FEDERAL COURTS IMPROVEMENT ACT OF 2001

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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FEDERAL COURTS IMPROVEMENT ACT OF 2001

THURSDAY, JULY 26, 2001

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, THE INTERNET,
AND INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:03 a.m., in Room 2141, Rayburn House Office Building, Hon. Howard Coble [Chairman of the Subcommittee] presiding.

Mr. COBLE. Good morning, ladies and gentlemen. The Subcommittee will come to order. Today we consider a bill that will enhance the operations of our Federal Courts, H.R. 2522, the Federal Courts Improvement Act of 2001.

Mr. COBLE. H.R. 2522 was introduced by the Ranking Member Mr. Berman and me by request of the United States Judicial Conference. It contains provisions that the Conference believes are needed to improve the Federal Court System, including provisions regarding personnel and other matters described in detail in the memorandum received by Members of the Subcommittee prior to this hearing.

These proposals cover judicial process improvements and judiciary personnel administration, benefits and protections. Based on the discussion of these proposals, the Ranking Member and I will work together with other Members to introduce a bill which will contain proposals that we believe will be successful in improving the Federal judicial system.

I am now pleased to recognize the distinguished gentleman from California, the Ranking Member of the Subcommittee, Mr. Berman, for his opening statement.

Mr. BERMAN. Thank you, Mr. Chairman. And I am very pleased to join you in introducing H.R. 2522 at the request of the U.S. courts. The judiciary is our coequal branch of Government and deserves to be accorded the greatest deference and respect. Thus, we have traditionally introduced without amendment the courts' requested annual legislation to maintain improvements in the functioning of the Federal Courts. However, because the structure of our constitutional democracy requires that the judiciary secure congressional approval of its funding and administrative functions, the Congress must fulfill its obligation to American voters by ensuring that court improvement in the legislation, like H.R. 2522, represents good public policy. Hearings such as this one will help us understand the merits of that legislation.

I look forward to hearing Judge Tacha's explanation. Is it Tacha?

Judge TACHA. Tacha.

Mr. BERMAN. All right. Tacha's explanation of H.R. 2522. I hope that we can secure speedy enactment of as much of this bill as good policy dictates and is politically feasible. I am also interested in attaching at some point in this process two additional provisions to any Federal Courts Improvement Act that we move this Congress. I would be interested in getting Judge Tacha's reaction to these provisions, specifically based on requests that have come to me from my colleagues in the Democratic Caucus, I would like to transfer Dyer County, Tennessee from the Western Division to the Eastern Division of the Western District of Tennessee. These are the kinds of things I talk about with my colleagues.

I also would like to accommodate the request of the New Jersey Congressional Delegation to split the U.S. District Court for New Jersey into two district courts. I thank again the Chairman for calling the hearing.

Mr. COBLE. I didn't even know if a Californian would know where Tennessee is located. I am impressed to know that.

Mr. BERMAN. I can tell you Dyer County really tests me.

Mr. COBLE. Thank you, Howard. I appreciate that.

Our only witness this morning is the Honorable Deanell R. Tacha, who is Chief Judge for the United States Court of Appeals for the Tenth Circuit. Judge Tacha was nominated for appointment on October 31, 1985 by President Reagan and sworn in on January 13, 1986. She has served as Chair of the Judicial Conference Committee on the Judicial Branch from 1991 to 1994, Chair of the Appellate Judges Conference of the American Bar Association from 1992 to 1993, Chair of the Judicial Administration Division of the American Bar Association from 1995—well, I guess this says 1995 to 1995. Is that right, Judge?

Judge TACHA. I think it might have been 1996.

Mr. COBLE. 1996, very well. Typo here. And a United States Sentencing Commissioner from 1994 to the present. She was awarded her BA Degree from the University of Michigan in 1968, and her JD in 1971. It is good to have you with us, Judge Tacha. We have your written statement, which I ask unanimous consent to submit into the record in its entirety.

Now, Judge, you were on the faculty at the University of Kansas, and one of my alma maters, North Carolina, attempted unsuccessfully to lure your basketball coach away. But——

Judge TACHA. Well, you know, Kansas is a lovely place to live and a great place to play basketball.

Mr. COBLE. That is what we were told. So we had to settle for another coach, and I think that is working out okay.

Judge TACHA. Well, we gave you that one, too, Matt Dougherty.

Mr. COBLE. Okay. You did indeed. Judge, Mr. Berman and I usually operate on a 5-minute rule around here, but since you are the only witness and it appears that Howard and I will be the only two Members today, we will be lenient with you. I stand corrected. The gentleman from Florida just joined us. Good to have you, Mr. Keller. So if you will proceed, and keep it as close to 5 minutes as you can.

STATEMENT OF THE HON. DEANELL R. TACHA, CHIEF JUDGE, UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Judge TACHA. I will do that. Good morning, Mr. Chairman, and Members of the Subcommittee on Courts, the Internet, and Intellectual Property. My name is Deanell Tacha. As you mentioned, I need to correct the record on one thing. My undergraduate degree is from Kansas and my law degree is from Michigan and I maintain those Jayhawk ties very faithfully.

I am currently Chair of the Judicial Conference Committee on the Judicial Branch and, as you have heard, I am Chief Judge of the Tenth Circuit. I am very pleased on behalf of all my colleagues and the 30,000 employees of the Judicial Branch to be here to testify on H.R. 2522, the Federal Courts Improvement Act.

First and foremost, and most importantly, I want to thank this Committee, you, Mr. Chairman, and Mr. Berman particularly, for introducing this legislation and holding this hearing and for all that you have done in the past Congresses in continually making improvements for the Federal Courts. It has been because of your leadership and stewardship that we have made some gradual and incremental progress that has been terribly helpful.

We also appreciated the leadership in the 106th Congress in actually considering some of the provisions that are before you yet today. You acquired House passage, at least, of some of those provisions, and we greatly appreciate it. So my thanks to you and to the Committee.

This bill that is before us today, H.R. 2522, really addresses three major areas. They are the area of court operations, personnel and administration. I think it would overstate the case to say there are any cataclysmic changes in this bill, but there are a lot of very important and quite diverse incremental improvements that would be so important for the Federal Courts and justice purposes.

Each of these provisions is numbered and we have provided you with a section by section analysis. I have put them in my own categories. Some of them are simply keeping pace with technology, like getting rid of the public drawing for jury wheels and having a geographic location for court records. Technology has simply outstripped our need to do that. Some are for assisting other agencies, the ones particularly that we are working with the NLRB on, the possibility of self-enforcement of NLRB orders. Some are simply to make us more efficient.

You will see in there a provision that allows for wiretap reporting to occur annually on the part of judges instead of every time a wiretap order is entered.

Finally, to make the laws that we apply work more effectively. There are some technical conforming amendments that are very important to give us a clearer definition under the law. So all of those are simply sort of merits conforming amendments.

There is one provision, however, that needs elaborating, and it is one important to all of the Government. I know that you are aware, as I am, of what is being described as an impending crisis in Federal personnel generally. The judiciary is no exception. We expect within the next 5 years to have—to be at risk, at least, of approximately 40 percent of our personnel reaching retirement age.

Therefore, the issues of recruitment, retention and incentives for our current work force are very important.

Highest among them is the improvement of health benefits. We seek in this legislation in section 204 authority for the Director of the Administrative Office to do some extensive investigation into enhancing the health care benefits available to the judiciary. One of our committees, the Judicial Conference Committee on Human Resources, along with the Administrative Office and particularly under the leadership of the Director, in 1997 commissioned a study by a very distinguished consulting benefits firm, Towers Perrin, which resulted in 1998 in a study that compares the judiciary's health benefits and with 20 other comparison groups. These included five universities, three quasi-Federal Government agencies and 12 large private employers.

To put the results of that study in the words of the people who studied it, the benefits available to judiciary employees are, and I quote, below average. These are benefits that are the traditional benefits available to Federal employees. They are life and health insurance. They are leave, and they are retirement benefits. That study concluded that as compared with our comparison group, not only are we below average, but there are many gaps in our coverage.

Now, gaps; i.e., these are things that are provided routinely by the comparison group and are not provided by the judiciary. They include such things as long-term care insurance, pre-tax flexible options, and comprehensive dental or vision coverage.

So at the direction of the Judicial Conference, we have taken some steps—and I give full credit to the Administrative Office and their staff—some steps within the current existing authorizing legislation and appropriations to make some possibilities available. This year, for example, on an employee-pays-all basis, we have been able to provide some flexible medical payment coverage and dependent care coverage. Now, that of course is all employee-funded, but it is a flexible beginning to this initiative.

We would like to proceed further. The other thing that actually has happened this year for the judiciary is that we are able to pay our medical benefits—our medical premiums, insurance premiums, on a pre-tax basis. That is about as far as we can go without the Director having authorization to look at further options. So section 204 is, very narrowly, to give the Director authority to go forward with looking at what other options there might be. Obviously, these will—some of these may require some or all appropriated funds are needed, and we would have to come back for the request to the Appropriations Committee for whatever appropriated funds, but we simply want to give the Director the first step in authorizing a look.

The first thing that we would do—and this is clear that this would be the first preference of the Judicial Conference—is move to try to investigate the possibility of some dental coverage plans. That Towers Perrin study to which I referred said not only were we below average in dental coverage, we are considerably below average, and as the mother of four children who have just emerged from the braces stage, I can tell you, I would say considerably below average understates the case. It is simply for people under

the regular Blue Cross/Blue Shield option plan no dental coverage of any kind. And that, of course, to our employees, is an extremely important thing.

To give you a point of comparison, there are 48 States who provide dental coverage for their employees. Of those, 21 pay it fully for their employees. Almost all private employers provide some level of dental coverage for their employees. The plan that we would pursue, if given this authorization, would be one that would cover up to $1,500 per employee for dental coverage. We estimate that even with that $1,500 amount, the—the claims accrued cost would be just about $484 a year for each employee. So the total cost to the Government would be somewhere around $15 million: A very, very important and critical benefit that we need to be able to move toward is a plan, and this authorization would give the Director that authority.

I might say more broadly that we, along with the rest of the Federal Government, think that these benefits for our employees are becoming more and more of an imperative. And as the judiciary's employees turn over, as they will, in the next 5 years, the ability to bring people whose skills and talents and commitments are commensurate with the kinds of responsibilities that they have are just terribly, terribly important. It seems to me that we share an interest in making sure that the Federal Government is at least a fair employer in comparison with other employers, particularly our State counterparts and also some in the private sector.

So we hope that we can join with you—and this is a beginning step—in addressing what are some really imperative problems in the benefits available to Federal employees. This is a just a first step, but section 204 is our way of beginning to look at the possibilities for better and improved benefits, particularly health benefits for our employees.

I stand ready to answer any questions about any sections that you might have, but that is an overview of the bill that we so much appreciate you introducing.

[The prepared statement of Judge Tacha follows:]

PREPARED STATEMENT OF THE HONORABLE DEANELL R. TACHA

Mr. Chairman, members of the House Subcommittee on Courts, the Internet, and Intellectual Property, my name is Deanell Tacha and I am chair of the Judicial Conference Committee on the Judicial Branch. I am also the Chief Judge for the Court of Appeals for the Tenth Circuit. I am pleased to testify before the subcommittee on H.R. 2522, the "Federal Courts Improvement Act of 2001."

At the outset, I would commend this subcommittee, and Chairman Coble and Mr. Berman in particular, for the stewardship that has been shown for the judiciary's legislative requests during the recent years, including the introduction of H.R. 2522 on July 17, 2001. This subcommittee's leadership in acting promptly on the judiciary's "courts improvement bill" in the last three Congresses has been instrumental in achieving passage in two of those Congresses of a large number of improvements to the federal court system in the areas of finance, personnel management, court procedures and administration. We appreciate your efforts and those of your staffs in helping make the Judicial Branch more effective and efficient.

H.R. 2522 addresses three subject areas: court operations; personnel matters; and administration. Each proposed section represents an incremental improvement to current practices. Also, eight of the provisions in H.R. 2522 were approved by this subcommittee and passed by the House in the 106th Congress as part of H.R. 1752. Each is identified below by an asterisk.

COURT OPERATIONS

Sec. 101 Bankruptcy administrator authority
Sec. 102 (*) Establishing Plano, Texas as a place of holding court
Sec. 103 Conditions of Probation and Pretrial Release
Sec. 104 Enforcement of National Labor Relations Board orders
Sec. 107 Clarifying scope of diversity jurisdiction for resident aliens
Sec. 108 Authority of district courts regarding jurors
Sec. 109 (*) Deletion of automatic excuse for juror service
Sec. 111 (*) Supplemental juror fee
Sec. 210 Protection against malicious recording of fictitious liens

PERSONNEL MATTERS

Sec. 201 (*) Disability retirement and cost of living adjustments for territorial judges
Sec. 202 (*) Lifting pay ceiling for selected FJC positions
Sec. 203 (*) Leave carryover for judicial branch executives
Sec. 204 Supplemental benefits authority
Sec. 205 Law Clerk loan deferment
Sec. 206 Inclusion of judicial branch personnel in organ donor leave program
Sec. 209 Student loan forgiveness for federal defenders

ADMINISTRATION

Sec. 105 Repeal of geographic location requirement for court records
Sec. 106 Reporting of wiretap orders
Sec. 110 (*) Elimination of public drawing requirement for selection of juror wheels
Sec. 207 Repeal of requirement for additional legislative action regarding judicial compensation
Sec. 208 (*) Maximum amounts of compensation for services other than counsel

Attached to this statement is a section-by-section analysis of the "Federal Courts Improvement Act" (see Appendix). One provision, however, deserves further elaboration. It is section 204, which would give the Director of the Administrative Office of the U.S. Courts authority to expand the health benefits program for judicial branch employees.

SECTION 204—SUPPLEMENTAL BENEFITS AUTHORITY

At the initiative of the Judicial Conference Committee on Human Resources and the Director of the Administrative Office, the international benefits consulting firm of Towers Perrin was retained in August 1997 to evaluate the benefits program available to the 30,000 employees of the Judicial Branch. With minor exceptions, those benefits are the core benefits available to all federal government employees, i.e., health and life insurance, retirement, Thrift Savings Plan, and leave. Judiciary employee benefits were compared to a cross section of large employers, including state governments, universities, 12 mainstream U.S. industrial companies, and 3 quasi- federal government organizations.

The Towers Perrin, *Judiciary Benefits Initiative, Employee Benefits Study*, was issued in March 1998. The study concluded that health benefits currently available to judiciary employees were "below average" as compared with the comparison group of employers. The study also described benefits routinely provided to employees of the comparison group which are not available to judiciary employees. These "gaps" included no long-term care insurance program, no pre-tax benefit options, such as flexible spending accounts for health care and dependent care, and no comprehensive dental or vision benefits.

At the direction of the Judicial Conference, the judiciary has already undertaken the clearly needed upgrade of its health-benefits program. A supplemental benefit plan, which offers flexible spending accounts for medical and dependent care expenses has been established. Employees and judicial officers are now able to pay their health care premiums on a pre-tax basis. These new programs are "employee-pay-all" funded. The next phase of the upgrade is to provide supplemental benefits, through a "cafeteria plan" program, which is paid in whole or part with appropriated funds. This phase will be a long term effort entirely dependent on obtaining funding. However, it cannot be undertaken without the authorization contained in Section 204 of H.R. 2522.

If section 204 is enacted into law, our intent is to seek funding for a dental benefits plan. The Towers Perrin study rated dental benefits "considerably below average" because the only coverage available to judiciary employees is "very limited" coverage in the Blue Cross Blue Shield standard option and a few other HMO-style plans. As a point of comparison, 48 states offer employees dental coverage, 21 of which pay 100 percent of the cost. Nearly all large private sector employers offer the same level of coverage. The plan we intend to pursue with the Appropriations Committee would set a maximum of $1,500 for reimbursement of dental expenses for each of the 30,000 judiciary employees. Statistical analysis of identical existing plans show that the actual claim-incurred cost will be approximately $484 per employee, or $15 million per year.

Providing judiciary employees with health benefits comparable to benefits provided state government employees and a great many private sector employees is motivated by necessity. As is pointed out in the Section 204 analysis, the judiciary is at risk of losing 40 percent of our employees to retirement over the next five years. As the General Accounting Office points out, one of the key challenges of the future for the entire Federal government is securing "staffs whose size, skills, and deployment meet agency needs." Because the judiciary must compete for qualified employees in every state and territory in the United States, the Judicial Conference has concluded that improving benefits is an imperative management tool.

A copy of the executive summary of the Towers Perrin study is attached to this statement (see Appendix). The full study is readily available should the subcommittee have an interest in having it.

Thank you for the opportunity to testify before this subcommittee. I would be pleased to answer any questions you may have concerning the provisions of H.R. 2522.

Mr. COBLE. Thank you, Your Honor. In addition to having been joined by Mr. Keller from Florida, we are pleased to welcome the gentleman from Massachusetts, Mr. Delahunt.

Your Honor, I don't mean by any means to take away from your very compelling presentation, but I have always felt that members on the Federal bench have a pretty good deal. We will talk about that in more detail in another day, perhaps——

Judge TACHA. Well, Mr. Chairman, I would never argue with you that I have a good job. The question is whether our staffs and everybody who works within the Judicial System are commensurately and fairly benefitted by choosing to be public servants instead of choosing to be in the private sector, and I think it is so important that we keep in mind that public service is a calling and that there is a point at which the sacrifice is too big and we need good people to make that sacrifice.

Mr. COBLE. Well, I think you do a good job, but I think you are rated favorably, but we will talk about that another day in more detail.

Judge, your testimony focused primarily on section 204 of the bill. Are you aware of Congressional Committees or private parties for that matter who are opposed to this?

Judge TACHA. I am not aware of any——

Mr. COBLE. Nor am I. I thought you might be if there were any. Section 209 would forgive student loans for Federal defenders. What requirements must a Federal defender meet in order to qualify for the loan forgiveness, A, and, B, are there limitations on the amount that can be forgiven?

Judge TACHA. My understanding of that proposal is that it would make it commensurate with the forgiveness that is already available for law enforcement officers and for prosecutors. The members of the Executive Branch and the prosecutorial side get that forgiveness, and I don't have the exact number. My memory is, though, that it might be up to—here: A borrower is entitled to cancellation

of up to 100 percent phased in over 5 years of employment in a qualifying agency of a Perkins loan made on or after November 15, 1990.

So they would get 100 percent, but it would be commensurate with what the prosecutors also would get, and it is for a loan made after 1990, and this is under a Department of Education authorization. And of course we would have to work with the Department of Education on that.

Mr. COBLE. I didn't hear what you said, Judge.

Judge TACHA. We would have to work with the Department of Education on that.

Mr. COBLE. Judge Tacha, section 105 repeals the geographic location requirements for court records. What are the benefits that will be realized in this?

Judge TACHA. Well, that is one of those that is to catch us up with technology. As you probably know, it was not too long ago that all court records were kept physically in the location. Now we are moving very rapidly to on-line case management and automated records of all kinds. I think it is fairly obvious that a geographic location would be hard to identify for those on-line records. They in fact reside all over in courts' computers, and so that particular statutory requirement in the age of technology is kind of an anachronism. We are actually involved in many projects around the Nation for even further automating these court records.

I might add on that point that that change is in part for the benefit of the litigants and counsel, because the more we are able to put the material, particularly case records and things like that, on-line, we make them far more available to the public litigants and to counsel. So that really is a service function as well as just keeping up with technology.

Mr. COBLE. Finally, let me ask one question, and I will recognize Mr. Berman. Section 105, Judge, amends the conditions of supervised release to allow intermittent confinement. Is this amendment in response to overcrowded prison facilities, which I know is a problem nationwide? And is there any opposition to this provision?

Judge TACHA. Well, let me answer the first one first. I am not clear that is directly a response to overcrowded conditions, because it is actually applicable as a condition of supervised release. And my understanding of this is that the Sentencing Reform Act and the Anti-Effective Death Penalty Act had some nonconforming provisions that give the Federal Courts an alternative to give intermittent confinement on supervised release. But we need to make the statutes conform to make that remain an alternative and let me tell you when that alternative is available. That alternative is available after a defendant is on supervised release within the first year of that supervised release and when the terms of supervised release have been broken, essentially. So—and also when the BOP, Bureau of Prisons, has facilities available.

The sentencing judges have found that to be a useful alternative to total revocation of supervised release. So it is yet another discretionary alternative for the sentencing judge that is short of canceling entirely the supervised release. So in that respect it may be a bit of a reaction, but it is really more of a public policy determination that there may need to be some alternatives to total rev-

ocation, depending on the defendant, and that would be left to the discretion of the judge.

Mr. COBLE. I thank you, Your Honor, and I think my red light is about to illuminate. So I will recognize the gentleman from California.

Mr. BERMAN. Well, thank you, Mr. Chairman. Just looking at certain provisions in the legislation, section 10, the protection against malicious recording of fictitious liens, makes it a crime punishable by up to 5 years to file a false lien or encumbrance against the property of any Federal judge. What is this trying to address? Why aren't civil remedies or fines sufficient to address it? Why judges as opposed to the world?

Judge TACHA. Well, I think it is because judges are the target of these rather more than the rest of the world. This would only go to frivolous filings of liens. Lots of the rest of the world has liens filed against them, but these are frivolous, not having to do at all with the property involved but having to do with totally unrelated litigation. These tend to be organized groups. We have had a particular problem on the West Coast with judges having liens filed, $50 million liens filed against their houses and then they go to sell their house and they discover the lien filed against it.

Mr. BERMAN. In what kind of litigation?

Judge TACHA. These are normally—well, they are often imprisoned or incarcerated people.

Mr. BERMAN. I see. I see.

Judge TACHA. And people who are not happy with the outcome, particularly in criminal litigation, although sometimes it is civil, but they are disgruntled litigants. So it doesn't—it is not a lien for the purpose for which a lien is designed; that is, a claim against the property. It is a claim against the Federal judge. And the U.S. Attorneys are called on to defend those. It is an increasing problem. My former Chief Judge——

Mr. BERMAN. So we will keep them in jail a little longer so they have more time to file more frivolous——

Judge TACHA. Well, we hope it might be a deterrent against the filing of these liens.

Mr. BERMAN. Well, I guess they would most know the value of that as a deterrent.

Judge TACHA. You and I probably can't speculate about that.

Mr. BERMAN. I guess—I assume on the student loan forgiveness for Federal defenders that there must be some provision that already allows that for U.S. Attorneys.

Judge TACHA. There is, and this is a matter of equity in the criminal justice system and one the judges think is very important. And I understand the American Bar Association has——

Mr. BERMAN. I congratulate you for viewing it that way, because they are a critical part of the system, and have a role to play in that system, and I think should be treated equally. I am curious, just as an old labor lawyer who hasn't practiced that for many, many years, what this issue is with the National Labor Relations Board.

Judge TACHA. You know, it is interesting. Most Federal agencies' orders are self-enforcing.

Mr. BERMAN. So the NLRB has to go to the Circuit Court.

Judge TACHA. They do. The NLRB has to come actually twice in many circumstances. They come first for the enforcement of the order, and then if the order is not complied with, they must come back for the contempt or sanctions of various kinds. The hope here is—and I am told we are working closely with the NLRB on this, because we would want it to work appropriately for the courts and the agency, but the provision provides for a 60-day period, during which one could appeal an order and come to the Circuit Court of Appeals.

Mr. BERMAN. The provision makes a substantive change in the law?

Judge TACHA. It does indeed, both giving the District Courts the contempt and sanctioning power and after 60 days making the order self-enforcing.

Mr. BERMAN. Just on the enforcement or on the contempt?

Judge TACHA. There is always contempt power. This gives jurisdiction in the District Courts for contempt and sanction power as well as the Court of Appeals.

Mr. BERMAN. And what about for enforcement?

Judge TACHA. During the 60-day window period, if you will, there is still an appeal of enforcement to the Court of Appeals, but after 60 days it would be self-enforcing. So it is sort of an exhaustion——

Mr. BERMAN. So the NLRB comes down with a decision ordering certain remedies for unfair labor practices. Instead of the board or the region having to now go to the Ninth Circuit to get that order enforced, the other side has a certain number of days to appeal that decision?

Judge TACHA. Yes.

Mr. BERMAN. Directly to the Court of Appeals?

Judge TACHA. To the Court of Appeals. Actually, there are three venue choices, but yes.

Mr. BERMAN. And if they don't, that becomes an enforce order, and then if it is not complied with, they can go to the District Court?

Judge TACHA. Exactly.

Mr. BERMAN. For contempt.

Judge TACHA. Exactly.

Mr. BERMAN. I have other provisions of the National Labor Relations Act that I would like to change. Can I use that for this as well?

Judge TACHA. Well, that is up to you. This is one where we think it serves both the board and the courts.

Mr. BERMAN. This could be a very good bill if we could just—I have a lot of things in the labor law I would like to put into this.

I think that—oh, final question. On this issue of electronic records and eliminating the requirement for physical records in the courthouse, it has been suggested that, well, what about the member of the public who doesn't have the computer at home; there are people who like to go down there and peruse court records for whatever reason that might appear bizarre to us, they think is important to them. Should the courthouse have some process by which in a reading room or something like this they could have access to a computer to go on-line, to look at the electronic records?

Judge TACHA. You know, Mr. Berman, that is an issue that the Judicial Conference and the Committee on Court Administration are looking at right now about the extent of accessibility, on-line accessibility of court records, and my understanding is that the proposals—and these are not finalized—the proposals are to do some courthouse inspection of records that would make that kind of thing available. That is not yet, I think, through the system. We have a staff member.

Okay. I am told every courthouse has them, and they are free.

Mr. BERMAN. Computers that the public can access to——

Judge TACHA. To get the court records. So I guess the answer is we have done it.

Mr. BERMAN. Thank you, Mr. Chairman.

Mr. COBLE. I thank the gentleman. The gentleman from Florida, Mr. Keller.

Mr. KELLER. No questions.

Mr. COBLE. The gentleman from Massachusetts, Mr. Delahunt.

Mr. DELAHUNT. Yes. Thank you, Mr. Chairman. Welcome, Your Honor.

Judge TACHA. Thank you.

Mr. DELAHUNT. Has any thought been given to expanding from the NLRB to other agencies in this bill?

Judge TACHA. Well, not in this bill, and I am not aware of other agencies that would have exactly this problem. Most agency orders, I think almost all, are on their face self-enforcing. So it is an anomaly in NLRB history I think that the NLRB acts—I mean orders are not. And it is actually an interesting anomaly, but I don't know the history of it.

Mr. DELAHUNT. I see. I didn't realize that, but that is interesting.

Recently, there was a GAO study that I and another Member had requested regarding the level of compensation for court-appointed counsel, and the disparity between those representing indigent criminal defenders based on an hourly rate and counsel retained by the Government in civil litigation was striking. It was substantial. You spoke earlier to the issue of the Federal defenders, and providing them with a—I forget what the benefit was, but the same benefit as is currently provided to the Assistant U.S. Attorneys. In your opinion, the Federal Defender Program, are salaries and benefits comparable to United States Attorneys?

Judge TACHA. Well, Federal defenders would be in the same boat as all the rest of the judiciary employees, and at least our study would suggest that the benefits particularly are not comparable to some other executive agency.

Mr. DELAHUNT. Compensation?

Judge TACHA. Compensation, I am sorry. I just don't know exactly where it fits vis-a-vis the U.S. Attorneys, but there is a provision in the statute that makes them equivalent for salary purposes. And so I think that given the number of years in, it would be roughly equivalent.

Mr. DELAHUNT. Roughly the same pension benefits, et cetera.

Judge TACHA. Yes. I think that is right, although remember, the Assistant U.S. Attorneys are employees of the Executive Branch and the Federal public defenders are employees of the Judicial Branch. So to the extent that we lag, they lag.

Mr. DELAHUNT. Right. I just think it is very critical to ensure that there is parity.

Judge TACHA. We fully agree.

Mr. DELAHUNT. And interestingly, in Boston recently in the Federal District Court, there is a very high profile case involving so-called organized crime figures, and the inability of the court to find counsel, outside counsel, led to what would appear to be an extremely heavy burden being placed on the Federal defenders. In your opinion, are there sufficient numbers in terms—to meet the caseload of Federal defenders, or is there an inadequate number of Federal defenders to meet the need?

Judge TACHA. Well, as you are probably aware, we, the entire judiciary tries to balance that defense load between Federal public defenders and what we call panel attorneys, who are the private counsel who are paid by courts.

Mr. DELAHUNT. But that is my point, Your Honor. In terms of those panel attorneys, if we are paying them a $100 an hour, you are not going to get anybody today for that. I mean, and I am thinking of the kind of complex cases that, you know, that are out there, particularly in the area of economic, white collar crime that require an awful lot of hours, that can be disruptive of a private practice. I just wonder if we need more resources to ensure the quality of justice in our system is at a responsible level.

Judge TACHA. The Conference has had several proposals for increasing gradually, I might say, gradually and incrementally, those—both panel attorneys and the salaries of those that are—or the payment to Federal Public Defenders. Chief judges, I can tell you this, chief judges have the authority to pay excess compensation in cases that require it, and it is not an unusual situation. I have seen them frequently authorize that excess compensation. And I suppose that looking at that would give us an idea how often we pay that.

But, yes, the Conference thinks it is terribly important to pay adequately either retained counsel or our wonderful Federal public defenders. And we have a Committee on Defender Services that is actually chaired by a judge in my circuit who looks annually at this question of what the going rate ought to be, and I think have in the past few years recommended increases in that amount. So we are very aware and very concerned about that.

Mr. DELAHUNT. If the Court—if the Chair would indulge me for just a minute or so, I think it is a real critical issue, and it is something that does not get any attention. Clearly, you know——

Mr. COBLE. But I didn't hear what you said, Bill. By all means, you will have a couple more minutes. No problem at all.

Mr. DELAHUNT. I was addressing you as the Court——

Mr. COBLE. If the lady from California will be patient, I am sure she will be.

Mr. DELAHUNT. She will be reasonably patient, she informs me.

Judge TACHA. May I just interrupt you for a moment? I am just told that the Conference has recommended an increase of up to $113 an hour, and we so far haven't gotten the appropriations for that.

Mr. DELAHUNT. This is one of those issues that no one pays attention—there is no advocacy, you know, for compensation for indi-

gent defenders. There is no advocate within Congress for the defenders. Most of our resources obviously go to fight crime, but as someone who is very familiar with the criminal justice system, and particularly in light of some other revelations in the course of the past several years regarding death penalty cases and the core of the problem apparently being inadequacy of legal services—and, again, I am not just focused on paying panels—I think we really run the risk of providing such a meager amount of resources that we can really threaten, if you will, the quality of justice and have huge implications for the confidence of the American people in our system.

Judge TACHA. You know, one thing that you should know is I am very proud the Conference has undertaken and our Defender Services Committee particularly, and out in the Federal Public Defender services, undertaken a great deal of training for panel attorneys. The capital cases are an obvious example, but it actually goes much farther than that, and we have undertaken really with the help of the Defender Services Committee some pretty substantial training, and indeed I am going down to New Mexico in September to work with some of the U.S. Attorneys and the panel attorneys and so forth.

Mr. DELAHUNT. Well, I would hope that you and your colleagues would focus on that issue that really doesn't attract any attention whatsoever.

Judge TACHA. Thank you.

Mr. DELAHUNT. And I empathize with you as far as the liens. The concern in my previous life, I was a prosecutor, and I had, I think, by the time it was over billions of dollars of lawsuits that were lodged against me.

I conclude by saying that I think the judiciary in many respects is overworked, understaffed and underpaid, and I will yield back.

Mr. COBLE. And, Bill, for your information——

Mr. DELAHUNT. All the court personnel, I might add.

Mr. COBLE. For your information, then, you may be interested. I received correspondence from one of my Federal district judges back home directing attention to the compensation of the court-appointed lawyers, to which you just alluded.

I thank the gentleman, and I am pleased to recognize the gentlelady from California, Ms. Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman. I am sorry I am late. I had to attend to the matter on the floor as this hearing began.

I appreciate the written testimony that you have provided. It is excellent, and I think the bill has much merit.

Judge TACHA. Thank you.

Ms. LOFGREN. One question I did have, and this is not directly on point to the bill, although there is reference to electronic filing and records, I am very interested in the view of the judiciary on the issue of access to records through the Internet. And I think there is an assumption on the part of some that because these are public records, therefore, they should be on the Internet. And I don't have a conclusion on that subject yet myself, but as I think through these issues, for example, bankruptcy filings, you know, there is a lot of information that could be data mined in those files.

Certainly the potential for identity theft would be elevated through easy access to the information.

So although they are public, they are not very available, and I am sort of wondering whether the assumption that we would put everything on-line is one that the judiciary embraces or the Division. What are the thoughts?

Judge TACHA. Yes. As a matter of fact, that very topic has been the subject of considerable discussion and the subject of some recommendations that have come to the Conference with respect to very detailed financial information particularly. I am not exactly sure—and I have got some staff here that can tell me.

The answer to your question is, yes, we have thought about it, and I am just told—I knew there was a committee out there studying it. It is called the Privacy Committee. Because there is this—the public access is one issue. This counterbalancing, for lack of a better word should be called a privacy issue, especially with respect to both security and financial issues. I am told they are about to make a recommendation. The Conference has not yet acted on sort of where those lines might be drawn.

We always—I always like to say the courts are totally open to the public, and we have always said that, but in this particular respect, open on the Internet has some liabilities or at least some risks that we want to be very careful about. And we would be glad to keep you posted and will keep you posted.

Ms. LOFGREN. I will very much value getting that report and sorting through it. I mean, as the issue—I remember years ago the Federal Court in San Jose was a trailer, and we now have an actual Federal Court building, but at the time——

Judge TACHA. Yes.

Ms. LOFGREN [continuing]. I was there as a young attorney and waiting for my matter, and there was a—they were doing traffic tickets. The magistrate was doing traffic tickets from Moffett Naval Air Station and the defendant said why are we making a Federal case out of this. It sort of sensitized me that certain magistrates are dealing with essentially municipal court matters because of the location of the offense in some cases, and some of that material—some of those files have—I don't know that we want to essentially publish as opposed to make available in a record.

So the other issues I am interested in in particular are patent court issues and the interplay with trade secrets and those types of matters, and I am hoping that the committee will also deal with that.

Judge TACHA. Yes. On that subject, as you probably know, there has always been the ability to seal documents, especially in the trade secrets area, and of course I don't see that changing overly, but we will have to make sure that there are mechanisms——

Ms. LOFGREN. This has recently become a huge controversy in California relative to who has the burden to seek to seal, and, you know, what kind of time frame will there be and what will automatically be made available. And there are some materials that are essential to a business entity that may not actually meet the threshold of a trade secret. And the concern, at least in the high-tech communities is sometimes the lawsuits are filed just to get the

information, not to find justice and a cause of action. So I am very interested in what the bench might have to say on that.

Judge TACHA. We will keep you posted on all those reports and determinations and I am sure the Conference will be taking this up shortly.

Ms. LOFGREN. Thank you.

Judge TACHA. Thank you.

Mr. COBLE. I thank the gentlelady. Your Honor, we appreciate your being here and your testimony. I am about to say something, Your Honor, that is—I am going to take you on a circuitous trip. This is an issue over which the Crime Subcommittee would really have jurisdiction, but we are going to take advantage of the presence of a member of the judiciary, and I am going to share it with you. Your Honor I am very distressed—and I even talked to Zoe Lofgren about this—I am very distressed about overcrowding conditions in prisons. I think that may well be a time bomb that is ticking and probably more seriously felt at the State level than the Federal, but do you have any comment on that?

Judge TACHA. Yes. The Conference has—and I think it is a very important piece of this puzzle. The Conference has long been opposed to mandatory minimums, and I think it would be fair to say that some, not all, but some of the overcrowding in prisons has to do with the mandatory minimums set in most criminal situations at 5 years. Now, the safety valve, which you are aware of, helped that a little bit, but the automatic imposition of mandatory minimums has had a rather dramatic effect, I think, on especially Federal prison populations. I can't speak to the States, but the problem in here is in the Federal prison populations as well.

So the Conference is on record as opposed to those, and we think that would be a very important step toward relieving a lot of issues, not the least of which is some discretion on the part of the sentencing judge for the lower mandatory levels.

Mr. COBLE. We might pursue that, then.

Bill, you or Zoe have anything further?

Your Honor, again, we thank you for your testimony, and the Subcommittee appreciates your contribution, and we welcome the others in the audience who are with us today. This concludes the legislative hearing on H.R. 2522, the Federal Court Improvements Act of 2001. The record will remain open for 1 week.

The Subcommittee stands adjourned.

[Whereupon, at 10:50 a.m., the Subcommittee was adjourned.]

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