JUDICIAL CONFERENCE OF THE UNITED STATES

STATEMENT OF

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

BEFORE

THE SUBCOMMITTEE ON COURTS AND COMPETITION POLICY

COMMITTEE ON THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES

ON

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

SEPTEMBER 29, 2010

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

September 29, 2010

Introduction

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

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

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

The Courthouse Construction Program

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

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

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

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

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

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

The Judiciary's Courtroom Sharing Policies

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

Conclusion

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

---

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

[3]*Id.* at 38