

STATEMENT OF JAMES C. DUFF, DIRECTOR
ADMINISTRATIVE OFFICE OF THE U.S. COURTS
BEFORE THE SUBCOMMITTEE ON
FINANCIAL SERVICES AND GENERAL GOVERNMENT
COMMITTEE ON APPROPRIATIONS
UNITED STATES SENATE
March 12, 2008

Introduction

Chairman Durbin, Senator Brownback, and members of the Subcommittee, I am pleased to appear before you this morning to present the fiscal year 2009 budget request for the Administrative Office of the United States Courts (AO) and to support the overall request for the entire Judicial Branch.

First, I would like to join Judge Gibbons in thanking you and your Committee for the support you provided the Judiciary in the fiscal year 2008 appropriations bill. In addition to the regular funding, we deeply appreciate your recognizing the impact enhanced border enforcement will have on the Judiciary by providing emergency appropriations to address the additional workload. In the aggregate, the funding will allow the Judiciary to provide some staffing increases in courts whose workload is heavily impacted by immigration and other law enforcement initiatives.

This is my second appearance before the Financial Services and General Government Subcommittee and I have now had the opportunity to work with this subcommittee and its staff through one full appropriations cycle. We recognize the very tight fiscal constraints in which you operate and appreciated being able to work closely with your staff throughout the process as our requirements changed and your allocation was reduced. I look forward to a continued productive relationship with your very able staff as we move through the year. I want to answer any questions you might have, and to describe the important needs of the federal Judiciary.

Role of the Administrative Office

In July 2006, I accepted the appointment of Chief Justice Roberts to become only the 7th Director of the Administrative Office of the U.S. Courts in its 69-year history. Created by Congress in 1939 to assist the federal courts in fulfilling their mission to provide equal justice under law, the AO is a unique entity in government. Neither the Executive Branch nor the Legislative Branch has any one comparable organization that provides the broad range of services and functions that the AO does for the Judicial Branch.

Unlike most Executive Branch agencies in Washington, the AO does not operate as a headquarters for the courts. The federal court system is decentralized, although the AO provides administrative, audit, human resources, legal, financial, management, program, security, information technology and other support services to all federal courts. It provides support and staff counsel to the policy-making body of the Judiciary, the Judicial Conference of the United States, and its 25 committees, and it helps implement Judicial Conference policies as well as

applicable federal statutes and regulations. The AO carries out a comprehensive financial audit program to ensure the Judiciary expends its resources properly. It also coordinates Judiciary-wide efforts to improve communications, information technology, program leadership, and administration of the courts, and is leading the effort to contain costs throughout the Judiciary. Our administrators, auditors, accountants, systems engineers, personnel specialists, analysts, architects, lawyers, statisticians, and other staff provide professional services to meet the needs of judges and staff working in the federal courts nationwide. The AO staff also respond to Congressional inquiries, provide information on pending legislation, and prepare Congressionally mandated reports.

Administrative Office Internal Review

Last year I reported to you that I was assembling a small advisory group of judges and court executives to assist me and our Deputy Director, Jill Sayenga, in a review of the organization and mission of the AO. I wanted to ensure that the structure and services provided by the AO are appropriate and cost-effective, and that they address the changing needs of the courts. We examined our core mission of service to the courts as defined by statute and directives from the Judicial Conference to determine if internal adjustments were needed to improve efficiency and responsiveness.

I am pleased to tell you the ad hoc advisory group confirmed that the AO is an organization of dedicated, service-oriented, capable professionals, but it did identify some areas where the AO's performance or ways of conducting business could be improved. The group provided practical and achievable recommendations on how to improve both the services of the AO to, and our working relationship with, the courts. To that end, teams of AO managers have been assembled to plan and implement the recommendations. Among other things, we will be reviewing internal operations, the deployment of our workforce, the best ways to obtain court input and advice, and improvements in communications with the courts and in working procedures. My goal is to ensure that the AO is the best service organization in the government.

Although the internal review was undertaken primarily to determine how well the AO currently fulfills its responsibilities, the ad hoc advisory group raised questions about the agency's continuing ability to deliver critical services, as well as its capacity to adapt to our court customers' future needs. Areas of concern include future budgetary constraints, the anticipated retirements of highly experienced and knowledgeable employees in senior management and technical positions, growing numbers of staff vacancies in critical areas, AO competitiveness in the labor market, the changing nature of work and required competencies, and the impact of change on employee morale.

After reviewing carefully our operations for the past year and a half, I am convinced that we require the current services level of staff and funding we request for Fiscal year 2009 to provide adequate support to the courts. The services provided by the AO are critical to the effective operation of our federal courts, and I hope you will continue to provide the resources we require.

Administrative Office Challenges

As I indicated when I testified last year, when I became Director in July 2006, I restricted recruitment actions for filling vacant positions to give me time to evaluate the organization, its mission, and priorities. Any exceptions for external recruitment were scrutinized carefully by an executive review committee and required my approval. I am pleased to report that, having completed this review, the hiring freeze has been partially lifted and critical vacancies are being filled.

In the interim, with significant additional effort on the part of our existing staff, and at times with great difficulty, the AO continues to perform vital human resources and financial functions, implements the policymaking efforts of the Judicial Conference, monitors program performance and use of resources, develops and supports automated systems and technologies, collects and analyzes court workload statistics, coordinates construction and management of court facilities, defines court resource needs through caseload forecasts and work measurement analyses, monitors the U.S. Marshals Service's implementation of the judicial facility security program, provides program leadership and support for court unit executives, develops and conducts education and training programs, and performs cyclical court audits and other financial and system audits to ensure integrity.

In addition to striving to perform its fundamental responsibilities outlined above in the most efficient and effective manner, the AO must look beyond the immediate day-to-day needs of the courts. It is our responsibility to anticipate and plan for changes in workload, workforce demographics, legislative mandates and other areas so that we can serve the courts effectively in the years ahead.

Planning for the Future

The AO frequently finds itself in uncharted waters. Whether it is responding to the *Booker* and *Fanfan* Supreme Court decisions or implementing the Bankruptcy Abuse Prevention and Consumer Protection Act, we are working with court leaders to develop plans and processes for the Judiciary to respond to new challenges. I highlight three of the initiatives on which we are currently working - responding to enhanced immigration enforcement, preparing to implement the retroactive application of the crack cocaine sentencing amendment, and implementing a pilot project you authorized last year under which the U.S. Marshals Service (USMS) assumes responsibility from the Federal Protective Service (FPS) for perimeter security at several designated courthouses. Judge Gibbons' testimony addresses the policy issues and impact on the Judiciary of these three initiatives. I would like to talk about the operational concerns and what the Administrative Office is doing to ensure the courts are prepared to support these efforts.

Enhanced Immigration Enforcement

Increased border enforcement is a priority of this Congress and the Administration. We

are grateful for your recognition that the Judiciary is integral to this effort by providing significant resources to the courts in 2007 and 2008 for us to respond to the resulting apprehensions and prosecutions. In addition to having the increased funding you provided, the Judiciary must plan and coordinate the management of the new workload effectively, particularly as Operation Streamline is implemented in more locations along the Southwest border. To that end, Administrative Office staff participated in a conference of top law enforcement officials from Southwest border districts and continue to maintain contact with executive branch personnel to ensure we are aware of and can respond to their priorities. Further, we have established a task force within the AO to facilitate the Judiciary's response to enhanced immigration enforcement and work with the Southwest border courts.

In conversations with judges, court managers, and federal defenders, particularly in the Southwest border districts, but also in districts throughout the country, we are finding that limitations beyond funding can make it difficult for courts to respond to the increased workload. Lack of space to hold court proceedings and to detain those apprehended, rising caseloads of federal defenders, finding enough panel attorneys willing to accept these cases at the current non-capital hourly rate of \$100, locating sufficient numbers of qualified interpreters, and hiring and retaining probation and pretrial services officers in the difficult work environment that exists along the Southwest border are all challenges that the AO, in coordination with the courts, is trying to address. These are difficult problems that will require creative and innovative solutions.

AO staff, in collaboration with court personnel, are systematically developing an inventory of areas where we do not have all of the resources to address the existing and potential new workload. Initially we are focusing on the Southwest border districts, but these issues are not necessarily limited to the Southwest border. Many districts throughout the country are affected by enhanced immigration efforts, resulting in increased numbers of legal and illegal alien defendants in locations such as the Middle District of North Carolina, the Western District of Arkansas, Nebraska, Idaho, the Northern District of Georgia, Oregon, Colorado, and the Southern District of Iowa. This leads, for example, to a need for more interpreters in some districts where the availability is quite limited and the demand and supply have not existed previously. To resolve these issues, we will have to look beyond the traditional ways we have addressed these needs and develop innovative, creative solutions.

Perimeter Security Pilot Program

Another new endeavor for the AO is implementation of a pilot project whereby the USMS will assume FPS perimeter security responsibilities in selected court facilities. As Judge Gibbons stated in her testimony, we are very grateful that you have given us the opportunity to pursue this project and to ensure that the Judiciary has comprehensive and effective security in place.

We are particularly troubled by the February 8, 2008, Government Accountability Office's (GAO) *Preliminary Observations on the Federal Protective Service's Efforts to Protect Federal Property* which found that FPS has not always maintained the security countermeasures

and equipment it was responsible for, such as perimeter cameras, which may expose federal facilities to a greater risk of crime or terrorist attack. This GAO report verifies the situation that Judge Gibbons described in testimony before this subcommittee last Spring regarding perimeter security equipment for which FPS was responsible, but which was not maintained, fixed or replaced, despite FPS being paid by the Judiciary for that service. Please be assured that courthouses do not have these problems because of the security provided the Judiciary by the USMS. It is specifically for the reasons identified in the GAO report, however, as well as the need to have one entity responsible for security, that we raised concerns about FPS perimeter security last year. We are grateful that you responded by authorizing the pilot project. The test-site courts will be provided with a consistent level of perimeter security as is the case in the interior of courthouses, and will allow those courts to rely on the Marshals Service as its single provider of security services, rather than FPS.

I would point out that GAO identified funding shortfalls as a primary cause of the FPS security deficiencies. This concerns us because, as you know, FPS is funded fully from the fees it charges other government agencies for its security services. While we have suggested on several occasions that FPS receive a direct appropriation at a funding level Congress deems appropriate to secure federal buildings, this proposal has not been pursued. Consequently, under the current funding scheme, any budgetary shortfall is borne by all federal agencies in the form of increased fees, thus increasing the Judiciary's funding requirements, as well as those of the Executive Branch agencies under your jurisdiction.

With regard to the pilot project, I assure you that AO staff are involved in every aspect of implementation and will be monitoring the project carefully. We have been on site at every pilot location to assess the level of security provided by FPS and to participate in determining the appropriate level of security to be provided by USMS. We are cognizant of the need to control costs during this pilot and for the future if it is determined that nationwide implementation is appropriate.

Crack Cocaine Sentencing Retroactivity

The last new area I would like to address is implementation of the retroactive application of the federal sentencing guidelines amendment for crack cocaine offenses. This effort is similar to our response to enhanced immigration enforcement in that it involves many components of the Judiciary as well as Executive Branch entities, as Judge Gibbons mentioned in her testimony. The AO's role in this endeavor began in November, when we hosted a contingency planning meeting prior to the decision of the Sentencing Commission to apply the amendment retroactively. We invited chief probation officers from the districts with the largest number of crack cocaine cases to meet at the AO, and we invited officials of the Sentencing Commission, the Department of Justice, and the Bureau of Prisons to join us. The discussion centered around identifying offenders in prison who may be eligible for immediate release, and planning for the successful reentry into the community of those qualified for release. At the planning meeting, two chief probation officers volunteered to host large conferences in Charlotte, North Carolina and St. Louis, Missouri that would gather judges, probation officers, prosecutors, and federal defenders from districts with a significant number of crack cocaine cases, and provide a forum to

develop practical plans for dealing with the workload at the district level. The two-day conferences included presentations by the Sentencing Commission, the Bureau of Prisons, the U.S. Marshals Service, and also panel discussions with judges, prosecutors, and defenders. There was widespread agreement at the conferences that the courts involved are capable of meeting the challenges posed by the additional workload. To ensure that the valuable information discussed during these conferences was available to all judges and court staff, AO staff recorded the sessions and posted the video on the Judiciary's intranet site.

In addition to the conferences, AO staff have worked to make implementation of the amendment easier for all of the courts. In coordination with the Sentencing Commission and the Judicial Conference's Committee on Criminal Law, AO staff developed a model order that can be used by the courts when resentencing inmates. This one-page form captures all of the information needed by the Commission and the Bureau of Prisons, and will allow judges and court staff to process the orders quickly. Also, databases used in the clerks offices, probation and pretrial services offices, and federal public defenders offices to capture statistics and workload data related to crack cocaine resentencings have been updated. Additionally, AO staff have disseminated important information about Bureau of Prisons procedures to the courts. I am pleased to report that all of these efforts were in place prior to the March 3, 2008, effective date.

Partnership with the General Services Administration

Last year when I testified before you I talked about my efforts to improve our working relationship with the General Services Administration (GSA). At that time I reported that substantial progress was being made and that we were working on significant changes in how GSA determines or calculates courthouse rents. Today, I am pleased to report that we have successfully concluded that effort. On February 19, 2008, I signed a Memorandum of Agreement (MOA), co-signed by the GSA Public Buildings Service Commissioner, that changes the way rent will be calculated for all federally owned courthouses to be delivered in the future. This new methodology will also be applied to a limited number of courthouses that the Judiciary already occupies.

The conventional approach that had been used to determine rent for most of our buildings, as well as those building occupied by other federal tenants of GSA space, is based on appraisals of commercial space in the same rental market as the federally-owned building. Every five years a new appraisal of the market was done and rental rates paid to GSA were adjusted accordingly. I would note that using this former "fair market value" method, in fiscal year 2009, the rent for the Court of International Trade, a GSA-owned building in Manhattan that is over 40 years old, will increase by \$1.5 million or 30 percent, based on the 5-year cyclical reappraisal done by GSA.

The MOA outlines a new process for determining rental rates based on a return on investment (ROI) methodology. Under the MOA, the rent will be fixed for the first 20 years of occupancy and will be set to return to GSA approximately 7 percent per year of its capital costs; operating costs will be adjusted annually to reflect GSA's actual operating expenses.

We are pleased that this MOA has been signed for several reasons. First and foremost, it ushers in a new era of collaboration and cooperation between the Judiciary and GSA and demonstrates that by working together, we can resolve problems in a way that is mutually beneficial to both parties. Second, it provides the Judiciary with certainty about the amount of rent it will pay for a 20-year time period, rather than being subject to changes every five years as a result of changing commercial market conditions. Third, the amount of rent will be based directly on the capital resources the Judiciary consumes, i.e., how much it costs to construct the building, rather than on periodic assessments of market rents in nearby commercial office buildings. Finally, with GSA agreeing to an "open-book" accounting of costs, the Judiciary will not have to hire consultants and expend considerable staff time reviewing appraisals based on subjective opinions of market value.

I have just outlined the many benefits that the Judiciary will enjoy under this MOA. Because this subcommittee also has jurisdiction over the General Services Administration, I assure you that GSA will also benefit from the provisions of the MOA. Specifically, GSA will have a guaranteed return on investment at a set rate with no market risk or vacancy risk. As mentioned above, under appraisal pricing, every five years the rate is reset. These reappraisals result in rent decreases as well as increases, so should market conditions be lower than the previous appraisal, GSA would get less rent. Also, under the MOA, the Judiciary is assuming the vacancy risk in the ROI buildings. That is, the Judiciary will pay the same rent over the 20-year time period even if space becomes vacant in the building. Consequently, GSA will not lose rental income until such time that it could backfill the space with another tenant. Finally, GSA will no longer have to respond to challenges to the fairness and validity of the rent determination process, which has led to criticism, tension, and unexpected reductions in the Federal Buildings Fund when GSA refunded overcharges to the Judiciary.

Courthouse Construction

I next will discuss another facility-related issue -- the status of our courthouse construction needs. We appreciated your willingness to fund new courthouse construction projects requested by the Judicial Conference in fiscal year 2008 even though the Administration did not include them in the President's Budget. We find ourselves in a similar situation this year with the President's Budget only requesting the additional funds needed for the San Diego courthouse. Despite reductions in the scope of the San Diego project, costs have increased significantly over the original GSA projections because of changing market conditions and the construction boom in California. The project has been delayed several years and is critically needed in this California Southwest border district because the existing courthouse is out of space.

As you know, we have another courthouse problem in Los Angeles. California (Central) is the largest district in the country and current facilities are seriously inadequate. Because of market conditions and delays, the cost of the Los Angeles project far exceeds GSA's original estimates. Despite the sizable reductions in scope made by the court, the cost of this project

continues to grow and will only get more expensive as time passes. The AO, the court, and GSA have been working together to find a solution. While we recognize how costly this project is, especially in a time of constrained resources for non-security discretionary programs, we believe the final project design must address long-term needs and provide an environment in which the judicial process can function safely and effectively. We also want to ensure that when alternatives are considered, all costs associated with the options are included in the analysis. Consequently, we are pleased that GAO has been asked to conduct a review of this project and trust that it will address all aspects of the issue. We also look forward to collaborating with GSA on the report this subcommittee asked it to provide and trust that our views will be reflected fully. I have stated on numerous occasions that the situation in Los Angeles is an extraordinary problem that may ultimately warrant an extraordinary solution.

Finally, we respectfully request that you consider the new courthouse construction projects included on the Judicial Conference approved Five-Year Courthouse Project Plan for fiscal years 2009-2013, a copy of which is attached to this Statement. As I mentioned, none of these projects is included in the President's 2009 Budget Request, yet they have been on the Five Year Plan for a number of years. Most of the projects have sites, have been or soon will be designed, and are awaiting construction funding. Every year a project is not funded its cost increases by about 10% based solely on inflation. We appreciate your consideration of these needs.

Administrative Office Fiscal Year 2009 Budget Request

Last I will address the fiscal year 2009 appropriations request for the Administrative Office of the U.S. Courts which is \$81,959,000. This represents an increase of \$5,923,000, or 7.8 percent, over fiscal year 2008 enacted appropriations. Although the percentage increase in appropriations we are seeking may appear significant, overall it represents a no-growth, current services budget request. I note this request funds 6 percent fewer staff than were funded in 1995 even though court staffing has increased almost 14 percent over the same time period.

The AO's appropriation comprises less than two percent of the Judiciary's total budget, yet the work performed by the AO is critical to the effective operation of the U.S. Courts. In addition to the appropriation provided by this Committee, as approved by the Judicial Conference and the Congress, the AO receives non-appropriated funds from sources such as fee collections and carryover balances to offset appropriation requirements. The AO also receives reimbursements from other Judiciary accounts for information technology development and support services that are in direct support of the courts, the court security programs, and defender services.

The requested increase of \$5.9 million is exclusively to cover base adjustments to maintain current services; the AO requests no program increases. Over half of the increase is to fund the proposed fiscal year 2009 pay adjustment and to annualize the fiscal year 2008 pay adjustment. The balance is for inflationary adjustments and to replace *non-appropriated* funds (carryover) that were used to finance the fiscal year 2008 financial plan, but which at this time are expected to decline in fiscal year 2009. If carryover is not replaced with direct appropriated

funds, we would be forced to reduce current on-board staffing. This would, in turn, adversely affect our ability to carry out the AO's statutory responsibilities and serve the courts. We will keep you apprised of actual carryover estimates as the year progresses. Should carryover surpass our estimates, the amount of appropriations we are requesting could be reduced.

Conclusion

Chairman Durbin, Senator Brownback, members of the Subcommittee, I have shared with you only a few examples of the diverse issues we handle and the type of services and support the Administrative Office provides the federal Judiciary. In addition to our service to the courts, the AO works closely with the Congress, in particular, the Appropriations Committee and its staff, to provide accurate and responsive information about the federal Judiciary. I recognize that fiscal year 2009 will be another difficult year for you and your colleagues as you struggle to meet the funding needs of the agencies and programs under your purview. I urge you, however, to consider the significant role the AO plays in supporting the courts and the mission of the Judiciary. Our budget request is one that does not seek new resources for additional staff or programs. I hope you will support it.

Thank you again for the opportunity to be here today. I would be pleased to answer your questions.

Five-Year Courthouse Project Plan for FYs 2009 – 2013
As Approved by the Judicial Conference of the United States on March 11, 2008
 (estimated dollars in millions)

FY 2009			Cost	Score	Est. Net Annual Rent
1	Austin, TX	Add'l. S&D / C	\$114.0	82.0	\$6.5
2	Salt Lake City, UT	C	\$168.5	67.9	\$11.4
3	Savannah, GA	Add'l. D	\$2.0	61.3	\$3.5
4	San Antonio, TX	S	\$18.0	61.3	\$9.2
5	Mobile, AL	Add'l. S / C	\$181.5	59.8	\$4.7
			\$484.0		\$35.4

FY 2010			Cost	Score	Est. Net Annual Rent
1	Nashville, TN	Add'l. D / C	\$164.6	67.3	\$7.0
2	Cedar Rapids, IA	Add'l. D / C	\$136.8	61.9	\$6.1
3	Savannah, GA	C	\$52.4	61.3	\$3.5
4	San Jose, CA	Add'l. S	\$32.0	54.5	\$9.4
5	Greenbelt, MD	S&D	\$10.5	53.8	\$1.6
			\$396.3		\$27.5

FY 2011			Cost	Score	Est. Net Annual Rent
1	San Antonio, TX	C	\$160.8	61.3	\$9.2
2	Charlotte, NC	C	\$106.1	58.5	\$7.1
3	Greenville, SC	C	\$66.4	58.1	\$4.1
4	Harrisburg, PA	C	\$48.1	56.8	\$5.4
5	San Jose, CA	D	\$14.4	54.5	\$9.4
			\$395.8		\$35.2

FY 2012			Cost	Score	Est. Net Annual Rent
1	Norfolk, VA	C	\$87.8	57.4	\$5.1
2	Anniston, AL	C	\$17.1	57.1	\$1.1
3	Toledo, OH	C	\$91.8	54.4	\$5.9
4	Greenbelt, MD	C	\$59.0	53.8	\$1.6
			\$255.7		\$13.8

FY 2013			Cost	Score	Est. Net Annual Rent
1	San Jose, CA	C	\$188.0	54.5	\$9.4
			\$188.0		\$9.4

S = Site; D = Design; C = Construction; Add'l. = Additional

In FY 2004, GSA requested only design funds for San Antonio, TX, which was planned to be built on a federally owned site. GSA advises that a privately owned site will be needed, which, therefore, requires funding to acquire a site. All cost estimates subject to final verification with GSA.