.R. 4558 under suspension of the rules by a voice vote. On September 18, 2002, the Senate passed H.R. 4558 by unanimous consent. On October 4, 2002, the President signed H.R. 4558 into law (Public Law 107–234).

H.R. 4858, improving access to physicians in medically underserved areas

Summary.—For description of language, see section 11018 of H.R. 2215, the 21st Century Department of Justice Appropriations Authorization Act (Public Law 107–273).

Legislative History.—On June 4, 2002, Representative Jerry Moran introduced H.R. 4858. On June 19, 2002, the Judiciary Committee ordered H.R. 4858 reported by a voice vote. On June 24, 2002, the Judiciary Committee reported H.R. 4858 (H. Rept. 107–528). On June 25, 2002, the House passed H.R. 4858 under suspension of the rules by a recorded vote of 407–7. No further action was taken on H.R. 4858 in the 107th Congress. However, the language of the bill was included as section 11018 of the conference report for H.R. 2215, the "21st Century Department of Justice Appropriations Authorization Act" (Public Law 107–273).

H.R. 4967, the Border Commuter Student Act (Public Law 107–274)

Summary.—H.R. 4967 expands authorization for "F" student visa status to include aliens who are nationals of Canada or Mexico, who maintain actual residence and place of abode in their country of nationality, who are pursuing a full or part-time course of study in academic or language studies, and who commute to the U.S. in-

stitution or place of study from Canada or Mexico. The bill also expands authorization for "M" student visa status to include aliens who are nationals of Canada or Mexico, who maintain actual residence and place of abode in their country of nationality, who are pursuing a full or part-time course of study in vocational or nonacademic studies, and who commute to the U.S. institution or place of study from Canada or Mexico.

Legislative History.—On June 19, 2002, Representative Jim Kolbe introduced H.R. 4967. On September 25, 2002, the Subcommittee on Immigration, Border Security, and Claims reported H.R. 4967 to the Judiciary Committee by a voice vote. On October 9, 2002, the Judiciary Committee ordered H.R. 4967 reported by a voice vote. On October 15, 2002, the Judiciary Committee reported H.R. 4967 (H. Rept. 107–753). On October 15, 2002, the House passed H.R. 4967 under suspension of the rules by a voice vote. On October 16, 2002, the Senate passed H.R. 4967 by unanimous consent. On November 2, 2002, the President signed H.R. 4967 into law (Public Law 107–274).

H. Res. 365, providing for the concurrence by the House with amendments in the amendment of the Senate to H.R. 1885

Summary.—H. Res. 365 contained the language of H.R. 3525, the "Enhanced Border Security and Visa Entry Reform Act of 2002" (later to become Public Law 107–173). It also contained a modified version of the language of H.R. 1885, the "Section 245(i) Extension Act of 2001." To utilize section 245(i), illegal aliens would have had to have immigrant visa petitions filed on their behalf within 120 days after the date that the Attorney General issues appropriate implementing regulations, but not later than November 30, 2002. Eligible aliens would have had to have entered into the family relationships qualifying them for permanent residence by August 14, 2001. In the case of employers seeking immigrant visas for aliens, the employers' applications for labor certification would have had to have been filed by August 14, 2001.

Legislative History.—On March 12, 2002, Chairman F. James Sensenbrenner introduced H. Res. 365. On March 12, 2002, the House passed H. Res. 365 under suspension of the rules by a vote of 275–137. No further action was taken on H. Res. 365 in the 107th Congress.

S. 1339, the Persian Gulf War POW/MIA Accountability Act of 2002 (Public Law 107–258)

Summary.—The Bring Them Home Alive Act of 2000 (Public Law 106–484) requires the Attorney General to provide refugee status to any alien (and his or her parent, spouse, or child) who is a national of Vietnam, Cambodia, Laos, China, or any of the independent states of the former Soviet Union, and who personally delivers into the custody of the U.S. government a living American prisoner of war from the Vietnam War. The Act grants similar status to any alien (and his or her family members) who is a national of North Korea, China, or the independent states of the former Soviet Union, and who delivers a living American prisoner of war from the Korean War. Information regarding the Act is to be broadcast by the International Broadcasting Bureau over Voice of Amer-

ica and other services. S. 1339 amends the Act to encompass the 1990–91 Persian Gulf War and any future American military operations against Iraq by providing refugee status to an alien (and his or her parent, spouse, or child) who is a national of Iraq or a nation of the greater Middle East, who personally delivers into the custody of the U.S. government a living American prisoner of war from the Persian Gulf War or subsequent actions against Iraq. To receive refugee status, the alien cannot be ineligible for asylum on the basis of the factors set out in section 208(b)(2)(A)(i)–(v) of the Immigration and Nationality Act (such as being a criminal, a terrorist, or a danger to the security of the United States).

Legislative History.—On August 2, 2001, Senator Ben Nighthorse Campbell introduced S. 1339. On June 27, 2002, the Senate Judiciary Committee ordered reported S. 1339, as amended, and reported S. 1339 without a written report. On July 29, 2002, the Senate passed S. 1339, as amended, by unanimous consent. On October 9, 2002, the House Judiciary Committee ordered S. 1339 reported by a voice vote. On October 15, 2002, the Judiciary Committee reported S. 1339 (H. Rept. 107–749, Part I). On October 15, 2002, the House passed S. 1339 under suspension of the rules by a voice vote. On October 29, 2002, the President signed S. 1339 (Public Law 107–258).

S. 1424, permanent authority for admission of "S" visa non-immigrants (Public Law 107–45)

Summary.—S. 1424 provides permanent authorization for the granting of "S" nonimmigrant visa status for informants.

Legislative History.—On September 13, 2001, Senator Kennedy introduced S. 1424 and the bill passed the Senate by unanimous consent. On September 15, 2001, the House passed S. 1424 by unanimous consent. On October 1, 2001, the President signed S. 1424 into law (Public Law 107–45).

CLAIMS

S.J. Res. 13, a joint resolution conferring honorary citizenship of the United States posthumously on Marie Joseph Paul Yves Roche Gilbert du Motier, the Marquis de Lafayette (Public Law 107–209)

Summary.—Before the 107th Congress, the United States has conferred honorary citizenship on only four occasions in the last two hundred years. Honorary citizenship is an extraordinary honor not lightly conferred. However, an exception is merited in the case of Paul Yves Roch Gilbert du Motier, also known as the Marquis de Lafayette. The Marquis de Lafayette made extraordinary contributions to, and sacrifices for, the cause of American independence and his support of the principles of representative government. The Marquis de Lafayette put forth his own money and risked his life for the freedom of Americans, was voted to the rank of Major General by the Congress, was wounded at the Battle of Brandywine during the Revolutionary War, secured the help of France to aid the United States' colonists against Great Britain. Upon his death, both the House of Representatives and the Senate draped their chambers in black as a demonstration of respect and

gratitude for his contribution to the independence of the United States.

The Marquis de Lafayette was granted citizenship by the States of Maryland and Virginia before the Constitution was adopted. In 1935, the State Department determined that the citizenship conferred by these states did not make him a United States citizen.

Legislative History.—On April 24, 2001, Senator John Warner introduced S.J. Res. 13. On December 13, 2001, the Senate Judiciary Committee ordered S.J. Res. 13 reported to the Senate. On December 18, 2001, the Senate passed S.J. Res. 13 by unanimous consent. On April 17, 2002, the House Subcommittee on Immigration and Claims reported S.J. Res. 13 to the Judiciary Committee by a voice vote. On July 17, 2002, the House Judiciary Committee ordered S.J. Res. 13 reported by a voice vote. On July 19, 2002, the Judiciary Committee reported S.J. Res. 13 (H. Rept. 107–595). On July 22, 2002, the House passed S.J. Res. 13 under suspension of the rules, as amended, by a voice vote. On July 24, 2002, the Senate passed S.J. Res. 13 as amended by the House by unanimous consent. On August 8, 2002, the President signed S.J. Res. 13 into law (Public Law 107–209).

ACTION ON OTHER PUBLIC LEGISLATION LEGISLATION PASSED BY THE HOUSE

H.R. 2155, the Sober Borders Act

Summary.—H.R. 2155 would have made driving at a land border port of entry with drugs or alcohol in the body a federal offense and would have deemed a driver to have given consent to submit to a drug or alcohol test by an INS officer. If the individual refused to submit to such a test, the bill would have required the Attorney General to notify the driver's state of jurisdiction of the driver's refusal to submit to a test. If a driver was convicted of driving at a land border port of entry under the influence of drugs or alcohol, the Attorney General would also have been required to notify the driver's state of jurisdiction of such conviction. H.R. 2155 would have authorized INS employees inspecting drivers at land border ports of entry to require impaired drivers to submit to a drug or alcohol test if inspectors had reasonable grounds to believe a driver was impaired or if the officer arrested a driver for operating a vehicle while impaired. Finally, the bill would have required the Attorney General to issue regulations authorizing INS officers to impound vehicles operated at a land border port of entry if the drivers refused to submit to a drug or alcohol test and if the impoundment would not be inconsistent with the laws of the State in which the port of entry is located.

Legislative History.—On June 13, 2001, Representative Jeff Flake introduced H.R. 2155. On September 25, 2002, the Subcommittee on Immigration, Border Security, and Claims reported H.R. 2155 to the Judiciary Committee by a voice vote. On October 9, 2002, the Judiciary Committee ordered H.R. 2155 reported, as amended, by a voice vote. On October 15, 2002, the Judiciary Committee reported H.R. 2155 (H. Rept. 107–754). On October 16, 2002, the House passed H.R. 2155 under suspension of the rules

by a recorded vote of 296–94. No further action was taken on H.R. 2155 in the 107th Congress.

H.R. 2603, the "United States-Jordan Free Trade Area Implementation Act"

Summary.—While H.R. 2603 authorizes the President to proclaim such modifications or continuation of duty, continuation of duty-free or excise treatment, or additional duties as are deemed necessary or appropriate to carry out the Agreement between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of the a Free Trade Area (Agreement), entered into on October 24, 2000, provisions dealing with competition policy and a Jordanian temporary immigration entry status were sequentially referred to the Committee on the Judiciary.

Legislative History.—The Committee on the Judiciary discharged H.R. 2603 and did not conduct hearings or mark-ups on this legislation. H.R. 2603 was introduced by Chairman Thomas on July 24, 2001 and referred to the Committee on Ways and Means and the Committee on the Judiciary. On July 31, 2001, H.R. 2603 was reported by the Committee on Ways and Means and discharged by the Committee on the Judiciary. Also on July 31, 2001, H.R. 2603 passed the House by voice vote, was received by the Senate and referred to the Senate Committee on Finance. On September 24, 2001, H.R. 2603 was discharged by the Senate Committee on Finance and passed the Senate by a voice vote. On September 28, 2001, H.R. 2603 was signed by President Bush and became Public Law No. 107–43.

LEGISLATION PASSED BY THE SUBCOMMITTEE

H.R. 2623, the Posthumous Citizenship Restoration Act

Summary.—In 1990, Congress passed the Posthumous Citizenship for Active Duty Service Act (Public Law 101–249) permitting the next-of-kin or another representative to file a posthumous citizenship claim on behalf of a United States non-citizen who died as a result of military service to our nation. The request for the posthumous citizenship must be filed no later than two years after the date of enactment (March 6, 1990), or two years after the date of the person's death, whichever date is later. H.R. 2623 would have given families who have missed the opportunity to file posthumous citizenship claims on behalf of their deceased relatives an additional two year opportunity to file for citizenship.

Legislative History.—On July 25, 2001, Representative Martin Meehan introduced H.R. 2623. On April 17, 2002, the Subcommittee on Immigration and Claims reported H.R. 2623 to the Judiciary Committee by a voice vote. While no further action on H.R. 2623 was taken in the 107th Congress, identical text was included in the section X of H.R. 2215, the "21st Century Department of Justice Appropriations Authorization Act," signed into law by the President on November 2, 2002 (Public Law 107–273).

H.R. 4043, to bar federal agencies from accepting for any identification-related purposes any State-issued driver's license, or other comparable identification document, unless the State requires licenses or comparable documents issued to nonimmigrant aliens to expire upon the expiration of the aliens' nonimmigrant visas

Summary.—H.R. 4043 would have provided that a federal agency may not accept for any identification-related purpose a driver's license (or similar identity document) unless the issuing State has in effect a policy requiring that when issuing such licenses to aliens on temporary visas, the licenses have expiration dates that (1) are not later than the last day of validity of the visas, or (2) are not later than 5 years after the date the licenses were issued (if the visa's period of validity was subsequently modified or superseded). The bill would have applied to licenses first issued (or renewed) to nonimmigrants one year after the date of enactment. The Attorney General would have made grants to States to assist them in issuing licenses or other identity documents.

Legislative History.—On March 20, 2002, Representative Jeff Flake introduced H.R. 4043. On May 2, 2002, the Subcommittee on Immigration and Claims ordered H.R. 4043 reported to the Judiciary Committee by a voice vote. No further action was taken on H.R. 4043 in the 107th Congress.

H.R. 4597, to prevent nonimmigrant aliens who are delinquent in child support payments from gaining entry into the United States

Summary.—Section 212 of the Immigration and Nationality Act specifies the grounds upon which an alien is inadmissible to the United States. H.R. 4597 would have added a ground of inadmissibility for arriving aliens who are not permanent residents and who are in arrears on child support payments. Any (non-permanent resident) alien would have been inadmissible if the alien was more than $2,500 in arrears in child support obligations that were legally obligated under a judgment, decree, or order to pay child support. The ground of inadmissibility would have expired when the obligation was satisfied or the alien came in compliance with an approved payment agreement. However, the Attorney General would have been able to waive the ground of inadmissibility upon a request of the court or administrative agency having jurisdiction over the order or if he determined that there were prevailing humanitarian or public interest concerns.

The bill also would have provided that, if consistent with State law, immigration officers would have been authorized to serve on any alien applicant for admission legal process with respect to any action to enforce or establish a child support obligation. Finally, the bill would have provided that if the Secretary of Health and Human Services received a certification from a State agency that an alien on a temporary visa was in arrears on child support obligations by more than $2,500, the Secretary could have provided the Secretary of State or the Attorney General information regarding the alien's inadmissibility.

Legislative History.—On April 25, 2002, Representative Benjamin Cardin introduced H.R. 4597. On May 2, 2002, the Subcommittee

on Immigration and Claims ordered H.R. 4597 reported to the Judiciary Committee by a voice vote. No further action was taken on H.R. 4597 in the 107th Congress.

H.R. 2276, to amend the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 to extend the deadline for aliens to present a border crossing card that contains a biometric identifier matching the appropriate biometric characteristic of the alien

Summary.—Border crossing cards have long allowed eligible Mexicans to travel up to 25 miles inside the border for up to 72 hours. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 mandated the issuance of new border crossing cards containing a machine readable biometric identifier. Under that Act, holders of old border crossing cards could still use them to cross the border until September 30, 1999. Congress later agreed to extend the deadline to September 30, 2001. H.R. 2276 would have granted an additional one-year extension to September 30, 2002.

Legislative History.—On June 21, 2001, Subcommittee on Immigration and Claims Subcommittee Chairman George Gekas introduced H.R. 2276. On June 27, 2001, the Subcommittee on Immigration and Claims ordered H.R. 2276 reported to the Judiciary Committee by a voice vote. No further action was taken on H.R. 2276 in the 107th Congress. However, H.R. 3325 (Public Law 107–173) extended the deadline as proposed in H.R. 2276.

H.R. 1198, the "Justice for United States Prisoners of War Act of 2001"

Summary.—On September 25, 2002, the Subcommittee on Immigration, Border Security, and Claims held a hearing on H.R. 1198, which would have required that any Federal court in which an action is brought against a Japanese entity by a member of the U.S. armed forces seeking compensation for mistreatment or failure to pay wages in connection with labor performed in Japan for that entity as a prisoner of war during World War II apply the statute of limitations of the State in which the action is pending to that action. The bill would have required courts not to interpret a provision contained in the Treaty of Peace With Japan as waiving any such claims by the United States. The bill also stated that it was U.S. policy to ensure that any war claims settlement terms between Japan and any other country that are more beneficial than terms extended to the United States under the Treaty of Peace With Japan are extended to the United States with respect to any claim covered by this legislation. Finally, the bill would have authorized the Secretary of Veterans Affairs to secure information relating to chemical or biological tests conducted by Japan on members of the U.S. armed forces held as prisoners of war during World War II and required all heads of departments and agencies with that information to release it to the Secretary. Once information was received by the Secretary regarding any particular individual, the bill would have directed that the information be made available to that individual to the extent otherwise provided by law. Testimony was received from the Honorable Dana Rohrabacher; William

H. Taft, IV, Legal Advisor, Department of State; Rob McCallum, Jr., Assistant Attorney General, Civil Division, Department of Justice; and Lester I. Tenney, PhD, Former Prisoner of War.

H.R. 5017, a bill to amend the Temporary Emergency Wildfire Suppression Act to facilitate the ability of the Secretary of the Interior and the Secretary of Agriculture to enter into reciprocal agreements with foreign countries for the sharing of personnel to fight wildfires

Summary.—H.R. 5017 would have amended the Temporary Emergency Wildfire Suppression Act by authorizing the Secretary of the Interior and the Secretary of Agriculture to enter into reciprocal agreements with foreign nations to provide federal employee status, for purposes of tort liability, to foreign personnel who are assisting in the presuppression or suppression of wildfires. Currently, the Secretaries are prohibited from entering into any such reciprocal agreement where the foreign nation does not assume any and all liability for the acts or omissions of American firefighters. Therefore, the only available civil remedies permitted in these agreements are limited to the laws of the host country. Finally, this section excludes firefighters, the sending country, or any associated organization from any action pertaining to, or arising out of, assistance pursuant to a reciprocal agreement authorized by this section.

Legislative History.—On June 26, 2002, Representative Scott McInnis introduced H.R. 5017. On June 28, 2002, the Subcommittee on Immigration, Border Security, and Claims held a hearing on H.R. 5017. Testimony was received from Paul Harris, Esq., Deputy Associate Attorney General, U.S. Department of Justice and Mr. Tim Hartzell, Director for the Office of Wildland Fire Policy, U.S. Department of the Interior. On July 9, 2002, the House passed H.R. 5017 under suspension of the rules by a voice vote. No further action was taken on H.R. 5017 in the 107th Congress.

FEDERAL CHARTERS

Subcommittee policy on new federal charters

On March 14, 2001, the Subcommittee on Immigration and Claims adopted the following policy concerning the granting of new federal charters:

The Subcommittee will not consider any legislation to grant new federal charters because such charters are unnecessary for the operations of any charitable, non-profit organization and falsely imply to the public that a chartered organization and its activities carry a congressional "seal of approval," or that the Federal Government is in some way responsible for its operations. The Subcommittee believes that the significant resources required to properly investigate prospective chartered organizations and monitor them after their charters are granted could and should be spent instead on the Subcommittee's large range of legislative and other substantive policy matters. This policy is not based on any decision that the organizations seeking federal charters are not worthwhile, but rather on the fact that federal charters serve no valid purpose and therefore ought to be discontinued.

This policy represented a continuation of the Subcommittee's informal policy, which was put in place at the start of the 101st Congress and has been continued every Congress since, against granting new federal charters to private, non-profit organizations.

A federal charter is an Act of Congress passed for private, non-profit organizations. The primary reasons that organizations seek federal charters are to have the honor of federal recognition and to use this status in fundraising. These charters grant no new privileges or legal rights to organizations. At the conclusion of the 104th Congress, approximately 90 private, non-profit organizations had federal charters over which the Judiciary Committee has jurisdiction. About half of these had only a federal charter, and were not incorporated in any state and thus not subject to any state regulatory requirements.

Those organizations chartered more recently are required by their charters to submit annual audit reports to Congress, which the Subcommittee sent to the General Accounting Office to determine if the reports comply with the audit requirements detailed in the charter. The GAO does not conduct an independent or more detailed audit of chartered organizations.

H.R. 3214, to amend the charter of the AMVETS Organization (Public Law 107–241)

Summary.—In 1998, the delegates of the "American Veterans of World War II, Korea, and Vietnam (AMVETS)" voted to change the organization's name to "American Veterans" to more accurately reflect its membership. Additionally, delegates voted to change the structure of the governing body. Finally, the organization has changed the location of its headquarters to Lanham, Maryland. In order for these changes to be recognized by the Department of Veterans Affairs, the AMVETS federal charter had to be amended. H.R. 3214 appropriately amends the federal charter.

Legislative History.—On November 1, 2001, Representative Michael Bilirakis introduced H.R. 3214. On April 17, 2002, the Subcommittee on Immigration and Claims reported H.R. 3214 to the Judiciary Committee by a voice vote. On July 10, 2002, the Judiciary Committee ordered H.R. 3214 reported by a voice vote. On July 12, 2002, the Judiciary Committee reported H.R. 3214 (H. Rept. 107–569). On July 15, 2002, the House passed H.R. 3214 under suspension of the rules a by voice vote. On September 5, 2002, the Senate Judiciary Committee ordered H.R. 3214 reported to the Senate and reported the bill without a written report. On October 2, 2002, the Senate passed H.R. 3214 by unanimous consent. On October 16, 2002, the President signed H.R. 3214 into law (Public Law 107–241).

H.R. 3838, to amend the charter of the Veterans of Foreign Wars of the United States organization to make members of the armed forces who receive special pay for duty subject to hostile fire or imminent danger eligible for membership in the organization, and for other purposes

Summary.—H.R. 3838 amends the federal charter of the Veterans of Foreign Wars. First, the Act allows any member of the armed forces who has received hostile fire or imminent danger pay

to be a member of the VFW. Under the prior charter, members of the armed forces must have served honorably and received a campaign medal for service or have served honorably for a specific period on the Korean peninsula. Many members of the armed forces who served under dangerous conditions in places such as Somalia or Kosovo were not eligible for VFW membership. Second, the Act includes the word "charitable" as one of the purposes of the VFW. Volunteerism has always been a large part of the mission of the VFW. However, in some states, VFW was being denied qualification as a charitable organization under section 501(c) of the Internal Revenue Code simply because the word "charitable" was not included in its charter. These amendments to the charter reflect the language of resolutions approved by the voting delegates of the VFW at their National Convention.

Legislative History.—On March 4, 2002, Representative Christopher Smith introduced H.R. 3838. On April 17, 2002, the Subcommittee on Immigration and Claims reported H.R. 3838 to the Judiciary Committee by a voice vote. On July 10, 2002, the Judiciary Committee ordered H.R. 3838 reported by a voice vote. On July 12, 2002, the Judiciary Committee reported H.R. 3838 (H. Rept. 107–570). On July 15, 2002, the House passed H.R. 3838 under suspension of the rules by a voice vote. On September 5, 2002, the Senate Judiciary Committee ordered H.R. 3838 reported to the Senate and reported the bill without a written report. On October 2, 2002, the Senate passed H.R. 3838 by unanimous consent. On October 16, 2002, the President signed H.R. 3838 into law (Public Law 107–242).

H.R. 3988, to amend title 36, United States Code, to clarify the requirements for eligibility in the American Legion (Public Law 107–309)

Summary.—H.R. 3988 makes a technical amendment to the membership qualifications language of the federal charter for the American Legion. Under the prior charter, veterans who left service were eligible to become members of the American Legion if they had served since "August 2, 1990 through the date of cessation of hostilities, as decided by the United States Government" and were "honorably discharged or separated from that service or continues to serve honorably after that period." The United States Government has never issued a cessation of hostilities decision. For those who are no longer serving, they have discharge papers stating they served honorably during that period. However, servicemen who served since August 2, 1990, and are still on active duty have no discharge papers for the period, and are not serving after the cessation of hostilities, but during that period. The amendment would change the standard for qualification to read "continues to serve during or after that period" to make clear that membership is open to the thousands of active duty personnel who served during operations Desert Shield, Desert Storm, and all the operations that followed in Iraq, Bosnia, Kosovo, and Afghanistan.

Legislative History.—On March 18, 2002, Subcommittee on Immigration and Claims Chairman George Gekas introduced H.R. 3988. On April 17, 2002, the Subcommittee on Immigration and Claims reported H.R. 3988 to the Judiciary Committee by a voice

vote. On July 10, 2002, the Judiciary Committee ordered H.R. 3988 reported by a voice vote. On July 12, 2002, the Judiciary Committee reported H.R. 3988 (H. Rept. 107–571). On July 15, 2002, the House passed H.R. 3988 under suspension of the rules by a voice vote. On November 14, 2002, the Senate Judiciary Committee ordered H.R. 3988 reported to the Senate, reported the bill without a written report and the Senate passed H.R. 3988 by unanimous consent. On December 2, 2002, the President signed H.R. 3988 into law (Public Law 107–309).

PRIVATE CLAIMS AND PRIVATE IMMIGRATION LEGISLATION

During the 107th Congress, the Subcommittee on Immigration and Claims received referral of 25 private claims bills and 56 private immigration bills. The Subcommittee held no hearings on these bills. The Subcommittee recommended 6 private claims bills and 3 private immigration bills to the full Committee. The Committee ordered 6 private claims bills and 3 private immigration bills reported favorably to the House. The House passed 5 private claims bills and 3 private immigration bills reported by the Committee. Of the 5 private claims bill and 3 private immigration bills, 3 private claims bill and 3 private immigration bills were passed by the Senate and signed into law by the President. One bill was still pending in the Senate at the close of the 107th Congress. One private bill ordered reported by the full Committee was not approved by the full House prior to the close of the 107th Congress.

OVERSIGHT ACTIVITIES

List of oversight hearings

Immigration and Naturalization Service and the Executive Office for Immigration Review, May 15, 2001 (Serial No. 21)

Guestworker Visa Programs, June 19, 2001 (Serial No. 22)

United States Population and Immigration, August 2, 2001 (Serial No. 30)

Using Information Technology to Secure America's Borders: INS Problems with Planning and Implementation, October 11, 2001 (Serial No. 43)

Immigration and Naturalization Service Performance: An Examination of INS Management Problems, October 17, 2001 (Serial No. 44)

A Review of Department of Justice Immigration Detention Policies, December 19, 2001 (Serial No. 55)

The Operations of the Executive Office for Immigration Review, February 6, 2002 (Serial No. 57)

Implications of Transnational Terrorism and the Argentine Economic Collapse for the Visa Waiver Program, February 28, 2002 (Serial No. 61)

The INS's March 2002 Notification of the Approval of Pilot Training Status for Terrorist Hijackers Mohammed Atta and Marwan Al-Shehhi, March 19, 2001 (Serial No. 63)

Immigration and Naturalization Service and Office of Special Counsel for Immigration Related Unfair Employment Practices, March 21, 2002 (Serial No. 68)

The INS's Interior Enforcement Strategy, June 19, 2002 (Serial No. 85)

Risk to Homeland Security from Identity Fraud and Identity Theft (Held jointly with the Subcommittee on Crime, Terrorism, and Homeland Security), June 25, 2002 (Serial No. 86)

Role of Immigration in the Proposed Department of Homeland Security pursuant to H.R. 5005, the Homeland Security Act of 2002, June 27, 2002 (Serial No. 91)

The INS's Implementation of the Foreign Student Tracking Program, September 18, 2002 (Serial No. 105)

Preserving the Integrity of Social Security Numbers and Preventing Their Misuse by Terrorists and Identity Thieves (Held jointly with the Subcommittee On Social Security of the Committee on Ways and Means), September 19, 2002 (Serial No. 102)

The INS's Interactions with Hesham Mohamed Ali Hedayet, October 9, 2002 (Serial No. 110)

United States and Canada Safe Third Country Agreement, October 16, 2002 (Serial No. 111)

Examination of INS management of its dual missions

The Subcommittee on Immigration, Border Security and Claims engaged in an ongoing examination of INS's mismanagement of its service and enforcement missions to assist the Committee in its legislative restructuring of the INS. For an analysis of INS's troubled management history, see the description of H.R. 3231.

On May 15, 2001, the Subcommittee held an oversight hearing on "the Immigration and Naturalization Service and the Executive Office for Immigration Review." Witnesses included Kevin Rooney, Director of EOIR and then-Acting INS Commissioner, Peggy Philbin, Acting Director of EOIR, Bishop Thomas Wenski, the Auxiliary Bishop of Miami who testified on behalf of the National Conference of Catholic Bishops' Committee on Migration, and Roy Beck, Executive Director, Numbers, USA.

On October 17, 2001, the Subcommittee held an oversight hearing on "Immigration and Naturalization Service Performance: An Examination of INS Management Problems". The Subcommittee heard from Glenn Fine, Inspector General of the U.S. Department of Justice, Richard Stana, Associate Director for Administration of Justice Issues, General Accounting Office, Elizabeth Espin Stern, Shaw Pittman, LLP, and Larry Gonzalez, Director, National Association of Latino Elected and Appointed Officials.

On June 6, 2002, the President released his plan to create the Department of Homeland Security and asked Congress for swift consideration. The President's plan transferred the functions of many agencies into the Department of Homeland Security, including both the immigration services and enforcement functions. Despite the submission of the Administration's bill, immigration questions remained relating to this new department. The plan did not describe how the INS would be structured within the department. Also, the authority over visa issuance in the plan was unusual. The authority was given to the new department, but consular affairs officers remained in the State Department under the plan. On June 27, 2002, the Subcommittee held an oversight hearing on "the Role

of Immigration in the Proposed Department of Homeland Security" to explore these issues and to help the Judiciary Committee draft appropriate legislation for an effective immigration system within the Department of Homeland Security. The witnesses were Grant Green, Under Secretary for Management and Resources, U.S. Department of State, John Ratigan, Baker & McKenzie, Mark Krikorian, Executive Director, Center for Immigration Studies, Kathleen Walker, the American Immigration Lawyers Association, and Kevin Appleby, Policy Director, U.S. Conference of Bishops Migration and Refugee Services.

Under Secretary Green supported the President's hybrid proposal for visa issuance. He said it would ensure that the Secretary of State retains the authority to deny visas on foreign policy grounds because visa decisions abroad are important in carrying out foreign policy. In emphasizing the importance of information sharing, Green stated that the State Department believed that a new Department of Homeland Security empowered to provide to consular officers abroad all the information that the U.S. Government possesses from whatever source is the most essential element in assuring the denial of visas to those who would do us harm.

He also noted the skills and training of consular officers, stating that these qualities peculiar to the Foreign Service would complement and strengthen those of the new Homeland Security Department to prevent potential terrorists from entering the country.

Mr. Ratigan testified that the visa function should be transferred from the State Department to the Department of Homeland Security and then incorporated into the INS, or its successor, to form a single, unified Government entity responsible for the formulation and implementation of U.S. immigration policy. He explained that this action would finally, 50 years after the passage of the Immigration and Nationality Act, give the U.S. a single policymaking and implementing body in immigration. Unifying U.S. immigration policy formulation and implementation under one roof, like the model established in Australia and Canada, would end the awkward and inefficient structure of shared authority with the State Department and the INS. It would also improve internal communication and coordination, improve case handling for applicants, make the immigration agency more attractive as a profession with the added overseas positions, and elevate the importance of fighting fraud above the State Department's main priority of facilitating travel and the free movement of people.

Mr. Ratigan noted the financial interest the State Department has in keeping visa issuance in its own department. If the function were transferred to the Homeland Security Department, the State Department would lose approximately $400 million annually in non-appropriated funds.

Mr. Krikorian testified that the service half of the INS must transfer to the Department of Homeland Security in addition to the enforcement half of the agency. He also argued that the visa function of the State Department should transfer to the new Homeland Security Department. Krikorian explained that terrorists have used all avenues of our immigration system to operate in the U.S. undetected, concluding that granting green cards or citizenship is a homeland security issue.

Ms. Walker testified that AILA would prefer immigration to remain in the Justice Department rather than move it to the Department of Homeland Security. If immigration must move to the new department, she proposed a fifth prong in the department structure for immigration only. Walker advocated for transferring EOIR out of the Justice Department and making it an independent agency to improve public perception of the agency. Walker also testified that visa issuance should remain in the State Department rather than move to the Department of Homeland Security.

Mr. Appleby stated that the Conference of Catholic Bishops opposes the transfer of the INS in its entirety to the Homeland Security Department. Instead, he recommended that specific enforcement components be transferred to the new department, while the remainder of the INS, including services and some non-terrorist related immigration enforcement functions, remain in the Justice Department. Appleby explained that immigration services already competing for limited resources within the INS would receive even less priority and resources in a new department. He added that the overwhelming majority of immigrants who enter the U.S. and for whom the new agency would be responsible are not national security threats to our country.

Review of the immigration detention policies and procedures of the Department of Justice

In the 106th and 107th Congresses, the Subcommittee received information indicating that a large number of aliens released by the INS abscond rather than appearing for hearings or removal. In the first session, the Subcommittee undertook a review of the Justice Department's detention and release policies, to assess whether those policies contributed to the large number of alien absconders. That review is ongoing.

According to statistics released by the Executive Office for Immigration Review, the rate of aliens who failed to appear for hearings overall fluctuated between 21 and 25 percent from FY 1996 to FY 1999. All tolled, between FY 1996 and FY 2000, more than 250,000 aliens failed to appear for hearings after being released from INS custody.

Certain criminal aliens released from INS custody pose a danger to the public. In response to requests from the Subcommittee, the Department of Justice has disclosed that more than a third of aliens released from INS custody have gone on to commit criminal offenses, including violent crimes and drug crimes. The INS released 35,318 criminals between October 1994 and May 1999. Of that number, 11,605 aliens committed further crimes. Among those crimes were 1,845 violent crimes, including 98 homicides, 142 sexual assaults, 44 kidnapings, and 347 robberies.

In addition, aliens who were released from INS custody have gone on to commit terrorist acts in the United States. Of particular note is Ramzi Yousef, a Pakistani citizen and national who was the mastermind behind the first World Trade Center bombing in 1993. On September 1, 1992, Yousef traveled to John F. Kennedy International Airport in New York under an assumed name and using a falsified passport. Upon his arrival at JFK, Yousef was arrested by the INS because he did not have a visa to enter the United

States. During inspection, he claimed to be an Iraqi dissident seeking asylum. Because of a lack of detention space, the INS paroled him into the United States. Once released by the INS, he carried out the first bombing of the World Trade Center in 1993, reportedly fleeing the United States the night of the attack. Yousef is currently serving a life sentence in the United States.

Section 236(a) of the Immigration and Nationality Act gives the Attorney General discretionary power to arrest and detain an alien pending a decision on whether the alien is to be removed from the United States. Despite the fact that the Act gives the Attorney General the authority to release many aliens, the Attorney General has long been prohibited from releasing specified aliens. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 expanded this category of nonreleasable aliens. Currently, the INS must detain arriving aliens subject to mandatory detention, aliens with criminal convictions, aliens removable under the terrorism grounds of inadmissibility and deportability, and those under final orders of removal.

Aliens not otherwise subject to mandatory detention are eligible for release under one of two procedures, depending on the alien's status. Arriving aliens seeking admission at a port of entry can only be released on parole. All other aliens not subject to mandatory detention may be released on bond.

In order to be released on bond, an alien must demonstrate to the INS's satisfaction that the alien would not pose a danger to persons or property if released and is likely to appear for any future proceeding. The IJs have authority to review INS bond decisions, and an appeal from an IJ bond decision may be taken by either party to the BIA. The INS may appeal a BIA release determination to the Attorney General. The BIA has held that an alien who is eligible for bond should not generally be detained pending a determination of removability absent a finding of dangerousness or flight risk.

The requirements for parole are more strict than the requirements for release on bond. Parole is now allowed only on a "case-by-case basis for urgent humanitarian reasons or significant public benefit." The IJs and BIA lack review jurisdiction over parole denials, but review of such denials may be sought in federal District Court on habeas.

The Subcommittee reviewed the factors that are considered in deciding whether an alien would pose a danger if released and is likely to appear for future proceedings, and why, despite consideration of those factors, so many aliens who are released commit criminal offenses, and/or fail to appear for proceedings or deportation.

The Subcommittee focused, in particular, on the release of arriving aliens. As part of that investigation, Committee staff met with INS officials responsible for making detention decisions and visited two INS detention centers at which arriving aliens are held in October 2001.

On October 23, 2001, staff toured the Wackenhut Detention Facility in Jamaica, New York (Jamaica facility). The Jamaica facility is one of the primary detention centers for aliens seeking admission at John F. Kennedy International Airport. On October 24, 2001,

staff toured the Elizabeth Detention Center in Elizabeth, New Jersey, the primary detention center for aliens seeking admission at Newark International Airport. On October 24, 2001, staff also met with the INS New York District Director, Edward J. McElroy, and his staff. In 1997, the New York District increased detention space for housing inadmissible aliens when it opened the Jamaica facility. Reversing a policy of paroling inadmissible aliens for immigration proceedings, the New York District now detains almost all aliens who are inadmissible for fraud and document-related reasons. The District has concluded that this policy ensures the security of the United States and ensuring compliance with the immigration laws.

In reviewing the failure of arriving aliens to appear after being paroled by the INS, staff also examined documents relating to detention and parole. In testimony submitted to the Senate on November 13, 2001, Richard Stana of the GAO discussed the release of arriving aliens subject to expedited removal who were deemed to have a "credible fear of persecution or torture."

Stana noted that INS policy favors the release of aliens found to have a credible fear, provided that the alien will likely appear for future removal proceedings and does not pose a danger to the community. He stated that there are several different factors that are considered in determining whether to release an alien found to have a credible fear, but that those factors are applied unevenly from office to office.

Aliens found to have a credible fear are placed in removal proceedings. This is primarily done to allow those aliens to request asylum from an IJ. Stana concluded, however, that a "significant number" of aliens released after being found to have a credible fear have not subsequently appeared for removal proceedings. Specifically, of 2,351 aliens found to have a credible fear between April 1, 1997, and September 30, 1999, in cases in which an IJ had issued a decision, 1,000 aliens, or 42 percent of the total, failed to appear for their hearings and were ordered removed in absentia. Furthermore, of the 7,947 aliens determined to have a credible fear of persecution from the inception of the program on April 1, 1997 through FY 1999, 3,140 (or almost 40 percent) had not filed for asylum as of February 22, 2000, despite the fact that they were released primarily to pursue such relief.

As part of its review of the Justice Department's detention policies, staff also reviewed a recent report from the Department of Justice Inspector General examining instances in which the INS released arriving aliens for deferred inspection. The Inspector General reviewed a sample of 725 inspections to determine the effectiveness of the deferred inspections process. "Deferred inspection" is a process by which an Inspector at a port of entry refers an alien seeking admission to the United States to an onward INS office to complete inspection in instances in which an immediate decision regarding admissibility cannot be made. In 79 of the 725 cases reviewed by the Inspector General (11 percent of the total), aliens paroled into the country failed to appear for their inspections. Of the 79 aliens in the sample who failed to appear, 42 were identified as having criminal records or immigration violations by Inspectors at the time of deferral.

The Inspector General found that there were no adequate procedures to ensure that individuals who failed to appear for deferred inspections were brought in to complete their inspection or were appropriately penalized for failing to do so. Absent any clear procedural guidance, the Inspector General determined, inspectors were largely left to their own discretion to determine appropriate actions when individuals failed to appear. The Inspector General concluded that actions when taken failed to yield significant results, but that more often, no follow-up of any kind was initiated.

On December 9, 2001, the Subcommittee held a hearing on the Department of Justice's immigration detention policies. Witnesses were Joseph R. Greene, then-Acting Deputy Executive Associate Commissioner for Field Operations, INS, INS District Director McElroy, Professor Margaret Taylor, Wake Forest University School of Law, and Paul H. Thomson, Commonwealth's Attorney, City of Winchester, Virginia. The witnesses discussed the application of the INS's detention policies, alternatives to detention, and the consequences of the INS's failure to detain dangerous aliens.

At that hearing, INS disclosed that it was currently detaining approximately 20,000 aliens. Of the aliens being detained, sixty-five percent were criminal aliens. INS detainees are housed in a variety of facilities across the country.

The INS also detailed its detention policy, which sets forth guidelines for determining priorities in which aliens should be detained, at that hearing. This policy sets forth four major categories of aliens and classifies these individuals as required detention, high priority, medium priority and lower priority. The four categories are: Category I—mandatory detention; Category II—which includes security and related crimes, other criminals not subject to mandatory detention, aliens deemed to be a danger to the community or a flight risk and alien smugglers; Category III—which includes inadmissible non-criminal aliens (not placed in expedited removal), aliens who committed fraud or were smuggled into the United States, and worksite apprehensions; and Category IV—which includes non-criminal border apprehensions, other aliens not subject to mandatory detention, and aliens placed in expedited removal referred to section 240 removal proceedings.

The Subcommittee continues to examine whether the INS's detention policy adequately protects the American people, and whether additional detention space, or a modification of the INS's detention policies, are needed to achieve this goal.

Oversight of the issuance of visas to and admission to the United States of the 19 September 11 hijackers

On September 26, 2001, Subcommittee Chairman Gekas and Ranking Member Sheila Jackson Lee sent a request to the Commissioner of the INS for information on all 19 aliens known to have participated in the September 11 attacks. On October 11, 2001, the INS sent its initial response to that letter.

In that response, the INS stated that 10 of the 19 were in lawful status, while three appeared to have overstayed the authorized period of their stay and were in unlawful status on September 11. The INS was "unable to confirm any relating records based on current information on six [of the] individuals."

On November 21, 2001, the INS updated its October 11, 2001 response. The INS stated that its previous report that two of the hijackers, Ahmed Alghamdi and Waleed Alsheri, were in illegal status was in error, based on erroneous dates of birth. That updated response showed that 15 of these aliens entered as visitors for pleasure, two as visitors for business, and one as a student. It showed that one (Mohammed Atta) adjusted his status to M–1 vocational student. Three were overstays: Satam Al Suqami; Nawaf Alhazmi; and Hani Hanjour.

In a March 14, 2002, Chairman Sensenbrenner asked the INS for a full immigration history of all 19 hijackers, including each of their entries and departures from the United States, and the status under which each entered on each of those occasions. The INS sent its response on April 4, 2002. That information arrived bearing the legend "DOJ Limited Official Use." An attachment to that information warned: "Be aware that dissemination to any party not entitled to receive the attached information may result in the imposition of criminal and/or civil penalties."

A review of the information that was provided by the INS showed that all 19 of the hijackers entered the United States on visas issued by the State Department. Accordingly, on June 27, 2002, Judiciary Committee Chairman Sensenbrenner asked the Secretary of State to provide to the Committee with copies of the Nonimmigrant Visa Applications (Forms OF–156) prepared by each of those hijackers. Given the high percentage of the hijackers who were Saudi Arabian nationals, Chairman Sensenbrenner also requested copies of the Consular Packages for the United States Embassy in Riyadh and the United States Consulate in Jeddah from 1996. On July 2, 2002, the State Department provided the Committee with information in response to that request. That submission was marked "Sensitive But Unclassified."

The Subcommittee continues to review the information that has been provided by both the INS and the State Department. Its investigation into the issuance of visas to and the admission of the 19 September 11 hijackers remains ongoing.

Review of the INS issuance of visa approval letters for Mohammed Atta and Marwan Al-Shehhi

In addition to the Subcommittee's general oversight into the admission and immigration histories of each of the 19 September 11 hijackers, the Subcommittee also launched a specific investigation into the issuance of visa approval letters for two of the hijackers, Mohammed Atta and Marwan Al-Shehhi. Atta and Al-Shehhi are believed to have each been piloting planes that crashed into the World Trade Center on September 11, 2001. Six months to the day after that incident, the flight school that the pair attended, Huffman Aviation, received notification that the INS had approved the application of each to change his status to M–1 student. Both the Subcommittee and the Department of Justice's Inspector General found several irregularities with respect to the issuance of those notifications.

Both Atta and Al-Shehhi entered the United States repeatedly on visitor visas between early 2000 and the September 11 attacks. On January 18, 2000, Al-Shehhi was granted a nonimmigrant visitor

visa by the State Department at the United States Consulate in Dubai. He was admitted to the United States on that visa at Newark International Airport on May 29, 2000. On May 18, 2000, Atta was issued a nonimmigrant visitor visa by the State Department at the United States Consulate in Berlin. On June 3, 2000, Atta was admitted to the United States at Newark International Airport as a visitor. Both filed applications for change of their nonimmigrant status to that of a vocational student to attend Huffman, a flight school in Venice, Florida.

As noted, on March 11, 2002, six months to the day after the September 11 attacks, Huffman received notification from the INS that applications to change status filed by Atta and Al-Shehhi had been approved. The notification letters were sent to the flight school from the INS Student Processing Center, operated by INS contractor "Affiliated Computer Systems Inc.," out of its offices in London, Kentucky. This incident raised almost immediate complaints from throughout the government, including the Congress, President, and Attorney General.

Information that the Subcommittee received in the course of this investigation revealed the following about Atta and Al-Shehhi's immigration history:

On July 3, 2000, Atta and Al-Shehhi signed up for flight training at Huffman. At the time that they signed up for training, Atta held a private pilot's license, and was seeking a commercial license. Al-Shehhi was seeking both a private and commercial license. The two started taking lessons on July 6, 2000.

On August 29, 2000, Huffman filed verifications of eligibility for vocational nonimmigrant student status (Forms I–20M) for Atta and Al-Shehhi with the INS. Subsequently, on September 19, 2000, Atta and Al-Shehhi each applied for a change in status from nonimmigrant visitor to non-immigrant student.

In December 2000, Atta and Al-Shehhi took their last flight tests at Huffman. Atta received his Instrument, Single/Multi-Commercial Certification. Al-Shehhi was granted the same certification along with his private pilot's license. Atta paid a total of $18,703.50 for his lessons, and Al-Shehhi paid $20,917.63 for his.

On January 4, 2001, after completing his training, Atta left the United States, travelling from Miami to Madrid. Atta reentered the United States at Miami International Airport on January 10, 2001, and applied for admission as a visitor. He presented his Egyptian passport during inspection, and was in possession of a Form I–20. This was, presumably, the I–20 that was filed by Huffman. The Inspector's notes reflect that Atta had told the Inspector that he had been attending flight school for five or six months. Apparently because of the information Atta gave to the primary Inspector, and the fact that he was carrying an unexpired visitor's visa, Atta was referred to secondary inspection to determine his admissibility during this entry. The INS checked its benefits processing database, CLAIMS, confirming that Atta had previously submitted an application to change his status to M–1 student. Atta was admitted as a nonimmigrant visitor.

On January 11, 2001, Al-Shehhi departed the United States at New York. He returned seven days later through New York, and was referred to secondary inspection. The primary Inspector noted:

"Subj. left one week ago after entry in May. Has extension and now returning for a few more months." The secondary inspection results show that Al-Shehhi was admitted by the secondary Inspector as a visitor for business. The notes in the secondary referral entry state: "Was in the US gaining flight hours to become a pilot. Admitted for four months."

On April 18, 2001, Al-Shehhi again departed the United States from Miami, going to Amsterdam. On May 2, 2001, he reentered the United States at Miami, and was again admitted as a visitor. He was not referred to secondary inspection on that date.[3]

Atta departed the United States on July 8, 2001, flying from Miami to Madrid. While Atta was outside of the United States, on July 17, 2001, his change of status application to M–1 student was approved. Atta reentered the United States at Atlanta, and was admitted as a visitor, on July 19, 2001. There is no indication as to whether Atta was referred to secondary inspection during that entry.

On August 9, 2001, Al-Shehhi's application for change of status to M–1 student was approved. As noted, on March 11, 2002, six months to the day after the September 11 attacks, Huffman received notification from the INS that the applications for change of status filed by Atta and Al-Shehhi had been approved. On March 14, 2002, Chairman Sensenbrenner sent a letter to the INS requesting information relevant to the INS's delayed issuance of the visa approval letters to Huffman for Atta and Al-Shehhi.

On March 19, 2002, the Subcommittee held a hearing on both the INS's delayed notification to Huffman and on the immigration statuses of Atta and Al-Shehhi. Rudi Dekkers, the President of Huffman appeared as a witness at that hearing, as did Thomas Blodgett, Managing Director of ACS, Commissioner James Ziglar of the INS, and Michael Cutler, a Special Agent with the INS.

In his testimony, the INS Commissioner admitted that the INS's information technology systems were "big on information and small on technology." While improvements had taken place, the Commissioner conceded that "the pace of improvement [of those systems] has been well behind any reasonable definition of the Service's needs."

The Commissioner also presented the Subcommittee with a series of measures that INS was considering to rectify gaps in current processes and policies related to student and visitor visas. Those changes fall into two categories: regulatory and administrative.

First, he stated that the INS was considering regulatory changes to tighten up temporary visa programs. For example, the agency was considering a regulatory change that would result in most holders of visitors' visas being admitted for a period of 30 days.

Second, the Commissioner testified that the agency was also considering changing its regulations to prevent a nonimmigrant alien with a pending request to change to student status who entered under some other status from beginning a course of study before

[3] The Washington Post reported on March 17, 2002, that Atta and Al-Shehhi took additional flight training in the United States in June 2001. Dan Eggen and Cheryl Thompson, Hijackers Visa Fiasco Points Up INS Woes, Mar. 17, 2002, at A21.

the alien's request for a change of status request to student was approved, as happened in the cases of Atta and Al-Shehhi.

Third, the Commissioner stated that the INS had reduced the processing time for student change of status applications to 30 days at two Service Centers and would reduce the processing time to 30 days or less at the remaining two. To prevent the possibility of a long gap in sending a return copy of the I–20, the Commissioner testified, the INS would immediately revise the process through which the I–20s are sent to the schools, so that the I–20 is returned promptly after the alien is authorized to enter into student status. In addition, the Commissioner stated, all applications filed at Service Centers, including student status applications, would be checked against the Interagency Border Inspection System (IBIS), an inspections database.

Thomas Blodgett, Managing Director of ACS, described the company's business relationship with the INS. ACS operates a microfilm, data entry, and storage facility in London, Kentucky for the INS that performs high-volume transaction processing for the microfilming, data entry, and storage of multiple INS forms, including I–94 and I–20 forms. ACS receives completed forms from INS Service Centers, schools, and ports of entry. It then scans and microfilms the forms, and enters certain data off of the forms. The data is returned to INS in microfilm and electronic form, and the original form is stored by ACS for a period specified by its contracts with the INS. After expiration of the contractual storage period, ACS mails the original form to the originating school.

Under its prior subcontract, ACS believed it was required to store those forms for 180 days before returning them to the school. ACS is now providing these services pursuant to a Blanket Purchase Agreement, dated October 22, 2001. The agreement changes the mandatory storage period from 180 days to 30 days for I–20 forms.

The third witness was Rudi Dekkers, the President of Huffman Aviation. Dekkers described the flight training that Atta and Al-Shehhi undertook at Huffman, and the role that the school played in Atta's and Al-Shehhi's applications for change of status.

Both Atta and Al-Shehhi came to Huffman claiming they were unhappy with a flight school that they were attending "up [n]orth," and seeking flight lessons. After they signed up with the school, Huffman found the two accommodations, from which they were evicted due to "excessive rudeness" to their landlord. The two were also nearly expelled from the flight-training program in August 2000 because of their "behavioral problems" and their inability to follow instructions. After a meeting with the Chief Flight Instructor, however, their behavior changed and they completed the course without further problems.

Huffman sent Forms I–20M for the two to the INS on August 29, 2000, along with copies of their passports. They took their last flight tests in December 2000, passed their FAA exams "with average grades," and were given temporary FAA licenses for 120 days. After paying their bills, the two were asked to leave the Huffman facility "due to their bad attitudes and not being liked by staff and students alike."

Huffman was contacted the morning after the September 11 attacks by the FBI, which was looking for the files for the two. Dekkers was thereafter asked whether he recognized any of the other terrorists, and he said that he did not. On March 11, 2002, Dekkers received the original I–20M's for Atta and Al-Shehhi in the mail. Dekkers stated that he "was relieved to see the paperwork, but not surprised. It usually takes a long time for visas to be returned from the INS." Dekkers claimed that an INS officer from Tampa came to him on March 14, 2002, requesting the original I–20M's, which Dekkers provided after the agent produced a subpoena.

More than two months after that hearing, on May 20, 2002, the Inspector General of the Department of Justice issued a report on the INS's contacts with Atta and Al-Shehhi. That report contained three sets of findings with respect to the two aliens.

First, the Inspector General concluded that the inspectors who admitted the two aliens did not violate INS policies and practices. The Inspector General was unable to reach any definitive conclusion whether Atta's admission in January 2001 was improper, given the limited record relating to the admission and the inspector's inability to remember the specifics of what was said at the time. The Inspector General found, however, that before September 11, the INS did not closely scrutinize aliens who were entering the United States to become students or consistently require them to possess the required documentation before entering the United States.

Second, the Inspector General found the INS's adjudication and notification process for change of status applications and the I–20 forms associated with those applications to be untimely and significantly flawed. Because the INS assigned a low priority to adjudicating these types of applications, a significant backlog existed. As a result, Atta's and Al-Shehhi's applications were adjudicated and approved more than 10 months after the INS received them, well after both aliens had finished their flight training course. Even after adjudication, the Inspector General found, there was another significant delay before the I–20 forms were mailed to the flight school notifying it of the approved applications because ACS held onto them for 180 days before mailing them to the school. The Inspector General found that ACS handled these forms consistently with its handling of other I–20 forms and its interpretation of the requirements of its contract with the INS. He determined that the evidence suggested, however, that the contract was written so that the I–20 forms would be returned to the schools within 30 days, and the Inspector General criticized the INS for failing to monitor adequately the requirements and performance of the contract. The Inspector General also criticized INS personnel for failing to consider the I–20s during the initial stages of the September 11 investigation, and thereby failing to make the FBI aware of the I–20s. No one in the INS took responsibility for locating the forms or notifying the FBI of their existence, an oversight the Inspector General found to be a failure on the part of many individuals in the INS.

Third, the Inspector General concluded that the INS's current, paper-based system for monitoring and tracking foreign students in the United States was antiquated and inadequate. The Inspector

General also noted several problems with the process pursuant to which the INS adjudicated Atta's and Al-Shehhi's applications for change of status. The Inspector General found that Atta and Al-Shehhi did not sign their I–20 Forms, which technically should have resulted in the forms being returned to them. More importantly, the Inspector General found, the adjudicator did not have complete information about Atta and Al-Shehhi before adjudicating their applications. In particular, the Inspector General found that according to long-standing INS policy, an alien who files an application for change of status and travels abroad abandons that application. Both Atta and Al-Shehhi filed applications with the INS for change of status on September 19, 2000, and thereafter each departed the United States at least twice before those applications were approved, abandoning those applications. Although the INS captures departure information in its Nonimmigrant Information System (NIIS) database, adjudicators were not required to access NIIS in every case to ensure that an applicant had not departed the United States while the application was pending.

After concluding its investigation, the Subcommittee concurs with the conclusions of the Inspector General.

As the Commissioner discussed in his testimony at the March 19, 2002 hearing, the INS has subsequently proposed changes to its regulations intended to address problems in the admission and change of status of nonimmigrant visitors and students uncovered by the Subcommittee's and the Inspector General's investigation of Atta and Al-Shehhi.

Specifically, the INS has promulgated an interim rule prohibiting non-immigrant visitors from pursuing a course of study prior to obtaining INS approval of a change to student status. The INS has stated that this change will ensure that aliens seeking to remain in the United States in student status will have received the appropriate security checks before beginning a course of study.

The INS has also issued a proposed rule that would eliminate the minimum period of admission for a nonimmigrant visitor for pleasure, which is currently six months. In place of the minimum period of admission for visitors, the agency is proposing that both visitors for business and visitors for pleasure be admitted for a period of time "that is fair and reasonable for the completion of the purpose of the visit." The INS is also proposing to reduce the maximum period of admission for visitors from one year to six months. The proposed rule will also prohibit a non-immigrant visitor from changing to student status unless the alien states an intention to study at the time of admission.

Oversight of federal agency policies and law enforcement efforts to prevent identity theft

The Subcommittee has recognized the necessity to better understand the serious threat to homeland security that emanates from identity fraud and identity theft. This need was illuminated by the fact that nearly all the 9/11 terrorists who perished on the hijacked planes employed one or more false identities. The hijackers obtained valid drivers' licenses and presented those cards as identification instead of their national passports that might have aroused some extra level of scrutiny.

Following those events, federal agents arrested hundreds of people working in airports, who were subsequently convicted of identity fraud, illegal misrepresentations, and immigration violations. Many of those convicted held top security clearances at airports and had regular access to secure areas.

The Subcommittee held two hearings to further its investigation regarding the federal government's role in preventing identity theft and determining the level of continued threat from terrorists exploiting the U.S. vulnerability from respective security weaknesses. The Subcommittee recognized that the Subcommittee on Crime, Terrorism and Homeland Security, as well as the Subcommittee on Social Security of the Committee on Ways and Means were appropriate partners with which to hold joint hearings on this subject.

The first of these joint hearings was held by the Subcommittee and the Subcommittee on Crime, Terrorism, and Homeland Security on "The Risk to Homeland Security From Identity Fraud and Identity Theft," on June 25, 2002. Witnesses were the U.S. Attorney for the Eastern District of Virginia, Paul McNulty, Social Security Administration Inspector General James G. Huse, Jr., Richard M. Stana, Director, Justice Issues, U.S. General Accounting Office, and Edmund Mierzwinski, U.S. Public Interest Research Groups Consumer Program Director.

The Members heard testimony from U.S. Attorney Paul McNulty, regarding the details of how the 9/11 terrorists were successful in obtaining valid Virginia drivers' licenses using false identities. He also testified to the need for stronger penalties, and mentioned that the Attorney General has endorsed legislation to increase the penalties for identity theft. James Huse, Inspector General of the Social Security Administration, described the critical security vulnerability caused by tens of thousands of foreigners each year illegally obtaining Social Security numbers by using fake documents. A report issued on May 10, 2002, by Mr. Huse's office, revealed that 1 in 12 foreigners receiving new Social Security Cards used counterfeit documents or stolen identities to get them. The report cited preliminary figures showing 100,000 Social Security Cards were wrongly issued to non citizens in 2000.[4]

Richard Stana from the GAO presented findings of a GAO study of identity theft completed in March 2002. That study provided cost data that pertained primarily to consumer and business losses and provided insight into the costs of identity theft and the investigatory complications that impact law enforcement. The GAO study included a review of identity theft investigations by Federal law enforcement agencies that illustrated the growing demands on law enforcement resources devoted to investigating and prosecuting perpetrators of criminal identity theft. The Subcommittee has determined that:

• There is a continuing threat from terrorists operating under false identities. Terrorists exploited the relatively weak procedures of several States to obtain legal identity cards that allowed them to commit the atrocities of September 11, 2001.

[4] "Foreigners obtain Social Security ID with Fake Papers," by Robert Pear, New York Times, May 19, 2002.

• There are no federal laws that require minimum standards for confirming identity before issuing identity documents.

• There are tens of thousands of illegal aliens and U.S. citizens using assumed identities working in high security jobs with security clearances issued by federal, state, and municipal agencies.

• There has been an exponential rise in identity theft related crime, often involving substantial financial loss to businesses and individual citizens. Current federal and state penalties for identity theft crime are insufficient, and law enforcement methods will need to updated to apprehend more identity thieves.

• There continues to be lax scrutiny of source documents by federal agencies and State agencies that issue identity cards, social security cards and drivers licenses, which makes it relatively easy for identity thieves to operate.

• There is a large and growing legal and illegal information market through which illegal aliens, criminals and terrorists can obtain and use valid documents such as drivers licenses and social security numbers.

• The INS is responsible for assisting State and federal agencies in training their employees in the examination of identity documents such as visas and immigration status documents. The INS does not now effectively train federal agencies in how to identity counterfeit source documents.

• Only after September 11, 2001, did the Social Security Administration reverse its policy on checking INS records before issuing Social Security cards to noncitizens. The INS has still not completed any arrangement to provide the SSA with automated checking of its records, despite public statements that this is a "top priority."

• There is still no biometric used either to confirm identity when SSA issues a card, nor any biometric attached to the card to confirm that the bearer is the same person to whom the card was issued. The SSA does not use any of the sophisticated anticounterfeiting measures and tamper proof production methods employed by the State Department for passports or visas, nor by the INS for the Permanent Residence Card or the Biometric Border Crossing Card.

• The INS is the only federal agency that actively pursues criminal organizations that manufacture counterfeit Social Security cards, false birth certificates and other false source identity documents. The SSA has no criminal enforcement powers and has initiated few programs to combat the widespread use of counterfeit Social Security Cards and false or stolen Social Security numbers. The relative lack of law enforcement against counterfeiting organizations makes it very easy for terrorists to obtain counterfeit documents that can be "upgraded" to legally issued identification documents such as valid Social Security cards, U.S. passports and State issued drivers licenses.

The SSA's Office of the Inspector General has proposed changes that would reduce fraudulent use of Social Security cards and Social Security Card numbers. According to the OIG, the SSA should:

• Obtain independent verification from the issuing agency (for example, INS and the State Department) for all evi-

dentiary documents submitted by noncitizens before issuing an original Social Security number,

- Establish a reasonable threshold for the number of replacement Social Security cards an individual may obtain during a year and over a lifetime, and then implement controls requiring management personnel to approve any applications exceeding this limit,
- Provide further training to its field office employees and perform quality reviews of Social Security number processing,
- Seek legislative authority to require chronic problem employers to use the INS/SSA pilot program that checks the Social Security numbers and alien identification numbers of new hires against SSA and INS data bases, and
- Continue pursuing with the IRS penalties against chronic problem employers, (If the IRS does not enforce such penalties, SSA should seek its own sanctioning authority.)

The OIG also recommended that Congress and the SSA consider the following steps:

- Increase the number of investigative and enforcement resources provided for SSN misuse cases,
- Authorize SSA and its OIG to disclose information from SSA files as requested by the DOJ and FBI in times of national emergency and in connection with terrorist investigations,
- Expand the agency's data matching activities with other federal, State, and local Government entities, and
- Explore the use of other innovative technologies, such as biometrics, in the enumeration process.

The second hearing took place on September 19, 2002. It was a joint Hearing of the Ways and Means Subcommittee on Social Security and Judiciary Subcommittee on Immigration, Border Security, and Claims titled "Ensuring the Integrity of Social Security Numbers and Preventing Their Misuse by Terrorists and Identity Thieves". The hearing examined the role Social Security number fraud plays in crime and terrorist activities, methods by which criminal fraud is accomplished utilizing stolen Social Security numbers, the integrity of the Social Security Administration's enumeration and wage crediting process, federal agency coordination and cooperation, including data sharing, to verify identification documents, and to detect and prevent fraud. The hearing also addressed recommended legislative proposals aimed at combating Social Security number misuse and protecting privacy.

The subcommittees heard testimony from Ms. Charisse M. Phillips, Director, Office of Fraud Prevention Programs, Bureau of Consular Affairs, U.S. Department of State, regarding the problems that lack of conforming standards among the States in issuing and controlling birth certificates, death certificates, and driver's licenses create for federal agencies when seeking to confirm identity. She testified that there needs to be a better method to confirm Social Security numbers easily and routinely. She pointed out that it is difficult to confirm the bonafides of U.S. birth certificates and driver's licenses, because the U.S. has more than 8,000 authorities issuing birth certificates. While the commonly accepted proof of identity is the driver's license, she explained that high-quality du-

plicates of state licenses are available on the Internet, with only a removable sticker warning "novelty item" to deter criminals. She explained that the State Department's passport workers have no way of verifying driver's licenses, either on-line or though routine access.

Mr. Jim Huse, Inspector General of the Social Security Administration, testified about how the current lack of identity theft enforcement by federal agencies, particularly relating to Social Security card numbers, is a significant risk to domestic security. He stated that in calendar year 2000 the SSA issued approximately 1.2 million Social Security numbers to non-citizens, out of some 5.5 million numbers issued in all. A recently conducted Office of Inspector General study indicates that 8 percent—196,000—of those 1.2 million SSNs were based on invalid immigration documents. Mr. Huse stated with alarm that "[w]e have no way of determining how many SSNs have been improperly assigned to non-citizens throughout history. The issuance of SSNs based on invalid documentation creates a homeland security risk.* * * Protecting the integrity of that identifier is as important to our homeland security as any border patrol or airport screening."

Mr. Huse provided an alarming example of the ease with which terrorists obtain social security cards from a case that is just completing the sentencing phase:

> The Antiterrorist Task Force arrested a naturalized American citizen who had trained with Palestinian guerrilla groups in Lebanon since he was 12 years old. He was carrying a loaded semi-automatic pistol and an assault rifle in the back seat of his car, along with four loaded 30-round magazines for the rifle and hundreds of rounds of additional ammunition. In his home were a calendar with September 11th circled in red, three different Social Security cards in his name, a false Alien Registration Card, evidence of credit card fraud and $20,000 in cash, as well as a wood carved plaque with the name of the terrorist group Hamas on it.
>
> We determined he had obtained the three different SSNs from SSA by falsifying two of his three SSN applications. He had used them to get jobs as a security guard and as an employee with the multi-billion-dollar Intel Corporation, when a criminal history check would have kept him from getting either job under his true identity.

Mr. Huse also testified as to federal agency coordination and cooperation to verify identification documents and to detect and prevent fraud. He said "it is critical that SSA independently verify the authenticity of the birth records with States, immigration records with the Immigration and Naturalization Service, as well as other identification documents presented by an applicant for an SSN."

The Committee heard testimony from Robert Bond, Deputy Special Agent in Charge, Financial Crimes Division, U.S. Secret Service, in which he described how, with the passage of federal laws in 1982 and 1984, the Secret Service was given primary authority for the investigation of access device fraud and parallel authority with other law enforcement agencies in identification fraud cases.

He explained that the Internet and advanced technology coupled with fierce competition within the financial sector has created a target rich environment for today's sophisticated criminals, including organized crime and foreign criminals. He testified that identity theft is not typically a "stand alone" crime, but almost always a component of one or more other crimes, such as financial crimes, violent crimes, or possibly, the facilitation of terrorist activities. In many instances, an identity theft case encompasses multiple types of fraud. In 2001, 20% of the 86,168 victim complaints regarding identity theft involved more than one type of fraud.

Mr. Bond explained that identity theft victims have to repair the damage done to their credit, their savings, and their reputation. Among the groups most at risk are senior citizens.

Mr. Grant D. Ashley, Assistant Director, Criminal Investigative Division of the Federal Bureau of Investigation, testified regarding the FBI's role in prosecuting identity thieves. He described investigations of identity theft, including bank fraud, credit card fraud, wire fraud, mail fraud, money laundering, bankruptcy fraud, computer crimes, terrorism, organized crime, and fugitive cases.

He described how a stolen identity is employed while the groundwork is laid to carry out the crime. This includes the rental of mail drops, post office boxes, apartments, office space, vehicles, and storage lockers as well as the activation of pagers, cellular telephones, and various utility services. He stated the need to strengthen existing federal identity theft criminal statutes and endorsed changes in federal law to impose a mandatory two-year enhanced penalty (over and above the sentence that would otherwise apply in a particular case) for a wide range of cases involving identification document fraud. He also supported increasing the maximum prison term for possession with intent to use unlawfully of valid or fake identity documents from three to five years.

Mr. Ashley gave an example of large scale identity theft:

> One case under investigation by one of our offices in conjunction with the U.S. Postal Inspection Service involves an individual who obtained personal identifying information such as the names, and dates of birth of attorneys in the Boston area from the Martindale-Hubbell directory of attorneys. Using this information, his co-conspirator visited the Massachusetts Bureau of Vital Records which has an open records policy and was able to obtain copies of birth certificates of his victims.
>
> According to interviews with the defendants, using the combined information, they were able to contact the Social Security Administration and obtain the victims' Social Security Numbers. Once they obtained the Social Security Numbers, they were able to order credit reports and look at the credit scores for these victims to determine their creditworthiness and where accounts already existed.
>
> Using this information they were able to make pretext calls to at least one bank and obtain the account number. This enabled them to wire transfer $96,000 from one of the victim's bank accounts, half of which went to a casino and the remainder went to one of the subject's personal accounts.

> One of these suspects also added authorized users to the victims' credit card accounts and ordered emergency replacement cards which were sent to them by overnight delivery. At the time of arrest, this individual was found to be in possession of at least 12 different license or identification cards from three states and at least four or five credit cards, all in the names of the victims whose identity he had stolen.

Mr. Ashley advised that "[t]here needs to be some serious review of the availability of personal identifying information, including the Social Security Number, over the internet, especially through these types of information brokers who can provide this information for a fee."

The hearing led to the following conclusions:

• Combating identity theft is key to protecting homeland security; According to SSA IG testimony, after the September 11th attacks, 5 Social Security numbers associated with some of the terrorists appeared to be counterfeit (were never issued by SSA), 1 was assigned to a child, and 4 of the terrorists were associated with multiple SSNs. According to FBI testimony, "terrorists have long utilized identity theft as well as Social Security number fraud to enable them to obtain such things as cover employment and access to secure locations. These and similar means can be utilized by terrorists to obtain driver's licenses, and bank and credit card accounts, through which terrorism is facilitated."

• Federal agencies must cooperate, as the SSA has no legal authority to levy fines and penalties against employers or employees who submit incorrect information on wage reports—the Internal Revenue Service enforces penalties for inaccurate wage reporting, and the Immigration and Naturalization Service has oversight responsibility for unauthorized citizens. Enhanced coordination and cooperation among these agencies can help stem the growth of Social Security number misuse.

INS systems oversight

The Subcommittee has a historical interest in INS information systems, initiating important legislation over the past 10 years that has mandated improvements in INS' use of technology. Because of the significance of INS' enforcement systems in combating terrorism, and the increased threat to Border Security from terrorism, the Subcommittee focused on those systems.

The Subcommittee took a broad approach to this oversight, including: (1) an oversight hearing on INS Information Technology; (2) a GAO study of four key INS enforcement systems; (3) on-site investigations of INS systems in use at airport Ports of Entry and land Ports of Entry; (4) on-site investigations of new systems planning, development and implementation; (5) an oversight hearing on the SEVIS system deployment.

The Subcommittee's oversight work on INS systems had a considerable impact, leading to improvements in INS management communication with Congress, changes in INS project management, a public commitment by the Department of Justice's Chief Information Officer to improve oversight of INS information technology projects, and a commitment to the GAO by INS to improve

its processes and documentation related to baseline cost and schedule data of these projects. The Subcommittee's hearings also generated a great deal of interest from the public and the press regarding the role of INS systems, which in turn will lead to a continuing emphasis on improving INS systems performance and delivery.

Oversight hearing on INS information technology

The Subcommittee conducted an oversight hearing on the INS's use of information technology in enforcement on October 11, 2001. The hearing was held to examine how the INS was implementing the information technology systems that it uses for enforcement, particularly the $111 million for new investment that was proposed in the FY2002 INS appropriation. The hearing also examined INS's lack of progress in implementing the automated systems component of the biometric Border Crossing Card and whether it constituted a critical mission failure or a deliberate policy decision by the former administration.

Similarly, the hearing addressed the delayed implementation of the Student and Exchange Visitor Information System (SEVIS), for which the INS failed to meet a congressionally set date for implementation. Both these systems were mandated by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. The Subcommittee was particularly concerned about these INS failures given that they occurred despite the agency receiving ample financial resources. GAO and DOJ OIG audits had revealed that the INS was deficient in Enterprise Architecture Management, Investment Management, and Information Security Management.

Commissioner Ziglar attempted to explain why the two major systems efforts of most interest to the Subcommittee had not been completed in a timely manner: (1) implementation of a systems approach to automated scanning of the new Biometric Border Crossing Card and (2) completion of a system to collect foreign student data from all universities, colleges and trade schools across the U.S. Commissioner Ziglar pledged to the Subcommittee Members that he would direct his managers to complete these two projects no later than the Spring of 2002.

Glenn A. Fine, Inspector General, U.S. Department of Justice, testified that his office's reviews of INS programs and their associated information technology systems found serious process and management deficiencies. He described how two OIG reviews of the INS's management of its automation initiatives found lengthy delays in completing many automation programs, unnecessary cost increases, and a significant risk that finished projects would fail to meet the agency's needs. The first of these audits concluded that the INS lacked comprehensive performance measures and insufficiently tracked the status of its projects. Consequently, the INS could not determine if progress towards the completion of the projects was acceptable. As a result, he stated that the INS faced risks that: (1) completed projects would not meet the overall goals of the automation programs, (2) completion of the automated projects would be significantly delayed and (3) unnecessary cost increases would occur. In the followup 1999 audit, it was reported that: (1) estimated completion dates for projects were delayed with-

out explanation, (2) costs continued to spiral upward with no justification for how funds were spent and (3) projects neared completion with no assurance for meeting performance and functional requirements.

Subcommittee investigations into the INS's failure to implement the Border Crossing Card as required by Congress

Section 104 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 mandated the implementation of a biometric Border Crossing Card. The INS began issuing the cards in 1998, and more than five million have been issued to date. By October 1, 2001 (later extended to October 1, 2002), any Mexican or Canadian national who seeks admission with a BCC is required to present the new biometric card to an inspector before being admitted to the United States.

The Subcommittee Members, especially the Chairman and Ranking Member, were deeply concerned that while the INS issued cards to meet one of the requirements of section 104, it failed to select or procure the card-verification equipment to read the encrypted optic back surface of those cards, and failed to begin work on the system to process the information on the aliens to whom the cards were issued. The biometric Border Crossing Card (also known as the laser visa), has a photo and basic ID information printed on the front and machine-readable information contained on a special laser read/write disk embedded in the back of the card. It was Congress's intent that effective October 1, 2001, any Mexican national who seeks admission with a BCC will be required to present the new biometric card to an Inspector before being admitted to the United States. Those purposes included: (1) having a machine read the card to confirm that is was not a counterfeit card and that the biometric information (fingerprint and photo) matched both the card holder and the centralized record and (2) that an automated record of entry and exit be created through a scanning device every time the person crossed the border. This issue was discussed at the October 2001 hearing. Largely as a result of the Subcommittee Chairman's expressed concern following the hearing, the Emergency Supplemental Appropriations bill appropriated $10 million and mandated that the INS purchase scanners and deploy them at sea, land, and air ports of entry. The Subcommittee staff met regularly with the INS to ensure that reasonable progress was made to establish minimum specifications for the optic readers, an implementation plan for the optic surface card readers, and the procurement plan for their acquisition. The staff has actively monitored the activity of the pilot phase of the implementation plan which is ongoing at interior locations in Southern California and at selected land port of entry locations on the Southwest border and at the Atlanta airport. Subcommittee staff has also investigated the security of the card-manufacturing process and of the data systems that capture and store the data obtained by the State Department Bureau of Consular Affairs.

Oversight of the INS's implementation of a entry-exit tracking system at U.S. ports of entry

Section 110 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 required INS to implement an automated entry-exit control system for land and sea ports of entry. The Subcommittee required the INS to meet with staff regarding acceleration of development of an effective entry-exit system, focusing on initial deployment at inspections stations in airports, beginning in October 2002. The Subcommittee staff relied on knowledge gained through these meetings when drafting the Enhanced Border Security and Visa Entry Reform Act of 2001 (H.R. 3525). In consultation with staff, the INS had earlier agreed to establish an interim system for tracking entry and exit of airline passengers using data from the Advanced Passenger Information System (APIS) and to add that information in a more efficient way to the IBIS system. To ensure that the INS receives that information, H.R. 3525 required that commercial airlines flying to the United States from abroad submit passenger manifests, including arrival and departure manifests, in advance electronically by January 1, 2003. The Subcommittee staff met with Customs officers in 2002 to monitor progress in receiving the required data from commercial airlines, including receiving a restricted report that identified which international airlines had not yet complied with the requirement. The Subcommittee staff also met with INS to ensure that plans had been made to capture the departure information that will be provided through APIS, so that foreign visitors not complying with the constraints of their visa admittance issued by the INS will be identified, starting January 1, 2003. The Subcommittee staff also required briefings by the INS regarding the implementation of biometric identification and mandatory entry and exit confirmation of visitors from countries identified as state sponsors of terrorism. The resulting system was identified by the Attorney General as a pilot for the United States Entry Exit System. Now in place at selected air and land ports of entry is the National Security Entry Exit Registration System, or NSEERS. The INS is now required to register, photograph, and fingerprint certain non-immigrant aliens subject to special registration as a condition of entry into the United States. The Subcommittee anticipates on site oversight observation of NSEERS in the 108th Congress.

Oversight of the operations of the Executive Office for Immigration Review

Throughout the 107th Congress, critics expressed concerns about the actions and operations of the Immigration Court and the Board of Immigration Appeals, the trial and appellate courts, respectively, of removal actions brought by the INS. These two courts are components of the Executive Office for Immigration Review within the Justice Department.

Observers have complained that cases before both the Immigration Judges and the BIA can take years to complete, and reports have stated that even cases involving detained aliens have gone unresolved at the BIA level for extended periods of time. Backlogs in cases have also been growing in recent years, although the number of BIA members has steadily increased over the past six years.

In addition, certain BIA members and IJs have been criticized, both by the public at large and by the immigration-law community, for failing to follow the language of the Immigration and Nationality Act, or for granting or denying relief inappropriately. The BIA has also been criticized for failing to defer to IJ decisions, including decisions premised on IJs' observations of witnesses at hearings. In the fall of 2001, the Subcommittee opened an oversight investigation into those concerns. That investigation is ongoing.

Backlogs in removal cases have been a problem for the BIA for several years, and that problem appears to have been largely unaffected by an increase in resources. For several decades up until February 1995, the BIA had five members, including a Chairman. Starting in 1995, the number of BIA members has steadily increased. Eight new members were appointed in 1995, one in 1997, two in 1998, two in 1999, four in 2000, and two in 2001. The BIA is now composed of 23 Members, including the Chairman and two Vice Chairmen (there are currently five vacancies).

Despite the fact that the number of BIA members have more than quadrupled since 1995, the backlog in issuing decisions on appeal grew. In FY 2000, the backlog increased even more, as the BIA completed 23,184 appeals against 35,361 receipts. An article from February 2001 stated that there was, at that time, a backlog of 60,000 cases at the BIA, and that non-detainee cases were taking "a matter of years."

This backlog has had tragic effects, both for aliens with cases languishing on appeal and for the public at large. Several newspaper articles published in the recent past described situations where aliens have been detained for years while waiting for the IJs and the BIA to rule on their cases. The backlog at the BIA has also allowed criminal aliens to remain in the United States to prey on the American public.

Observers also complained about decisional irregularities in decisions issued by the IJs and the BIA. In an October 2000 series, The (San Jose) Mercury News examined the grant and denial rate for 219 IJs from 1995 to 1999, finding "extraordinary disparities from one judge to the next." As it stated "[A]t one end of the spectrum, some judges granted asylum in more than half the cases they heard. At the other end, judges granted asylum in less than 5 percent of the cases they heard, some less than 2 percent." The Mercury News noted that "[a]sylum lawyers and advocates have long complained that the results are arbitrary."

Critics have also complained that a large number of aliens who are released by the INS and by the IJs and the BIA subsequently fail to appear at scheduled hearings. According to statistics released by EOIR, the rate of aliens who failed to appear for hearings overall fluctuated between 21 and 25 percent between FY 1996 and FY 1999. A large number of criminal aliens have gone on to commit additional crimes in the United States after they were released from INS custody.

After collecting information on the operations of EOIR, and discussing the issues raised with immigration practitioners, on February 6, 2002, the Subcommittee held an oversight hearing on the operations of the office. Kevin Rooney, Director of EOIR appeared as a witness, as did Stephen Yoel-Loehr of the American Immigra-

tion Lawyers Association and former BIA members Michael Heilman and Lauren Mathon.

In his testimony, Director Rooney described recent initiatives implemented by the BIA and Immigration Court to improve efficiency, expedite cases, and reduce the removal case backlog. Of particular note was the "streamlining" initiative. Under this initiative, noncontroversial cases that meet specified criteria may be reviewed and adjudicated by a single Board Member. The types of cases in which the "streamlining" procedures may be used include unopposed motions, withdrawals of appeals, summary remands, summary dismissals, other procedural and ministerial issues determined by the Chairman, and affirmances of IJ decisions without opinion. This latter category is limited to cases (1) where the result reached in the decision under review was correct and any errors in the decision were harmless or nonmaterial, (2) where the issue on appeal is squarely controlled by existing BIA or federal court precedent and does not involve the application of precedent to a novel fact situation or (3) where the factual and legal questions raised on appeal are so insubstantial that three-Member review is not warranted.

Director Rooney explained that the streamlining initiative was then being implemented through a pilot project, with the results of the project used to implement streamlining on a permanent basis. For FY 2002, approximately 58% of all incoming cases were sent to the streamlining panel, and the streamlining panel issued 15,372 decisions, which helped the Board increase its productivity by 50% for the year. Rooney asserted that an independent audit concluded that streamlining did not result in an appreciable difference in the ultimate outcome of a case, nor did it affect the rate of legal representation of aliens in appeals before the Board. He also claimed that the independent auditor concluded that the Streamlining Project has been an "unqualified success."

In his testimony, former Board Member Heilman detailed problems that have impaired the BIA's performance and efficiency. Heilman stated that, having reviewed over 100,000 appeals at the BIA, "the overwhelming percentage of [IJ] decisions * * * were legally and factually correct, and that the subsequent appeals were without any substantial basis on any ground."

Heilman claimed that there were a number of incentives for aliens to appeal, including the low filing fee (waived, he claimed, in many of the cases) and the fact that the alien did not have to pay for fees or transcripts. "[T]he single greatest incentive for an alien to appeal" though, he asserted, was the fact that the filing of an appeal stayed the IJ's order until the BIA issued a decision.

Heilman also argued that the usefulness of the BIA's precedent decisions has decreased as the number of Board Members has increased. He asserted that as the size of the BIA increased, the BIA "came to be marked by internal divisions based on personality conflicts." In particular, he noted, the IJs "came to see their decisions being subjected to intemperate and even personal critiques by certain BIA Members." The BIA panels began to issue conflicting decisions, and to remand increasing numbers of cases to the IJs. "Many Immigration Judges came to believe that their decisions were not

being subjected to a reasonable review, but rather the whims of individual Members."

To correct these problems, Heilman argued that the BIA should limit the cases that it hears on appeal, considering precedential cases and cases where "a clear case has been made that an Immigration Judge has made an incorrect application of the law below." He also suggested that aliens should be required to file a brief within 30 days of filing the appeal identifying legal errors committed by the IJ, that a time limit be set by regulation or statute within which the BIA would have to render a decision on the merits of the appeal, that the number of Board Members be reduced to no more than nine, and that an alien be charged the cost of the alien's appeal. Other changes proposed by Heilman would end the present practice by which an alien may have an asylum application heard by both an INS asylum officer and an IJ, and would require cases to be screened by INS attorneys before they are filed with an IJ.

Former Board Member (and current Social Security Administrative Law Judge) Lauren Mathon offered her own perspective on the backlog problem and other problems facing the BIA. Judge Mathon gave five reasons for the BIA's staggering backlog: A backlog at the time that the number of Board Members expanded, "radical changes" in the immigration laws in 1996 that have resulted in extensive litigation, an increase in the number of IJs, management difficulties at the BIA between 1995 and 2000, and the fact that many recent Board Members lack immigration expertise.

Judge Mathon lauded three BIA initiatives: the "streamlining" initiative, the jurisdiction panel, and the backlog panel. She stated that the streamlining initiative "allows the Board to adjudicate noncontroversial cases by a single Board Member," and claimed that it has dramatically increased BIA production of the Board. She explained that streamlining is responsible for about a third of the BIA's overall production. The jurisdiction panel, Judge Mathon stated, "effectively and efficiently adjudicates all cases with jurisdictional issues," without having to address the merits of the cases considered. Judge Mathon stated that the backlog panel "has been successful in making a big dent in the backlog."

To address the BIA's caseload and make Board Members accountable, Judge Mathon proposed setting specific time limits for the BIA to render decisions and mandating a result for failure to meet these limits, requiring the BIA to enforce the regulatory numerical and temporal deadlines for filing appeals and motions, mandating the Board to consider only those issues raised on appeal, setting a short and specific time limit for a Board Member to write a separate opinion or dissent, reducing the number of Board Members to a total of 16, adding more categories of cases for adjudication by a single Board Member on the streamlining panel and promoting consistency of decisions among the panels.

Yale-Loehr also addressed the effectiveness of the streamlining initiative in his testimony. He stated that an outside auditor who had examined the initiative concluded that the "overwhelming weight of both 'objective' and 'subjective' evidence gathered and analyzed indicated that the Streamlining Pilot Project has been an unqualified success." Yale-Loehr also argued, in his testimony, for

the creation of "a separate, Executive Branch agency that would include the trial-level immigration courts and the BIA."

On the day of the EOIR oversight hearing, the Attorney General announced proposed regulatory amendments containing procedural changes in how the BIA adjudicates cases, which incorporated many of the streamlining procedures utilized by the BIA. The final rule implementing those amendments was issued on August 23, 2002. Under these new regulations:

- Carrying forward the streamlining pilot, decisions will be issued by a single Board member where there are no novel questions, disagreements or difficult matters of law. Three-member panels of the BIA will continue to consider "complex cases."
- The BIA will no longer review IJs' factual findings *de novo,* and will instead employ a "clearly erroneous" standard, the standard of review that most appellate courts use for factual issues.
- The rule includes a series of time limits for the adjudication of cases to provide a more timely decision to the parties:
    - A single Board Member has 90 days either to decide the case or refer it for three-member panel review, and
    - A three-member panel must render its decision within 180 days of referral. In limited circumstances, these time limits may be temporarily suspended.

After a six-month transition period, the Board will be reduced to 11 members.

At the February 6, 2002 hearing, Yale-Loehr discussed these regulations in their proposed form. He was critical of the Attorney General's proposals for eliminating the backlog at the BIA and reducing the appeal period for BIA appeals, arguing that the existing backlogs before the BIA are not the result of inefficiency, but rather reflect a lack of resources, and that a reduction in the number of Board Members would not serve the interests of fairness or efficiency.

Inquiry into the INS admission of four aliens from the Progresso and request for INS directives

On March 22, 2002, Subcommittee staff received information about the *Progresso,* a ship sailing under a Maltese flag that landed at the Port of Chesapeake, Virginia on March 16, 2002. Specifically, staff was informed that Ahmad Salman, Thulan Qadar, Mohammad Nazir, and Adnan Ahmad, four Pakistani nationals who were crewmen aboard that ship, were waived into the United States for shore leave while that ship was in port. When the ship departed on March 18, 2002, the four were not on board. Initial reports suggested that after it was discovered that the four had failed to appear for the *Progresso's* departure, the names of the four were checked against a terrorist "watch" or "lookout" list, which had not, purportedly, been done before they were admitted. That check allegedly revealed that the name of one of the four appeared on the lookout list. Shore passes for the rest of the crew reportedly were subsequently revoked.

Subcommittee staff was also informed that INS Field Operations issued field guidance in the Fall of 2001 stating that crewmen were not to be waived for shore leave without permission from the District Director, Deputy District Director, Assistant District Director

for Investigations, or Assistant District Director for Examinations. Permission was not obtained from any of these four INS employees before the four named crewmen were waived for shore leave during the *Progresso's* March 2002 visit to Chesapeake, Virginia, staff was told.

On March 22, 2002, Committee and Subcommittee staff held a conference call with employees of both the INS and Department of Justice about this incident. On that call, the INS and Justice Department officials revealed that the names of each of the crewmen was checked against the Interagency Border Inspection System (IBIS) prior to the *Progresso's* arrival, resulting in no matches. A mistake in the entry of information for one of the aliens, however, caused INS to miss information regarding that alien's prior immigration history. Specifically, the alien had applied for admission previously, but withdrew that application when the evidence that he presented to support his application could not be verified.

Later that day, Chairman Sensenbrenner sent a request to the INS for additional information on that incident, to be forwarded to the Committee by March 27, 2002. On March 25, 2002, the Commissioner sent his initial response to that request. On April 3, 2002, he forwarded a full description of this incident. That letter verified that one of the four aliens had a prior immigration history that was mistakenly overlooked when he was granted a landing permit. The response also indicated that the Inspector who waived the four failed to comply with the aforementioned field guidance because, she stated, she was unaware of the policy. The Supervisor responsible was removed, the INS said, and the agency initiated an investigation to determine whether any other personnel were responsible for the guidance not being followed or disseminated.

Following public disclosures about this incident, the Commissioner "implement[ed] a zero tolerance policy with regard to INS employees who fail to abide by headquarters-issued policy and field instructions." This "zero tolerance policy" raised the issue of how many "headquarters-issued policy and field instructions" were then currently in effect, and whether any of those instructions were in conflict with one another or reflected policies that might have needed review in light of the terrorist attacks of September 11, 2001. For these reasons, on April 2, 2002, Chairman Sensenbrenner requested that the Attorney General provide the Committee, no later than April 5, 2002, with copies of all current INS "headquarters-issued policy and field instructions," along with copies of any documentation indexing those instructions. The Chairman stated that he was particularly interested in "any indices that have been issued to assist INS headquarters, regional, and field personnel in applying those instructions."

On April 5, 2002, the Justice Department notified Subcommittee staff that the INS had identified approximately six boxes of materials and "several volumes of electronic materials" which "may be responsive to the Chairman's request." No indices existed, raising the question of how INS staff could possibly comply with the zero tolerance policy.

Review and assessment of the Immigration and Naturalization Service's foreign Student Tracking Program

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Congress directed the Attorney General to develop and conduct a program to collect specified information on nonimmigrant students and exchange visitors from approved institutions of higher education and designated exchange programs. In the USA PATRIOT Act, Congress mandated that the Attorney General fully implement that program, authorizing $36,800,000 (later appropriated) for this purpose.

The tracking of alien students in the United States again became a priority for the INS after the first World Trade Center bombing. The investigation of that incident revealed that Eyad Ismoil, a 21-year-old Jordanian citizen, had driven the truckload of explosives into the World Trade Center that were detonated on February 26, 1993. Ismoil entered the United States in 1989 on a student visa, attending Wichita State University in Kansas for three semesters before dropping out to live and work illegally in Texas for the next two years.

Congress imposed a requirement for an electronic monitoring system for foreign students in IIRIRA, mandating that a program to collect information on students and exchange visitors from a minimum of five countries, designated by the Attorney General, be established by January 1, 1998. Not later than four years after the commencement of that program, the Attorney General, Secretary of State, and Secretary of Education were to file a joint report with the House and Senate Judiciary Committees on the feasibility of expanding the program to cover all foreign nationals. Not later than one year after the filing of that report (or by January 1, 2003), the Attorney General was to expand that program to cover all foreign students. The program was required to be self-funding, through a fee paid by students.

As mandated by this provision, in June 1997 the INS developed a computer program, the Coordinated Interagency Partnership for Reporting on International Students (CIPRIS), to test the concept of an electronic reporting system. The most significant difference between the former student tracking process and CIPRIS was that under CIPRIS, schools provided information about themselves and their students directly into INS computer systems, instead of the INS relying on information from forms being entered after the fact by contractors. As the Inspector General has noted, CIPRIS "was intended to involve the issuance of student registration cards that would contain additional identifying information about the student such as fingerprints and photographs that were collected by the schools."

Following the CIPRIS pilot, the Student and Exchange Visitor Program (SEVP) was established. SEVP is the reengineered process under which nonimmigrants and exchange visitors are to be admitted into the United States. The CIPRIS computer system was reconfigured into SEVIS, the internet-based computer system on which SEVP operates.

The attacks of September 11, and the fact that three of the 19 hijackers were present in the United States on student visas, refocused attention on the student tracking system. In section 416 of

the USA PATRIOT Act, Congress mandated that SEVIS be fully implemented by January 1, 2003, providing funding for this purpose.

There are two ways in which a school can submit SEVIS information to the INS: (1) a "real-time" interactive method that allows authorized users to input individual student information and transmit the information to the INS and (2) a "batch" reporting system that will allow an institution's servers to upload and download large amounts of information directly into the INS system. The web-based "real-time" interactive method is intended for smaller institutions with few foreign students, while the batch system is contemplated for institutions with large populations of foreign students.

The INS introduced SEVIS on a limited, preliminary basis in July 2002. On September 18, 2002, the Subcommittee held an oversight hearing on the INS's implementation of the SEVIS system, to review and assess the status of that program. The witnesses at that hearing were: Janis Sposato, Assistant Deputy Executive Associate Commissioner for the Immigration Services Division, INS, Glenn Fine, Inspector General, U.S. Department of Justice, Catheryn D. Cotten, Director of the International Office, Duke University, and Dr. Terry W. Hartle, Senior Vice President for Government and Public Affairs, American Council on Education.

At hearing. Sposato described the efforts that the INS has made to implement SEVIS. She stated that the INS was "confident" that SEVIS would "meet the January 1, 2003, date established by the USA PATRIOT Act for making SEVIS available" to schools, noting that INS has "deployed the initial operational version of SEVIS six months prior to the USA PATRIOT Act deadline."

Fine, Cotten, and Hartle, however, each questioned whether SEVIS would be fully operational by the January 30, 2003 deadline set by the INS for schools to be using SEVIS to issue Forms I–20.

Fine asserted that while SEVIS would be technically operational by that date, he had concerns about whether the INS would be able to complete all the steps necessary to ensure full and proper implementation by January 30, 2003. His concerns included whether the INS would assign and train sufficient numbers of dedicated staff to review and approve the schools' applications to access SEVIS, whether it would conduct sufficient and thorough site visits of schools applying to accept foreign students, whether it would adequately train school officials to use SEVIS, and whether it would train INS inspectors and investigators adequately to use SEVIS to detect fraud.

While Cotten also believed that INS could have an electronic mechanism in place to bring all schools online and connect them to SEVIS by January 30, 2003, thus meeting the mandatory schools compliance date, she doubted whether the schools could have all of their data entered into the system by that date. She argued that the INS should give schools a full calendar year, or until January 30, 2004, to enter all of their information. She also noted that the INS had not then published a final rule containing the SEVIS requirements for students, and had not even published a proposed rule for exchange visitors, arguing that schools should know what was expected of them. She questioned whether the ex-

change visitor program would be "completely usable or accurate when it comes online."

Cotten also argued that schools would not be able to manually enter their information by the January 30, 2003, deadline, noting that the INS would not have the batch submission system available until October 2002 at the earliest. She asserted that "[h]asty and forced mandatory record entry on" all of the foreign student files in the United States would "result in a data base that is so full of errors as to be unreliable and unusable."

To improve the system, Cotten recommended that the INS establish a SEVIS Help Desk providing assistance in all U.S. time zones for at least 12 hours per day. She advised that the help desk staff be trained and knowledgeable both in the student and exchange visitor regulations and in how to represent students and scholar in SEVIS under those regulations.

Hartle asserted that while the higher education and exchange visitor communities support the prompt implementation of SEVIS, there is much that remains to be done before SEVIS will be operational. He stated that these groups were, at that point, deeply concerned that they would face enormous difficulties when compliance was required because they had "very little information" to enable them to implement the new system. Specifically, like Cotten, Hartle noted that the SEVIS regulations for students had not been published in final form, that the regulations for exchange visitors had not been published in draft form, and that batch processing of information was not then available. He further complained that the amount of the fee that students would have to pay to be registered in the SEVIS system and the procedure for collecting the fee was unsettled, and that the INS had "no meaningful plans for training and has ignored our repeated requests that they hold regional briefing sessions for campus officials that we would organize and pay for."

Sposato responded at the hearing to Cotten's concerns about schools entering all of their foreign student data by January 30, 2003. Sposato explained that the January 30 date was for new students, while schools would have up to the start of the next "full academic term" to enter continuing students. She further explained that additional training and compliance monitoring would occur in the Spring of 2003.

Review of the INS interior enforcement strategy

"Interior enforcement" is the INS's scheme for enforcing the immigration laws within the United States. The INS's interior enforcement strategy is meant to complement the agency's "border enforcement strategy," which aims to prevent unauthorized aliens from entering the United States.

In January 1999, the INS announced a new interior enforcement strategy. The plan's stated primary strategic goal was to reduce the size and annual growth of the illegal resident population. To achieve this goal, the INS established the following strategic priorities:

(1) Identify and remove alien criminals (subsequently modified to include terrorists),

(2) Deter and diminish smuggling and trafficking of aliens,

(3) Respond to community reports and complaints about illegal immigration and build partnerships to solve local problems,

(4) Minimize immigration benefit fraud and other document abuse, and

(5) Deter and limit employment opportunities for aliens not authorized to work.

Criticisms of that policy were voiced shortly after it was announced. Those criticisms largely focused on the fact that the interior enforcement strategy did not prioritize, or even address, the general removal of illegal aliens from the United States.

Despite the fact that this goal was absent from the interior enforcement strategy, the removal of illegal aliens from the United States has been described as a crucial factor in any immigration enforcement plan. In prepared remarks to the Subcommittee in February 1995, Barbara Jordan, former Chair of the United States Commission on Immigration Reform (CIR), stated that:

Credibility in immigration policy can be summed up in one sentence: Those who should get in, get in; those who should be kept out, are kept out; and those who should not be here will be required to leave. * * * [F]or the system to be credible, people actually have to be deported at the end of the process.

Critics of the interior enforcement plan concluded that the plan's failure to address the removal of non-criminal aliens to be a crucial flaw. At a hearing on that strategy held by the Subcommittee in June 1999, Congressman Lamar Smith, then-Chairman of the Subcommittee, stated:

> The interior enforcement strategy recently unveiled by the Immigration and Naturalization Service effectively gives up removing illegal aliens from the United States. Except for a small fraction of convicted criminal aliens, illegal aliens have little or no fear that they will ever be deported. If it widely known that once they get past the border, illegal aliens are almost never removed from the United States. This in turn, of course, encourages ever greater waves of illegal immigration.

In addition to this point, some observers have been critical of the INS's performance even in the narrow priority areas that the agency has identified. Major errors have been found in the INS's ability to identify and remove alien criminals and terrorists. The September 11 attacks were carried out by 19 aliens who had previously been admitted as nonimmigrants. In response, INS asserted that "terrorists" were the "first priority" of its interior enforcement efforts. The INS's ability to identify alien terrorists was called into question, however, in March 2002, when it was revealed that six months after those attacks, the flight school in Florida that two of the hijackers attended received confirmation letters that applications for change of status had been approved for the two.

INS's record in removing criminal aliens from the United States has also been uneven, at best. GAO has identified criminal alien removal as "one of INS's long-standing challenges." The INS's experience with its Institutional Hearing Program is indicative of its inconsistent performance in identifying and removing criminal aliens. The IHP, now known as the Institutional Removal Program, is the

agency's main vehicle for placing aliens who are incarcerated in state and federal prisons into deportation proceedings so that they can be expeditiously deported upon release.

In September 2002, the Justice Department Inspector General issued a report finding that the INS has not effectively managed the IRP. In particular, the Inspector General determined, the INS has yet to determine the nationwide population of foreign-born inmates, particularly at the county level, and therefore cannot properly quantify the resources the IRP needs to fully identify and process all deportable inmates.

That report also found that the INS did not always timely process IRP cases, and as a result has been forced to detain criminal aliens released from incarceration into INS custody to complete deportation proceedings. After reviewing a judgmental sample of 151 alien files of criminal aliens in INS custody, which included criminal aliens released from federal, state, and local correctional facilities throughout the country, the Inspector General identified a total of $2.3 million in IRP-related detention costs, of which $1.1 million was attributable to failures in the IRP process within the INS's control.

A review of the INS's anti-smuggling efforts also shows major flaws. In a May 2000 report, GAO stated that the INS's ability to implement and evaluate the effectiveness of the domestic component of its anti-smuggling strategy is impeded by several factors, including a lack of program coordination, the absence of an automated case tracking and management system, and limited performance measures.

The INS's ability to minimize fraud and document abuse has also been criticized over the past two years. In particular, in a January 2002 report, the GAO concluded that while the INS does not know the extent of the immigration benefit fraud problem, reports and INS officials themselves indicate that the problem is "pervasive" and "significant," and that immigration benefit fraud is "rampant." GAO cited an INS Service Center official who estimated that fraud is "probably involved" in 20 to 30% of all applications filed.

Despite these problems, the GAO found that benefit fraud is a comparatively low priority within the INS. GAO determined that the agency's efforts to contain immigration benefit fraud are fragmented and unfocused.

In its 1997 Executive Summary, the CIR underscored the importance of worksite enforcement, the fifth priority in the agency's interior enforcement strategy, to controlling illegal immigration. The CIR found that "[r]educing the employment magnet is the lynchpin of a comprehensive strategy to deter unlawful migration."

In contrast to the strong emphasis on employer sanctions that CIR advocated, the INS's efforts in this area have been weak for several years. In testimony before this Subcommittee in 1999, Commissioner Hill of the CIR, deemed the demotion of employer sanctions to last among the stated priorities in its interior enforcement plan "unacceptable."

INS claimed that worksite enforcement's diminished status amongst its priorities reflected its perceptions that it had failed to effectively deter illegal immigration through its worksite enforce-

ment efforts and that achievement of its other goals, such as removal of criminal aliens, would reverse that trend.

As part of its review of the INS's interior enforcement strategy, on June 19, 2002, the Subcommittee held an oversight hearing on that strategy. Appearing at that hearing were Joseph Greene, Assistant Commissioner for Investigations, INS, Richard Stana, Associate Director for Administration of Justice Issues, GAO, Steven Camarota, Director of Research, Center for Immigration Studies, and Marissa Demeo, Regional Counsel for the Mexican American Legal Defense Fund.

At hearing, Greene described the interior enforcement operations that the INS has been conducting since the September 11 attacks. He asserted that as a result of a new emphasis on worksite enforcement targeting national interest industries, there has been more than a 20 percent increase in employer sanction case completions. It appears that this emphasis has been focused primarily in a series of investigations into the hiring practices of airport employers known as "Operation Tarmac." The purpose of these investigations is to ensure that individuals who work at airports and who have direct access to commercial aircraft and other secure areas are authorized to work, and that employers are complying with the employment eligibility verification requirements in employing these individuals.

Greene also discussed the agency's efforts to target alien smuggling organizations from countries that are of national security interest to the United States. This program, known as "Operation Southern Focus," was initiated in January 2002. He asserted that since the inception of this operation, "five significant alien smugglers have been arrested and charged with alien smuggling violations, and significant alien smuggling pipelines have been severely crippled."

Another aspect of the INS's post-September 11 enforcement efforts is the Alien Absconder Initiative, which is designed to identify and apprehend unauthorized aliens who have unexecuted final orders of removal. Green described the AAI as the INS's "first national program to address alien absconders." There are currently 314,000 aliens in the United States under final orders. Greene testified that approximately 700 of those aliens had been apprehended in the first phase of that initiative.

Stana testified that the INS could do a better job of using its limited interior enforcement resources. Specifically, he testified that the INS needs better data to determine staff needs, reliable information technology, clear and consistent guidelines and procedures for line staff, effective collaboration and coordination, both internally and with other agencies, and performance measures to assess its results.

Camarota argued that interior enforcement is a critically important part of effective immigration control, but that efforts to enforce immigration laws within the United States have been very limited for a long time. The INS's lax enforcement of the immigration laws has resulted in an illegal-alien population of eight million in the United States, he asserted, and has had other serious adverse ramifications for our country, some of which have been economic and some of which have been security-related.

Camarota further asserted that lax enforcement of the immigration laws has increased America's vulnerability to foreign-based terrorists, noting that 22 of 48 al Qaeda-linked terrorists in the United States between 1993 and 2001 committed significant violations of immigration laws prior to taking part in terrorism. He asserted that allowing a large illegal population to reside in the United States facilitates terrorism for two reasons: first, it has crated a large underground industry that furnishes illegal aliens with fraudulent identities and documents that terrorists can (and have) tapped into; and second, the existence of a huge illegal population creates a general contempt or disregard for immigration law.

Camarota made several proposals to improve interior enforcement. Specifically, he suggested that the INS implement several systems for monitoring the flow of aliens through the United States, including a tracking system for temporary visa holders, an effective entry/exit system for aliens on temporary visas, and the placing of the names of visa overstayers in a criminal database. He also argued for improvements in the area of worksite enforcement, integration of INS databases, and increasing the number of INS investigators.

Demeo commented on several recent Justice Department interior enforcement initiatives and proposed initiatives. She asserted that Operation Tarmac adversely impacts the Latino community without forwarding the goal of fighting terrorism. She argued that allowing local law-enforcement to enforce the immigration laws actually decreases public safety and increases mistrust between Latinos and law-enforcement.

Inquiry into the State Department shredding of completed diversity visa applications

According to The Associated Press on August 21, 2002, "State Department officials say they have been using high-speed shredders * * * to destroy the records of immigrants who fail to win entry to the United States after applying through" the diversity visa lottery system, despite the post-September 11 emphasis on sharing such information among law enforcement and intelligence agencies. The Associated Press the next day reported that law enforcement and counter-terrorism officials who it told about the shredding said that they "could see an investigative use for the information," quoting an unnamed top Bush administration counter-terrorism official who said that the destruction of the applications was "very shocking."

On August 23, 2002, Subcommittee Chairman Gekas asked the State Department to provide this Subcommittee with an assessment of the intelligence value of applications from unsuccessful diversity visa applicants. He also asked the State Department to retain those applications until after it submitted the requested information to the Subcommittee, and until after the Subcommittee had an opportunity to take action on the information.

On September 6, 2002, the State Department responded to that letter, announcing that it was revising its procedure for processing diversity lottery entries. The Department stated that it was suspending the shredding of all current entries while other agencies assessed the intelligence value of those documents.

Investigation into INS interactions with Hesham Mohamed Ali Hedayet

On July 4, 2002, Hesham Mohamed Ali Hedayet, an Egyptian national, entered Los Angeles International Airport and shot and killed two people at the El Al ticket counter before being shot once—and mortally wounded—by an El Al security guard. Four days later, as information on that attack was released, the Subcommittee opened an investigation into the incident and into Hedayet's presence in the United States.

Press reports shortly after the July 4 shooting stated that Hedayet was a lawful permanent resident, having gained that status through his wife, who won the diversity lottery in 1996. Those reports indicated that Hedayet had adjusted his status under section 245(i) of the Immigration and Nationality Act, but that he had previously filed an application for permanent residency, which was denied in 1996.

It was unclear from those press reports on what basis Hedayet filed his original applications, or why that application was denied. Given the facts reported, however, it appeared most likely that Hedayet had applied for asylum. The possibility that Hedayet had filed an asylum application raised the possibility that the INS might have had information suggesting that Hedayet had engaged, may have engaged, or intended to engage in terrorist activity prior to the July 4, 2002 shooting and yet still granted him permanent residence.

To assess whether the INS had information in its possession suggesting that Hedayet should have been denied adjustment of status and deported, on July 8, 2002, Subcommittee Chairman Gekas sent a letter to the Commissioner of the INS requesting a copy of Hedayet's alien file (A-file).

The Committee received the A-file on July 29, 2002. After the documents were received and reviewed, it was apparent that Hedayet had applied for, and was denied, asylum, but no asylum application was included with that packet, and no reference was made to asylum in the cover letter that accompanied that file. In fact, all references to asylum were redacted from the documents received, including on Hedayet's Employment Authorization Document and a fingerprint card.

The Committee continued to press the Department of Justice for the remaining documents in Hedayet's A-file. On September 24, 2002, the INS provided additional documents responsive to the July 8, 2002, request, including the missing asylum application and Asylum Officer's decision, to staff. Notably, in his cover letter accompanying those documents, the Commissioner stated that Hedayet's asylum information was being released to the Subcommittee because the Attorney General had waived the confidentiality of that document.

The A-file revealed that Hedayet entered the United States on July 31, 1992, at Los Angeles as a B–2 visitor for pleasure, with permission to remain in the United States until January 25, 1993. That visa was issued by the U.S. Consulate in Cairo, Egypt, on July 13, 1992.

On December 29, 1992, less than a month before his authorized stay was due to expire, Hedayet filed his asylum application. He

alleged that the police in Egypt arrested him without reason over a period of 14 years, and that he had been followed, jailed, "threatened by phone [and] letter for no reason, just because I am a religious individual who has a strong belief in my religion and God." He stated in his asylum application that he was arrested several times and "was forced to sign papers * * * admitting crimes I did not commit and did not know about." He claimed to have been physically and psychologically tortured.

The only group in which he claimed membership in his asylum application was a "Mosque Association," the purpose of which is "to understand truly and apply Islamic law in the 20th Century under any circumstances. * * * In houses and government to extend all the effor[t]s to support establishing Islamic government."

He was interviewed in conjunction with that application on March 30, 1993. Almost two years later, on March 7, 1995, the INS Asylum Office in Anaheim, California sent Hedayet a notice of intent to deny his asylum application.

In that notice, the INS stated that Hedayet had told the asylum officer that the police forced him to sign papers falsely stating that he was a member of "Gamatt El Islamaia" and that he was trying to overthrow the government. This is an apparent reference to al-Gama'a al-Islamiyya, also known as the "Islamic Group" or "IG."[5]

Hedayet claimed that he was afraid for his wife, "Hala El Awadly," and young son, who were, he claimed, "still in Egypt."

The Asylum Officer had concerns about Hedayet's credibility, but not the common concern that Hedayet had manufactured his claim, per se. In fact, the Asylum Officer concluded that Hedayet had experienced past harm at the hands of the Egyptian government. Specifically, Hedayet had claimed that he had been arrested twice for no reason shortly before coming to the United States, that the Egyptian government put a guard on his apartment whenever a foreign head of government would visit Egypt, and that the Egyptian government sent a letter to the bank where he worked, essentially asking that he be fired.

What the asylum officer did not believe was Hedayet's assertion that he only wanted the nonviolent overthrow of the Egyptian government. As the asylum officer stated:

> You said that your father and his friends gave you advice as to how to avoid trouble with the authorities, but you declined to take the advice, preferring to flee the country instead. When asked about the Copts, you maintained that the Copts are not treated badly in Egypt, despite the fact that treatment of Copts is a matter of comment among human rights groups the world over. You lived in Cairo, are well-educated and articulate, but claim to have read nothing about anti-Coptic activities in the city. No one who knows anything about Egyptian politics, as you obviously

[5] The State Department describes al-Gama'a as "Egypt's largest terrorist group," stating that it "specialized in armed attacks against Egyptian security and other government officials, Coptic Christians, and Egyptian opponents of Islamic extremism" before it announced a cease-fire in March 1999.

From 1993 until the cease-fire, al-Gama'a launched attacks on tourists in Egypt, most notably an attack in November 1997 at Luxor that killed 58 foreign tourists. It also claimed responsibility for the attempt in June 1995 to assassinate Egyptian President Hosni Mubarak in Addis Ababa, Ethiopia.

> do, could be as unaware of Coptic problems as you claim to be. *Each of these inconsistencies is suggestive of concealment, and call into question your assertion that all you wish for the government of Egypt is that it be overthrown by peaceful means.*

(emphasis added). This finding, coupled with Hedayet's assertions that he had been mistreated by the Egyptian government (which the INS believed) and that he had been accused of membership in the IG would suggest that Hedayet may have been a terrorist, or may have been connected to terrorism.

It did not appear, however, that the INS investigated Hedayet's claims that he was suspected of being a terrorist by the Egyptian government, or the possibility that he may, in fact, have been a terrorist. Rather, it does not appear that any extrinsic information, beyond Hedayet's own statements, was considered by the INS in denying that application.

Notably, the INS Asylum Officer apparently did not deny that application because of Hedayet's perceived lack of credibility. Rather, the asylum officer stated the application was denied on the ground that Hedayet had "not proven that [the harm that he had experienced in the past] was on account of one of the five enumerated grounds (race, religion, nationality, membership in a particular social group, or political opinion)."

Hedayet did not respond to the notice of intent to deny his asylum application. For this reason, on October 19, 2002, the INS sent him a final decision denying his asylum, along with charging him with overstaying his visa, at the last home address he provided to the Asylum Office, in Mission Viejo, California. Those documents were returned to the INS by the Postal Service, marked: "Return to Sender/No Forward Order on File/Unable to Forward."

The deportation hearing was set for March 26, 1996. When Hedayet failed to appear, the Immigration Judge ordered those proceedings administratively closed, rather than issuing a final order of deportation for Hedayet, because there was no proof that Hedayet had been served with the order to show cause. The trial attorney sent the case to the service clerk to locate the postal return receipt in order to prove that the documents had been served. The record of action in the file states in a subsequent March 29, 1996 entry: "unable to locate ret. rec."

The INS did not thereafter attempt to locate Hedayet, but rather sent his A-file to its records branch for filing. A memo in the file from INS's Detention and Deportation branch, dated June 11, 1996, states:

> [I]nasmuch as the charging document was not served on the alien and the file does not contain a current address to which the OSC could be mailed, this case is considered not properly under Docket Control. The file will be forwarded to records. * * * If at any time after the date of this memorandum, the alien is encountered, a superceding OSC is to be issued, if applicable, and properly served on the alien and EOIR.

It appears from the file documents that Hedayet was "encountered" by the INS on June 11, 1996, the date this memorandum

was issued, because on that day the INS renewed Hedayet's employment authorization. Despite this interaction with the alien, the INS did not place Hedayet in proceedings on that date.

Hedayet himself next contacted the INS after his wife, under the name "Awadly Abslamhala," was notified by the State Department that she had won the diversity visa lottery on July 18, 1996. Hedayet applied for adjustment of status, premised on his eligibility for derivative immigration status as the husband of a diversity visa lottery winner, on November 22, 1997.

As noted, information in Hedayet's asylum application suggested that he had been accused of having terrorist connections by the Egyptian government. If Hedayet had engaged in terrorist activity, or if the INS had reasonable ground to believe that Hedayet was engaged or was likely to engage in terrorist activity, he would have been barred from adjustment of status. It does not appear, however, that the INS investigated those claims or even reviewed those claims in connection with his adjustment application.

Further, documents relating to Hedayet's son, which are also in Hedayet's A-file, suggest other possible evidence of fraud in Hedayet's asylum application. The son's visa application states that he has lived in the United States since July 1992. According to the INS, both Hedayet's son and his wife actually arrived in the United States on March 12, 1993. It appears, however, from the asylum officer's decision that Hedayet claimed at his March 30, 1993, asylum interview that his wife and son were still in Egypt. Specifically, the asylum officer stated: "You said you are afraid for your family, your wife and young son. They are still in Egypt." There are two ossible reasons Hedayet may have claimed falsely that his family was still in Egypt when they were actually in the United States: First, he may have thought that he would have a better chance of being granted asylum if it appeared that his wife and son were in danger, and that he needed asylum status to protect them from harm. Second, he may have thought that he would be less likely to receive asylum if the government knew that he had brought his wife and son to America. Either of these would have been a material misrepresentation, barring Hedayet from adjustment of status. It is unclear whether the adjudicator who granted Hedayet adjustment of status to lawful permanent resident reviewed the asylum application, or questioned Hedayet about this discrepancy, however.

Notwithstanding these and other questions, Hedayet's adjustment application was approved by the INS, and he was granted lawful permanent resident status on August 29, 1997.

The same day that Subcommittee staff received Hedayet's A-file, the Justice Department forwarded the Subcommittee a copy of a memorandum, dated September 18, 2002, from the Attorney General to the Commissioner of the INS concerning the Hedayet case. In that memorandum, the Attorney General stated that he "was made aware of certain serious irregularities in the INS' treatment of" Hedayet on September 13, 2002. The Attorney General noted that based on a review of the file by the INS, it appeared that:

- Hedayet claimed that he had been accused of being a terrorist, but the INS did not conduct any further investigation to assess whether this accusation was true.

• INS was unable to serve Hedayet with the OSC because he had moved.

• The INS continued to grant Hedayet employment authorization after denying his asylum application while he was in illegal status, but did not recalendar his deportation proceedings.

• It was unclear whether Hedayet was interviewed in connection with his adjustment application, or whether the officer who adjudicated that application reviewed his asylum application, "which presumably would have triggered a further inquiry into his possible terrorist connections."

Because these facts "have implications for our immigration system and our national security," the Attorney General directed the Commissioner to "undertake a prompt investigation" into the Hedayet case and to report back to the Deputy Attorney General "with [his] findings, including any remedial or disciplinary action taken." The Attorney General also told the Commissioner to review pending asylum applications "to ascertain whether other individuals may be present in the United States who have admitted that they have been accused of terrorist activity or terrorist associations."

On October 9, 2002, the Subcommittee held an oversight hearing into the INS's interactions with Hedayet. Appearing as witnesses at that hearing were: William Yates, Deputy Executive Associate Commissioner, Immigration Services Division, INS, Dr. Steven Camarota, Director of Research, Center for Immigration Studies, Daniel Pipes, Director, Middle East Forum, and Paul Virtue, Hogan & Hartson (former General Counsel of the INS).

Yates started his testimony by asserting that no enforcement or intelligence information indicated that Hedayet was ever associated with a terrorist organization, or had engaged in any criminal activity prior to July 4, 2002, and that INS's decisions in connection with Hedayet's asylum and adjustment of status applications "were appropriate under the laws, regulations, policies and procedures in existence at the time." He stated, however, that the INS has improved its processing procedures and strengthened its security measures since adjudicating those applications.

Yates also stated that applications for asylum are now forwarded to the FBI and CIA for background checks, and the INS would have scheduled Hedayet to have his fingerprints taken at an Application Support Center under the improved procedures. Finally, Yates asserted, Hedayet's allegation that he had been accused of membership in a terrorist organization would have triggered referral of his case to INS Asylum Headquarters for further scrutiny.

It does not appear that the INS's forwarding of Hedayet's applications to the FBI and CIA for background checks would have made a difference in this case, because Yates asserted that there was no domestic intelligence indicating that Hedayet was ever associated with a terrorist organization. Rather, it appears that the Egyptian government would have been the best source for information to assess Hedayet's assertions that he had been falsely accused of being a member of a terrorist organization by that government. As Camarota testified, however, the primary reason that the INS failed to do so was because of the asylum confidentiality provisions. Camarota noted that there is a fear that a foreign government may

move to penalize members of an asylum applicant's family who are still in their home country if the foreign government became aware that the applicant was seeking asylum in the United States. He argued, however, that "the national security of the United States must supercede such concerns."

In addition to his comments about the asylum confidentiality provision, Camarota testified about the abuses of asylum and adjustment of status by alien terrorists in the United States, and about problems with those forms of relief generally.

Camarota described the asylum system as "lax," and argued that asylum "has been one of the favorite means for terrorists to live in the United States." He claimed that this system has allowed terrorists "not only to enter the United States but has also allowed them to remain in the country moving about freely while they plan their attacks." He stated that several aliens who participated in terrorist attacks in the United States used political asylum to enter and/or remain in the country, including: Sheik Omar Abdel Rahman, who inspired several terrorist plots, most notably the 1993 attack on the World Trade Center, Mir Aimal Kansi, who murdered two CIA employees, and Ramzi Yousef, who masterminded the first attack on the World Trade Center.

Camarota also described the diversity visa lottery, which was used by Hedayet and his wife to remain in the United States, as "very problematic from a national security point of view." He criticized the lottery for allowing 50,000 aliens a year with no strong ties to the United States to become permanent residents, arguing that aliens with few ties to the United States are more likely to be willing to attack our country. Camarota further asserted that Hedayet is not the only terrorist to use the lottery.

He also contended that section 245(i) of the Immigration and Nationality Act is a significant threat to American national security in that it allows illegal aliens to use this procedure to adjust status without returning home to be processed. This procedure increases the chance that a problem with the application will be missed by eliminating consular officers in the home country (who, Camarota alleged, are in a much better position than an INS adjudicator to judge the validity of the application and whether someone poses a security threat) from the visa-issuance process.

Pipes, in turn, criticized the INS's "cavalier attitude" toward Hedayet's possible membership in the IG. He suggested that Hedayet may have mentioned the Egyptian government's accusations because, anticipating "that the INS would do a thorough investigation of his life and want[ing] to spin his record in advance he decided the best tactic would be pre-emption." Although Pipes admitted that the Egyptian government might have compelled an innocent person to sign a false document, he argued that "there was also a very real possibility that Hedayet actually did belong to" the IG. Given what Pipes described as the IG's "long and notorious history of terrorism," he found the INS's "complete lack of curiosity on this issue * * * astonishing."

Virtue argued, on the other hand, that while Hedayet's case serves as the basis for legitimate inquiry into INS processes and procedures, "it is both unfair and inaccurate to use the case to raise allegations against sound immigration policies that underlie

programs involving the protection of refugees, the diversity lottery, or former [s]ection 245(i)." He argued that immigration reform needs to enhance "our intelligence capacity while respecting our commitment to due process and civil liberties and facilitating the free flow of people and goods.

A review of the information provided by the Justice Department and the testimony of the witnesses leads to the conclusion that the INS did not investigate concerns regarding Hedayet. There is no evidence that the INS requested background checks from any U.S. government components, nor does it appear that the INS verified Hedayet's story with the Egyptian government. The INS apparently did not verify Hedayet's story with the Egyptian government because of its reading of the confidentiality regulation. While there are serious humanitarian concerns underpinning the INS's interpretation of this regulation, the agency must assess whether its interpretation adequately protects the national security and, if not, must review its position on asylum confidentiality.

Review of the immigration history of suspected criminals in high-profile cases

Throughout 2002, the media reported that a number of individuals suspected of engaging in criminal activity in high-profile cases were aliens present in the United States. In order to assess whether those individuals were lawfully admitted to the United States, and if so, to determine whether the INS or the State Department may have had information relevant to the aliens' criminal activity at the time that the aliens were issued visas or admitted to the United States, the Subcommittee requested that the INS provide it with the immigration records for a number of these aliens.

On August 31, 2002, Maximiliano Cilerio Esparza, a Mexican national, allegedly attacked and raped two Catholic nuns in Klamath Falls, Oregon. One of those nuns died from her injuries. Esparza is being currently held without bail by local officials on aggravated murder and other charges.

According to an article in the September 6, 2002 edition of The Oregonian, Esparza has an extensive immigration history. Although the paper provided a lengthy description of Esparza's that history, there were portions of Esparza's relationship with the INS that were unclear even from that article. In order to assess whether the INS had properly handled Esparza's case, on September 10, 2002, Subcommittee Chairman Gekas requested the alien's file from the INS.

Subsequently, on October 9, 2002. The Oregonian reported that the Department of Justice's Inspector General was investigating why Border Patrol agents who twice arrested and released Esparza in 2002 didn't perform more extensive background checks on the alien that might have uncovered a previous conviction that the alien had in California, and might have revealed that he had been deported before, subjecting him to federal prosecution.

On November 6, 2002, the INS provided a copy of Esparza's alien file to the Subcommittee. In the cover letter attached to that file, the Commissioner stated that the Inspector General "is reviewing the entire case to see whether established procedures were followed." The Subcommittee is continuing its investigation of this

matter, and has followed up with the INS seeking additional information.

The Subcommittee is also investigating the interactions that the INS and State Department may have had with two individuals who have been charged in a series of shootings in the Washington, D.C. and Richmond areas, John Allen Muhammad (also known as John Williams, Wayne Weeks, and Wayne Weekley) and John Lee Malvo (also known as Lee Malvo and Lee Boyd Malvo).

Shortly after Muhammad and Malvo were arrested on October 24, 2002, the press reported that Malvo was a Jamaican national. Subcommittee staff requested information on Malvo, and on October 25, 2002, Chairman Sensenbrenner sent a request to the Attorney General seeking a complete briefing on Malvo's immigration history. Three weeks later, press reports indicated that Muhammad was known to the United States Embassy in Antigua while he was living in that country. On November 15, 2002, Chairman Sensenbrenner sent a request to the Secretary of State for any information that the State Department might have regarding Muhammad's repeated entries and possible criminal activities. The Subcommittee is awaiting responses to those requests.

Review of information on alleged Mexican incursions into the United States

In early 2002, the Subcommittee received a number of reports concerning alleged incursions along the Southwest Border by the Mexican police and military. One report indicated that there had been a total of 23 incursions by Mexican military and police into the United States along the Southwest border that were documented in 2001, and that the actual number of incursions may be three times that number.

On September 24, 2002, Subcommittee Chairman Gekas requested copies of all documents that the INS has addressing incursions into the United States between January 2001 and the present. The INS is currently compiling those documents to present to the Subcommittee for review.

INS maintenance of alien address records

At the request of Subcommittee Chairman Gekas, the General Accounting Office issued a November 2002 report titled: "Homeland Security: INS Cannot Locate Many Aliens Because It Lacks Reliable Address Information," GAO–03–188. The report addressed (1) the INS's failure to effectively track aliens under the current address processing system; (2) the insufficiency of current INS forms with respect to address reporting; (3) the need for the INS to adequately inform aliens of the need to both provide complete address information and update address information when necessary; and (4) additional options which the Executive branch might adopt without congressional action to enhance the INS's information gathering capabilities.

Examination of immigration and United States population

After the 2000 Census was taken, the Census Bureau released many reports, including several numbers involving the immigrants population in the U.S. On August 2, 2001, the Subcommittee held

a hearing to examine immigrant population numbers released by the Census Bureau. On August 2, 2001, the Subcommittee heard from Dr. John Long, the Chief of the Population Division of the U.S. Census Bureau; Dr. Jeffrey Passel, Principal Research Associate in the Population Studies Center of the Urban Institute; Dr. Steven Camarota, Director of Research at the Center for Immigration Studies; and Mr. William Elder, Chairman for the Sierrans for U.S. Population Stabilization.

Dr. Long testified that 281 million people were counted in Census 2000, an increase of 33 million from 1990. This was a 13.2 percent increase and the largest numeric increase between any two censuses in U.S. history. At the time of the hearing, the Census Bureau estimated a foreign-born population of about 30 million in the U.S., almost 11 percent of the U.S. population. The foreign-born population measured by the 1990 census was around 20 million, which was about 8 percent of the population, according to Long.

Dr. Passel testified that although the 2000 numbers of immigrants are large relative to the total population, the percentage of foreign-born is lower than historical highs. He noted that from about 1870 through 1920, the percentage of foreign-born in the U.S. population ranged from 13 to 15 percent. He also noted that the illegal population has reached unprecedented levels and, by his own estimation, number from 8 to 9 million.

Dr. Camarota testified that immigration policy accounted for the extraordinary population increase during the 1990s. This translates into 1.3 million legal and illegal immigrants settling in the U.S. each year, he stated. During the 1990s, it is likely that immigrant women gave birth to an estimated 6.9 million children. If the number of births and the number of new arrivals are added together, the total impact on population growth is around 20 to 21 million of the total 33 million, or roughly two thirds of the population growth in the U.S. is new immigrants and births to immigrant women. The Census Bureau indicates that immigration will add about 76 million people to the U.S. population between now and 2050, according to Camarota.

Camarota testified that this large growth has significant consequences for some quality-of-life issues such as sprawl and congestion. It has an enormous impact on the size of school-aged population. Roughly 90 percent of the increase in the number of children in public schools in the U.S. over the last 20 years is a direct result of post-1970 immigration, said Camarota.

Mr. Elder stated that the growth of 33 million during the 1990s is equivalent to adding a State the size of California, including all of its houses, apartments, factories, office buildings, shopping centers, schools, streets, freeways and automobiles; its consumption of power, water, food, and consumer goods; and its environmental waste stream of refuse, air and water pollution, to an already crowded and stressed U.S. environment. Intentionally or not, Elder stated that Congress created the current population boom through immigration policy. This has undone the progress of the American people toward a stable and sustainable population in voluntarily adopting replacement level reproduction, an average of two births per woman, Elder stated.

Review of the Immigration and Naturalization Service and Office of Special Counsel for Immigration-related unfair employment practices

Representative Bob Barr requested an oversight hearing to examine the consequences of the Immigration Reform and Control Act of 1986 with regard to employer sanctions and employment discrimination. The law places American employers in a difficult situation. They are required to verify the employment eligibility of their workers or face fines and possibly be penalized criminally by the INS for knowingly hiring illegal aliens. On the other hand, employers cannot ask for more documents than are required by law without the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) possibly initiating an investigation and/or prosecution of the employer for violating an alien's civil rights. To further complicate the process for employers, fraudulent employment authorization documents are abundant and ubiquitous.

On March 21, 2002, the Subcommittee held an oversight hearing on this matter. Witnesses included Juan Carlos Benitez, Special Counsel for Immigration Related Unfair Employment Practices, U.S. Department of Justice, Joseph Greene, Acting Deputy Executive Associate Commissioner for Field Operations, INS, Otto Kuczynski, President of Fairfield Textiles Corporation, and Wade Henderson, Executive Director of the Leadership Conference on Civil Rights.

Mr. Benitez noted that the OSC is the only office in the Federal Government specifically designed and empowered to protect the civil rights of alien workers. Benitez testified that even 16 years after IRCA was passed, U.S. citizens and lawful aliens are discriminated against based upon whether they appear or sound foreign. He explained that one of OSC's major priorities is to educate the general public, both employers and employees, about their rights and obligations. Benitez stated that OSC has established an early intervention program which is unique among Government anti-discrimination enforcement agencies and is based upon the idea that prevention of discrimination and early intervention are more important than obtaining a remedy after the fact.

Mr. Greene testified that the INS concentrated its personnel and its resources on employment cases involving criminal violations or widespread egregious industry-wide civil violations, particularly those cases where a nexus with human smuggling or human trafficking had been established or where there was evidence that worker exploitation has occurred. He stated that the INS believes that criminal convictions and their accompanying sentences have proven to be a far greater deterrent to illegally hiring aliens than the employer sanctions law.

Mr. Kuczynski is the owner of a company that knits, dyes, and finishes fabric. The large majority of his workforce has always consisted of immigrants. He is an immigrant himself and explained that he always makes clear to his employees that his company does not and would not discriminate against immigrants. He testified that in 1991, the INS raided his facilities and took into custody employees who appeared to be immigrants. A number of employees were determined to be illegal aliens even though the company had

the necessary documentation of the employees. The INS issued no notices of violation on the company, but had disrupted production by taking the employees into custody. Kuczynski could not afford another major disruption to his business so he vowed to ensure no illegal alien would be hired, even unwittingly.

In 1998, his company received a letter from OSC at the Justice Department regarding a charge of discrimination from someone who had sought a job with his company. OSC looked through hundreds of the company's documents, took depositions, and threatened suit against Fairfield Textiles, alleging the company violated the law in not hiring the individual who filed the charge. Kuczynski reported that OSC threatened that if he did not want to be sued, the company would have to agree to including a civil penalty of $2,000 and back pay of $7,451. Kuczynski declined and OSC instituted suit against Fairfield Textiles. The case settled two and a half years later. Fairfield Textiles paid a fine of $1,100 to the U.S. Treasury and paid the charging party $12,470. The legal fees and related costs to defend the charge exceeded $93,000.

Kuczynski's company was sued because of "document abuse." He explained that the law permits an applicant to choose which document the applicant presents to an employer from a list of acceptable documents to prove the applicant's identity and work eligibility. The employer cannot request the applicant to present more or different documents than are required. In addition, the employer must accept a document which, on its face, appears to be genuine and relates to the person who presents it. Failure to comply with this regulatory requirement can lead to a fine of up to $2,000 per violation.

Mr. Henderson testified that the OSC is woefully underfunded, operating on a budget of only about $6 million a year and with a staff of approximately 30 employees. He stated that the employer sanctions have not worked to decrease illegal immigration and should be re-examined.

Examination of the U.S. and Canada Safe Third Country Agreement

On August 30, 2002, Safe Third Country Agreement final draft text was initialed by our Administration as one point of the 30 point Ridge-Manley Smart Border Action Plan between the U.S. and Canada. Under the agreement, if an alien seeks to travel from the United States to Canada through a land border port of entry to apply for asylum in Canada, the alien will generally be sent back to the U.S. to apply for asylum. If an alien travels from Canada to the U.S. for the same purposes, the alien must seek asylum in Canada, the first of the two countries in which the alien traveled. The intent is to prevent asylum shopping in both the U.S. and Canada. The policy behind the agreement is that an alien is safe in either country and should seek asylum in the first country in which the alien lands.

Because this draft agreement was creating significant controversy, the Subcommittee held a hearing to examine its pros and cons on October 16, 2002. The witnesses were Kelly Ryan, Deputy Assistant Secretary, Bureau of Population, Refugees, and Migration, U.S. State Department, Joe Langlois, Director of the Asylum

Division, INS, Mark Krikorian, Executive Director, Center for Immigration Studies, and Bill Frelick, Director, Amnesty International.

Ms. Ryan testified that negotiations on this matter were undertaken at the request of the Canadian government. She stated that approximately one-third of asylum applicants in Canada pass through the U.S. first. Thus, such an agreement would be more beneficial to Canada than it would be to the U.S. The greatest challenge is determining an asylum seeker's travel itinerary before making a claim and hence determining which country is responsible for adjudicating that claim, Ryan stated. To avoid debates with Canada over whether an applicant did or did not transit the U.S. en route to Canada, the proposal would be limited to land border ports of entry. Only at ports of entry will there be incontrovertible evidence that an alien was physically present in one of our two countries before applying for asylum in the other.

Ryan testified that in contrast to the EU approach, this proposal would not attempt to substantively harmonize the U.S. and Canadian asylum systems. She explained several reasons why asylum seekers prefer to apply in Canada rather than in the U.S. Some are attracted by Canadian social welfare benefits. Others may seek to file a second application after having a claim rejected in the U.S. Others have strong family, community, or language ties to Canada. Family ties caused the U.S. to propose several family member exceptions in the agreement. Finally, Ryan stated that the U.S. has no intention to expand this bilateral agreement to include third countries.

Mr. Langlois explained that the proposed agreement is founded on the premise that there can appropriately be limits on the ability of an asylum seeker to choose a country of refuge so long as that asylum seeker has a full and fair opportunity to present a claim for protection and to receive asylum if the applicant is a true refugee.

The proposed agreement contains an exemption for family members so that asylum seekers with spouses, sons, daughters, parents, legal guardians, siblings, grandparents, grandchildren, aunts, uncles, nieces, and nephews in the U.S. or Canada will be allowed to reunite with their family members in either country, as long as the relative has lawful status (other than as a visitor) or him or herself has a pending asylum claim in that country. Langlois also explained that the agreement contains exceptions for unaccompanied minors.

Mr. Krikorian testified that this agreement is a logically and morally necessary part of any asylum system. He analogized asylum to giving a drowning man a berth in a lifeboat. A genuinely desperate man grabs at the first lifeboat that comes his way. A person who seeks to pick and choose among lifeboats is, by definition, not seeking immediate protection, but instead seeking immigration.

Krikorian acknowledged that, in the short run, the U.S. will face an increase of asylum applicants as a result of the agreement because more people will be returned to the U.S. than returned to Canada, mostly due to air travel patterns. However, he stated that this is not an argument against the agreement because it should be considered a first step in reaching similar agreements with

other safe countries transited by asylum seekers, particularly EU countries and perhaps Mexico.

Mr. Frelick opposed the agreement. He referenced the INS's estimates that about 200 people a year come from Canada to the U.S. to seek asylum while about 15,000 people went to Canada from the U.S. to apply for asylum. With a backlog of over 250,000 asylum cases, Frelick argued that it made no sense to knowingly increase our asylum application backlog.

He disputed that asylum shopping was in fact a problem, stating that most asylum applicants want to apply in Canada but are stopped upon arrival at a U.S. airport and simply lodge an asylum application as a way of avoiding deportation and detention before later proceeding to their desired location of Canada. Frelick also stated that because the agreement only applies to land border port of entry crossing, illegal border crossings and smuggling will rise.

Mr. Felick questioned how the exceptions would be adjudicated. How would the governments determine whether an applicant really is a family member of someone in the second country? He concluded that this agreement has nothing to do with national security and solves no visible problem.

Request for GAO on the INS Forensic Document Lab

In April 2001, the Chairmen of the Judiciary Committee and the Subcommittee requested that the General Accounting Office review and issue a report on the INS Forensic Document Lab. The INS has one forensic document lab to handle all requests for forensic examinations for deportation/removal hearings, asylum, and inspection cases for the U.S. Located in McLean, Virginia, this lab also handles requests from federal, state, and local agencies, including the State Department, FBI, and ATF, because it has the largest known collection of document exemplars.

With the INS's increased case load, the FDL has been unable to investigate many of the cases sent to it by INS trial attorneys, inspectors, and asylum officers in a timely manner. Thousands of case documents are sent to the lab because document fraud is such a prevalent problem. However, due to the lab's backlog, many documents are not examined in time for scheduled immigration removal hearings months later. As a result, cases go forward in which INS trial attorneys suspect fraud and aliens often receive relief from deportation.

Because of the Committee's concern regarding document fraud, the Committee asked the GAO to ascertain the capabilities of the FDL, the number of cases the lab receives each year, the types of requests the lab receives, whether the lab is capable of detecting the most sophisticated document counterfeiting and alteration methods, the priorities of the lab, the percentage of cases the lab is able to complete by the requested deadline, the lab's budget, and the lab's staff level.

The GAO issued its report, "INS Forensic Document Laboratory—Several Factors Impeded Timeliness of Case Processing" (GAO–02–410), in March 2002. The GAO determined that the INS established a forensic case priority system in FY 99 to ensure that certain categories of cases received priority attention by FDL examiners. Despite the new system, the FDL's overdue caseload and

case completion time for its highest-priority cases—custody and criminal cases—were higher in FY 01 than in FY 00. In addition, case completion time increased on average from 12 to 19 days for custody cases and from 11 to 34 days for criminal cases.

With a January 2002 supplemental appropriation by Congress, the FDL planned to nearly double its lab staff size and budget. However, because the lab would need time to recruit, hire, and train the new staff, the impact of these increases on case completion time and reduction in pending caseloads would not be immediate and was unknown as of the report printing.

The GAO made the following recommendations to the Attorney General in its report: collect and analyze data on requesters' deadlines for obtaining forensic case results so that the lab can better ensure that cases are processed in an order that is optimally responsive to both the requesters' needs and INS's case priority system, and collect and analyze data on the total amount of time spent processing forensic cases to help the lab better manage its workload, project staff and budgetary needs, and establish benchmarks for case deadlines that are based on requesters' needs. The INS concurred with the GAO's recommendations, stating that the agency is evaluating requirements for an enhanced automated case management system that will enable the lab to effectively implement the report recommendations.

Request for GAO report on immigration benefit fraud

In April 2001, the Chairmen of the Judiciary Committee and the Subcommittee requested that the GAO study and report on immigration benefit fraud. The GAO issued its report "Immigration Benefit Fraud—Focused Approach is Needed to Address Problems" (GAO–02–66), in January 2002. The GAO reported that the INS does not empirically know the extent of the immigration benefit fraud problem. However, reports and INS officials indicate that the problem is pervasive, rampant and significant and will increase as smugglers and other criminal enterprises use fraud as another means of bringing illegal aliens, including criminal aliens, into the country.

GAO concluded that several problems have hampered INS's immigration benefit fraud investigations. First, the interior enforcement strategy does not lay out a comprehensive plan to identify how components within and among the service centers and district offices are to coordinate their immigration benefit fraud investigations. Second, INS has not established guidance for opening immigration benefit fraud investigations or for prioritizing investigative leads. Third, the INS does not have an effective and efficient capability for tracking and managing agency-wide investigations. Finally, information sharing among offices is remarkably inadequate.

The GAO recommended that the Attorney General direct the INS Commissioner to revise INS's interior enforcement strategy to better integrate its many units, including the service centers' operations units involved in benefit fraud enforcement, to effectively coordinate limited resources and to address crosscutting policy and procedural or logistical problems, revise INS's strategy to determine how INS should balance its dual responsibilities of processing applications in a timely manner and detecting fraudulent applica-

tions, develop guidance for INS's investigative units at the district office and service centers to use in deciding which benefit application fraud cases to pursue, use the criminal investigative reporting system, or develop another method, to track and manage benefit fraud investigations, so that INS can maintain data on individuals and organizations that are or have been the target of investigations, determine the actions and related costs that would be associated with providing adjudicators access to INS databases for reviewing applications for alien benefits, and if appropriate, provide adjudicators such access, and establish outcome-based performance measures for benefit fraud investigations against which to gauge the success of these efforts.

In its response to the report, the INS agreed with GAO's recommendations with one exception. While the INS agreed that it should more effectively detect fraudulent applications and process applications in a more timely manner, it did not believe that both issues should be addressed by the interior enforcement strategy. INS cited the pending restructuring plan that divides INS's enforcement and service missions into two distinct bureaus.

This Committee's repeated requests of the INS for fraud percentages in various benefit application forms and this GAO report prompted the INS to initiate a benefit fraud assessment of its application forms in January 2003. The Committee will monitor the agency's assessment, the results, and future strategies to detect fraud, deny fraudulent applications, and punish the applicants.

Oversight of the State Department's Visa Condor Program

Following the September 11, 2001, attacks, attention was focused on the State Department's issuance of visas to citizens of countries from which the hijackers came. In the week after the attacks, Committee and Subcommittee staff began meeting with State Department officials to urge corrective changes in the visa review and issuance process. Thereafter, the State Department implemented procedures under which aliens from specific countries would be subjected to heightened scrutiny before being issued visas.

Following the September 11 attacks, the process by which the State Department issues visas received strong criticism. In apparent response to public and internal concerns about its visa-issuance procedures, the State Department, in conjunction with other Executive branch components, began an extensive review of those procedures as they relate to the national security. In November 2001, staff received a briefing on a State Department plan to perform additional background checks on certain visa applicants. The "20-day" name check went into effect on November 14, 2001, and applied to all male visa applicants between the ages of 16 and 45 from specified countries (the exact list of which is classified). The State Department's Consular Lookout Automated Support System (CLASS)[6] automatically placed a hold on these applications, so that a visa could not be issued in less than 20 days. While this hold was pending, the visa application information was electronically transmitted to the FBI for the name check. On the 21st day,

[6] CLASS is a database that includes name-check information from overseas and domestic State Department offices, INS, Customs, FBI and CIA.

CLASS released the hold and prompted the consular officer to make a visa decision. If the consular officer had not received a negative response on an applicant, the visa could be issued.

In January 2001, the State Department instituted a 30-day name check, called "Visas Condor," for visa applicants who fall within the 20-day name check and fit certain additional, classified, criteria. Aliens meeting the Condor criteria were required to complete a supplemental visa application form, information from which was sent to the United States in a cable for review. Name checks were originally performed by the CIA and FBI as a part of this process. The Visas Condor security check applied only to visas adjudicated after January 2002, and did not apply to previously issued visas.

On September 20, 2002, representatives of the State Department, CIA, and Justice Department (representing the FBI) updated Committee and Subcommittee staff on the implementation of Visas Condor. Up until July 2002, consulates were told to hold applications for aliens to whom Visas Condor applied for 30 days, and then process any applications for which the consulate had not received a response. In July, consulates were told to wait for a response before issuing a visa in a Visas Condor case, creating a massive backlog. In September, the process was changed, with FBI assuming responsibility for performing the name checks. Under the new procedures, FBI will refer an application to the State Department for forwarding to CIA only if checks result in a possible match. The State Department hopes to reduce the processing time for applications in which there are no hits to 10 days.

Prior to the implementation of these procedures, between April and July 2002, the Foreign Terrorist Tracking Task Force (FTTTF), an interagency group operating under the auspices of the Justice Department, assumed primary responsibility for Visas Condor name checks for the FBI.[7] According to a GAO report released in October 2002, of 38,000 cables processed as of August 1, 2002, the FTTTF identified 280 visa applicants "who should not receive a visa under the" terrorism provisions of the Immigration and Nationality Act. The Department of State received the refusal recommendations for approximately 200 of these applicants after the 30-day hold had expired and the visas had been issued. This number was lowered to 105 in subsequent published reports. According to information recently received by the Subcommittee, as of December 3, 2002, FTTTF has withdrawn its objection to the issuance of 59 of those 105 cases, and the remaining 46 are pending with the FTTTF.

On November 11, 2002, staff received a briefing from the State Department on a change in visa procedures for three "low-risk" categories of visa applicants: scientists, immigrants, and refugees. Each of these categories is subject to special clearance procedures, and were previously subject to a hold on issuance pending a positive response. Under the revised procedures, visas may be issued to aliens subject to the procedures if no response is received in 15 days, 30 days, and 45 days, respectively. Consulates must still receive a positive response on Visa Condor cases before issuing visas.

[7] In July 2002, the FBI streamlined its internal procedures for providing Visas Condor responses to the State Department and moved the primary responsibility for Condor name checks from the FTTTF to the FBI's National Name Check Program.

Committee and Subcommittee staff were briefed on the problems that the State and Justice Departments have had in implementing Visas Condor on December 12, 2002. As the State Department, and to a lesser degree, the FBI and Justice Department further refine the Visas Condor name-check system, the Committee and Subcommittee will continue to oversee the implementation of those checks.

Oversight of foreign guestworker programs

On February 16, 2001, President Bush and Mexican President Fox issued a joint statement that "we agree there should be an orderly framework for migration which ensures humane treatment, legal security, and dignified labor conditions. For this purpose, we are instructing our Governments to engage, at the earliest opportunity, in formal high-level negotiations aimed at achieving short and long-term agreements that will allow us to constructively address migration and labor issues between our two countries." The Committee conducted a careful review of guestworker issues in the expectation that President Bush would propose a new guestworker program as an outgrowth of these negotiations with Mexico.

The review first focused on the Bracero program. In 1942, in response to the U.S. manpower shortage arising from World War II, the United States and Mexico negotiated a treaty permitting the entry of Mexican farm workers, known as "braceros". This emergency wartime measure was the beginning of the Bracero program, which continued under various legal authorizations for 22 years and involved approximately 5 million Mexican workers.

In "Guestworker Programs: Evidence from Europe and the United States and some Implications for U.S. Policy",[8] Joshua Reichert & Douglass Massey write that:

> An increasing body of research indicates that the Bracero Program was pivotal in building a tradition of migration to the United States. * * *
>
> [B]raceros were able to build up a network of interpersonal relations and social ties upon which future migration could and, indeed, did eventually become self-sustaining in the absence of active recruitment by the United States government.
>
> * * * * *
>
> [I]n the long run the Bracero Program was far from temporary. When the program was phased-out in 1964, former braceros did not cease migrating to the United States as had been anticipated. Rather, they continued to enter the country, legally if possible, but if not, then as undocumented migrants. In a very real sense, therefore, the phenomenal growth in illegal immigration to the United States over the past 15 years represents an unintended result of the Bracero Program.

The Committee then looked at the experience of Germany with guestworkers. Well funded under the Marshall Plan, the German economy developed at an astonishing rate in the post-war period.

[8] 1 Population Research and Policy Review 1 (1982).

With the growing economy came a tremendous increase in the amount of jobs in the country. In contrast, World War II decimated the German workforce. The war left a substantial void in the demographic of working age men in the German population. Initially, the void of laborers was filled by defectors from the newly formed communist East Germany; however, the need for laborers quickly surpassed the number of defectors. In response, the German government opted to create a program to recruit temporary foreign workers. It was expected that these jobs (mostly factory, agricultural and mining jobs), when automated, would eliminate the need of temporary workers causing the workers to return to their home countries. The number of workers increased steadily throughout the years; in 1956, there were 95,000 foreign workers in Germany, by 1966, there were 1.3 million, climbing to 2.6 million in 1973.

Although German officials and foreign workers alike maintained that their residency in Germany was temporary, all signs pointed to the opposite. Many German employers persuaded their workers to stay, thus saving the costs of retraining new workers. The German government abetted this practice by not strictly enforcing rotation, mandated as part of the guestworker program. The government also increased the rights of the workers with each renewal of a work permit; for example, after one year of satisfactory work and suitable accommodations, the worker could send for his family. Immigrant populations swelled rapidly. With workers bringing their wives and children to live with them, it became apparent that the guests were planning on staying permanently. Children of immigrants were attending German schools and speaking German. Second generation workers who were born in Germany were unfamiliar with the country from which their parents emigrated, thus, they had no intention of returning.

This caused a backlash in Germany. The German government made repeated attempts to prevent the number of foreign workers from rising. However, as guestworkers already present brought more and more family members to Germany, the overall population of foreigners in Germany has been ever increasing since the early 1970's despite the lack of new guestworkers.

In their book "Administering Foreign-Worker Programs", Mark Miller and Philip Martin found that:

> [E]uropean governments did not expect foreign-worker employment to result in large-scale permanent immigration. Foreign workers were expected to be a temporary or complementary work force, which eventually returned home. To the contrary, a large number of foreign workers have become long-term residents of Europe, and foreign-worker policies have become de facto but still not fully acknowledged immigration policies. * * * [R]epatriation of foreign workers and their dependents who do not voluntarily return has proven to be a difficult, if not impossible, goal to attain.
>
> In retrospect, one fundamental miscalculation of European alien-labor policies was underestimation of the human dimensions of alien-worker employment. As foreign-worker policies were progressively improved over the years, facilitating family entry and other measures to im-

> prove the lot of foreign workers, European governments undercut their own policy goal of short-term foreign-worker employment.* * * By the time unfavorable economic conditions moved governments to implement the expectation of return, many foreign workers had such long continuous residency due to permit renewal that they could not be forced to return home.

On April 12, 2001, Chairman Sensenbrenner and Subcommittee Chairman Gekas sent a letter to President Bush stating in part that:

> The most significant item on the Mexican agenda is the creation of a new guestworker program in the United States for Mexican workers and the consequent "regularization" of Mexicans illegally present in the United States. Such a request must be viewed through the prism of past large-scale guestworker programs both in the United States and Europe.
>
> In the United States, the Bracero program from 1942 to 1964 brought in millions of Mexican workers to do agricultural labor. The program attempted to safeguard guestworkers and domestic workers alike, but guestworkers were still, unfortunately, exploited. Millions of dollars from laborers' earnings, sent to Mexican banks for the workers' retirement, disappeared. Significant illegal immigration coexisted with the Bracero program and the program's end stimulated this illegal flow, as formerly legal workers continued to return to the U.S. and work illegally.
>
> Europe's experience with guestworker programs since the end of World War II, such as with Turkish workers in Germany, has been that "temporary" workers often ended up staying permanently (despite the best efforts of the host government). This created a permanent underclass of "temporary" workers and their families.
>
> In light of this history, several questions about any proposed new guestworker program, especially one that is expanded beyond the agricultural sector, must be answered.
>
> First, would a guestworker program constitute an amnesty for illegal aliens now here in the United States, especially if it offers permanent residence after a term as a guestworker?
>
> Second, would a program contain any real method to guarantee that guestworkers return home? As long as the wage differential between Mexican and U.S. jobs remains as great as it is, such a method might be difficult to find.
>
> Third, would a guest-worker program contain any protections for American workers? If the only requirement would be that guestworkers be paid the minimum wage, guestworkers might be used to flood the labor market and drive down wages in various industries.* * * Would businesses be required to recruit American workers, be prohibited from replacing American workers with Mexicans, and be required to focus on long-term solutions to labor needs?

On June 19, 2001, the Subcommittee on Immigration and Claims held an oversight hearing on Guestworker Visa Programs. Witnesses were Susan Martin, Institute for the Study of International Migration, Georgetown University, Randel Johnson, Vice President, Labor and Employee Benefits at the U.S. Chamber of Commerce, Mark Krikorian, Executive Director of the Center for Immigration Studies, and Cecilia Munoz, Vice President of the Office of Research Advocacy and Legislation, National Council of La Raza.

Oversight of the Visa Waiver Program

The Visa Waiver Program allows aliens traveling from certain designated "low-risk" countries to come to the United States as temporary visitors for business or pleasure without having to obtain the nonimmigrant visa normally required to enter the United States. There are currently 28 countries, mostly European, participating in the VWP. In fiscal year 2001, 17.1 million aliens entered the U.S. under the VWP. The program is of great importance to the U.S. travel and tourism industry.

The Department of Justice's Office of Inspector General issued a report in 1999 on the "Potential for Fraud and INS's Efforts to Reduce the Risks of Visa Waiver Pilot Program". The report concluded that "[a]buse of the [VWP] poses threats to U.S. national security * * *." It stated that "it is believed that thousands of * * * mala fide [VWP] applicants—those individuals using fraudulent VWP passports or individuals with fraudulent intent using valid [VWP] passports—successfully entered the United States without being intercepted" and that "the [VWP] provides an avenue for terrorists, criminals, and other inadmissible applicants to enter the United States".

The VWP is based on the premise that nationals of participating countries pose little risk of being security threats or overstaying the period of their admittance. Therefore, there is no need for prescreening by State Department consular officers abroad who would normally review documents provided by a visa applicant and interview the applicant to determine whether he or she posed a danger or was likely to overstay.

While this premise might have been true in years past regarding nationals of wealthy and democratic European countries that make up the bulk of VWP participants, it is questionable whether it is true today. The New York Times reported on December 28, 2001, that a "world of Muslim militancy * * * took root in Europe in the 1990's" and that "Europe became the forward operating base for Islamic terror over the last decade."

There seems to be a high risk that Western intelligence services have no idea as to the identity of many terrorists who are nationals of VWP countries. If they tried to enter the U.S. under the VWP, their names would not come up on any lookout system. All they would need to enter would be a passport. In fact, a number of terrorists have already gained access to the U.S. or U.S.-bound aircraft through the use of passports of VWP countries that were issued to them in a legitimate fashion. Zacarias Moussaoui, the putative "20th hijacker" on September 11, came to the U.S. as a French national under the VWP. Richard Reid, the "shoe-bomber", had gotten aboard a U.S.-bound flight from Paris using a British

passport that the French government believes to be legitimately his.

The Department of Justice Inspector General's 1999 report on the VWP stated that the "INS estimates that over 100,000 blank [VWP] passports have been stolen in the past several years." The report went on to state that "passports of [VWP] countries are in demand on the black market.

The VWP is vulnerable in a number of ways to aliens seeking entry to the U.S. possessing European passports that have been stolen while blank and then modified to identify the aliens. First, while the federal government does maintain a database of lost or stolen VWP country passports that is used by INS inspectors at ports of entry, the IG found that VWP countries do not always report lost or stolen passports to the U.S. government. INS inspectors told IG investigators that "some countries are reluctant to provide data on stolen passports."

The next vulnerability is that the numbers of passports reported stolen or lost by VWP countries are not always entered into the lookout database, or not entered in a timely manner. The IG found that the "INS did not systematically collect information on all stolen passports and did not create lookout records based on the information that it did receive." This was because "[t]here is no single entity within INS responsible for the collection of information on stolen passports" and "no single office within INS * * * responsible for systematically entering stolen passport numbers into the lookout system.

The IG recommended that the INS "[d]esignate a unit to systematically collect information on stolen blank [VWP] passports and ensure timely * * * entry of stolen passport numbers into the lookout system." The IG's 2001 follow-up report stated that the INS did issue a memorandum to district directors in October 1999 consolidating functions in the INS "Lookout Unit." However, the IG found that "these policies are not being followed."

The next vulnerability is that the passport numbers that are entered into the database or are queried against the lookout system are often incorrect. The IG found in 1999 that in the cases of 112 of the 1,067 passports studied, there were discrepancies between the passport numbers as they were reported stolen and the passport numbers as they were entered into the lookout system. The major problem was that some passports contain multiple numbers, including serial or issuing numbers. Obviously, "[i]f the INS inspector queries a number other than the passport number that was used to create the lookout record, or if the lookout record was created using a number other than the passport number, a match will not be found." The IG recommended that the INS "[d]evelop clear guidelines for the entry of passport numbers when creating lookout records." The IG in 2001 found that while the October 1999 memo to district directors contained guidelines on which number on a passport to enter into the lookout system, "[i]nterviews with INS officials at the four [ports of entry] indicate a lack of uniformity among ports as to which passport number they enter for lookout records."

The last major vulnerability is that the passport numbers of aliens arriving under the VWP are not always checked against the

lookout system by INS inspectors. The IG found that the reason for this was primarily that INS inspectors had, on average, less than one minute to check and decide on each foreigner arriving at an airport and that INS inspectors thus usually manually entered passport numbers only if they had suspicions about particular individuals. The IG recommended that the INS "[m]odify primary inspection policy to ensure that the passport number of each [VWP] applicant is checked against the lookout system."

Unfortunately, the IG found in 2001 that while the INS's October 1999 memorandum to district directors did direct that inspecting officers at air and sea ports of entry query the passport number of all applicants for admission, including VWP applicants, it was likely that this was still not being done consistently at all ports of entry.

For all these reasons, the IG concluded that "[i]t is difficult for the INS to ensure that inadmissible aliens with fraudulent VWP passports are reliably refused entry into the United States. * * *" The threat of terrorists using stolen passports to gain entry to the U.S. under the visa waiver program is not entirely theoretical. The AP reported that a search of abandoned Al Qaeda caves in Afghanistan found "blank U.S. and European passports."

On February 28, 2002, the Subcommittee in Immigration and Claims held an oversight hearing on Implications of Transnational Terrorism and the Argentine Economic Collapse for the Visa Waiver Program. Witnesses included Glen Fine, Inspector General, U.S. Department of Justice, Peter Becraft, Deputy Commissioner, INS, Yonah Alexander, Professor, Potomac Institute for Policy Studies, and William Norman, President, Travel Industry Association of America. A short time after this hearing took place, Argentina was suspended from participation in the VWP.

SUBCOMMITTEE ON THE CONSTITUTION[1]

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ROBERT C. SCOTT, Virginia
MELVIN L. WATT, North Carolina

[1] Subcommittee chairmanship and assignments approved January 31, 2001.
[2] Asa Hutchinson, Arkansas, resigned from the House effective midnight August 6, 2001.
[3] J. Randy Forbes, Virginia, assignment to the subcommittee approved June 13, 2002.

Tabulation of subcommittee legislation and activity

Legislation referred to the Subcommittee	122
Legislation on which hearings were held	6
Legislation reported favorably to the full Committee	5
Legislation reported adversely to the full Committee	0
Legislation reported without recommendation to the full Committee	0
Legislation reported as original measure to the full Committee	0
Legislation discharged from the Subcommittee	3
Legislation pending before the full Committee	0
Legislation reported to the House	8
Legislation discharged from the Committee	4
Legislation pending in the House	1
Legislation failed passage by the House	1
Legislation passed by the House	10
Legislation pending in the Senate	4
Legislation vetoed by the President (not overridden)	0
Legislation enacted into Public Law	4
Days of legislative hearings	6
Days of oversight hearings	10

JURISDICTION OF THE SUBCOMMITTEE

The Subcommittee on the Constitution has legislative and oversight responsibility for the Civil Rights Division and the Community Relations Service of the Department of Justice, as well as the U.S. Commission on Civil Rights and the Office of Government Ethics. General legislative and oversight jurisdiction of the Subcommittee includes civil and constitutional rights, civil liberties and personal privacy, federal regulation of lobbying, private property rights, federal ethics laws, and proposed constitutional amendments.

H.R. 2175, Born-Alive Infants Protection Act of 2002 (Pub. L. No. 107–207)

Summary.—It has long been an accepted legal principle that infants who are born alive, at any stage of development, are persons who are entitled to the protections of the law. But recent changes in the legal and cultural landscape have brought this well-settled principle into question. These changes have allowed our culture and legal community to accept the notion that once a child is marked for abortion, it is wholly irrelevant whether that child survives an abortion and emerges from the womb as a live baby. That child may still be treated as though he or she did not exist, and would not have any rights under the law—no right to receive medical care, to be sustained in life, or to receive any care at all. Credible public testimony received by the Subcommittee on the Constitution indicates that this is, in fact, already occurring. According to eyewitness accounts, "induced-labor" or "live-birth" abortions are indeed being performed, resulting in live-born premature infants who are simply allowed to die, sometimes without the provision of even basic comfort care such as warmth and nutrition.

H.R. 2175, the "Born-Alive Infants Protection Act of 2001," provides that, for purposes of federal law, "the words 'person,' 'human being,' 'child,' and 'individual,' shall include every infant member of the species homo sapiens who is born alive at any stage of development." The term "born alive" is defined as "the complete expulsion or extraction from its mother of that member, at any stage of development, who after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of the voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion." This definition of "born alive" was derived from a model definition of "live birth" that has been adopted, with minor variations, in thirty states and the District of Columbia.

Legislative History.—H.R. 2175, the "Born-Alive Infants Protection Act of 2001," was introduced by Constitution Subcommittee Chairman Steve Chabot on June 14, 2001. On July 12, 2001, the Subcommittee on the Constitution held a hearing on H.R. 2175 at which testimony was received from the following witnesses: Hadley Arkes, Ney Professor of Jurisprudence and American Institutions, Amherst College; Jill L. Stanek, R.N., formerly of Christ Hospital, Oak Lawn, Illinois; Watson A. Bowes, Jr., M.D., professor emeritus of Obstetrics and Gynecology, School of Medicine, University of North Carolina at Chapel Hill. Additional material was submitted by Matthew G. Hile, Ph.D.; F. Sessions Cole, M.D.; Gordon B. Avery, M.D., Ph.D.; Advocate Christ Medical Center; and Jill. L. Stanek, R.N. On July 12, 2001, the Subcommittee on the Constitution met in open session and ordered favorably reported the bill H.R. 2175, without amendment, by a voice vote, a quorum being present. On July 24, 2001, the Committee met in open session and ordered favorably reported the bill H.R. 2175 without amendment by a recorded vote of 25 to 2, a quorum being present. (H. Rept. 107–186). On March 12, 2002, H.R. 2175 was passed by the House

after a motion to suspend the rules and pass the bill was agreed to by voice vote. On July 18, 2002, H.R. 2175 passed the Senate after a motion to suspend the rules and pass the bill was agreed to by voice vote. On July 26, 2002, H.R. 2175 was presented to the President and on August 5, 2002, it was signed into law by President Bush, becoming Pub. L. No. 107–207.

H.R. 476, Child Custody Protection Act

Summary.—H.R. 476, the "Child Custody Protection Act," has two primary purposes. The first is to protect the health and safety of young girls by preventing valid and constitutional state parental involvement laws from being circumvented. The second is to protect the rights of parents to be involved in the medical decisions of their minor daughters. To achieve these purposes, H.R. 476 makes it a federal offense to knowingly transport a minor across a state line, with the intent that she obtain an abortion, in circumvention of a state's parental consent or parental notification law. A violation of the Act is a Class One misdemeanor, carrying a fine of up to $100,000 and incarceration of up to one year. H.R. 476 does not supercede, override, or in any way alter existing state parental involvement laws. Nor does the Act impose any parental notice or consent requirement on any state. H.R. 476 would prevent the interstate transportation of minors in order to circumvent valid, existing state laws by using Congress's authority to regulate interstate activity to protect those laws from evasion.

Legislative History.—H.R. 476, the "Child Custody Protection Act," was introduced by Rep. Ileana Ros-Lehtinen on Feb. 6, 2001. The Subcommittee on the Constitution held a hearing on H.R. 476 on September 6, 2001, at which testimony was received from the following witnesses: Ms. Eileen Roberts, Mothers Against Minors' Abortions, Inc.; Professor John C. Harrison, Professor of Law, University of Virginia School of Law; Rev. Katherine Ragsdale, Vicar, St. David's Episcopal Church; and Ms. Teresa S. Collett, Professor of Law, South Texas College of Law. Additional material was submitted by the Honorable Ileana Ros-Lehtinen; Mr. Laurence H. Tribe, Tyler Professor of Constitutional Law, Harvard University and Mr. Peter J. Rubin, Associate Professor of Law, Georgetown University; Bill and Karen Bell; and the Center for Reproductive Law and Policy. On February 7, 2002, the Subcommittee on the Constitution met in open session and ordered favorably reported the bill H.R. 476, without amendment, by a voice vote, a quorum being present. On March 20, 2002, the Committee met in open session and ordered favorably reported the bill H.R. 476, without amendment, by a recorded vote of 19 to 6, a quorum being present. (H. Rept. 107–387). On April 17, 2002, the House passed H.R. 476 by a vote of 260 to 161. On April 17, 2002, H.R. 476 was received in the Senate, read twice, and referred to the Committee on the Judiciary. No further Senate action was taken on the measure.

H.R. 1022, Community Recognition Act of 2001

Summary.—The purpose of H.R. 1022 was to ensure that the rules of etiquette for flying the flag of the United States do not preclude the flying of flags at half mast when ordered by city and local officials. The legislation would have authorized the chief elected

leader of a city or other locality, in the event of the death of a present or former official of that particular locality, to proclaim that the national flag be flown at half staff.

4 U.S.C. § 7(m) grants authority to the President of the United States or the Governor of any State, territory, or possession to order that the national flag be flown at half staff in recognition of the death of a current or former official of the government under which they preside. Local officials may order the national flag flown at half mast only with the direct permission of the President or their Governor. Permission sought is not always timely, which results in the missed opportunity to properly honor the individual in question. H.R. 1022 would have permitted the chief elected official of local government entities, such as cities, towns, counties, or other like traditional political subdivisions, to honor those leaders or public servants who either died in the line of duty or passed away following a distinguished career in public service by ordering the national flag flown at half staff.

While the Code does not expressly outlaw the common practice of lowering the flag in honor of local heroes it, neither does it expressly permit such activity. This ambiguous wording has upset local officials across the country who believe that communities should have the right to honor their fellow citizens without the express and time consuming permission of either the President or their corresponding Governor.

Legislative History.—On March 14, 2001, H.R. 1022 was introduced by Representative Doolittle of California, and subsequently referred to the Committee on the Judiciary. On November 15, 2001 the Committee ordered reported the bill favorably to the House, with amendment, by a voice vote. On November 29, 2002 the Committee filed the report, H. Rept. 107–305. On November 15, 2002, the House passed the bill by the Yeas and Nays, 420—0, and subsequently was referred to the Senate Judiciary Committee, which took no further action.

H. Res. 459, expressing the sense of the House of Representatives that Newdow v. U.S. Congress was erroneously decided, and for other purposes

Summary.—On June 26, 2002, the United States Court of Appeals for the Ninth Circuit, in *Newdow* v. *U.S. Congress*, 292 F.3d 597 (9th Cir. 2002), held that the Pledge of Allegiance is an unconstitutional endorsement of religion, stating that it "impermissibly takes a position with respect to the purely religious question of the existence and identity of God," and places children in the "untenable position of choosing between participating in an exercise with religious content or protesting." Id. at 609. The purpose of H. Res. 459 was to express the sense of the House that *Newdow* v. *U.S. Congress* was erroneously decided.

Legislative History.—On June 26, 2002, H. Res. 459, expressing the sense of the House of Representatives that *Newdow* v. *U.S. Congress*, 292 F.3d 597 (9th Cir. 2002), was erroneously decided, and for other purposes was introduced by Judiciary Committee Chairman F. James Sensenbrenner and referred to the Judiciary Committee's Subcommittee on the Constitution. On June 27, 2002, Chairman Sensenbrenner moved to suspend the rules and agree to

the resolution. A motion to suspend the rules and agree to the resolution was agreed to by a 416 to 3 vote, 11 members voting "present". On June 26, 2002, a similar resolution, S. Res. 292, was introduced in the Senate by Sen. Tom Daschle and was agreed to by a 99–0 vote.

H. Con. Res. 62, expressing the sense of Congress that the George Washington letter to Touro Synagogue in Newport, Rhode Island, which is on display at the B'nai B'rith Klutznick National Jewish Museum in Washington, D.C., is one of the most significant early statements buttressing the nascent American constitutional guarantee of religious freedom

Summary.—The purpose of H. Con. Res. 62 was to express the sense of Congress that George Washington's letter to Touro Synagogue in Newport, Rhode Island, which is on display at the B'nai B'rith Klutznick National Jewish Museum in Washington, D.C., is one of the most significant early statements buttressing the nascent American constitutional guarantee of religious freedom. H. Con. Res. 62 also calls for the text of the letter to be widely circulated, serving as an important tool for teaching tolerance to children and adults alike.

Legislative History.—H. Con. Res. 62 was introduced by Rep. Patrick J. Kennedy on March 14, 2001. No hearings were held on H. Con. Res. 62. On June 28, 2001, the Committee met in open session and ordered favorably reported the bill H. Con. Res. 62 with amendment—inserting the actual text of the letter—by voice vote, a quorum being present. (H. Rept. 107–143). No further action was taken on the measure in the House. On February 15, 2001, S. Con. Res. 16, expressing the sense of Congress that the George Washington letter to Touro Synagogue in Newport, Rhode Island, which is on display at the B'nai B'rith Klutznick National Jewish Museum in Washington, D.C., is one of the most significant early statements buttressing the nascent American constitutional guarantee of religious freedom, was introduced by Sen. Lincoln D. Chafee. On February 15, 2001, S. Con. Res. 16 was referred to the Committee on the Judiciary which ordered the measure to be reported favorably without amendment. On July 23, 2001, S. Con. Res. 16 was agreed to in the Senate by unanimous consent.

H.R. 4965, Partial-Birth Abortion Ban Act of 2002

Summary.—H.R. 4965, the "Partial-Birth Abortion Ban Act of 2002," bans the partial-birth abortion procedure in which an intact living fetus is partially delivered until some portion of the fetus is outside the body of the mother before the fetus is killed and the delivery completed. A partial-birth abortion is defined by H.R. 4965 as an abortion in which a physician "deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus." An abortionist who violates the ban would be subject to fines or a maximum of two years imprisonment, or both. H.R. 4965 also establishes a civil cause of action for

damages against an abortionist who violates the ban and includes an exception for those situations in which a partial-birth abortion is necessary to save the life of the mother. H.R. 4965 differs from legislation to ban partial-birth abortions approved by previous Congresses in that it contained a revised definition of the banned procedure and includes Congress's factual findings that, based upon extensive medical evidence compiled during congressional hearings, a partial-birth abortion is never necessary to preserve the health of a woman.

Legislative History.—H.R. 4965, the "Partial-Birth Abortion Ban Act of 2002," was introduced by Constitution Subcommittee Chairman Steve Chabot on June 19, 2002. The Committee's Subcommittee on the Constitution held a hearing on H.R. 4965 on July 9, 2002. Testimony was received from four witnesses: Dr. Kathi Aultman, M.D.; Dr. Curtis Cook, M.D.; Professor Robert A. Destro, Professor of Law, Columbus School of Law at the Catholic University of America; and Simon Heller, Consulting Attorney with the Center for Reproductive Law and Policy. Additional materials were submitted by Dr. Kathi Aultman M.D.; Dr. Curtis Cook, M.D.; the Center for Reproductive Law and Policy; Rep. Steve Chabot; and Rep. Randy Forbes. On July 11, 2002, the Subcommittee on the Constitution met in open session and ordered favorably reported the bill H.R. 4965, without amendment, by a vote of 8 to 3, a quorum being present. On July 17, 2002, the Committee met in open session and ordered favorably reported the bill H.R. 4965 without amendment by a recorded vote of 20 to 8, a quorum being present. (H. Rept. 107–604). On July 24, 2002, the House approved H.R. 4965 by a vote of 274–151, with one member voting "present". On July 25, 2002, H.R. 4965 was received in the Senate. No further Senate action was taken on the measure.

H.J. Res. 36, proposing an amendment to the Constitution of the United States authorizing the Congress to prohibit the physical desecration of the flag of the United States

Summary.—H.J. Res. 36 proposes to amend the United States Constitution to allow Congress to prohibit the physical desecration of the flag of the United States. The proposed amendment reads: "The Congress shall have the power to prohibit the physical desecration of the flag of the United States." The amendment itself does not prohibit flag desecration. It merely empowers Congress to enact legislation to prohibit the physical desecration of the flag and establishes boundaries within which it may legislate. Prior to the United States Supreme Court decision in *Texas* v. *Johnson*, 491 U.S. 397 (1989), forty-eight states and the Federal Government had laws prohibiting desecration of the flag. The purpose of the proposed amendment is to restore to the Congress the power to protect the flag.

Legislative History.—On March 13, 2001, H.J. Res. 36, proposing an amendment to the Constitution of the United States authorizing the Congress to prohibit the physical desecration of the flag of the United States, was introduced by Rep. Randy (Duke) Cunningham. No hearings were held on H.J. Res. 36. On Thursday, May 24, 2001, the Subcommittee on the Constitution met in open session and ordered favorably reported the bill, H.J. Res. 36, without

amendment, by a vote of 5 to 3, a quorum being present. On Wednesday, June 20, 2001, the Committee met in open session and ordered favorably reported the bill, H.J. Res. 36 without amendment by a recorded vote of 15 to 11, a quorum being present. (H. Rept. 107–115). On July 17, 2001, the House passed H.J. Res. 36 by a vote of 298–125. On March 13, 2001, S.J. Res. 7, proposing an amendment to the Constitution of the United States authorizing the Congress to prohibit the physical desecration of the flag of the United States, was introduced by Sen. Orrin G. Hatch. On March 13, 2001, S.J. Res. 7 was referred to the Committee on the Judiciary and on July 15, 2001, the Committee on the Judiciary referred S.J. Res. 7 to its Subcommittee on the Constitution. No further action was taken on the measure.

H.J. Res 42, memorializing fallen firefighters by lowering the American flag to half-staff in honor of the National Fallen Firefighters Memorial Service in Emmitsburg, Maryland

Summary.—H.J. Res. 42 recognizes the thousands of Americans that have fallen while serving as a fire or emergency personnel. This joint resolution acknowledges the lowering of the American flag at the National Fallen Firefighters Memorial Service held in Emmitsburg, Maryland. H.J. Res. 42 joins the Federal Government in praise and prayers for our fallen heroes by lowering the American flag to half-staff on the day of this memorial service.

Legislative History.—H.J. Res. 42 was introduced on March 29, 2001 by Congressman Castle. On October 2, 2001 the joint resolution passed the House by a 420–0 vote. On October 4, 2001 the Senate passed the joint resolution by unanimous consent. On October 16, 2001 the joint resolution was signed by the President and became Public Law 107–51.

H.J. Res. 67, a proposed amendment to the Constitution that would authorize governors to appoint persons temporarily to take the place of Representatives who had died or become incapacitated in emergency situations

Summary.—H.J. Res. 67 would authorize governors to appoint persons temporarily to take the place of Representatives who had died or become incapacitated when 25% or more of all Representatives were unable to perform their duties. Generally, under the proposed amendment, each appointee would serve until a Member was elected to fill the vacancy and each special election would be held at any time during the 90-day period beginning on the date of the individual's appointment.

Such a proposal is not the first of its kind to have been introduced. From the 1940's through 1962, the issue of filling House vacancies in the event of a national emergency generated considerable interest among some Members of Congress during the "cold war" with the former Soviet Union. More than 30 proposed constitutional amendments which provided for temporarily filling House vacancies or selecting successors in case of the disability of a significant number of Representatives were introduced from the 79th through the 87th Congress. The House has never voted on any of these proposals.

Many of the current issues raised and policy arguments offered in support of or in opposition to the temporary appointment of Representatives are the same as those that were made 50 years ago, but the events of September 11, 2001, have raised additional issues. Suicidal terrorists may act independently from sovereign nations and may not be deterred from using weapons of mass destruction because of the possible consequences for their own people. Opponents argue that allowing governors to appoint Representatives temporarily would depart from a foundational principle under which the House has kept close to the people and each Member has taken his seat only as a result of direct election by the voters in the Member's district. Also, the states, rather than Congress, may be in the best position to provide for expedited election procedures in emergencies.

Legislative History.—Representative Brian Baird introduced H.J. Res. 67 on November 10, 2001. H.J. Res. 67 was referred to the House Judiciary Committee and then to the Subcommittee on the Constitution on November 27, 2001. The Subcommittee on the Constitution held a hearing on H.J. Res. 67 on February 28, 2002. No further action was taken on H.J. Res. 67.

H.J. Res. 96, tax limitation amendment

Summary.—H.J. Res. 96 was a proposed constitutional amendment that would require any legislative measure changing the internal revenue laws that increases revenue by more than a de minimis amount to receive the concurrence of two-thirds of the Members of each House voting and present. Excluded from this requirement would be any increase resulting from the lowering of an effective rate of any tax. The supermajority requirement could be waived when a declaration of war is in effect or when the United States is engaged in military conflict which causes an imminent and serious threat to national security and is so declared by a joint resolution, adopted by a majority of the whole number of each House, which becomes law. Pursuant to the Necessary and Proper Clause of Article I, section 8 of the Constitution, the Congress would have authority to enact implementing legislation.

Legislative History.—Proposals to limit the level or rate of growth of revenues were considered on the House Floor in conjunction with consideration of proposed balanced budget amendments in the 101st, 102nd, and 103rd Congresses. At the beginning of the 104th Congress, the House adopted a new provision in its rules requiring that an income tax rate increase be approved by three-fifths of the Members voting.[1] The House also began an annual practice of considering a constitutional amendment requiring a two-thirds vote on certain tax legislation. On April 15, 1996, H.J. Res. 159 failed to receive the required two-thirds vote for constitutional amendments by a vote of 241–157. It would have required any bill to levy a new tax or to increase the rate or base of any tax to receive a two-thirds majority of the whole number of each House of Congress.

At the beginning of the 105th Congress, the House rule was changed to require a three-fifths vote for any bill that "amends

[1] See House Rule XXI, cl. 5(c), 104th Cong.

subsection (a), (b), (c), (d), or (e) of section 1, or to section 11(b) or 55(b) of the Internal Revenue Code of 1986, that imposes a new percentage as a rate of tax and thereby increases the amount of tax imposed by any such section."[2] In addition, the Committee on the Judiciary conducted a markup of H.J. Res. 62 following a hearing conducted by the Subcommittee on the Constitution, during which eight witnesses, including two Members of Congress, testified. On April 8, 1997, the Committee ordered H.J. Res. 62 to be reported, as amended, by a vote of 18–10.[3] H.J. Res. 62, as amended, would have required, inter alia, any legislative measure changing the internal revenue laws to receive the concurrence of two-thirds of the Members of each House voting and present, unless the bill is determined at the time of adoption not to increase the internal revenue by more than a de minimis amount. But on April 15, 1997, the bill failed by a vote of 233–190.

In 1998, H.J. Res. 111 was introduced but subsequently modified and deliberated pursuant to H. Res. 407, a rule for its consideration. Pursuant to H.AMDT. 553, section 1 of H.J. Res. 111 was amended to additionally state that "[f]or the purposes of determining any increase in the internal revenue under this section, there shall be excluded any increase resulting from the lowering of an effective rate of any tax." On April 22, 1998, H.J. Res. 111, as amended, failed by a vote of 238–186.

During the 106th Congress, H.J. Res. 37 failed on April 15, 1999 by a vote of 229–199, and H.J. Res. 94 failed on April 12, 2000 by a vote of 234–192. The bills were identical to each other and identical to H.J. Res. 111, 105th Cong., as amended, except that the bills introduced during the 106th Congress did not contain a section providing that Congress can enact enabling legislation.

On March 22, 2001, Representative Pete Sessions introduced H.J. Res. 41, during the 107th Congress. H.J. Res. 41 failed on April 25, 2001 by a vote of 232–189. On June 6, 2002, Representative Sessions introduced H.J. Res. 96. On June 12, 2002, H.J. Res. 96 failed by a vote of 227–178.

S. 1202, the Office of Government Ethics Authorization Act of 2001

Summary.—S. 1202 would reauthorize the Office of Government Ethics through 2006. The small agency established in 1978 fosters high ethical standards for government employees. The agency oversees compliance by federal departments and agencies with a variety of ethics laws. It issues rules and regulations for federal employees to follow on such matters as conflict of interest, post-employment restrictions, standards of conduct, and financial disclosure.

Legislative History.—S. 1202 was introduced by Senator Lieberman on July 19, 2001. On November 15, 2001, the Senate passed the bill by Unanimous Consent. On November 16, 2001 the bill was referred to the Judiciary Committee. On December 20, 2001 the House agreed to suspend the rules and pass the bill by a voice vote. S. 1202 was signed by the president on January 15, 2002 and became Public Law 107–119.

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[2] See House Rule XXI, cl. 5(b), 106th Cong.
[3] See H. Rept. 105–50, 105th Cong., 1st Sess. (1997).

S. 2690, to reaffirm the reference to one Nation under God in the Pledge of Allegiance (Pub. L. No. 107–293)

Summary.—The purpose of S. 2690, is to reaffirm Congress's commitment to the Pledge of Allegiance and our national motto, "In God we trust," in the wake of the Ninth Circuit Court of Appeals' June 26, 2002, holding in *Newdow* v. *U.S. Congress*, 292 F.3d 597 (9th Cir. 2002), that the Pledge of Allegiance is an unconstitutional endorsement of religion, because it "impermissibly takes a position with respect to the purely religious question of the existence and identity of God," and places children in the "untenable position of choosing between participating in an exercise with religious content or protesting." Id. at 609. America has a rich history of referring to God in its political and civic discourse and acknowledging the important role faith and religion have played throughout our Nation's history. Thus the Ninth Circuit's analysis in the *Newdow* ruling cannot be supported by any reasonable interpretation of the Establishment Clause and is inconsistent with the meaning given the Establishment Clause since America's founding.

Both the House and the Senate approved S. 2690, which contained extensive findings regarding the numerous ways in which the government has recognized the religious heritage of America, in order to reaffirm that the Nation's motto and pledge as currently written are consistent with the First Amendment of the United States Constitution. It is important to note that under *Pierce* v. *Underwood*, 487 U.S. 552 (1988), Congress, by approving S. 2690 which calls for the re-codification of section 4 of title 4 of the United States Code, could be presumed to have adopted previous interpretations of this provision, including the Ninth Circuit Court of Appeals' interpretation of section 4 of title 4 of the United States Code in *Newdow* v. *U.S. Congress*, 292 F.3d 597 (9th Cir. 2002). The Committee wishes to make clear that it is not the intent of Congress to adopt any previous judicial interpretations of this provision, particularly that given to it by the Ninth Circuit in the *Newdow* ruling.

Legislative History.—S. 2690, which would reaffirm the reference to one Nation under God in the Pledge of Allegiance (Pub. L. No. 107–293), was introduced by Sen. Tim Hutchinson on June 27, 2002, at which time it passed the Senate by a 99 to 0 vote. On June 27, 2002, S. 2690 was received in the House and referred to the Committee on the Judiciary. On July 18, 2002, S. 2690 was referred to the Committee's Subcommittee on the Constitution. No hearings were held on S. 2690 and on August 29, 2002, S. 2690 was discharged from the Subcommittee. On September, 10, 2002, the Committee met in open session at which point S. 2690 was amended to clarify that section 4 of title 4's requirement that men, who are not in uniform, "remove their headdress with their right hand and hold it at the left shoulder, the hand being over the heart" prior to reciting the pledge, only applies to a "non-religious" headdress. S. 2690 was then ordered reported favorably with amendment, by voice vote, a quorum being present. (H. Rept. 107–659). On October 7, 2002, Judiciary Committee Chairman F. James Sensenbrenner moved to suspend the rules and pass S. 2690 as amended and on October 8, 2002, the motion was agreed to by a 401 to 5 vote, with 4 members voting "present". On October 17, 2002, the

Senate agreed to the House amended version of S. 2690 by unanimous consent. On November 4, 2002, S. 2690 was presented to the President and on November 13, 2002, it was signed by the President, becoming Pub. L. No. 107–293.

H.R. 503, Unborn Victims of Violence Act of 2001

Summary.—Under current Federal law, an individual who commits a Federal crime of violence against a pregnant woman receives no additional punishment for killing or injuring the woman's unborn child during the commission of the crime. Therefore, except in those States that recognize unborn children as victims of such crimes, injuring or killing an unborn child during the commission of a violent crime has no legal consequence whatsoever. H.R. 503, the "Unborn Victims of Violence Act of 2001," fills this gap in Federal law by providing that an individual who injures or kills an unborn child during the commission of one of over sixty Federal crimes will be guilty of a separate offense. The punishment for that separate offense is the same as the punishment provided under Federal law for that conduct had the same injury or death resulted to the unborn child's mother.

An offense under H.R. 503 does not require proof that the defendant knew or should have known that the victim was pregnant, or that the defendant intended to cause the death or injury of the unborn child. If, however, the defendant committed the predicate offense with the intent to kill the unborn child, the punishment for the separate offense shall be the same as that provided under Federal law for intentionally killing or attempting to kill a human being. By its own terms, H.R. 503 does not apply to "conduct relating to an abortion for which the consent of the pregnant woman has been obtained or for which such consent is implied by law." The bill also does not permit prosecution "of any person for any medical treatment of the pregnant woman or her unborn child," or "of any woman with respect to her unborn child."

Legislative History.—On February 7, 2001, Rep. Lindsey Graham introduced H.R. 503, the "Unborn Victims of Violence Act of 2001." The Committee's Subcommittee on the Constitution held a hearing on H.R. 503 on March 15, 2001. Testimony was received from the following witnesses: William Croston III, Charlotte, North Carolina; Professor Richard S. Myers, Professor of Law, Ave Maria School of Law; Juley Fulcher, Director of Public Policy, National Coalition Against Domestic Violence; Robert J. Cynkar, Attorney at Law, Cooper, Carvin & Rosenthal. On March 21, 2001, the Subcommittee on the Constitution met in open session and ordered favorably reported the bill, H.R. 503, without amendment, by a voice vote, a quorum being present. On March 28, 2001, the Committee met in open session and ordered favorably reported the bill, H.R. 503, without amendment, by a recorded vote of 15 to 9, a quorum being present. (H. Rept. 107–42). On April 26, 2001, the House passed H.R. 503 by a vote of 252 to 172 with one member voting "present". On April 26, 2001, H.R. 503 was received in the Senate and on June 8, 2001, it was read a second time and placed on the Senate Legislative Calendar. No further action was taken on the measure.

OVERSIGHT ACTIVITIES

List of oversight hearings

Presidential Pardon Power, February 28, 2001 (Serial No. 2)
State and Local Implementation of Existing Charitable Choice Programs, April 24, 2001 (Serial No. 13)
Constitutional Role of Faith-Based Organizations in Competitions for Federal Social Service Funds, June 7, 2001 (Serial No. 17)
Constitutional Issues Raised by Recent Campaign Finance Legislation Restricting Freedom of Speech, June 12, 2001 (Serial No. 20)
HUD's "Legislative Guidebook" and Its Potential Impact on Property Rights and Small Business, Including Minority-Owned Businesses, March 7, 2002 (Serial No. 67)
United States Commission on Civil Rights, April 11, 2002 (Serial No. 73)
Civil Rights Division of the United States Department of Justice, June 25, 2002 (Serial No. 81)
Privacy Concerns Raised by the Collection and Use of Genetic Information by Employers and Insurers, September 12, 2002 (Serial No. 100)
Supreme Court's School Choice Decision and Congress' Authority to Enact Choice Programs, September 17, 2002 (Serial No. 101)
A Judiciary Diminished is Justice Denied: the Constitution, the Senate, and the Vacancy Crisis in the Federal Judiciary, October 10, 2002 (Serial No. 108)

Presidential Pardon Power

On February 28, 2001, the Subcommittee on the Constitution held an oversight hearing on the Presidential Pardon Power. Witnesses included: Daniel T. Kobil, Professor of Law, Capital University Law School; Allan J. Lichtman, Professsor of History, American University; Margaret Colgate Love, Former Pardon Attorney, U.S. Department of Justice; Alan Charles Raul, Former Associate Counsel to the President.[4]

Daniel Kobil testified that the Framers rejected every proposal to limit the clemency power and the Supreme Court has "consistently refused to allow inroads into the President's authority."[5] Kobil mentioned important exercises of the clemency power in our nation's history which served to "bind the country together" and "heal wounds" following the Civil War and the Vietnam War. Kobil concluded that the current decline in exercise of the clemency power may result in the power not being used by future Presidents in "deserving cases."[6]

Alan Lichtman testified that use of the pardon power has been "politically charged throughout American history and not always exercised with what Alexander Hamilton called "scrupulousness and caution."[7] Lichtman noted the controversies surrounding

[4] See Oversight Hearing on the Presidential Pardon Power, 107th Cong., Sess. 1 (Feb. 28, 2001).
[5] Id. (Testimony of Daniel Kobil).
[6] See id.
[7] Id. (Testimony of Alan J. Lichtman).

President John Adams' pardon of anti-tax rebels, Andrew Johnson's pardon of ex-Confederates and Bush and Reagan's pardons of Watergate scandal figures.[8] Lichtman concluded, "[T]he lesson of history is that appropriate use of the pardoning power requires a delicate balance, not just of caution, but also of courage, something that has not been emphasized in the recent controversy [with Clinton's pardons]."[9]

Margaret Colgate Love testified that the Justice Department's "reluctance to recommend cases favorably for clemency was, at least in part, responsible for the extraordinary breakdown of the pardon process at the end of the Clinton administration."[10] Ms. Love noted that she was "grateful" for the final Clinton pardons, two-thirds of which went to "ordinary people" who had waited for relief for years.[11] Ms. Love concluded that the controversy surrounding the Clinton pardons will offer President Bush and his Attorney General the opportunity to review the use and administration of the pardon power.[12]

Alan Charles Raul testified that during his tenure as an associate counsel to President Ronald Reagan, the pardon process was "orderly and deliberate."[13] Mr. Raul noted that a President's approach to granting pardons reflects on the President's character and his "respect for the rule of law. * * * A president who disrespects the rule of law and views the pardon power as essentially a personal prerogative rather than a public trust will be in a position to exploit [and] abuse the process."[14] He concluded that Americans can best restrain the pardon power by electing Presidents of good character.[15]

Oversight of the United States Commission on Civil Rights

The House Committee on the Judiciary through its Subcommittee on the Constitution has continued its oversight of the United States Commission on Civil Rights. On June 22, 2001, the Subcommittee Chairman Steve Chabot wrote to Commission Chair Mary Frances Berry concerning the June 5, 6, and 9, 2001 reports in the New York Times that the Commission failed to involve all commissioners in the preparation of its draft report entitled "Voting Irregularities in Florida During the 2000 Presidential Election," prematurely leaked the Report to the public and failed to provide affected parties with full access to the contents of the Report. Chairman Chabot questioned the Commission's adherence to its own review and public disclosure policies.[16]

On June 27, 2001, the Senate Rules and Administration Committee held a hearing concerning the Commission's Report on the Florida Election. The Subcommittee issued a letter to the Commission on July 10, 2001, seeking to resolve a disagreement over the availability and the substance of data used by Professor Allan

[8] See id.
[9] Id.
[10] Id. (Testimony of Margaret Colgate Love).
[11] See id.
[12] See id.
[13] See id. (Testimony of Alan Charles Raul).
[14] Id.
[15] See id.
[16] See Letter from Chairman Steve Chabot, Subcommittee on the Constitution, to Commission Chair Mary Frances Berry (June 22, 2001).

Lichtman in formulating the Report's conclusions. The Committee requested production of all documents relating to the data and methodology used by Professor Lichtman in his analysis.[17] Commission Staff Director Les Jin's responses on July 9, 2001 and July 16, 2001 were inadequate and unresponsive. The Commission never produced Professor Lichtman's data.[18]

On July 20, 2001, the Subcommittee sent a letter to the Commission to renew its request for information and documents that the Commission failed to provide and to follow-up on Jin's responses.[19] The Commission's July 30, 2001 reply was evasive, and the Commission again refused to produce the requested documents.[20] On August 21, 2001, the Subcommittee sent a letter to the Commission expressing concern that the Commission had apparently deliberately withheld documents relating to its contractual relationship with McKinney & Associates, an outside public affairs firm the Commission hired when it also maintained its own public affairs office with three employees.[21] The Commission responded with an incomplete production of McKinney contracts.

On November 30, 2001, the Subcommittee wrote to Chair Berry concerning the Commission's position that Commissioner Victoria Wilson, who was appointed to complete the term of the late Judge Leon Higginbotham, which expired on November 29, 2001, was entitled to maintain her seat and serve a full six-year term.[22] Following that letter, on December 4, 2001, the Subcommittee requested and received the position of the U.S. Department of Justice which stated that a Commission "member serves only the remainder of the predecessor's term."[23] On December 5, 2001, White House Counsel Alberto R. Gonzales issued a letter to the Commission confirming that Ms. Wilson's term expired on November 29, 2001 and the President's appointee, Peter N. Kirsanow, was entitled to assume Wilson's seat as a full member of the Commission.[24]

Chair Berry disregarded both the Subcommittee's and the White House Counsel's letters, and at the December 8, 2001 Commission meeting, refused to recognize and seat Peter Kirsanow as a Commissioner. On December 14, 2001, the Subcommittee received an opinion from the Congressional Research Service which concluded that the 1994 Commission statute did not repeal the uniform staggered Commission term requirement in the 1983 legislation and that Mr. Kirsanow was entitled to the vacant position on the Commission: "[I]t is consonant with the congressional intent for the [C]ommission to maintain the staggered three year appointment cycle by calculating a successor's term from the date of expiration of her predecessor's term, a practice followed by many other similar agencies."[25]

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[17] See Letter from Chairman Chabot, to Chair Berry (June 27, 2001).

[18] See Letters from Les Jin, to Chairman Chabot and accompanying documents (July 9, 2001 and July 16, 2001).

[19] See Letter from Chairman Chabot, to Chair Berry (July 20, 2001).

[20] See Letter from Les Jin, to Chairman Chabot and accompanying documents (July 30, 2001).

[21] See Letter from Chairman Chabot, to Chair Berry (Aug. 21, 2001).

[22] See Letter from Chairman Chabot, to Chair Berry (Nov. 30, 2001).

[23] See Letter from Assistant Attorney General Dan Bryant, to Chairman Chabot (Dec. 4, 2001).

[24] See Letter from Alberto R. Gonzales, Counsel to the President, to Chair Berry (Dec. 5, 2001).

[25] Memorandum from Morton Rosenberg, Specialist in American Public Law, American Law Division, Congressional Research Service, to Chairman Chabot (Dec. 14, 2001).

In January 2002, the Subcommittee wrote to Chair Berry concerning her unlawful refusal to seat Commissioner Kirsanow and commenced an investigation into the unlawful use of Commission resources to fund litigation against the United States.[26] On February 27, 2002, the Subcommittee obtained an opinion from GAO General Counsel Anthony Gamboa which held that "the Commission does not have statutory authority to use its appropriated funds to hire outside counsel" in the Wilson case.[27] This opinion served as the basis for the Subcommittee's February 27, 2002 letter to Solicitor General Olson urging him to maintain the government's appeal of a ruling permitting the Commission to intervene in *U.S.* v. *Wilson*.[28]

Also in February of 2002, the Subcommittee commenced a review of the Commission's overall management. On February 14, 2002, the Subcommittee sent a letter to Berry questioning the Commission's compliance with GAO's 1997 recommendations issued in a Report entitled, "U.S. Commission on Civil Rights: Agency Lacks Basic Management Controls."[29] In a follow-up letter, on March 7, 2002, the Subcommittee probed the Commission's relationship with McKinney & Associates.[30] Staff Director Les Jin's responses revealed the Commission's failure to implement many of the reforms recommended by GAO five years ago.[31] Documents produced showed Commission expenditures of over $170,000 on McKinney & Associates, despite the fact that the Commission continued to receive bad press and could not explain what McKinney does for the Commission.[32]

On April 11, 2002, the Subcommittee on the Constitution held an oversight hearing to inquire into Commission mismanagement which continues to undermine public confidence in the Commission's work. Witnesses included: Abigail Thernstrom, Commissioner; Les Jin, Commission Staff Director; Hillary O. Shelton, Director, NAACP Washington Bureau; and Thomas Schatz, President, Citizens Against Government Waste.[33]

Commissioner Thernstrom testified that Commission meetings are marked by "procedural chaos" and "[r]ules are changed arbitrarily. I'm never sure what will be on the agenda until I get there."[34] Thernstrom raised concerns about Commissioners' lack of access to the staff and its work: "Direct conversations with anybody outside the Staff Director, Les Jin, are explicitly prohibited. Moreover, memos to Mr. Jin containing vital questions are regularly unanswered or only very partially answered."[35] She noted that reports take years to complete and often the information gathered is "obsolete." Commissioner Thernstrom emphasized that "secrecy"

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[26] See Letter from Chairman Chabot, to Commission Chair Berry (Jan. 9, 2002).

[27] See Letter from GAO General Counsel Anthony H. Gamboa, to Chairman Chabot (Feb. 27, 2002).

[28] See Letter from Chairman Chabot, to Solicitor General Ted Olson (Feb. 27, 2002).

[29] See Letter from Chairman Chabot, to Chair Berry (Feb. 14, 2002). See also U.S. Commission on Civil Rights: Agency Lacks Basic Management Controls GAO/HEHS–97–125 (July 1997).

[30] See Letter from Chairman Chabot, to Chair Berry (Mar. 7, 2002).

[31] See Letters from Commission Staff Director Les Jin, to Chairman Chabot (February 22, 2002 and March 13, 2002).

[32] See id. and accompanying documents produced to the Subcommittee.

[33] See Oversight Hearing on the US Commission on Civil Rights, 107th Cong., Sess. 2 (Apr. 11, 2002).

[34] Id. (Testimony of Commissioner Abigail Thernstrom).

[35] Id.

and "fear of dissenting voices" pervades the Commission's report process.[36] Commissioner Thernstrom concluded with this overall assessment: "The Commission should be a source of hard facts on current civil rights issues and a place of robust debate. It is neither. It is a national embarrassment."[37]

Staff Director Les Jin defended the Commission's work: "The Commission has produced quality work in a timely manner, covering a broad range of civil rights topics."[38] Jin noted two reports generated by Commission staff—one concerning alleged "minority voter disenfranchisement" in the 2000 Florida election and another alleging racial profiling by the New York City Police Department. Jin did not respond to Commissioner Thernstrom's contention that these reports rested on dubious statistical data. Moreover, Jin did not dispute the Subcommittee's conclusion that the Commission failed to implement fully GAO's 1997 management recommendations. Jin reiterated his policy that staff are not permitted to speak with or respond to Commissioner's written questions or memorandum.[39]

Hillary Shelton testified that the "NAACP appreciates and often relies on the Commission's work."[40] He noted the Commission's reports on issues affecting native Hawaiians, age discrimination, concerns of native Alaskans, and ethnic tensions in American communities. Shelton did not comment on the efficiency of the Commission's report process or its overall management.[41]

Thomas Schatz testified to the Commission's failure to implement GAO's 1997 reforms. He raised concern over the relationship between the Commission and McKinney & Associates noting, "[I]t is highly unusual for any Federal agency to hire a private firm to handle public relations * * *."[42] He recommended that GAO conduct another study on the Commission.[43] Following the hearing, the Subcommittee asked GAO to reassess the Commission's overall management and its compliance with GAO's 1997 recommendations.[44]

When the Senate, at the recommendation of Republican Leader Trent Lott, appointed Russell Redenbaugh on July 18, 2002, Constitution Subcommittee Chairman Chabot issued a press release in which he praised the newly balanced Commission and criticized the press and leaders of some Arab American and civil rights groups for seeking to disrupt the new balance of the Commission by the immediate unwarranted calls for the removal of Commissioner Peter N. Kirsanow for his comments at a July 19, 2002 Commission meeting in Detroit, Michigan.[45]

In September 2002, the Subcommittee wrote two letters to the Commission regarding its refusal to pay Tim Keefer, Commissioner Kirsanow's newly appointed Special Assistant, the appropriate sal-

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[36] See id.
[37] Id.
[38] Id. (Testimony of Commission Staff Director Les Jin).
[39] See id.
[40] Id. (Testimony of Hillary O. Shelton).
[41] See id.
[42] Id. (Testimony of Thomas Schatz).
[43] See id.
[44] See Letter from Chairman Chabot, to GAO Comptroller David M. Walker (Nov. 13, 2002).
[45] See Chairman Praises Newly Balanced Civil Rights Commission, Press Release, House Committee on the Judiciary (July 23, 2002).

ary of GS–13, Level 10.[46] The Commission's claim that all other special assistants start at GS–13, Level 1 was contradicted by documents the Commission produced, revealing that one special assistant started at GS–13, Level 9. The Subcommittee requested that the Commission reconsider the designation of Mr. Keefer in light of his record of achievement and superior qualifications.[47] Les Jin refused to review the personnel decision of the Commission human resources office.

In October 2002, the Subcommittee wrote a letter to the Commission when it refused to authorize the travel of Commissioners to Washington, D.C. for purposes of participating in the out-of-town meeting in Jackson, Mississippi.[48] Chairman Chabot warned, "If the Commission continues to operate in this manner, I will not hesitate to seek a reduction in the Commission's FY–2003 budget."[49]

Oversight of the Department of Justice Civil Rights Division

The House Committee on the Judiciary through the Subcommittee on the Constitution continued its oversight of the Department of Justice Civil Rights Division under the direction of Assistant Attorney General Ralph Boyd. In May 2002, Chairman Chabot and oversight staff met with Assistant Attorney General Boyd to discuss the Division's enforcement record. In a follow-up meeting, oversight staff met with Division deputies to discuss the more than 400 school desegregation cases still pending, political subdivisions subject to Section 5 of the Voting Rights Act, pending Florida voting rights litigation, and agreements with cities and municipalities in use of force cases.

On June 25, 2002, the Subcommittee on the Constitution held an oversight hearing to review the Division's progress. Assistant Attorney General Boyd was the sole witness.[50] Boyd testified that during his tenure the Division has acted "carefully, but aggressively" in prosecuting civil rights violations. He noted that following September 11, the Division investigated over 350 incidents of alleged discrimination against individuals of Middle Eastern descent, from which federal and state authorities initiated 80 prosecutions. Boyd testified that the Division has taken the lead in prosecution of human trafficking. The Division has also reached landmark settlement agreements with 21 communities across the country to improve the accessibility of public buildings and venues. Boyd also discussed the Division's efforts to conclude two decades old desegregation cases—one in the State of Mississippi and the other in Yonkers, New York. The Chairman encouraged the Assistant Attorney General to continue to lift consent decrees in school desegregation cases as school districts satisfy the terms of the decrees.[51]

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[46] See Letters from Chairman Chabot, to Staff Director Jin (Sept. 10, 2002 and Sept. 20, 2002).
[47] See Letter from Chairman Chabot, to Staff Director Jin (Sept. 20, 2002).
[48] See Letter from Chairman Chabot, to Staff Director Jin (Oct. 9, 2002).
[49] Id.
[50] See Oversight Hearing on the Civil Rights Division of the U.S. Department of Justice, 107th Cong., Sess. 2 (June 25, 2002).
[51] See id. (Testimony of Assistant Attorney General Ralph Boyd).

Throughout 2002, the Committee monitored the Division's filings, paying close attention to the roughly 380 school desegregation cases still pending. On October 30, 2002, Committee oversight staff met with Division deputies to review the Division's recent activities. The Division has reached agreements for unitary status in approximately 20 cases this year.

Judicial vacancy crisis oversight

On October 10, 2002, the Subcommittee on the Constitution held a hearing to explore the causes and effects of the current federal judiciary vacancy crisis and the Senate's constitutional role in confirming judges. Witnesses were: John Eastman, Professor, Chapman University School of Law; Todd Gaziano, Senior Fellow in Legal Studies, Heritage Foundation; Ralph Neas, President, People for the American Way; and Kay Daly, Spokesperson, Coalition for a Fair Judiciary.[52]

Professor John Eastman testified to the limited nature of the Senate's advise and consent role. He noted that the Framers refused to grant the Senate the power of appointment "because they wanted the accountability that came with placing the appointment power in a single individual" and "they knew the tendency of public bodies to feel no personal responsibility and to give full play to intrigue and cabal."[53] Professor Eastman contended that the ideological litmus test proposed by some Senators would threaten the independent judiciary and its ability to check congressional power. He suggested that the Committee consider legislation that would give the sole appointment power to the President.[54]

Todd Gaziano testified to the Senate's "intentional refusal" to act on many of the President's nominees. He noted that the average wait for confirmation of the first 11 court of appeals nominees was 500 days. Gaziano raised concerns about the judicial emergencies created in courts where the vacancy rates have increased substantially. He testified that the large vacancy rate on the Sixth Circuit, with only nine out of 16 seats filled, has resulted in serious allegations by a dissenting judge that the Chief Judge improperly influenced the outcome of a case by using nonrandom procedures to appoint himself to the panel in *Grutter* v. *Bollinger,* a case involving the use of race in admission to the University of Michigan Law School.[55]

Ralph Neas contended that the Senate has made significant progress in reducing vacancies. He argued that Eastman and Gaziano's charges of delay are "totally inaccurate" producing his own statistics that purported to show that "confirmations are nearly four times the number confirmed during the entire first year of the first Bush administration and more than twice the number confirmed during the first year of the Clinton administration."[56] He concluded that no Presidential nominee should be entitled to a lifetime seat on the Federal bench.[57]

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[52] See Oversight Hearing on a Judiciary Diminished is Justice Denied: The Constitution, the Senate and the Vacancy Crisis in the Federal Judiciary, 107th Cong., Sess. 2 (Oct. 10, 2002).
[53] Id. (Testimony of Professor John Eastman).
[54] See id.
[55] See id. (Testimony of Todd Gaziano).
[56] Id. (Testimony of Ralph Neas).
[57] See id.

Kay Daly testified to the efforts of coalition groups to encourage Senate confirmation of nominees. She contended that the judicial confirmation process has been "hijacked" by left-of-center interest groups that attack the President's nominees for "anything at all, even including membership in a men's only fly-fishing club that they can use to charge a nominee with being racist, sexist, bigoted, homophobic * * *."[58] She noted that the nominees are unable to defend themselves because confirmation hearings are delayed for months and sometimes years which "permit[s] the drumbeat of ethics criticism to continue in the media unobstructed."[59] Daly urged the Senate to take swift action to confirm nominees.[60]

Chairman Chabot noted for the record that following an inquiry from the Committee regarding the case assignment irregularities in the Sixth Circuit, Chief Judge Martin has instituted more random assignment procedures and agreed to conduct an extensive review of the Sixth Circuit's internal operating procedures. In response to the Committee's inquiry regarding the procedures used in *Grutter,* Chief Judge Martin wrote: "Operating within a circuit as ours with eight vacancies out of sixteen positions, we, of course, have found great difficulty in completing enough panels * * *."[61]

The Subcommittee solicited and received letters from the Chief Judges of four other circuit courts and the Chair of the Judicial Conference Committee on Judicial Resources discussing the challenges created by vacancies in the Federal courts. Chief Judge Ginsburg of the D.C. Circuit wrote, "[I]f the court does not have additional judges soon, our ability to manage our workload in a timely fashion will be seriously compromised."[62] Chief Judge Becker of the Third Circuit described the court's struggle to handle pro se cases, which compromise 50% of the court's docket: "In this area, we are sorely pressed, for the burden on the judges of the Court is crushing and we are stretched beyond the limit."[63] Chief Judge J.L. Edmondson of the Eleventh Circuit noted that if either or both of the two judges now eligible elect to take senior status, the court will be in "serious trouble."[64]

Genetic privacy oversight hearing

On September 12, 2002, the Subcommittee on the Constitution held an oversight hearing on the concerns raised by the collection and use of genetic information by employers and insurers. Witnesses included: Tom Miller, Director of Health Studies, Cato Institute; Dr. John Rowe, President and CEO, Aetna; Joanne Hustead, Senior Counsel, Health Privacy Project, Assistant Professor,

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[58] Id. (Testimony of Kay Daly).

[59] Id.

[60] See id.

[61] Letter from Chief Judge Boyce Martin, Sixth Circuit Court of Appeals, to Chairman James Sensenbrenner, House Committtee on the Judiciary (Aug. 22, 2002).

[62] Letter from Chief Judge Ginsburg, D.C. Court of Appeals, to Chairman Chabot (Oct. 16, 2002).

[63] Letter from Chief Judge Becker, Third Circuit Court of Appeals, to Chairman Chabot (Oct. 15, 2002).

[64] Letter from Chief Judge J.L. Edmondson, Eleventh Circuit Court of Appeals, to Chairman Chabot (Oct. 8, 2002).

Georgetown University; and Dr. Deborah Peel, President, the American Psychoanalytic Foundation.[65]

Tom Miller testified that there is little evidence that health insurers use genetic information in medical underwriting and evidence of genetic discrimination by employers is limited to "isolated anecdotes."[66] Miller noted the complications in crafting legal protection for personally identifiable genetic information. He argued that a broad prohibition on any disclosure of genetic information "would prevent good health risks from obtaining positive genetic information on their behalf and then voluntarily disclosing it to potential health insurers."[67] He concluded that market-based, private-sector mechanisms for protecting genetic information should be considered as alternatives to expanded regulation.[68]

Dr. John Rowe testified that discrimination based on genetic information is highly speculative because the technology is new and still developing. Dr. Rowe illustrated how an absolute ban on genetic information would impair insurers' capacity to provide appropriate service to members:

> For individuals known to have the gene for a familial form of colorectal cancer, their best interest, in terms of early detection and prevention, is to have frequent screenings via colonoscopy, every six months instead of every three to five years. We can only approve payment for those six-monthly tests if we know that the individual has the colorectal cancer gene. If we don't have access to that information, the person doesn't have access to the treatment.[69]

He concluded by discussing some of the privacy guidelines Aetna has suggested for the industry including coverage of genetic testing and consultation with physicians to facilitate appropriate interpretation of tests.[70]

Joanne Hustead testified that federal law is inadequate in protecting genetic information: "The HIPAA privacy regulation does not prevent health plans from collecting genetic information or from requiring that people undergo genetic tests or provide genetic information."[71] Hustead noted further that the HIPAA nondiscrimination provisions protect the genetic information of only a very narrow subset of policy-seekers.[72] Hustead also raised concern that the Americans with Disabilities Act "permits employers to collect much more medical and genetic information than they need to assess whether a person can actually perform the essential job functions."[73] Hustead urged Congress to pass genetic privacy legislation that would "fill the gaps" in current federal law.[74]

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[65] See Oversight Hearing on the Privacy Concerns Raised by the Collection and Use of Genetic Information by Employers and Insurers, 107th Cong., Sess. 2 (Sept. 12, 2002).
[66] See id. (Testimony of Tom Miller).
[67] Id.
[68] See id.
[69] Id. (Testimony of Dr. John Rowe).
[70] See id.
[71] Id. (Testimony of Joanne Hustead).
[72] See id.
[73] Id.
[74] See id.

Dr. Deborah Peel testified that as a physician she has seen frequent discrimination based on patients' medical and genetic conditions. She raised concern that the new amendments to HIPAA will not adequately protect genetic information. Dr. Peel contended that the amendments will take away a patient's right to consent to the release of medical information and grant health plans retroactive access to a patient's past health records. She urged Congress to review the HIPAA amendments and deny these rule changes.[75]

[75] See id. (Testimony of Dr. Deborah Peel).