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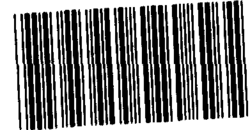

STATEMENT OF

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GENERAL GOVERNMENT DIVISION

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,

AND THE ADMINISTRATION OF JUSTICE

HOUSE COMMITTEE ON THE JUDICIARY

ON H.R. 7039

Mr. Chairman and Members of the subcommittee we appreciate the opportunity to testify before you today on H.R. 7039. This bill would amend existing laws governing the protection of Government witnesses, the performance of U.S. marshal duties, and the fees that can be charged for certain services provided by the Government in connection with litigation in Federal courts. This bill would also amend Rule 4 of the Federal Rules of Civil Procedure relating to the service of process.

Our comments are based in large part on work we have performed in response to a request by Senator Max Baucus to review the operations of the United States Marshals Service and

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U.S. marshals. To date we have issued two reports from this review. 1/

Our first report concerned operating problems caused by the existing organizational arrangement which makes U.S. marshals subject to control by two different branches of the Government. The second report discussed in part the need to raise fees for service of process and the need to lift a restriction on the use of mail as a method to serve certain types of civil process. Our third report which will concern the Witness Security Program is not yet complete. Because many aspects of H.R. 7039 are related to our work, our testimony will be directed at its provisions.

PROTECTION OF WITNESSES

Title I of the bill is concerned with the administration of the Witness Security Program. It would repeal Title V of the Organized Crime Control Act of 1970 (84 Stat. 933) which led to the establishment of the Witness Security Program and would provide more comprehensive direction for conducting the program. We believe that the Congress should consider a number of factors in deliberating on the bill.

Program growth

Proposed section 3521(a) of the bill would lift the existing restriction in the law that witnesses admitted into

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1/These reports are "U.S. Marshals' Dilemma: Serving Two Branches of Government" (April 19, 1982), and "U.S. Marshals Can Serve Civil Process and Transport Prisoners More Efficiently" (April 22, 1982).

the program be involved in testifying against organized criminal activity. By lifting the organized criminal activity restriction, more persons clearly could be eligible for admission to the program. If the legislative expectation is to actually increase the number of program participants, we believe the subcommittee should obtain information from the Department of Justice and pertinent law enforcement bodies concerning the potential resource requirements that could result from an increased use of the program.

Agreements with protected witnesses

Proposed section 3521(c)(1) would require the Attorney General to enter into an agreement with witnesses before providing them protection. The agreement would set forth the witnesses' responsibilities, the protection that the Attorney General will provide, and the procedures that will be followed if a breach in the agreement occurs.

This would substantially change current program practices by establishing an agreement enforceable by both the witness and the Justice Department. We believe the subcommittee should better define the nature of the agreement contemplated by the bill. It is not clear whether the agreement required by H.R. 7039 would be a contract, or some other type of agreement that could be enforced without applying the principles of contract law.

In this regard, the Department has argued that contract doctrine was not applicable to the current Witness Security Security Program. One of the reasons cited was that a

witness' participation in the program (i.e. testifying) failed to meet the elementary contractual requirement of consideration. Because it is a citizen's duty to testify, an agreement to do something that one already has a clear duty to perform cannot serve as consideration for a contract. The Attorney General also has taken the position that 18 U.S.C. 201(h) prohibits him from entering into a contract to procure the testimony of a witness. This law forbids offers or payments to, and solicitations or receipts by a witness of anything of value 'for or because of' testimony given or to be given by a witness. In view of these arguments, we recommend the bill be clarified to explain whether the agreements required under the bill would be contracts between witnesses and the Attorney General and the types of relief that would be available to a witness in case of a breach of the agreement by the Attorney General.

Termination from program

Proposed section 3521(d)(1) concerns the termination of protection for persons in the program because of substantial breaches in the agreement they entered into with the Attorney General. This section provides for notifying witnesses of their proposed termination from the program and of their right to request a hearing within 30 days of receipt of the notice. Hearings are to be held in a Federal district court before a magistrate who shall determine whether or not a substantial

breach of the agreement occurred. If a magistrate finds that the witness substantially breached the agreement, the magistrate may enter an order terminating the protection provided under this bill. Proposed section 3521(d)(2) provides for a similar mechanism if the witness believes the Attorney General breached the agreement. Decisions by a magistrate may be appealed to the district court. If a magistrate or court finds that a substantial breach occurred, it may grant injunctive or other relief to the witness.

We believe some clarification to section 3521(d) is needed. It has not been clear in the past whether "termination" meant simply that some services being given to the witness, such as funding, would cease or, whether all of the Department's responsibilities for the witness (including physical protection) would end as an incident of the "termination". The term "termination" is not defined in the pending legislation. In light of the past confusion over what constitutes termination, an issue may arise under this bill whether a termination action would allow the Department to continue to provide some level of protection for a witness. In addition, because hearings are usually held in open court and this could jeopardize a witness' new identity, we believe the bill should provide that hearings related to breaches of agreements should be held "in camera" or in some other secure manner. Otherwise, witnesses could endanger their security while exercising their appeal rights.

Civil proceedings

Finally, proposed section 3521(e) establishes procedures for the Attorney General to follow when a protected witness is named as a defendant in a civil proceeding. Under this section the Attorney General may serve the witness with process (a practice now followed by the Justice Department). If a judgment is entered against the witness, the Attorney General shall determine whether the person has made reasonable efforts to comply with the judgment and shall take appropriate steps to urge the person to comply with the judgment. If the Attorney General determines the witness has made reasonable efforts to comply, disclosure would not take place. However, if the Attorney General determines the witness has not made reasonable efforts, he may, after considering the danger to the person, either disclose the witness' identity to the plaintiff entitled to recovery pursuant to the judgment or he may enter an order requiring the person to take action, in accordance with the judgment, as deemed necessary. Failure to comply with the Attorney General's order may be considered a breach of the agreement established by subsection 3521(c). Under the bill, disclosure of a witness' identity and location will be made on the express condition that further disclosure by the plaintiff can be made only if it is essential to efforts to recover under the judgment. Disclosure or non-disclosure by the Attorney General will not subject the United

States to liability or be considered a breach of the agreement by the Attorney General.

Proposed section 3521(e) is designed to address a problem that various third parties--such as creditors--experience when persons are relocated by the Government. The problem is how to enforce a judgment against a witness when his/her new identity and location are unknown. We have two comments on the proposed section.

First, the section will not resolve the problem that may arise where the Attorney General believes a witness has made a "reasonable" compliance effort, but the plaintiff does not. At this point, the plaintiff, who could not identify or locate the witness, would be hindered substantially in his ability to recover a court judgment. In this situation the Attorney General would be placed in the difficult position of balancing the relative importance of the judgment to be enforced against the need to protect witnesses enrolled in the very program the Department is charged with administering.

Second, proposed section 3521(e) is not a panacea to all problems encountered by third parties when attempting to enforce judgments. Under this subsection, any action (disclosure or issuing an order) by the Attorney General is contingent on the consideration of the danger to the witness posed by the action. Obviously, any disclosure of a witness' new

identity and location could potentially diminish the security of a witness. Thus, it is possible that disclosures might not occur in many instances under this section. Issues exist as to how much discretion the Attorney General should have in this matter and with the process by which third parties pursue their legal rights against witnesses. We are considering alternatives which may differ from 3521(e).

UNITED STATES MARSHALS SERVICE
AND THE SERVICE OF PROCESS

Title II is divided into five sections. Section 201 basically codifies the establishment of the Marshals Service and its powers and duties. We have some reservations concerning section 201. Section 202 amends 28 U.S.C. 1921 to allow the Attorney General to prescribe fees for the service of process and section 203 amends Rule 4 of the Federal Rules of Civil Procedure--the general rule which governs the manner of serving civil process. We are generally in favor of sections 202 and 203 as they substantially concur with the recommendations contained in our second report on marshals.

Power/duties of Marshals Service

Proposed section 201 contains three major initiatives: (1) the elimination of the political appointment of U.S. marshals, (2) the elimination of the ability of the courts to control the provision of necessary services to them, and (3) the reduction of U.S. marshals' involvement in serving summonses, complaints, and subpoenas.

Relationship to the courts

Section 201 would significantly change existing law governing the performance of marshal duties--such as court security, service of process and execution of court orders--for the Federal courts. Current law provides that a presidentially appointed (with Senate confirmation) U.S. marshal will attend sessions of court at the court's direction and will execute all orders and process directed to him under U.S. authority. Proposed section 561(c) would eliminate the political appointment of U.S. marshals. Proposed section 562(a) would eliminate the courts' ability to direct the performance of certain duties for the courts. Under the bill, marshals would be appointed by the Attorney General, and services for the courts would be provided by the Marshals Service as directed by the Attorney General.

The change in the manner of appointment of U.S. marshals would probably be beneficial to the Marshals Service's efforts to supervise and direct district marshals' operations. This is so because as political appointees, U.S. marshals are neither appointed to nor removed from office by the Attorney General. Consequently, this affords them a degree of independence from the Director of the Marshals Service who is appointed by the Attorney General. On the other hand, a change in the appointment process without a corresponding adjustment to meet the needs of the judiciary could be detrimental to the courts' ability to have marshals perform necessary duties.

By repealing the authority of the courts to direct marshals to perform necessary services (court security, process service and execution) for the judiciary, the Attorney General solely would be responsible for directing marshals in these areas. By design, this change will necessarily increase the dependence of the courts on the Department of Justice. Therefore, this would be a less responsive system to meet the needs of the district courts.

The bill does not designate the services presently performed by marshals for the courts as a priority function of the Attorney General. Thus, it is possible that providing these services to the court could carry a low priority in view of all the other investigative and enforcement functions performed by the Department. The courts may have little recourse other than to accept whatever level of services the Marshals Service would provide.

In summary, we believe an entity within Government should exist which has as its primary basic mission the performance of services deemed necessary by the courts. If the direct relationship of the courts to marshals is severed as proposed by this bill, we believe there should be a corresponding adjustment to ensure the judiciary's needs are met in a responsive manner. Obviously, the views of the judiciary on this matter are crucial.

Civil process

Proposed section 562(b)(2) would limit marshals' involvement in serving summonses and complaints and subpoenas for private litigants to three circumstances. These are:

(A) When a party is proceeding under 28 U.S.C. 1915 (in forma pauperis), 28 U.S.C. 1916 (seaman actions) or if service is required under any other express statutory provision.

(B) When a court issues an order stating that a marshal is needed to properly effect service.

(C) When a party submits an affidavit indicating that service by other means is not feasible.

Our second report on marshal operations concluded that marshals were being used excessively to serve routine civil process. The report recommended that the Judicial Conference of the United States develop an amendment to Rule 4 of the Federal Rules of Civil Procedure to limit marshals' involvement in serving civil process to those situations when service of process by marshals is specifically required by law or is deemed necessary by the courts.

There are two differences between proposed section 562 (b)(2) and our recommendation. The first is that the proposed section allows either a litigant, through the filing of an affidavit, or a judicial official to determine if a marshal is needed to serve process. In contrast, we recommended that the

authority to make these determinations be vested ultimately in a judicial official.

We do not believe litigants should be in a position to unilaterally determine, absent any criteria, whether a marshal is needed to serve process. Without some controls over the ability of private litigants to make these determinations, this type of provision could undermine the purpose of the change. Specifically, if each litigant is given the choice between a U.S. marshal and a private process server, and the fees for both persons' services are essentially comparable, the litigant might normally be expected to choose the U.S. marshal. The marshal (as a law enforcement official) lends an added aura of authority to the function of serving process that is not needed for most civil process, but is nonetheless probably welcomed and desired by a litigant.

If the provision for the submission of an affidavit by private litigants is to be retained, we recommend that the Congress should also delineate specific criteria which must be met by the litigant before a marshal serves the litigant's process. Alternatively, the Congress could provide that each district court specify the conditions under which a litigant could request that a marshal serve process.

The second difference between our recommendation and the bill is the method used to reduce marshals' involvement in serving process. Our report recommended that a change to Rule

4 of the Federal Rules of Civil Procedure, rather than a change in the general statute authorizing marshals to serve process, was the best vehicle to achieve this reduction because we considered the desired change to be of a procedural, rather than legislative nature.

In April 1982, the Supreme Court transmitted amendments to Rule 4 to the Congress for approval. However, in August 1982, the Congress passed Public Law 97-227 which delayed the effective date of the amendments until October 1983 to enable it to review specific comments and criticisms related to the proposed amendment.

One specific criticism related to an apparent ambiguity between the current statutory authorization of U.S. marshals to serve process--28 U.S.C. 569(b)--and the proposed Rule 4 amendment. On one hand, the proposed amendment was intended to limit marshals' involvement in serving process. However, current law would continue to read that marshals "shall execute all lawful writs, process and orders issued under authority of the United States, including those of the courts . . ." Thus, the argument was made that litigants might rely on 28 U.S.C. 569(b) to routinely utilize marshals to serve process, thereby thwarting the intent of the Rule 4 amendment.

This bill would amend both the law governing marshals' process serving efforts (section 562(b)(2)) and the applicable

portion of Rule 4 (section 203(c)(1-3)) so that they are consistent. These portions of the bill would essentially reinforce each other and collectively achieve the same purpose as our recommendation. However, we believe our concerns about the ability of litigants to request marshals to serve process should still be considered.

Also, the bill appears to contain an inconsistency relating to the service of process. This inconsistency involves proposed section 562(b)(2)(B) regarding the proposed statute authorizing marshals to serve process and proposed section 203(c)(2)(C) which would amend Rule 4 of the Federal Rules of Civil Procedure. The former provision seems to allow district courts to establish rules providing either a case-by-case or a blanket determination that service of process by a marshal is necessary, while the latter provision seems to limit this determination to a case-by-case basis. We recommend that consideration be given to the additional workload that could be placed on the court if decisions are required to be made only on a case-by-case basis.

<u>Process fees</u>

Section 202 of Title II proposes to amend the statutory provision relating to the fees marshals charge for serving process--28 U.S.C. 1921. This bill is the latest in a series of legislative efforts to amend this outdated statute. The fees marshals charge for serving process are set by statute

and have not been changed significantly in over 180 years. In 1799, the Congress established a fee of $2.00 for serving writs and $.50 for serving subpoenas. A rate of 5 cents a mile was also allowed. In 1962, Public Law 87-621 increased the basic fees to their current level: $3.00 for serving writs and $2.00 for serving subpoenas, plus 12 cents a mile. Private litigants are charged this fee by marshals for serving their civil process unless they are determined by the court to be indigent.

We estimate that during fiscal year 1980 the cost of serving civil process exceeded the fees charged by between $2.0 and $4.7 million. During this period marshals served about 353,000 pieces of civil process for private litigants. We believe private litigants should pay fully for process service performed for them by marshals. This bill would allow the Attorney General to set the fees to achieve this purpose. As such, we support Section 202.

Use of mail

Section 203 of Title II would amend Rule 4 of the Federal Rules of Civil Procedure. The portion of section 203 which attempts to make Rule 4 consistent with the marshals' process serving statute was discussed previously. However, another portion of section 203 relating to the service of summonses and complaints by mail warrants discussion.

As previously mentioned, in August 1982, the Congress delayed the effective date of amendments to Rule 4 because of

specific comments -nd criticisms it received regarding them. In regard to serving process by mail, a concern was raised that the proposed amendment would have specified that only certified or registered mail could be used to serve summonses and complaints by mail. Thus, any Federal judicial district which was currently using a method of mail service authorized under State law, other than certified or registered mail, could no longer use that method.

Our report recommended that all Federal judicial districts be authorized to use certified mail to serve summonses and complaints regardless of whether a corresponding authorization was provided for under State law. Section 203 would authorize the use of certified mail as well as other methods of process service authorized by State law. The effectiveness of mail service authorized under State law other than certified mail was not within the scope of our review.

Finally, we note that the proposed amendments do not provide for the entry of default judgments if a person served by mail fails to appear or respond. We recognize that the consequences that should follow from a litigant's failure to comply with service of process by mail is a controversial issue. Nevertheless, we believe some meaningful sanction or mechanism should be in place to enhance the viability of certified mail as a method of process service. Under

proposed section 203 a person who is properly served with a summons and complaint by certified mail and fails to appear or respond is liable only for the costs of subsequently being served in person.

We did detailed audit work relating to the service of process in eight Federal judicial districts, three of which used certified mail to serve summonses and complaints. Although not always following the practice, all three districts had entered default judgments on persons served process by certified mail. In these three districts, we spoke with judges, magistrates, U.S. marshals, clerk of the court personnel, and U.S. attorney personnel to gain their perceptions on the effectiveness of certified mail for serving summonses and complaints. In addition, in two of the three districts, we analyzed files of civil cases in which default judgments were rendered on persons served process by certified mail.

Our work showed that certified mail is an effective method of serving summonses and complaints and that few challenges were made in those cases when a default judgment was entered against a defendant based on service by certified mail. For certified mail to be effective, some meaningful consequence should result if process is properly served and ignored. We question whether the lesser sanction of section 203--payment for service in person--will be an effective

mechanism to promote the utility of certified mail.

This concludes our prepared statement. We hope this information will be helpful to the subcommittee in its efforts to evaluate this legislation. We would be pleased to respond to any questions at this time.