

STATEMENT OF
HONORABLE JULIA S. GIBBONS, CHAIR
COMMITTEE ON THE BUDGET OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
BEFORE THE SUBCOMMITTEE ON
FINANCIAL SERVICES AND GENERAL GOVERNMENT
OF THE
COMMITTEE ON APPROPRIATIONS OF THE
UNITED STATES SENATE

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INTRODUCTION

Chairman Durbin, Senator Brownback, and members of the Subcommittee, I am Judge Julia Gibbons of the Sixth Circuit Court of Appeals. Our court sits in Cincinnati, Ohio, and my resident chambers are in Memphis, Tennessee. As the Chair of the Judicial Conference Committee on the Budget, I come before you to testify on the Judiciary's appropriations requirements for fiscal year 2009. In doing so, I will apprise you of some of the challenges facing the federal courts. This is my fourth appearance before an appropriations subcommittee on behalf of the federal Judiciary and my second appearance before the Financial Services and General Government panel. Appearing with me today is James C. Duff, the Director of the Administrative Office of the United States Courts.

In addition to a discussion of our fiscal year 2009 request, my testimony will cover several policy issues that impact the federal courts. I will also update you on the Judiciary's efforts to contain costs as well as discuss several information technology innovations that are examples of the Judiciary's continual efforts to improve federal court operations.

STATEMENTS FOR THE RECORD

Mr. Chairman, in addition to my statement and Director Duff's, I ask that the entire statements of the Federal Judicial Center, the Sentencing Commission, the Court of Appeals for the Federal Circuit, and the Court of International Trade be included in the hearing record.

FISCAL YEAR 2008 FUNDING

Mr. Chairman and Senator Brownback, let me begin today by thanking you and your colleagues for making the Judiciary a funding priority in the fiscal year 2008 appropriations cycle. The funding you provided, combined with greater than anticipated fee carryover balances and reduced requirements due to our cost containment initiatives, will allow us to finance continuing operations in the courts as well as to address workload needs. We are particularly appreciative of the \$25 million you provided the Judiciary in emergency funding to respond to workload associated with immigration enforcement initiatives being implemented by the Department of Homeland Security and the Department of Justice. We are fully cognizant of the difficult funding choices you faced during conference on the omnibus bill and appreciate your willingness to

support the needs of the Judiciary. We appreciated the opportunity to work with the Subcommittee to identify our highest priority funding needs when your allocation was significantly reduced during conference on a final bill.

We also are grateful for several provisions included in the omnibus bill, which we believe will improve federal court operations. Two that are particularly important are the pilot project to assess the feasibility of transferring responsibility for perimeter security at several designated primary courthouses from the Federal Protective Service to the U.S. Marshals Service and the increase in the non-capital hourly rate paid to private panel attorneys who represent eligible defendants under the Criminal Justice Act. I will discuss the pilot project in more detail next and return to panel attorney rates later in my testimony.

COURT SECURITY

Mr. Chairman, during my testimony last year I conveyed to the Subcommittee the Judiciary's concerns regarding the expense and quality of security provided the courts by the Federal Protective Service (FPS). FPS provides, on a reimbursable basis, exterior perimeter security for federal agencies, including at courthouses and multi-tenant court facilities. The Judiciary's FPS costs are paid from our Court Security appropriation and fiscal year 2009 billings are projected to be \$72 million.

Last year I spoke of incidents of inoperable FPS-provided exterior cameras at courthouses and the absence of cameras altogether at key locations resulting in "dead zones" with no camera surveillance, despite our paying FPS for the equipment. Security lapses such as these left courthouses with serious security vulnerabilities. Fortunately, to help ensure that the courts had adequate security, the United States Marshals Service (USMS) assumed responsibility for repairing or replacing FPS-provided perimeter cameras at a number of courthouses where it was apparent that FPS did not have the resources to do so. This resulted in the Judiciary's paying for the same services twice: once to FPS in its security charges, and also to the USMS in the funding we transferred to it for systems and equipment for interior and perimeter courthouse security. The Judicial Conference had become increasingly concerned about this issue and consequently, in March 2007, it endorsed a recommendation to expand the USMS's current mission to include perimeter security of court facilities nationwide where the Judiciary is the primary tenant.

Mr. Chairman, within a month after last year's hearing you convened a meeting with the Directors of the U.S. Marshals Service, Federal Protective Service, and the Administrative Office of the U.S. Courts to learn more about this issue. As a result of your personal interest and commitment to improve court security, the Senate version of the fiscal year 2008 Financial Services and General Government appropriations bill (H.R. 2829) included the provision approving a pilot project permitting the USMS to assume responsibility from FPS for perimeter security at several designated courthouses. And, as I just mentioned, the provision was included in the final conference agreement on the fiscal year 2008 omnibus appropriations bill thus allowing the Judiciary and the USMS to begin implementation of the pilot. Specifically, the pilot project involves the USMS monitoring the exterior of the courthouses with court security officers and

assuming control of FPS monitoring equipment. The USMS, working with the Administrative Office of the U.S. Courts, selected seven courthouses for the pilot. I would note that the Everett McKinley Dirksen U.S. Courthouse in Chicago will be the first pilot site to move forward. The other six sites are: the Theodore Levin U.S. Courthouse, Detroit, Michigan; the Sandra Day O'Connor U.S. Courthouse, Phoenix, Arizona; the Evo A. DeConcini U.S. Courthouse, Tucson, Arizona; the Russell B. Long Federal Building/U.S. Courthouse, Baton Rouge, Louisiana; the Old Federal Building and Courthouse, Baton Rouge, Louisiana; and the Daniel Patrick Moynihan U.S. Courthouse, New York, New York.

The pilot project is anticipated to begin in the fourth quarter of fiscal year 2008 and will be in effect for approximately 18 months at which time an evaluation of the pilot will be provided to the Subcommittee. The annualized cost of the pilot is estimated to be \$5 million, which will be offset by anticipated reductions in FPS billings. We appreciate your concern with the security of our courthouses, and we will provide the Subcommittee with updates as the pilot project gets underway.

Work of the U.S. Marshals Service

I would like to say a few words about the vitally important work of the U.S. Marshals Service. Inside the courthouse, judges, court staff, attorneys, jurors, defendants, litigants, and the public depend entirely on the USMS for their safety. Heightened security at courthouses due to high-threat trials and terrorism concerns have made the work of the USMS more difficult, and it has responded extremely well to those challenges. For judges like myself, the USMS also ensures our security outside of the courthouse, and it takes this charge seriously. In September 2007, the USMS established a new Threat Management Center that serves as the nerve center for responding to threats against the Judiciary. The Center provides vital data to U.S. Marshals nationwide on threats against judges and court personnel. The USMS also has overseen the installation of nearly all of the 1,600 intrusion detection systems in the homes of federal judges in order to provide increased judicial security outside of courthouse facilities. This has been a two-year effort and includes ongoing system monitoring by a security firm. All of us in the federal court family are grateful to John F. Clark, Director of the U.S. Marshals Service, his staff, and the U.S. Marshals throughout the 94 judicial districts for their dedication and responsiveness to the security needs of the federal Judiciary. The USMS operates within very tight resource levels, and we urge Congress to fund fully the USMS's fiscal year 2009 budget request to enable it to continue meeting its statutory mandate to protect the federal Judiciary.

RETROACTIVITY OF CRACK COCAINE SENTENCING AMENDMENT

Mr. Chairman, I would like to discuss an issue that has received some attention in recent months: the changes to federal sentencing guidelines for crack cocaine offenses approved by the U.S. Sentencing Commission. The Commission is a bipartisan, independent agency within the Judicial Branch that was established by the Sentencing Reform Act of 1984 to develop national sentencing policy for the federal courts. The Commission promulgates the sentencing guidelines that federal trial court judges consult when sentencing defendants convicted of federal crimes.

On May 1, 2007, the Commission submitted a package of amendments to the federal sentencing guidelines that, in the absence of congressional action to the contrary, went into effect on November 1, 2007. Among the amendments was one that modified the federal sentencing guidelines for crack cocaine offenses. The amendment reduced the base offense level, or starting point, for crack cocaine offenses under the guidelines downward by two offense levels. This amendment does not affect the statutory mandatory minimum penalties for crack cocaine offenses established by Congress. The Commission took this action to alleviate some of the longstanding problems associated with the penalty scheme for cocaine offenses, which requires 100 times more powder than crack cocaine to receive the same statutory mandatory minimum penalty commonly referred to as the "100-to-1 ratio." As a result of the amendment, the average sentence for crack cocaine offenders sentenced on or after November 1, 2007 will be approximately 16 months less than those sentenced before that date.

The Commission is authorized by statute to decide whether amendments that reduce penalties should be given retroactive effect. In December 2007, the Commission voted unanimously to give retroactive effect to the amendment for crack cocaine offenses. Retroactivity of the amendment became effective on March 3, 2008.

Pursuant to statute, once the Commission has given an amendment retroactive effect, a defendant, the director of the Bureau of Prisons, or a court on its own may move to have a defendant's term of imprisonment reduced pursuant to the Commission's policy statement on retroactivity and the limits of the amendment. The Commission estimates that approximately 19,000 federal offenders over a span of several years may be eligible to seek to have their terms of imprisonment reduced as a result of retroactivity. These individuals were sentenced throughout the country although a large number of potentially eligible offenders were sentenced in districts located within the Fourth Circuit (West Virginia, Virginia, Maryland, North Carolina, and South Carolina).

A federal sentencing judge will make the final determination of whether an offender is eligible for a lower sentence and how much that sentence should be lowered. That determination will be based on many factors, including whether the offender's reduced sentence or release would pose a danger to public safety.

I will not discuss the merits of retroactivity since such policy decisions are outside the Budget Committee's area of responsibility; however, I will note that the Criminal Law Committee of the United States Judicial Conference supported the Commission's decision on retroactivity. The Criminal Law Committee and its staff at the Administrative Office of the U.S. Courts have been working closely with the Commission to give the courts sufficient time, resources, and guidance to prepare for and process these cases. It is this process that I would like to take a moment to discuss.

We anticipate there may be an initial surge of motions for reductions in sentence filed in the federal courts. These filings will be handled by various district court components, including district judges, clerks offices, probation and pretrial services offices, and federal defender offices.

It is generally agreed that a large number of motions for a reduction in sentence will not involve court hearings and will be decided on written filings, so our workload associated with processing those cases should not be unduly burdensome. The cases that require hearings will require more court resources. At present, no extraordinary measures have been necessary to address the increased workload due to retroactivity, although additional resources will be available if needed for smaller districts that may be disproportionately impacted by the number of federal offenders seeking a reduction in sentence based on retroactivity.

We believe retroactivity will have the greatest impact on our probation offices. The crack cocaine offenders who may be released after a federal judge grants the motion for a reduction in sentence will require close probation supervision, drug testing, and possibly drug and other treatment services as do other federal offenders leaving federal prison. At this time, however, our fiscal year 2009 budget does not request additional staffing or other resources associated with retroactivity of the crack cocaine sentencing amendment. The Judiciary believes the additional workload associated with retroactivity can be absorbed within existing resource levels.

IMPACT OF INCREASED BORDER ENFORCEMENT

Another issue that has received significant attention from Congress and the Administration is illegal immigration, so I would like to discuss the impact of increased border and immigration enforcement initiatives on the work of the federal courts. In recent years the Administration has dedicated significant resources to address the issue of illegal immigration. The President's Fiscal Year 2009 Budget includes \$12 billion for the Department of Homeland Security (DHS) for border security and enforcement efforts, a 19 percent increase over fiscal year 2008, and a more than 150 percent increase since 2001. DHS has used the funding to increase the number of border patrol agents significantly, particularly on the southwest border with Mexico. Since 2001, more than 5,000 additional border patrol agents have been hired with most of them placed along the southwest border. In fiscal year 2008, DHS received funding to hire an additional 3,000 border patrol agents, and the President's Fiscal Year 2009 Budget includes funding for another 2,200 agents, bringing the total to 20,000 agents. When fully staffed the Border Patrol will have more than doubled in size since 2001.

The level of criminal case filings in the federal courts in the five judicial districts along the southwest border is high by historical standards -- 19,825 filings in 2007 versus 17,184 in 2001 -- but filings have not increased commensurate with the increased resources provided to DHS for border enforcement. Despite zero tolerance border initiatives such as Operation Streamline in which nearly everyone apprehended for violating U.S. immigration laws is prosecuted, resource constraints in the justice system have precluded more cases from being prosecuted in the federal courts. Staffing shortages in U.S. Attorney offices, lack of detention beds needed to secure offenders awaiting prosecution, and staffing constraints in U.S. Marshals offices have resulted in the establishment of certain threshold levels in some border districts that must be met before a case is prosecuted. For example, a U.S. Attorney in one district may prosecute someone coming into the country illegally after the tenth attempt, while a U.S. Attorney in another district may prosecute after the fifth attempt.

To the extent the federal courts are perceived as a factor that limits the number of cases that can be prosecuted on the border, I would note it is Congress that establishes the number of district judgeships and the districts to which they are assigned, and Congress and the Executive Branch that control the authorization, funding, and construction of new courthouses. The district courts on the southwest border have not received any new district judgeships since 2002 despite Judicial Conference requests for additional judgeships in 2003 (11 judgeships), 2005 (11 judgeships), and 2007 (10 judgeships). In recent years Congress has been responsive to the need for new courthouse space on the southwest border, and we hope that you will support the additional \$110 million included in the President's Fiscal Year 2009 Budget to fund fully a new federal courthouse in San Diego, California. The Judicial Conference designated the San Diego courthouse a judicial space emergency in 2003, but the General Services Administration has been unable to award a contract for the project due to escalating construction costs in Southern California.

It now appears that Congress has taken steps to address the resource needs across the justice system on the southwest border by providing additional resources beyond those provided to DHS. In fiscal year 2008 the Department of Justice received \$7 million in emergency funding to hire more assistant U.S. Attorneys (AUSAs) in the five judicial districts along the southwest border. The U.S. Marshals Service received \$15 million in emergency funding to address southwest border workload needs including the hiring of 100 additional deputy U.S. Marshals. The President's Fiscal Year 2009 Budget includes \$100 million for a new Southwest Border Enforcement Initiative focusing law enforcement and prosecutorial efforts on fighting violent crime, gun smuggling, and drug trafficking in that region. If funded, this initiative will increase the number of AUSAs along the southwest border by another 50 positions. The President's Budget also seeks \$88 million to expand detention capacity along the southwest border. The resultant increase in criminal filings we expect to see from this infusion of resources will impact our district judges, clerks offices, probation and pretrial services offices, and federal defender offices on the border. I would note, however, that the Judiciary's fiscal year 2009 budget submission does not request funding for new clerks or probation office staff on the border or elsewhere. Congress provided the Judiciary with \$45.4 million over the last two years -- \$20.4 million in fiscal year 2007 and \$25.0 million in fiscal year 2008 -- to address immigration-related workload so, from a staffing perspective, the courts are well positioned in the short term to respond to the increased workload that we expect will materialize. However, as I just mentioned, we do require additional district judgeships on the southwest border, and construction of a new federal courthouse in San Diego is the Judiciary's top space priority.

COST CONTAINMENT EFFORTS

The Judiciary recognizes that continuing pressures on the federal budget due to the conflicts in Iraq and Afghanistan, investments being made to improve security here at home, and the goal of eliminating the budget deficit by 2012, will necessitate austere federal spending going forward, particularly for non-security discretionary programs. Indeed, the President's Fiscal Year 2009 Budget proposes a 0.3 percent increase in this category of spending, well below the rate of inflation. The Administration and Congress are rightfully concerned about overall federal

spending and budget deficits, and we recognize that you face tough choices. I want to assure the Subcommittee that the Judiciary is doing its part to contain costs.

We are now more than three years into an intensive effort to reduce costs throughout the Judiciary. As I mentioned in my testimony last year, this cost containment effort was born out of our fiscal year 2004 experience in which a funding shortfall necessitated staff reductions of 1,350 clerk and probation office employees, equal to 6 percent of the courts' on-board workforce. As a result of this situation and the prospect of continuing federal budget pressures, the late Chief Justice William H. Rehnquist charged the Judicial Conference's Executive Committee with developing an integrated strategy for controlling costs. After a rigorous six-month review by the Judicial Conference's various program committees, the Executive Committee prepared, and the Judicial Conference endorsed in September 2004, a cost-containment strategy for the federal Judiciary. The strategy focuses on the primary cost drivers of the Judiciary's budget -- compensation costs and the rent we pay to the General Services Administration for courthouses and leased office space. We have had great cooperation Judiciary-wide as we have moved forward on implementing cost containment initiatives. I will highlight several cost containment initiatives for you.

Containing Rent Costs

The amount of rent we pay to GSA has been a matter of concern to the Judiciary for a number of years. Since fiscal year 2004 we have made a concerted effort to contain rent costs, with considerable success. In fiscal year 2004, prior to the implementation of cost containment, we projected that our GSA rent bill would be \$1.2 billion in fiscal year 2009. I am pleased to report that our current GSA rent estimate for fiscal year 2009 is now projected to be \$200 million less, or \$1.0 billion, 17 percent below the pre-cost containment projection. Following are two of our rent containment initiatives that have contributed to these reduced rent costs.

- Rent Validation Project. In recent years we have been working cooperatively with GSA to reduce our space rent costs through a rent validation program that has yielded significant savings and cost avoidances. This rent validation initiative originated in our New York courts where staff spent months scrutinizing GSA rent bills and found rent overcharges. The cumulative effect of this discovery were savings and cost avoidances over three fiscal years totaling \$30 million. The Administrative Office expanded this effort nationwide by training all circuit executive offices to analyze and detect errors in GSA rent billings. Although it is quite time consuming, detailed reviews of GSA rent billings are now a standard business practice throughout the courts. Through this national effort, in fiscal year 2007 we identified additional overcharges totaling \$22.5 million in multi-year savings and cost avoidances, bringing cumulative savings/cost avoidances to \$52.5 million. We anticipate receiving additional rent adjustments and credits resulting from over \$10 million in rent errors that we recently reported to GSA. By identifying and correcting space rent overcharges we have been able to re-direct these savings to other Judiciary requirements, thereby reducing our request for appropriated funds.

- Rent Caps. To contain costs further, the Judiciary established budget caps in selected program areas in the form of maximum percentage increases for annual program growth. For our space and facilities program, the Judicial Conference approved a cap of 4.9 percent on the average annual rate of growth for GSA rent requirements for fiscal years 2009 through 2016. By comparison, the increase in GSA rent in our fiscal year 2005 budget request was 6.6 percent. This cap will produce a GSA rent cost avoidance by limiting the annual amount of funding available for space rental costs. Under this initiative, circuit judicial councils around the country will be responsible for managing rent costs in their circuits, which will require the councils to prioritize space needs -- and in some instances deny requests for new space -- in order to stay within the 4.9 percent cap.

Containing Information Technology Costs

Another cost containment success has been identifying and implementing more cost-effective approaches in deploying computer servers around the country. Before this initiative, each court unit maintained local servers to access Judiciary applications and databases. New technology, along with improvements in the Judiciary's national data communications network, has allowed the consolidation of servers at a single location without compromising the performance levels of existing applications. In some cases performance has actually improved. As a result of this initiative, the Judiciary reduced by 89 the number of servers needed to run the jury management program, producing savings of \$2.0 million in the first year and expected savings of \$4.8 million through fiscal year 2012. In addition, servers that run the case management system in our probation program were consolidated, with projected savings and cost avoidances of \$2.6 million through fiscal year 2012. The Judiciary expects expanded implementation of this initiative to result in significant information technology cost savings or cost avoidances. A big cost saver will be the consolidation of servers for the Judiciary's national accounting system in fiscal year 2008, which is expected to achieve savings and cost avoidances totaling \$55.4 million through fiscal year 2012.

Containing Personnel Costs

A major focus of the Judiciary's cost containment efforts involves controlling personnel costs. At its September 2007 meeting, the Judicial Conference approved recommendations from a major court compensation study which will slow the growth in personnel costs throughout the Judiciary, specifically in clerks and probation offices and judges' chambers staff. The approved actions will reduce funding available to the courts for annual salary step increases for employees, limit the number of career law clerks (who are typically paid more than term law clerks), revise salary setting policies for new law clerks, and modernize the federal courts' position benchmarks which govern the classification and grading of staff nationwide. We estimate these measures may save up to \$300 million from fiscal year 2009 through fiscal year 2017.

INNOVATION IN THE FEDERAL COURTS

While we look to contain costs wherever possible, we continue to make investments in technologies that improve federal court operations, enhance public safety, and increase public access to the courts to name just a few examples. The Judiciary is a leader in taking state-of-the-

art technology and adapting it to the courts' unique needs, and we continually look for innovative ways to apply new technologies to our operations. These investments are made possible through the funding we receive from Congress, and we are grateful for Congress's continuing support of our information technology program. Let me describe for you several of our innovations.

Use of Global Positioning System Technology

Some of our probation and pretrial services offices are now using Global Positioning System (GPS) technology to monitor around the clock the location of individuals under pretrial release or post-conviction supervision. As a condition of their sentence or supervised release, an offender or defendant might be required to carry a GPS unit. Some GPS tracking devices let officers send a text message or voice message directly to the receiver worn by the offender enabling an alert to be sent if the offender wanders into forbidden territory.

An incident that occurred in California offers an example of the application of GPS technology. A defendant on a GPS tracking device was ordered by a federal judge to stay away from his ex-wife due to a prior history of domestic violence. He was also subject to an active restraining order. In the middle of the day, the defendant drove by his ex-wife's place of employment. The pretrial services officer received a text message alert and immediately contacted the defendant on the tracking device, instructing him to come to the office. The officer contacted the ex-wife, the court was notified, and appropriate action was taken. In this instance, the pretrial services officer had established exclusion zones around the wife's home and work. For convicted sex offenders whose victims included children, these exclusion zones can include schools, parks, and playgrounds. Many offenders help defray the cost of monitoring on an ability-to-pay basis. GPS monitoring can cost up to \$9 per day, roughly double the cost of less expensive electronic monitoring, but still well below the more than \$63 per day required to incarcerate an offender.

Case Management/Electronic Case Files System

The Case Management/Electronic Case Files (CM/ECF) system is an electronic case management system that provides federal courts with docket management capabilities, including the option of permitting case documents to be filed with the court over the Internet. Managing case filings electronically is more cost efficient than the labor- and space-intensive process of paper filings previously used. The electronic case filing system was launched in November 1995, when a team from the Administrative Office of the U.S. Courts helped the U.S. District Court in the Northern District of Ohio cope with more than 5,000 document-intensive asbestos cases. The court faced up to 10,000 new pleadings a week, a workload that quickly became unmanageable. The team developed a system that allowed attorneys to file and retrieve documents and receive official notices electronically. More than 10 years and several upgrades later, the system has fundamentally changed how the entire judicial system operates. The system is currently operating in all of our district and bankruptcy courts and will be operational in all of the regional courts of appeals in early 2009. Over 30 million cases are on CM/ECF systems nationwide, and nearly 350,000 attorneys and others have filed documents over the Internet. On average, four million new electronic documents are filed into the system each month, and roughly half of those are filed over the Internet by attorneys. CM/ECF is considered the world's most comprehensive court

electronic case filing system. It has been one of the most important innovations in U.S. federal court administration.

Public Access to Court Electronic Records

The Public Access to Court Electronic Records (PACER) system is an electronic access service run by the federal Judiciary that allows the public to obtain case and docket information from federal appellate, district, and bankruptcy courts via the Internet. The PACER system offers an inexpensive, fast, and comprehensive case information service to any individual with a computer and Internet access. Users can retrieve, among other information, a listing of parties and participants in a case, a compilation of case-related information, such as cause of action, nature of suit and dollar demands, judgments or case status, and appellate court opinions. The data is displayed directly on the user's computer screen within a few seconds. The system is available 24 hours a day and is simple enough that little user training is required. The PACER program has been hugely successful. In 2007 alone, over 350 million requests for information were processed by PACER. As directed by Congress, nominal fees are charged for accessing court records although some records are available without charge. Given the high-volume usage of PACER, the fees collected in the aggregate are substantial. Congress has authorized the Judiciary to utilize these fees to run the PACER program as well as to offset some costs in our information technology program that would otherwise have to be funded with appropriated funds. The Judiciary's fiscal year 2009 budget request assumes \$68 million in PACER fees will be available to finance information technology requirements in the courts' Salaries and Expenses account, thereby reducing our need for appropriated funds.

THE JUDICIARY'S WORKLOAD¹

I turn now to a discussion of the workload facing the courts. As indicated in the caseload table in our fiscal year 2009 budget request, 2008 caseload projections are used to compute fiscal year 2009 staffing needs. Our projections indicate that caseload will increase slightly in probation (+1%) and pretrial services (+3%) and increase substantially for bankruptcy filings (+23%). For 2008 we are projecting small declines in appellate (-3%) and criminal (-3%) caseload, and a steeper decline in civil filings (-8%). Let me discuss some recent trends and caseload drivers and offer some context for these projections.

Probation and Pretrial Services

Workload in our probation and pretrial services programs continues to grow. The number of convicted offenders under the supervision of federal probation officers hit a record 115,930 in 2007 and is expected to increase again in 2008 to 116,900. In addition to the increased workload, the work of probation officers has become significantly more challenging. In 1985, fewer than half of the offenders under supervision had served time in prison. By 2007, the percentage had

¹Unless otherwise stated, caseload figures reflect the 12-month period ending in June of the year cited (i.e., 2008 workload reflects the 12-month period from July 1, 2007 to June 30, 2008).

climbed to 80 percent. As these figures indicate, probation officers no longer deal primarily with individuals sentenced to probation in lieu of prison. Offenders coming out of prison on supervised release have greater financial, employment, and family problems than when they committed their crimes. In addition, the number of offenders sentenced in federal court with prior criminal convictions more than doubled between fiscal years 1996 and 2006, and the severity of the criminal histories of persons under probation officer supervision has been increasing as well. Offenders re-entering the community after serving time in prison require close supervision by a probation officer to ensure they secure appropriate housing and employment. Successful re-entry improves the likelihood that offenders will pay fines and restitution and become taxpaying citizens.

Recent legislation will also increase the workload of probation and pretrial services officers. For example, we expect that the Adam Walsh Child Protection and Safety Act of 2006 will significantly increase the number of sex offenders coming into the federal court system. The Adam Walsh Act also increases the registration requirements for sex offenders, which means probation officers must coordinate closely with state and local authorities to ensure that law enforcement and the public receive the required notice. Monitoring the behavior of sex offenders is challenging and requires intense supervision on the part of probation and pretrial services officers to protect the community.

As I discussed earlier in my testimony, the retroactive application of the crack cocaine sentencing amendment will also have an impact on the work of probation officers although it is difficult to predict with certainty at this point how many current federal prison inmates will gain early release and enter the federal probation system.

Bankruptcy Filings

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), implemented in October 2005, has significantly affected workload trends in the nation's bankruptcy courts. While filings are still below pre-BAPCPA levels -- 751,056 filings in 2007 versus 1,635,725 filings in 2004 -- we forecast that filings will increase 23 percent in 2008 to 923,000 and top one million filings in 2009. The state of the economy, particularly as it impacts home foreclosures and credit availability, will be a major factor in the number of personal bankruptcies -- which constitute the majority of bankruptcy cases. It is possible that 2008 bankruptcy filings will be above the current projection.

The number of filings alone, however, should not be viewed as the sole indicator of overall workload. BAPCPA created new docketing, noticing, and hearing requirements that make addressing the petitions far more complex and time-consuming. Our bankruptcy courts have indicated that the actual per-case work required of the bankruptcy courts has increased significantly under the new law, at least partially offsetting the impact on the bankruptcy courts of lower filings. For example, BAPCPA requires Chapter 7 filers to complete and pass a complex "means test" and receive a credit counseling briefing by an approved agency. Also, filers under Chapters 7 and 13 may not receive a discharge of their debts unless they have completed an approved financial management course. These and other new requirements must be reviewed by

the clerk's office, which must take further action if the filers do not meet the requirements. BAPCPA also requires more than 35 new motions and pleadings in various chapters of the bankruptcy code. Each new motion requires judicial review and can result in hearings, orders, and opinions, thus consuming more judicial resources.

Appellate Filings

After hitting an all-time high of 68,313 filings in 2006, appellate caseload declined to 58,809 filings in 2007 and is expected to decline by 3 percent to 57,300 filings in 2008. This decline comes on the heels of significant workload growth from 2002 to 2006 during which filings increased 20 percent initially due to a surge in challenges to Board of Immigration Appeals (BIA) decisions in the appellate courts and later due to the large number of criminal and habeas corpus petitions filed by state and federal prisoners from 2004 to 2006 challenging their sentences pursuant to the Supreme Court's decisions in *Blakely v. Washington* (2004), and in the consolidated cases, *United States v. Booker* and *United States v. Fanfan* (2005). After the initial surge of sentence-related filings associated with these decisions, we are now seeing appellate filings for criminal and habeas corpus petitions approach pre-*Blakely* and *Booker/Fanfan* levels.

About one-third of all BIA decisions are challenged in the federal appellate courts with 70 percent of those challenges occurring in the Second and Ninth Circuits. While BIA appeals have dropped in the last year, these cases continue to demand extensive resources since they often turn on a credibility determination by a Department of Justice immigration judge, thus requiring close judicial review of a factual record by the appellate courts.

Civil Filings

Civil filings in the courts generally follow a more up and down filing pattern. In 2005 civil filings reached a record 282,758 filings, declined to 244,343 filings in 2006, then increased again to 272,067 filings in 2007. The increase in 2007 was due primarily to asbestos diversity case filings in the Eastern District of Pennsylvania. The Judiciary projects civil case filings will continue this up and down pattern, decreasing 8 percent to 250,500 filings in 2008.

Criminal Filings

Criminal filings in the federal courts have been trending downward the last several years, and this trend is expected to continue through 2008. From the previous year, filings declined 2 percent in 2005, 3 percent in 2006, and a half-percent in 2007 to 67,503 filings. Filings are projected to decline another 3 percent in 2008 to 65,800 filings.

Last year I testified that criminal filings were likely depressed due to significant vacancies in AUSA positions nationwide and that once vacancies were filled criminal filings would reverse course and begin to increase. As I mentioned earlier in my testimony, it now appears that additional resources are being provided to fill AUSA positions, particularly in the five judicial districts along the southwest border with Mexico. Also, the Administration is committing more resources to the prosecution of sexual exploitation of children. In fiscal year 2008, the Department of Justice received \$5 million to hire 40 additional AUSAs to prosecute these exploitation cases under the Adam Walsh Act. I would emphasize that our criminal caseload

projection for 2008 does not take into account the impact additional AUSAs will have on criminal case filings, so we may see 2008 filings above the projected level.

FISCAL YEAR 2009 BUDGET REQUEST

For fiscal year 2009, the Judiciary is seeking a 7.6 percent overall increase above the fiscal year 2008 enacted appropriations. The courts' Salaries and Expenses account, which funds clerks and probation offices nationwide, requires a 7.4 percent increase. Fiscal year 2009 appropriations requirements for each Judiciary account are included at Appendix A.

The goal of our fiscal year 2009 request is to maintain staffing levels in the courts at the level Congress funded in fiscal year 2008, as well as to obtain funding for several much needed program enhancements. As I noted earlier in my testimony, we are not requesting additional staff for our clerks or probation offices. We believe the requested funding level represents the minimum amount required to meet our constitutional and statutory responsibilities. While this may appear high in relation to the overall budget request submitted by the Administration, I would note that the Judiciary does not have the flexibility to eliminate or cut programs to achieve budget savings as the Executive Branch does. The Judiciary's funding requirements essentially reflect basic operating costs of which more than 80 percent are for personnel and space requirements.

Eighty-six percent (\$407 million) of the \$475 million increase being requested for fiscal year 2009 funds the following base adjustments, which represent items for which little to no flexibility exists:

- Standard pay and benefit increases for judges and staff. This does not pay for any new judges or staff but rather covers the annual pay adjustment and benefit increases (e.g., COLAs, health benefits, etc.) for currently funded Judiciary employees. The amount budgeted for the cost-of-living adjustment is 2.9 percent for 2009.
- An anticipated increase in the number of on-board senior Article III judges.
- The projected loss in non-appropriated sources of funding due to the decline in carryover balances available in fiscal year 2009 versus the level available to finance the fiscal year 2008 financial plan (see discussion on the following page).
- Space rental increases, including inflationary adjustments and new space delivery, court security costs associated with new space, and an increase in Federal Protective Service charges for court facilities.
- Adjustments required to support, maintain, and continue the development of the Judiciary's information technology program which, in recent years, has allowed the courts to "do more with less" -- absorbing workload increases while downsizing staff.

- Mandatory increases in contributions to the Judiciary trust funds that finance benefit payments to retired bankruptcy, magistrate, and Court of Federal Claims judges, and spouses and dependent children of deceased judicial officers.
- Inflationary increases for non-salary operating costs such as supplies, travel, and contracts.
- Costs associated with Criminal Justice Act (CJA) representations. The Sixth Amendment to the Constitution guarantees that all criminal defendants have the right to the effective assistance of counsel. The CJA provides that the federal courts shall appoint counsel for those persons who are financially unable to pay for their defense.

After funding these adjustments to base, the remaining \$68 million requested is for program enhancements. Of this amount:

- \$33 million will provide for investments in new information technology projects and upgrades, and courtroom technology improvements.
- \$18 million to increase the non-capital panel attorney rate from \$100 to \$118 per hour. I will discuss this requested increase in more detail in a moment.
- \$8 million is requested for the Supreme Court's exterior renovations and roof system repairs.
- \$5 million is for additional staff and associated costs to address fiscal year 2009 workload requirements (32 FTE), two additional magistrate judges and staff (9 FTE), library renovations and new equipment at the Court of Appeals for the Federal Circuit, and the start-up costs for two new federal defender organizations.
- \$4 million would provide for necessary investments in court security, such as court security systems and equipment and new positions at the U.S. Marshals Service (9 FTE).

Non-Appropriated Sources of Funding

I would like to discuss briefly the non-appropriated sources of funding that the Judiciary uses to partially finance its operations and how they impact our appropriations needs. In addition to appropriations from Congress, the Judiciary collects fees from bankruptcy and civil case filings, from the public for on-line access to court records, and from other sources. Fees not utilized during the year they are collected may be carried over to the next fiscal year to offset appropriations requirements in that year. Every fee dollar collected that is not needed to finance current year needs represents a dollar less that the Judiciary must seek from Congress in the following year.

In formulating the Judiciary's fiscal year 2009 budget request, we made certain assumptions regarding the level of fees and carryover that would be available to finance fiscal year 2009 requirements. Because the projection for carryover balances are below the level that was available to finance fiscal year 2008 operations, the fiscal year 2009 request includes a line item

requesting appropriated funds -- \$95 million in the courts' Salaries and Expenses account -- to replace the anticipated decline in carryover balances. (New fee collections are projected to be flat from fiscal year 2008 to fiscal year 2009 so there is no restoration requested or needed for that component of our financing.) While it is premature for me to identify a specific amount, I am confident that we will not need the full \$95 million we requested to replace carryover balances. This is due to several factors, including the courts' frugal spending during the continuing resolution for the first quarter of fiscal year 2008 and fewer judge confirmations than we anticipated. As we did this past year, we will keep the Subcommittee apprised of changes to fee and carryforward projections that could impact our fiscal year 2009 appropriation needs as we move through fiscal year 2008. The Judiciary will submit the first of two fiscal year 2009 budget re-estimates to the Subcommittee in May 2008.

INCREASE IN NON-CAPITAL PANEL ATTORNEY RATE

We believe that one program enhancement in our budget request deserves strong consideration in order to ensure effective representation for criminal defendants who cannot afford to retain their own counsel. We are requesting \$17.5 million to increase the non-capital panel attorney rate to \$118 per hour, effective January 2009. A panel attorney is a private attorney who serves on a panel of attorneys maintained by the district or appellate court and is assigned by the court to represent financially-eligible defendants in federal court in accordance with the Criminal Justice Act (CJA). In the fiscal year 2008 omnibus spending bill, the Subcommittee approved an increase in the non-capital rate paid to these panel attorneys from \$94 to \$100 per hour, and provided a cost-of-living adjustment to the capital rate from \$166 to \$170 per hour. These new rates took effect on January 1, 2008.

While we are very appreciative of the increase to \$100 per hour for non-capital work, we believe a more significant increase is required to enable the courts to attract and retain enough qualified attorneys to accept appointments and to provide them a fair rate of pay. This is critical in order for the Judiciary to ensure that persons represented by panel attorneys are afforded their constitutionally guaranteed right to *effective* assistance of counsel.

We believe there is a direct relationship between the lack of qualified panel attorneys available to take CJA appointments and the significant financial difficulties panel attorneys encounter maintaining their legal practices at the current rate. It is predominantly solo and small-firm lawyers that take on CJA cases, and these panel attorneys must first cover their overhead costs. With overhead costs of approximately \$64 per hour, at the \$100 rate, that leaves a net average of only \$36 per hour, *before taxes*. We believe that this net rate of \$36 per hour, when compared to the net national average "market rate" of \$148 per hour for non-CJA private criminal cases, prevents the courts from attracting sufficient numbers of qualified attorneys to take CJA appointments because those attorneys can obtain higher pay on non-CJA cases. Each time a panel attorney is asked by the court to accept a non-capital CJA appointment, he or she must consider the inherent "opportunity" cost associated with the higher hourly rate he or she could otherwise earn on a non-CJA case.

The CJA authorized the Judicial Conference to implement annual cost-of-living adjustments (COLAs) to panel attorney rates, subject to congressional funding. If the statutory COLAs provided to federal employees (the base employment cost index component only) had been provided to panel attorneys on a recurring, annual basis since 1986, the authorized non-capital hourly rate for fiscal year 2009 would be \$136. While the Judicial Conference supports the \$136 rate, it is mindful of the constrained federal budget environment and, therefore, proposes attaining the authorized rate in two stages, an \$18 per hour increase in fiscal year 2009 from \$100 to \$118 per hour, with a second increase to \$140 per hour in fiscal year 2010 (the \$140 rate includes a \$4 COLA to the fiscal year 2009 rate of \$136). The Judiciary is committed to fully restoring the non-capital panel attorney rate, in a cost-conscious manner, by implementing the authorized rate over two years.

I will close on this topic by reiterating that the Judiciary greatly appreciates the \$100 non-capital rate Congress provided in fiscal year 2008, but the concern remains that, after overhead is considered, the rate does not provide compensation that will attract enough qualified panel attorneys to take on the complex work involved in federal criminal cases. I urge the Subcommittee to provide the funding necessary to increase the non-capital panel attorney rate to \$118 per hour in fiscal year 2009.

CONTRIBUTIONS OF THE ADMINISTRATIVE OFFICE

I would like to briefly outline the important work performed by the Administrative Office (AO) of the United States Courts. Year in and year out, the AO provides critical support to the courts. With only a fraction (1.3%) of the resources that the courts have, the AO does a superb job of supporting our needs.

The AO has key responsibilities for judicial administration, policy implementation, program management, and oversight. It performs important administrative functions, but also provides a broad range of legal, financial, program management, and information technology services to the courts. None of these responsibilities has gone away and new ones are continually added, yet the AO staffing level has been essentially frozen for 15 years. As an example, despite no new staff, the AO has been instrumental in implementing the Judiciary's cost containment strategy which has achieved significant savings and cost avoidances.

In my role as Chair of the Judicial Conference Committee on the Budget, I have the opportunity to work with many staff throughout the AO. They are dedicated, hard working, and care deeply about their role in supporting this country's system of justice.

The fiscal year 2009 budget request for the Administrative Office is \$82.0 million. The AO's request represents a current services budget, no additional staff or program increases are sought. All of the requested increase is necessary to support current services, mainly standard pay and general inflationary increases, as well as funding to replace the anticipated lower level of carryover amounts with appropriated funds in fiscal year 2009.

I urge the Subcommittee to fund fully the Administrative Office's budget request. The increase in funding will ensure that the Administrative Office continues to provide program leadership and administrative support to the courts, and lead the efforts for them to operate more efficiently. Director Duff discusses the AO's role and budget request in more detail in his testimony.

CONTRIBUTIONS OF THE FEDERAL JUDICIAL CENTER

I also urge the Subcommittee to approve full funding for the Federal Judicial Center's request of \$25.8 million for fiscal year 2009.

The Center's director, Judge Barbara Rothstein, has laid out in greater detail the Center's needs in her written statement. I simply add that the Center plays a vital role in providing research and education to the courts. The Center's research and its educational programs are highly respected and valued for their quality and objectivity. The Judicial Conference and its committees request and regularly rely on research projects by the Center. The Center's educational programs for judges and court staff are vital in preparing new judges and court employees to do their jobs and in keeping them current so that they can better deal with changes in the law, and in tools -- like technology -- that courts rely on to do their work efficiently.

The Center has made good use of its limited budget. It uses several technologies to deliver information and education to more people more quickly and inexpensively. The relatively small investment you make in the Center each year (less than one-half of one percent of the Judiciary's budget) pays big dividends in terms of the effective, efficient fulfillment of the courts' mission.

CONCLUSION

Mr. Chairman, I hope that my testimony today provides you with some insight into the challenges facing the federal courts as well as what we are doing to contain costs and become more efficient. I realize that fiscal year 2009 is going to be another tight budget year as increased mandatory and security-related spending will result in further constrained domestic discretionary spending. We recognize the fiscal constraints Congress is facing. Through our cost-containment efforts and information technology innovations we have significantly reduced the Judiciary's appropriations requirements without adversely impacting the administration of justice. I know you agree that a strong, independent Judiciary is critical to our nation. I urge you to fund this request fully in order to enable us to maintain the high standards of the United States Judiciary.

Thank you for your continued support of the federal Judiciary. I would be happy to answer any questions the Subcommittee may have.

**Judiciary Appropriations
(\$000)**

Appropriation Account	FY 2008 Enacted Level (P.L. 110-161) ¹	FY 2009 President's Budget (Feb. 4, 2008)	% Change: FY 2009 vs. FY 2008 Enacted
U.S. Supreme Court			
Salaries & Expenses	\$66,526	\$69,777	4.9%
Care of Building and Grounds	<u>12,201</u>	<u>18,447</u>	51.2%
Total	78,727	88,224	12.1%
U. S. Court of Appeals for the Federal Circuit	27,072	32,357	19.5%
U.S. Court of International Trade	16,632	19,622	18.0%
<i>Courts of Appeals, District Courts & Other Judicial Services</i>			
Salaries & Expenses¹ Direct	4,619,262	4,963,091	7.4%
Vaccine Injury Trust Fund	<u>4,099</u>	<u>4,253</u>	3.8%
Total	4,623,361	4,967,344	7.4%
Defender Services¹	846,101	911,408	7.7%
Fees of Jurors & Commissioners	63,081	62,206	-1.4%
Court Security	<u>410,000</u>	<u>439,915</u>	7.3%
Subtotal	5,942,543	6,380,873	7.4%
Administrative Office of the U.S. Courts	76,036	81,959	7.8%
Federal Judicial Center	24,187	25,759	6.5%
Judiciary Retirement Funds	65,400	76,140	16.4%
U.S. Sentencing Commission	15,477	16,257	5.0%
<i>Direct</i>	\$6,241,975	\$6,716,938	7.6%
<i>Vaccine Injury Trust Fund</i>	\$4,099	\$4,253	3.8%
<i>Total</i>	\$6,246,074	\$6,721,191	7.6%

¹Pursuant to P.L. 110-161, fiscal year 2008 appropriations include \$25 million in emergency appropriations (\$14.5 million in the courts' Salaries and Expenses account and \$10.5 million in the Defender Services account) for workload associated with DOJ and DHS immigration enforcement initiatives.