

FY 2012 President's Budget Request

Fees and Expenses of Witnesses

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Overview Summary Statement
Fees and Expenses of Witnesses

For the Fees and Expenses of Witnesses (FEW) appropriation, the Department requests a total funding level of \$270,000,000 for FY 2012 to remain available until expended. This resource level is a request of \$101,700,000 increase for program enhancements over the FY 2011 Full Year Continuing Resolution level. The (FEW) is a mandatory appropriation and is under Strategic Goal III to ensure the Fair and Efficient Administration of Justice. Electronic copies of the Department of Justice's Congressional Budget Justifications and Capital Asset Plan and Business Case exhibits can be viewed or downloaded from the Internet using the Internet address: <http://www.udoj.gov/jmd/2012justification/>.

The Fees and Expenses of Witnesses activity provides funding for all fees and expenses associated with the provision of testimony on behalf of the Federal Government. Specifically, there are two types of witnesses that are compensated under the provisions of this activity. Fact witnesses testify as to events or facts about which they have personal knowledge. These witnesses are paid a statutorily established rate of \$40 per day plus reasonable amounts for travel and certain other costs associated with their appearance. Expert witnesses provide technical or scientific testimony and are compensated based on negotiations with the respective Federal Government attorney. Funding allocated to this activity is also used to pay the fees of physicians and psychiatrists who examine defendants upon order of the court to determine their fitness to stand trial.

The Emergency Witness Assistance Program allows the Government to aid witnesses who might not otherwise testify because of perceived threats surrounding the litigation. This program started in 1997 and is limited to a participation period not to exceed 30 days. The services provided include transportation needs, temporary housing, temporary subsistence, emergency telephone calls, and child/elder care.

The Protection of Witnesses activity provides funding for the security of government witnesses, or potential government witnesses, and their families when their testimony, concerning organized criminal activity, may jeopardize their personal security. Typical expenses include, but are not limited to, subsistence, housing, medical and dental care, travel, documentation, identity changes, one-time relocation, costs associated with obtaining employment, and other miscellaneous expenses. This activity also provides for construction and maintenance of strategically located safesite facilities to house protected witnesses before and during trial; the purchase and maintenance of armored vehicles; and the maintenance of a secured network.

The Victim Compensation Fund was established by Section 1208 of the Comprehensive Crime Control Act (Title II of P.L. 98-473). The Fund is used by the Attorney General to "pay restitution to, or in the case of death, compensation for the death of any victim of a crime that causes or threatens death or serious bodily injury and that is committed by any person during a period in which that person is provided protection under this chapter." In the case of death, an amount not to exceed \$50,000 may be paid to the victim's estate. Moreover, the act authorizes payment of an amount not to exceed \$25,000 to the estate of any individual whose death was caused by a protected witness before the enactment of this law.

The Private Counsel activity was established under 28 C.F.R. 50.15 and 50.16, whereby, the Civil Division is authorized to retain private counsel to represent government officers and employees who are sued, charged or subpoenaed for actions taken while performing their official duties. Further, funding allotted to this activity is used to pay private legal representation expenses associated with the provision

of testimony before Congressional committees in instances wherein government counsel is precluded from representing Federal Government employees, or in instances wherein private counsel is otherwise appropriate.

The District of Columbia Superior Court Informant Program (SCIP) was established upon passage of the 1991 Dire Emergency Supplemental Appropriations Act. Unlike the Witness Security program, which provides permanent relocations and identity changes, the SCIP provides temporary relocation and limited protective services to witnesses who provide prosecution testimony in District of Columbia Superior Court cases.

The Alternative Dispute Resolution activity funds the expenses of hiring third party neutrals and witnesses in resolution proceedings.

The Foreign Counsel activity was established under 28 C.F.R. § 0.46, whereby, the Civil Division is authorized to all other civil litigation including claims by or against the United States, its agencies or officers, in domestic or foreign courts, special proceedings, and similar civil matters not otherwise assigned, and shall employ foreign counsel to represent before foreign criminal courts, commissions or administrative agencies of the Department of Justice and all other law enforcement officers of the United States who are charged with violations of foreign law as a result of acts which they performed in the course and scope of Government services.

II. Summary of Program Changes

Item Name	Description				Page
		Pos.	FTE	Dollars (\$000)	
FEW	Fees and Expenses of Witnesses- Expert Witnesses	0	0	92,039	6
FEW	Protection of Witnesses	0	0	9,661	9

II. Program Changes by Decision Unit to Strategic Goal

Item Name	Decision Unit		FTE	Dollars (\$\$\$)	Number and Type of Positions	
					Position Series	No. of Positions in Series
Fees and Expenses of Witnesses – Expert Witnesses	FEW	3	0	92,039	0	0
Protection of Witnesses	FEW	3	0	9,661	0	0

III. Appropriations Language and Analysis of Appropriations Language

Appropriations Language

For fees and expenses of witnesses, for expenses of contracts for the procurement and supervision of expert witnesses, for private counsel expenses, including advances, and for expenses of foreign counsel, \$270,000,000, to remain available until expended , of which not to exceed \$10,000,000 is for construction of buildings for protected witness safesites; not to exceed \$3,000,000 is for the purchase and maintenance of armored and other vehicles for witness security caravans; and not to exceed \$11,000,000 is for the purchase, installation, maintenance, and upgrade of secure telecommunications equipment and a secure automated information network to store and retrieve the identities and locations of protected witnesses.

Note.—A full-year 2011 appropriation for this account was not enacted at the time the budget was prepared; therefore, this account is operating under a continuing resolution (P.L. 111–242, as amended). The amounts included for 2011 reflect the annualized level provided by the continuing resolution.

Analysis of Appropriations Language

No substantive changes proposed.

Note: The FY 2012 President’s Budget uses the FY 2011 President’s Budget language as a base so all language is presented as new.

Legal Activities
Fees and Expenses of Witnesses
Program Performance Justification
Activity Resource Summary
(In thousands of dollars)

IV. Decision Unit Justification

Activity: Fees and Expenses of Witnesses

<i>Fees and Expenses of Witnesses</i> TOTAL	Perm. Pos.	FTE	Amount
2010 Enacted with Rescissions			122,583
2011 CR			122,583
Adjustments to Base and Technical Adjustments			0
2012 Current Services			122,583
2012 Program Increases			92,039
2012 Request			214,622
Total Change 2011-2012			92,039

Base Program Description:

This program provides for payment of fees and expenses of expert witnesses who appear on behalf of the Federal Government when scientific or technical expertise is required in the prosecution or defense of a case. The pursuit of complex litigation by the Department would not be possible without qualified experts to testify and to refute the non-legal particulars of individual cases. The testimony of expert witnesses is essential to the successful outcome of such litigation. While a wide array of specialized disciplines are involved in the Department's litigation, experts from certain disciplines are used extensively. For example, approximately seventy percent of expert witnesses used by the Department in 2010 were physicians, psychiatrists, appraisers, engineers, or economists. Also, the testimony of fact witnesses is used in court proceedings by the Department's legal divisions and the United States Attorneys. Fact witnesses are needed in a wide range of court proceedings, as well as pre-trial conferences. Daily attendance fees and other expenses paid to fact witnesses are intended to defray the costs of appearing to testify. The attendance fee is set by law. Courts often order the Federal Government to pay the costs associated with mental competency examinations conducted by physicians or psychiatrists. These examinations are performed in an attempt to determine whether an accused person is mentally competent to stand trial and/or was mentally competent at the time of the offense.

Planned Base Initiatives:

- To provide adequate funding for payment of fees and related expenses incurred by individuals who provide factual, technical or scientific testimony on behalf of the United States or court designated indigent individuals, as provided by law. Funds provided for this activity also guarantee the right of accused persons to a fair and impartial trial by ensuring that the accused is mentally competent to stand trial and that the court has testimony regarding the mental competency of the accused at the time of the alleged offense.

- To provide reasonable compensation for expert witnesses, who testify on behalf of the United States, at rates established by the Attorney General or the Assistant Attorney General for Administration, pursuant to 28 U.S.C. § 524.
- To provide adequate resources to compensate fact witnesses who testify on behalf of the Federal Government for the expenses associated with the attendance at legal proceedings. The court-attendance fee paid to fact witnesses is set by law (28 U.S.C. § 1821). As a result of Public Law 96-346 (September 10, 1980), the amounts authorized for travel, per diem and mileage are set by regulations governing official travel by federal employees and promulgated by the Administrator of the General Services Administration.
- To provide adequate resources to compensate fact witnesses used by those defendants designated as indigent by the courts. Expenses are paid to those witnesses who appear in criminal proceedings in Federal court for the indigent defendants.
- To provide payment for the fees and expenses of psychiatrists who perform court-ordered evaluations to determine the mental competency of defendants, pursuant to 18 U.S.C. § 4241, § 4242, and § 4248.

Legal Activities
Fees and Expenses of Witnesses
Justification of Program and Performance
Activity Resources Summary
(In thousands of dollars)

Activity: Protection of Witnesses

<i>Protection of Witnesses</i> TOTAL	Perm. Pos.	FTE	Amount
2010 Enacted with Rescissions			34,000
2011 CR			34,000
Adjustments to Base and Technical Adjustments			0
2012 Current Services			34,000
2012 Program Increases			9,661
2012 Request			43,661
Total Change 2011-2012			9,661

Base Program Description:

The procedure for designating a person as a protected witness is set forth in Department of Justice OBD Order 2110.2 "Witness Protection and Maintenance Policy and Procedures." This order places within the United States Marshals Service the responsibility for the security of these witnesses and their families. This program provides for their financial maintenance including the following: subsistence expenses; housing; medical and dental expenses; travel; documentation expenses for identity changes; one-time relocation; costs for obtaining employment; and other miscellaneous expenses. This activity also provides for construction and maintenance of strategically located safesite facilities to house protected witnesses before and during trial. Therefore, the Witness Protection Program provides the funding for the protective services offered to the District of Columbia Superior Court Witnesses for subsistence expenses; travel; temporary relocation and other miscellaneous expenses.

Planned Base Initiatives:

- To increase the effectiveness of the Department's efforts to combat criminal activity in such areas as organized crime, drugs or narcotics, and murder or conspiracy to commit murder, by ensuring the safety of endangered or threatened witnesses.
- To protect witnesses and their families when the testimony of the witnesses may jeopardize their personal security.
- To compensate witnesses for subsistence costs such as housing, food, relocation, and incidental expenses as provided by the Witnesses Security Reform Act of 1984.
- To provide orientation, documentation, and family-oriented services to new WITSEC Program entrants. In FY 2010 a realignment of the current program structure was proposed by eliminating the Superior Court Informant Program (SCIP) and moving the funds previously allotted for the SCIP in the amount of (\$1.0 million) to the Protection of

Witnesses decision unit. A formal notification of the proposed decision unit realignment will be transmitted once the FY 2010 President's request is enacted.

- To increase the effectiveness of Federal prosecutions in the District of Columbia by providing funding to temporarily relocate District of Columbia Superior witnesses who face potential danger as a result of their participation in Superior Court prosecutions.
- To provide funding to temporarily protect Superior Court witnesses and their families when the testimony of the witnesses may jeopardize their personal security.
- To compensate Superior Court witnesses for subsistence costs such as food, temporary relocation, and other expenses incidental to their protection.

Legal Activities
Fees and Expenses of Witnesses
Program Performance Information
Activity Resource Summary
(In thousands of dollars)

Activity: Victim Compensation Fund

<i>Victim Compensation Fund</i> TOTAL	Perm. Pos.	FTE	Amount
2010 Enacted with Rescissions			0
2011 CR			0
Adjustments to Base and Technical Adjustments			0
2012 Current Services			0
2012 Program Increases			0
2012 Request			0
Total Change 2011-2012			

Base Program Description:

This program provides resources to compensate individuals who are victimized by protected witnesses. The Fund was initially funded by the 1985 Supplemental Appropriations Act (P.L. 99-88).

Restitution will not exceed \$50,000 for those victimized since the establishment of the Fund. Restitution not to exceed \$25,000 shall be paid to the estate of victims killed as a result of crimes committed by persons who have been enrolled in the Witness Security Program if such crimes were committed prior to enactment of P.L. 98-473. The Department paid \$22,500 from this program in FY 2006 and 2007. No costs are anticipated for this program in FY 2011 and FY 2012.

Planned Base Initiative:

- To provide compensation to those individuals, or, in the case of death, to the individual's estate, who are victimized by a protected witness.

Legal Activities
Fees and Expenses of Witnesses
Program Performance Information
Activity Resource Summary
(In thousands of dollars)

Activity: Private Counsel

<i>Private Counsel</i> TOTAL	Perm. Pos.	FTE	Amount
2010 Enacted with Rescissions			7,000
2011 CR			7,000
Adjustments to Base and Technical Adjustments			0
2012 Current Services			7,000
2012 Program Increases			0
2012 Request			7,000
Total Change 2011-2012			

BASE PROGRAM DESCRIPTION:

This activity provides funding to allow the Department to retain outside private counsel to represent Government officers and employees who are sued for actions taken while performing their official duties. As provided for under 28 C.F.R. 50.15 and 50.16, the Civil Division is delegated the authority to retain such counsel and further provided that payments for such services will be payable from the Department of Justice appropriations.

Planned Base Initiatives:

- To continue to defend Federal employees personally sued for carrying out official duties. To retain private counsel to represent Government officers and employees who are sued for actions taken while performing their official duties.

Legal Activities
Fees and Expenses of Witnesses
Program Performance Information
Activity Resource Summary
(In thousands of dollars)

Activity: Superior Court Informant Program

<i>Superior Court Informants</i> TOTAL	Perm. Pos.	FTE	Amount
2010 Enacted with Rescissions			0
2011 CR			0
Adjustments to Base and Technical Adjustments			0
2012 Current Services			0
2012 Program Increases			0
2012 Request			0
Total Change 2011-2012			

Base Program Description:

This program provides for funding for the protective services offered to the District of Columbia Superior Court witnesses. Specifically, funding is provided for subsistence expenses; travel; temporary relocation and other miscellaneous expenses. Funding in 1996 was provided from available balances. All participants have already converted to the Witness Security Program (WSP). No one has entered this short term program in four years. Due to the lack of activity in this program, previously available funding has been moved into the allotment for Protection of Witnesses where SCIP funding originated.

Legal Activities
Fees and Expenses of Witnesses
Program Performance Information
Activity Resource Summary
(In thousands of dollars)

Activity: Alternative Dispute Resolution

<i>Alternative Dispute Resolution</i> TOTAL	Perm. Pos.	FTE	Amount
2010 Enacted with Rescissions			1,300
2011 CR			1,300
Adjustments to Base and Technical Adjustments			0
2012 Current Services			1,300
2012 Program Increases			0
2012 Request			1,300
Total Change 2011-2012			

Base Program Description:

Alternative Dispute Resolution (ADR) encompasses a wide range of problem-solving and conflict management techniques including mediation, early neutral evaluation, arbitration and mini-trials. ADR processes offer the opportunity to settle pending civil litigation in ways that can be more efficient than unassisted negotiations, and on terms that can be more advantageous to the parties. According to the National Performance Review, ADR can enhance the public's access to justice by reducing delays and costs associated with government litigation. ADR can provide quick solutions in government disputes which, in turn, produce savings in interest payments on outstanding debts that the government owes in cases in litigation. ADR can provide quick solutions in government disputes which, in turn, produce savings in interest payments on outstanding debts that the government owes in cases in litigation. ADR can provide flexibility, creativity, and control that lawyers and clients do not enjoy in litigation. Moreover, ADR often produces better, more comprehensive long-term solutions to problems.

Planned Base Initiatives:

- To attempt resolution of civil disputes and litigation by using professional services of a mediator, arbitrator or other alternative dispute resolution provider.
- To provide funding to pay the Government's share of the costs incurred during ADR proceedings.

Legal Activities
Fees and Expenses of Witnesses
Program Performance Information
Activity Resource Summary
(In thousands of dollars)

Activity: Foreign Counsel

<i>Foreign Counsel</i> TOTAL	Perm. Pos.	FTE	Amount
2010 Enacted with Rescissions			3,417
2011 CR			3,417
Adjustments to Base and Technical Adjustments			0
2012 Current Services			3,417
2012 Program Increases			0
2012 Request			3,417
Total Change 2011-2012			

Base Program Description:

This activity provides funding to allow the Department to retain outside foreign counsel to represent Government officers and employees who are sued in a foreign country while performing their official duties. As provided under 28 C.F.R. § 0.46, the Civil Division is delegated the authority to retain such counsel and further provided that payment for such services will be payable from the Department of Justice appropriations.

Planned Base Initiatives:

- To continue to defend Federal employees personally sued for carrying out official duties. To retain foreign counsel to represent Government officers and employees who are sued for actions taken while performing their official duties in a foreign country.

V. Program Increase by Item

FY 2012 Program Increase:

A. EXPERT WITNESSES

A program increase of \$92,039,000 is requested for FY 2012.

Projected expert witness costs for FY 2012 are expected to increase for the Department's primary expert witness users in areas that continue to expand such as national security investigation and prosecutions and in fraud cases arising from the Government's response to the economic crisis. In November, 2009, a Federal judge ruled that the Army Corps of Engineers' failure to properly maintain a navigation channel led to a massive flooding in Hurricane Katrina. Because of that decision, the Federal Government may be made liable for billions of dollars in damage claims; therefore, a significant amount of expert witness resources will be needed to accurately and fairly access the thousands of claims filed in this case. Further, the Vaccine Program has experienced a staggering increase in claims, largely attributable to the assertion that thimerosal, a vaccine preservative, can cause autism. Also, in connection with the increase in the number of Spent Nuclear Fuel trials, additional experts will be called upon to give testimony.

Further, one hundred and fourteen tribes have filed 98 Tribal trust cases in the United States District Courts in the United States Court of Federal Claims. The ability of the United States to defend these claims, or their potential settlement, depends overwhelmingly on expert witness testimony. The United States holds approximately 46 million acres of land and natural resources in trust for the Tribes. Expert witnesses play an integral role in assessing the value of the land and the underlying value of all natural resources that accrue to Native Americans.

Also, there has been a significant increase in the need for expert witnesses in United States Attorney Office cases especially complex financial and mortgage fraud cases and large-scale tax shelter cases. From FY 2006 to FY 2010, obligations for expert witness increased by \$58.2 million, from \$118.0 million to \$176.2 million.

Since FY 2006, this no-year mandatory appropriation has remained flat at \$168,300,000. In that time, no program increases have been requested for this appropriation because the unobligated balances carried forward have bridged the gap between the enacted levels and the actual need. However, the unobligated balances are nearly depleted. Specifically, the unobligated balances decreased by 61.1 percent from \$96.8 million carried into FY 2006 to \$18.6 million carried forward into FY 2011. The requested program increase for FY 2012 is necessary to maintain the current Fees and Expenses Witnesses operating level.

While the activities within the Fees and Expenses of Witnesses appropriation have been funded with a combination of direct appropriations and prior year unobligated balances carried forward, the funding is no longer sufficient to maintain existing operating levels because the unobligated balances have decreased significantly over time.

The chart below illustrates the historical change in starting balances and obligations for the full appropriation.

<u>Fees and Expenses Unobligated Balances</u>						
	<u>FY 2007</u>	<u>FY 2008</u>	<u>FY 2009</u>	<u>FY 2010</u>	<u>FY 2011</u>	<u>FY 2012 est</u>
Starting Balance	\$96,232,000	\$90,670,000	\$64,995,000	\$39,767,000	\$18,551,000	\$0
Delta from (\$)		-\$5,562,000	-\$25,675,000	-\$25,228,000	-\$21,216,000	-\$18,551,000
prior year (%)		-6%	-28%	-39%	-53%	-100%

<u>Fees and Expenses Obligations</u>						
	<u>FY 2007</u>	<u>FY 2008</u>	<u>FY 2009</u>	<u>FY 2010</u>	<u>FY 2011 est</u>	<u>FY 2012 est</u>
Obligations	\$204,294,000	\$219,975,000	\$232,140,527	\$229,216,737	\$270,000,000	\$289,000,000
Delta from (\$)		\$15,681,000	\$12,165,527	-\$2,923,790	\$40,783,263	\$19,000,000
prior year (%)		8%	6%	-1%	18%	7%

1/ The Department expects to augment the FY 2011 enacted funding level with prior year recoveries to meet the estimated demand for expert witness services.

FY 2012 Program Increase:

B. PROTECTION OF WITNESSES

A program increase of \$9,661,000 is requested for FY 2012.

The Protection of Witnesses is requesting a program increase of \$9,661,000 in FY 2012 because of increased subsistence and operating costs, including food, fuel and air travel which reflect inflation associated with costs of living as well as higher than typical costs of fuel and air travel. The number of witnesses entering the Program are associated with violent gang activity and can not be transported on commercial aircraft with the general public, thus, requiring an increased number of private charter flights at a greater expense than commercial travel.

This increase also includes security equipment and counter-surveillance technology to protect witnesses. The United States Marshalls Service is in the development phase of a pilot program to electronically track program participants and develop counter-surveillance capabilities against those who may seek to harm them. Technologies currently being considered in this include Closed Circuit Television (CCTV), and Global Pre-Positioning Systems (GPS) monitoring. The CCTV application expanded would provide enhanced countermeasures supporting witness security protective missions and movements. The development of GPS technology can also enable Witness Security Program personnel to monitor the location, movement activities of Program participants, potentially improving security for those participants. Enhanced use of GPS technology would provide real-time geographic data alerting Program personnel of any security compromises and allow for an immediate response. The cost of a CCTV system can vary widely depending on video quality/resolution and the number of component elements (cameras, monitors, cabling/hardware, recording equipment, etc). Basic systems can start at approximately \$600 to upwards of \$5,000 depending on component capabilities, wired/wireless access, transmitter/receiver requirements, weather protection, etc.

VI. Program Offsets by Item –Not applicable

VII. Exhibits