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The Honorable Bill Shuster
Chairman
The Honorable Eleanor Holmes Norton
Ranking Democratic Member
Subcommittee on Economic Development, Public
Buildings, and Emergency Management
Committee on Transportation and Infrastructure
House of Representatives

Subject: *Questions for the Record: Hearing on the Judiciary's Ability to Pay for Current and Future Space Needs*

On June 21, 2005, we testified at the Subcommittee's oversight hearing on the judiciary's ability to pay for current and future space needs.[1] This report responds to your June 23, 2005, request in which you asked additional questions about the Federal Buildings Fund (FBF) and the judiciary's efforts to manage its space needs. To respond to these questions, we primarily relied on our previous work and knowledge of these areas. We prepared this response during June and July 2005 in accordance with generally accepted government auditing standards. Because our response is primarily based on previously issued products, we did not seek agency comments on a draft of this report. Our answers to your questions follow.

Question 1. On page 6 [of your testimony] you mention the downside of "flexible design guidance" – what does that mean and how does it affect construction budgets?

As we reported in 1995,[2] flexible design guidance refers to the wide latitude the General Services Administration (GSA) and the judiciary had in choosing the location, design, construction, and finishes of courthouse projects. These choices significantly affected courthouse construction costs. Because of such choices, some courthouses had more expensive materials or costly design configurations and enhancements than other courthouses. This flexibility contributed to large degrees

[1] GAO, *Courthouse Construction: Overview of Previous and Ongoing Work*, GAO-05-838T (Washington, D.C.: June 21, 2005).
[2] GAO, *Federal Courthouse Construction: More Disciplined Approach Would Reduce Costs and Provide for Better Decisionmaking*, GAO/T-GGD-96-19 (Washington, D.C.: Nov. 8, 1995).

of uncertainty and variability in courthouse construction budgets. For example, in the Foley Square courthouse in New York, GSA used white marble from floor to ceiling as well as in the main lobby and carried the marble motif to each elevator lobby throughout the building. By comparison, GSA used drywall, wood, and manufactured stone highlights to finish the lobby of the Alexandria courthouse in Virginia. According to the GSA project officer, these materials were less expensive than marble. The different choices made about the fixtures and finishes of these two courthouses had a major impact on their construction costs.

Question 2. Your testimony also frequently mentions systematic oversight (page 6), and the need for a systematic process to oversee and manage court projects. As you know, GSA has a Courts Management Group currently housed within the Office of the Chief Architect. Do you believe that is the best placement for this important office? Since it is 4 levels removed from the Commissioner, how effective can it be?

We have not formally evaluated the overall effectiveness and/or organizational placement of the Courts Management Group within GSA's Office of the Chief Architect. However, we have recognized that the creation of such an office is important to bringing more focus and discipline into the courthouse planning, funding, and construction process.

In 1993, the Administrative Office of the U.S. Courts (AOUSC) and GSA convened an Independent Courts Building Program Panel to provide an objective assessment of the overall courthouse construction program. The panel made a number of recommendations intended to improve the management of the program, identify opportunities for cost savings, and ensure that public funds were being spent efficiently and cost-effectively. One of the panel's recommendations was to create a Center for Courthouse Programs (CCP) within GSA's Public Buildings Service.

In 1995, GSA established the Courthouse Management Group, within its Public Buildings Service, to be the central management organization for the courthouse building program. The Courthouse Management Group officially became CCP and was relocated under the Office of the Chief Architect, within the Public Buildings Service, as part of a 2003 reorganization of the central office of GSA's Public Buildings Service. CCP was established to serve as the central point of contact for the judiciary, GSA's field offices, the Office of Management and Budget (OMB), and Congress. CCP's responsibilities include reviewing and finalizing prospectuses, which are detailed project descriptions, before they are submitted to OMB; developing cost benchmarks; comparing cost estimates for new projects with these benchmarks; and determining whether proposed courthouse designs conform to the standards published in the *U.S. Courts Design Guide (Design Guide)*.

According to GSA, its Office of the Chief Architect is the source of design and construction expertise for GSA's $10 billion construction program and is an appropriate location for CCP. GSA indicated that CCP is a technical resource to

GSA's Administrator and Public Buildings Service Commissioner, providing the benefit of professional expertise in the creation of buildings, including courthouses, but is not large enough to justify an independent office.

Question 3. What impact have caps had on the Federal Buildings Fund? What about the rent the Administrator waives each year? For the Federal Buildings Fund to have sufficient monies to manage the federal inventory, how important is it that agencies are housed in federally owned space?

We have found that rent caps, or restrictions, have had a serious, detrimental impact on the ability of the Federal Buildings Fund (FBF) to finance the government's real property asset management needs. Since the early 1980s, we have repeatedly noted that rent exemptions, such as those instituted at various times by OMB and Congress, have contributed to shortfalls in FBF. In a 1989 report,[3] we described the restrictions as a principal reason why FBF has accumulated insufficient money for capital improvements, and we recommended the elimination of all rent restrictions.

According to GSA, most of the rent restrictions have been lifted, but a number of narrowly focused rent exemptions still remain. Some were legislatively mandated, but the GSA Administrator granted most of the current exemptions. In general, these exemptions are focused on one building or are granted for a limited time. The total amount of the estimated annual rent forgone because of these rent exemptions is about $170 million. Table 1 lists these exemptions, their justifications, and the estimated forgone annual rent.

Table 1: Current Rent Exemptions in GSA Buildings

Agency, address	Justification	Estimated forgone annual rent
Smithsonian Institution, National Museum of the American Indian, New York, NY	Legislatively mandated exemption.	$4,566,632
U.S. Postal Service, 271 Cadman Plaza, New York, NY	GSA granted an exemption to the Postal Service as part of a 99-year rent-free agreement with GSA as a condition of the negotiated sale of the building in lieu of a transfer of funds from GSA.	$1,820,000
National Building Museum, 5th and F Sts., Washington, DC	Legislatively mandated exemption.	$1,300,000
Woodrow Wilson Center, 1300 Pennsylvania Ave., Washington, DC	GSA granted an exemption based on funding limitations imposed by Congress and the compelling purpose of memorializing the nation's 28th President.	$5,400,000
Department of Commerce, 14th St. and Constitution Ave., Washington, DC	GSA granted an exemption covering the area of the building that is maintained at the expense of the tenant agency.	$400,000
National Imaging and Mapping Agency, M St., Washington, DC	GSA granted a rent exemption of 50 percent because the tenant agreed to pay all maintenance, capital improvements, and security expenses due.	$7,038,552

[3] GAO, *Federal Office Space: Increased Ownership Would Result in Significant Savings*, GAO/GGD-90-11 (Washington, D.C.: Dec. 22, 1989).

Agency, address	Justification	Estimated forgone annual rent
Department of Agriculture, multiple locations, Washington, DC	GSA granted a 100-percent rent exemption for the tenant's three headquarters buildings for fiscal years 1996 through 2006 to allow the tenant to accumulate funds needed for major repairs on these buildings. The tenant will then pay for the repairs.	$52,406,234
Railroad Retirement Board, nationwide locations	GSA granted a partial rent exemption so that the tenant would pay only the actual costs for these buildings through fiscal year 2013.	$3,655,063
Centers for Medicare and Medicaid Services, nationwide locations	GSA granted a partial rent exemption so that the tenant would pay only the actual costs for these buildings through fiscal year 2013.	$15,717,264
Social Security Administration, Washington, DC	GSA granted a partial rent exemption so that the tenant would pay only for the actual costs for these buildings through fiscal year 2013.	$72,417,477
Department of State, 1801 Pennsylvania Ave., Washington, DC	GSA granted an exemption for space used by the President's G-8 Economic Summit staff from August 2004 to November 2004 because neither the Department of State nor the G-8 Economic Summit has received appropriated funding for rent payments to GSA.	$1,330,740
International Broadcasting Board of Governors, Washington, DC	GSA granted an exemption in 2004 based on tenant certification that it did not have funds available to meet the obligation. A new long-term occupancy agreement is being negotiated.	$1,016,195
Presidential and Armed Forces Inaugural Committees, Mary E. Switzer Building, Washington, DC	GSA granted an exemption in 2004 because it found that it was not practical or feasible for the tenant to pay the rent.	$2,415,440
U.S. Election Assistance Commission, Washington, DC	GSA granted an exemption for fiscal year 2004 because the tenant was appropriated only 12 percent of its authorized budget and did not have sufficient money to pay its rent.	$100,060
Total		**$169,583,657**

Source: GAO analysis of GSA data.

Note: According to GSA, the U.S. Senate does not pay market rates for its GSA facilities (district offices) because of an October 1996 signed memorandum of agreement between the U.S. Senate and GSA regarding tenant-requested improvements, but the U.S. Senate has not been granted a formal exemption.

We have repeatedly reported on the importance for cost reasons of housing agencies in owned space rather than leasing space from the private sector. In a 1989 study of 43 projects, we found that constructing government buildings would cost $12 billion less than leasing the same facilities from the private sector over a 30-year period.[4] These findings were borne out in additional GAO studies in 1995 and 1999.[5] We also

[4] GAO/GGD-90-11.

[5] GAO, *General Services Administration: Opportunities for Cost Savings in the Public Buildings Area*, GAO/T-GGD-95-149 (Washington, D.C.: July 13, 1995) and GAO, *General Services Administration: Comparison of Space Acquisition Alternatives—Leasing to Lease-Purchase and Leasing to Construction*, GAO/GGD-99-49R (Washington, D.C.: Mar. 12, 1999).

identified a heavy reliance on costly leasing as an issue that contributed to our identifying federal real property as a governmentwide high-risk issue in 2003.[6] In addition, we have found that the surplus generated for FBF through leasing is minimal. GSA officials said that GSA charges agencies the price it pays for the lease plus an 8-percent, administrative fee.

Question 4. What is the schedule for completion of the April request from this Committee? Have you begun the work? Any problems?

As discussed on July 15, 2005, with the office of the Subcommittee on Economic Development, Public Buildings, and Emergency Management, we are pursuing the following three objectives.

(1) How are rent payments calculated by GSA and planned and accounted for by the judiciary?

(2) What trends has the judiciary experienced in rent payments and space needs in recent years?

(3) What challenges, if any, does the judiciary face in managing its need for space to accomplish its mission?

We plan to complete our design work for this request by August 31, 2005. At that time, we will be in a position to commit to a final issuance date. Our work on the request is underway. We have met with the judiciary and GSA, and we have started collecting and analyzing relevant data. To date, both the judiciary and GSA have fully cooperated with our work.

Question 5. Government-wide, do landholding agencies receive sufficient appropriations to meet their space acquisition and maintenance needs?

Federal landholding agencies we reviewed have not historically received enough funding to meet their federal real property management needs. These agencies commonly have sizable deferred maintenance backlogs that are continually increasing because of insufficient funding for facility maintenance. For example, in a 2004 GAO report,[7] we cited an estimate by the Secretary of Defense that the total cost of improving facilities to a level that would meet the department's condition goals would be between $62 billion and $164 billion. Using funds for infrastructure has, in fact, limited the ability of the Department of Defense to devote more funding to other critical departmental needs. In January 2003, we reported that the Department of the

[6] GAO, *High-Risk Series: Federal Real Property*, GAO-03-122 (Washington, D.C.: January 2003).
[7] GAO, *Defense Infrastructure: Long-term Challenges in Managing the Military Construction Program*, GAO-04-288 (Washington, D.C.: Feb. 24, 2004).

Interior estimated the value of its deferred maintenance backlog at between $8.1 billion and $11.4 billion.[8] Using facility assessments, the Office of Facilities Reliability, within the Smithsonian's Office of Facilities Engineering and Operations, determined that the Smithsonian Institution had an inventory of about $329 million in deferred maintenance projects as of October 2004.[9] Even with recent increases in congressional funding for facility construction and maintenance, many federal facilities are still in an alarming state of deterioration. Deteriorating federal facilities, in part, caused us to designate federal real property as a governmentwide high risk area in 2003 and to continue that designation in our 2005 update.

Question 6. Please comment on the potential effectiveness of the Judiciary's efforts to reduce their space costs? What more would you recommend they do?

In 1995, we reported that GSA and the judiciary have processes to identify needs and to propose courthouse construction projects; however, they had not developed and implemented a strategic capital investment plan that (1) puts projects in some long-term strategic context, (2) sets priorities among competing projects, and (3) identifies short- and long-term project funding needs.[10] We recommended that GSA and AOUSC work together to take the following actions:

- Complete and effectively implement a plan for capital investment that identifies, fully justifies, and sets priorities among needed projects and lays out all known needed projects in a long-term strategic context—including the specific rationale and criteria used for identifying each of the higher-priority projects and the estimated funding needed to design and construct the projects.

- Clearly define project scope and refine construction cost estimates before requesting project approval and final funding levels.

- Establish and effectively implement a systematic and ongoing project oversight and evaluation process to compare and contrast courthouse projects, identify opportunities for reducing costs, and communicate and apply lessons learned to ongoing and future projects.

- Establish a mechanism to monitor and assess the use of the flexible design guidance with a view toward striking a better balance in the choices made about courthouse design, including features and finishes.

In a 2004 congressional briefing, we identified key actions the judiciary and GSA have taken to improve the courthouse construction program. Specifically, in fiscal year

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[8] GAO, *Major Management Challenges and Program Risks: Department of the Interior*, GAO-03-104 (Washington, D.C.: January 2003).
[9] GAO, *Smithsonian Institution: Facilities Management Reorganization Is Progressing, but Funding Remains a Challenge*, GAO-05-369 (Washington, D.C.: Apr. 25, 2005).
[10] GAO/T-GGD-96-19.

1996, the judiciary implemented an annually updated, rolling Five-Year Courthouse Plan, and in 1997, it revised the *U.S. Courts Design Guide* to incorporate new criteria intended to encourage cost-consciousness. According to the judiciary, several actions designed to improve communications and management of the program have been implemented.

At the Subcommittee's June 21, 2005, hearing, the judiciary discussed multiple initiatives designed to control the building program's costs and reduce the rent amounts paid to GSA. The initiatives include a review of the standards in the *Design Guide* and a re-evaluation of the long-range planning process. While the judiciary's cost-containment initiatives could be a step forward, we believe our original 1995 recommendation to implement a strategic capital investment plan is still relevant. Additionally, our 1997 analysis of actual courtroom use for trials and nontrial activities at seven locations suggested there may be opportunities to reduce costs by building fewer full-sized trial courtrooms through implementing courtroom sharing.[11]

Question 7. Do the excerpts of prior GAO reports included in testimony submitted by the judiciary present a fair and accurate reflection of the current status of the Federal Buildings Fund?

Our prior reports have shown that rent payments have provided a relatively stable, predictable source of revenue for FBF, but that this revenue has not kept pace with demands. All of the excerpts AOUSC quoted from our reports were accurate, but they did not reflect the full breadth of the issues related to federal real property management included in those products. For example, in each of the five cited GAO reports and testimonies, AOUSC quoted our findings of FBF's shortfalls without noting that in each case we found that rent restrictions—like the one AOUSC is requesting—contributed to those shortfalls. The following bullets provide additional context for each of AOUSC's citations from our reports.

- As cited by AOUSC, we concluded in 1981 that FBF had not generated sufficient revenue for construction and that there was no evidence that FBF had improved agencies' use of space.[12] However, in that report, we also found that initial expectations for FBF were too high because GSA relied too much on costly leasing, OMB and Congress restricted the rent GSA could charge, and FBF was not established with upfront funds. We concluded that FBF may overcome its early cash flow problems over time and recommended that Congress strengthen FBF in a number of ways, including providing GSA with additional authority to borrow from the Treasury or making direct appropriations to augment FBF's resources. Since that report, Congress has made numerous supplemental appropriations to FBF.

[11] GAO, *Courthouse Construction Sufficient Data and Analysis Would Help Resolve the Courtroom-Sharing Issue*, GAO-01-70 (Washington, D.C.: Dec. 14, 2000).
[12] GAO, *GSA's Federal Buildings Fund Fails to Meet Primary Objectives*, GAO/PLRD-82-18 (Washington, D.C.: Dec. 11, 1981).

- As cited by AOUSC, we testified in March 1990 that FBF was not generating sufficient revenue for construction or property acquisition.[13] However, we also stated in that testimony that one reason for the insufficient FBF revenues was that OMB and Congress have periodically restricted the rent GSA could charge tenant agencies. We estimated in that testimony that these restrictions had reduced FBF revenue by $4 billion up to that time. Moreover, in a report published 3 months earlier, we recommended eliminating all OMB and congressional rent restrictions.[14]

- In 1992, as cited by AOUSC, we testified again that FBF had not met its original expectations and that the Pentagon's removal from the GSA system could signal erosion of support for the concept.[15] However, we also cited problems such as rent restrictions and dependence on leased space as reasons for FBF generating insufficient revenue.

- AOUSC cited our 1993 finding that there are a number of obstacles to the government's cost-effective, businesslike acquisition and management of real property mission assets. These obstacles included GSA management weaknesses and FBF shortfalls.[16] However, our report also noted that a number of reforms had been proposed to remove the obstacles and that the principal reasons for FBF shortfalls included rent restrictions and a reliance on leased space.

- AOUSC cited our 1993 finding that rent payments, while providing a relatively stable, predictable source of revenue, have not been sufficient to finance capital investment and the costs of leased space.[17] However, AOUSC's citation excluded our observation that one reason FBF generated less revenue than anticipated was that OMB and Congress periodically restricted the rent GSA could charge federal agencies.

In addition, you asked us if there were other issues in the AOUSC testimony that could benefit from additional context. We would like to elaborate on three issues. First, AOUSC stated several times that the amount the judiciary pays in rent does not match the exact costs that GSA incurs for the space it provides to the judiciary. For example, according to the AOUSC testimony, GSA's pricing policy allows it to include local real estate taxes in calculating rents for tenants in federally owned facilities, even though the federal government is exempt from such charges. One of the major purposes of the Public Buildings Act Amendments of 1972, which established FBF, was to finance the real property and related activities of GSA by requiring agencies to pay rent to GSA for deposit into FBF. By law, rent is based on approximate commercial charges for comparable space and services and was chosen over cost recovery to produce more income so that the fund could finance construction and

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[13] GAO, *The Disinvestment in Federal Office Space*, GAO/T-GGD-90-24 (Washington, D.C.: Mar. 20, 1990).
[14] GAO/GGD-90-11.
[15] GAO, *DOD Rental Payments to GSA*, GAO/T-GGD-92-31 (Washington, D.C.: Apr. 8, 1992).
[16] GAO, *Federal Real Property: Key Acquisition and Management Obstacles*, GAO/T-GGD-93-42 (Washington, D.C.: July 27, 1993).
[17] GAO, *Federal Buildings Fund Limitations*, GAO/GGD-93-34R (Washington, D.C.: Apr. 5, 1993).

major repairs. The rate that GSA charges agencies for rent is approved by OMB; is based on market appraisals of fully serviced rental values, which reflect what a private sector owner would charge for the space; and includes values for taxes, depreciation, and liability insurance charges paid in the private sector.

Second, the AOUSC testimony notes that Congress paid for courthouses built from fiscal year 1990 through fiscal year 2004 through direct appropriations into FBF. We found that Congress can make and often did make supplemental appropriations into FBF over this period. However, this supplemental funding was not tied directly to any specific projects or types of projects. According to the relevant appropriations acts, the additional amounts are being deposited into FBF to carry out the purposes of the fund. Moreover, according to the statute establishing FBF and the relevant appropriations acts, funds in FBF are available to GSA for real property management functions, including space acquisition and management functions. Thus, the direct appropriations into the fund cover more real property activities than funding new courthouses, as AOUSC maintains.

Third, it is important to note that AOUSC's analysis of other agencies' rent payments may not capture the full complexity of the rent issue. Under the law, courthouses are listed as public buildings under the control of the GSA Administrator and GSA is required by law to charge the judiciary for the space and services provided to it. Certain buildings are specifically exempted by law from GSA management and control, including the Capitol Building and the surrounding House and Senate office buildings, the Main Treasury Building, and buildings located on the grounds of a Department of Defense (DOD) facility. Thus, the legislative branch, the Treasury Department, and DOD do not pay rent into FBF or receive services from GSA for these properties. However, landowning agencies do pay to maintain their own facilities out of their budgets. Because the judicial branch is not statutorily exempt from GSA's management, the judiciary is required to pay rent into FBF for the space it occupies and the services it receives.

Question 8. What types of data would GAO require to conduct an accurate and effective space utilization study of courtrooms?

GAO has not developed criteria for determining effective courtroom utilization, but we have recommended that the judiciary do so. Specifically, our 1997 recommendations provided the judiciary with an analytical approach for determining how many new courtrooms should be built. This approach took into account courtroom usage and other factors. The judiciary needs to design and implement cost-effective research for determining the number and types of courtrooms needed, as well as whether each district judge needs a dedicated courtroom. Such research should include

- establishing criteria for determining effective courtroom utilization and a mechanism for collecting and analyzing data at a representative number of locations so that trends can be identified over time and better insights obtained on court activity and courtroom usage;

- designing and implementing a methodology for capturing and analyzing data on latent usage, courtroom scheduling, and other factors that may substantially affect the relationship between the availability of courtrooms and judges' ability to effectively administer justice;

- using these data and criteria to explore whether the practice of assigning one judge per courtroom is needed to promote efficient courtroom management or whether other courtroom assignment alternatives exist; and

- establishing an action plan with time frames for implementing and overseeing these efforts.[18]

In 2000, we reviewed and commented on part of a May 2000 Ernst & Young study on the judiciary's space facilities programs, specifically the part of the study pertaining to courtroom use and sharing.[19] We determined that this study was not designed to provide the type of data and analysis we and other research organizations such as the Rand Institute for Civil Justice and the Federal Judicial Center, the judiciary's research arm, have determined would be needed to help resolve the courtroom-sharing issue.

We are sending copies of this report to the Administrator, GSA, and the Director, AOUSC. We will make copies available to others on request. The report is also available on GAO's Web site at www.gao.gov. If you have any questions, please contact me on (202) 512-2834 or at goldsteinm@gao.gov.

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Director, Physical Infrastructure Issues

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[18] GAO, *Courthouse Construction: Better Courtroom Use Could Enhance Facility Planning and Decisionmaking*, GAO/GGD-97-39 (Washington, D.C.: May 19, 1997).
[19] GAO-01-70.

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