IMPROVING AND STRENGTHENING THE OFFICE OF ADVOCACY

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IMPROVING AND STRENGTHENING THE OFFICE OF ADVOCACY

THURSDAY, MARCH 22, 2001

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
Washington, DC.

The committee met, pursuant to call, at 10:12 a.m. in Room 2360, Rayburn House Office Building, Hon. Donald Manzullo [chairman of the committee] presiding.

Chairman MANZULLO. Good morning and welcome to this hearing of the Committee on Small Business. A special welcome to those who have come some distance to participate and to attend this hearing.

Since its inception in 1976, the Office of Advocacy has had the difficult, but important, task of being an effective voice for small business within the executive branch of the Federal government. There have been a number of distinguished individuals who, as Chief Counsel, have directed the Office of Advocacy and who have left an admirable record of accomplishments, despite the lack of resources and limited authority.

Two of the former Chief Counsel are here with us today—Frank Swain and Thomas Kerester. We welcome their participation and the insight that they bring to this hearing.

Over time there have been various constructive suggestions to strengthen the Office of Advocacy and to make it more effective and independent. Some of these suggestions are contained in S.295, "The Independent Office of Advocacy Act of 2001," which was introduced in the Senate by the Chairman and Ranking Member of the Senate Committee on Small Business on February 27, of this year.

In the House of Representatives, we have drafted a bill for discussion that makes the Office of Advocacy more independent and provides that Office with greater resources and more authority to represent the interests of small businesses.

I want to work with my colleagues on both sides of Capitol Hill to pass a bill that produces real results for main street America.

Some of the features of the House draft include: Empowering the Chief Counsel to issue regulations under the Regulatory Flexibility Act thereby putting teeth in the requirement that Federal agencies accurately measure the economic consequences of their actions before regulating small businesses; transferring the Small Business and Agriculture Regulatory Enforcement Ombudsman to the Office of Advocacy thereby providing more muscle to protect small businesses from arbitrary and unconscionable enforcement actions by Federal agencies; giving the Chief Counsel the right to file com-

ments in all rulemakings where the Federal agency has requested comments and to intervene in on the record rulemakings [where no fine or penalty is involved]; requiring that all Federal agencies publish the Chief Counsels comments about a proposed regulation, that they give such comments substantial weight, and that they make known any disagreements with the comments; concentrating in the Office of Advocacy and under the leadership of the Chief Counsel the responsibility for combating contract bundling and providing an augmented staff, at no additional cost, to do an effective job.

In short, the House draft concentrates on strengthening the Office of Advocacy and the Chief Counsel to combat three major problems facing small businesses—preventing needless and burdensome regulations, assisting small businesses that have been the victims of Federal agencies' unfair compliance and enforcement actions, and being the focal point for combating contract bundling.

Again thank you all for participating in this hearing. And thank you in the audience for attending this hearing.

[Chairman Manzullo's statement may be found in appendix.]

[The following was submitted in place of Ms. Velazquez verbal statement due to loss of the transcribers tapes.]

Ms. VELAZQUEZ. Thank you, Mr. Chairman.

We all know the incredible job the Office of Advocacy has done to protect the interests of small business within the federal government.

Whether they were saving $3 billion dollars in regulatory reform for small business or overseeing the SBREFA process at EPA—the Office of Advocacy has done whatever is necessary to protect this bedrock of our economy from sometimes over-reaching federal policies.

However, as Members of this Committee—it is our duty to review options which can improve the way federal agencies conduct the people's business. In this case, we must review these options knowing any determinations we make are done so with the best interests of small businesses squarely in mind.

Today is the first step in what I believe will be a critical undertaking for this Committee—and for America's small business community.

This hearing provides a unique opportunity for this Committee to take a "first-mover" approach towards strengthening Advocacy—providing a powerful and independent presence for small businesses in America.

As we begin our examination of how to make the Office of Advocacy more independent, it is crucial that we keep our "eye on the ball" during this process. We must do everything to ensure that small businesses have a voice and that their interests are given full weight in the deliberations of the federal government.

Unfortunately, moves like simply providing Advocacy its own authorization line item and then calling that "independence" does absolutely nothing for small business.

So, then how do we measure whether or not we have been successful in creating a more independent Office of Advocacy? The answer to that question is simple—Have we reinforced the agency's ability to oversee the Reg Flex Act?

But allow me to make one point crystal clear—success is not just in providing the tools—it is how effective you are in using those tools.

In fact, as is the case with this agency—it is success can be traced directly to simplicity itself. Advocacy has been so incredibly effective because it has stayed true to its core mission of providing support to small businesses and entrepreneurs.

Indeed, it is this "simplicity" that has been its guiding force and greatest strength.

However, as this process moves forward today, many of the proposals we will hear would force Advocacy into a much greater role—which would lead to a decline in its effectiveness as an agency.

While some of these proposals, including having Advocacy take a more active role in the issues of federal procurement, are examined—I would caution Members that these enhancements should not come at a reduction in its responsibilities under the Reg Flex Act.

We also need to have a frank discussion of resource allocation for a new and improved Advocacy.

Unfortunately, with the current budgetary situation, which has seen SBA's operating budget slashed by 43%, is it realistic for any of us here today to assume that this Administration will support any new ventures—when they have clearly demonstrated an unwillingness to meet even their current commitments.

My colleagues, these issues of funding and focus are absolutely crucial that it will take the partnership of this Committee, our counterparts in the Senate as well as the President and his Administration. But, this partnership should also include elements that are simply not in place as of yet—those elements are the SBA Administrator and the Chief Advocate.

For us to give this matter proper deliberation, these pieces are absolutely essential to our case—to be perfectly frank, we have to do this with their support and input. Without it, we are engaging in a "cart before the horse" type of action—which will lead us right back to where we are now.

And believe me, in doing so, we reduce our own effectiveness—which is not something we can afford to do in the current economic and political climate.

Mr. Chairman, in closing, I would like to thank you for convening this hearing today on such a critically important issue to small business owners. I would also like to extend my appreciation to the panelists for their testimony today. Their commitment to the protecting small businesses in this country deserves to be acknowledged and commended.

[Ms. Velazquez's statement may be found in appendix.]

[Missing portion of hearing due to loss of transcribers tape.]

STATEMENT OF FRANK SWAIN, A PARTNER IN THE LAW FIRM OF BAKER & DANIELS

[The first section of Mr. Swain's statement is missing due to loss of transcribers tape.]

Mr. SWAIN. Now it is not always contrary to the position of the administration, but the norm has been that the Office of Advocacy

is the—and it is the only presidential appointee that I am aware of that has this privilege—comes up here and testifies without having their statement reviewed for consistency of administration policy by the Office of Management and Budget. That has been the situation since 1978, and it's continued through every chief counsel as far as I know.

The other area that is strikingly independent is that through the original Regulatory Flexibility Act and now much more strongly under SBREFA, the Chief Counsel has the ability to participate formally in judicial level regulatory proceeding without the permission of other federal agencies and without the permission of the Justice Department.

This is unique. I do not think that there is any other office within the executive branch of the government that can appear against another federal executive agency into court. And this is truly independent and truly unique.

The question is whether this is enough or whether the office ought to be doing more and made more independent from the SBA.

My own view is that you give up something when you make it more independent. And what you give up is the ability to go in behind the scenes and work with regulators that are your colleagues in that Administration to try to work better decisions before they are ever published in the Federal Register.

It is clear that if an Administration official believes that the Chief Counsel for Advocacy is coming out of the same group and, to a degree, part of the same team, they are going to be more interested in working with them than if they are a wholly independent agency. And I think the $64 question is whether that is too much to give up if you make the Chief Counsel totally independent and a separate agency.

I will just address one other issue. It was alluded to by Congresswoman Velazquez. Even with the original statutory list of functions of the SBA Office of Advocacy, quite candidly, we had to pick and choose which we could and which we could not do.

The Congress really had us doing everything for small business, and we had, at our high point, probably 85 people in the office. And even with 85 people working full-time, we could not do everything that the law told us to do.

So we had to do some picking and choosing, and in cases where it was important to the Congress, we tried to discuss why we were not doing certain things. But I have a concern that we do not ask the office to do too much and spread it too thin.

[Mr. Swain's statement may be found in appendix.]

Chairman MANZULLO. Thank you very much. Our next witness is Tom Kerester. I think I pronounced it correctly. And the next five minutes of testimony is yours, Mr. Kerester.

STATEMENT OF THOMAS KERESTER, A REAL ESTATE CONSULTANT ON RESIDENTIAL AND COMMERCIAL PROPERTIES WITH COLDWELL BANKER STEVENS, REALTORS IN NORTHERN VIRGINIA

Mr. KERESTER. Thank you, Mr. Chairman and members of the Committee.

I am Tom Kerester. I served as chief counsel for advocacy from May 1992 to January of 1993, which was a very short period, under former president Bush. And even though it was short and demanding, it was very rewarding, very fulfilling, and very stimulating. And what it did was it renewed my faith in small business, in the entrepreneurial spirit, and in my belief that, as small business goes, so goes the nation.

I appreciate the Committee's invitation, and I applaud the Committee for taking this action. I want to make the record clear that I am testifying as a former advocate and not on behalf of any other person, group, company, or association.

Currently, I am a real estate consultant on residential and commercial properties with Caldwell Banker Stevens Realtors in Northern Virginia. And I say that because, as an independent contractor, I continue to face the small business issues that small businesses face across the country.

We all know that for the past 20 years plus, advocacy has served a very, very useful role. And, because of our complex society, I think advocacy is needed more now. And I am a firm believer that its role, authority, and stature should be elevated, if that is the proper term; and it would be under this bill.

As I said in my testimony before this Committee in April 1995, the greatest challenge facing small business today, as it has been during all that time, is gaining the public recognition at all levels of all governments, that small business is the engine that drives this economy. And this Committee and the Members know better than anybody else, that they are the engine that drives this economy. I think that the draft bill by the Committee goes a long way to achieving those objectives.

When I look at the background paper on the Office of Advocacy prepared by Jerry Glover, the most recent Advocate, I think they did a terrific job with the limited amount of professional and dedicated staff.

On seeing Frank Swain, I should give homage to him and to Milt Stewart for their efforts on behalf of small business over their term of office as Advocate.

Because of limited time, I want to focus my comments on the bill under three headings.

One is the power and functions of the chief counsel, the other is the budget line requirement, and the third is the new office location.

I had a good working relationship with Pat Saiki, the Administrator. When I came on board, she told me two things, "Be independent as you should be, but keep me advised," and we had a good working relationship.

Under the power and functions of the chief counsel heading, in my paper I mentioned four categories. One is that the bill clarifies the intent of Congress, and it lets the small business community know that this Congress will not tolerate costly and burdensome regulations and rules imposed by some overzealous bureaucrats.

Second, it ensures compliance with these rules by giving advocacy extended power and also gives them more oversight authority. And then it says to the chief counsel, "We are giving you all this,

but we want you to be held accountable to us and to the administration." And it provides rules within which they could do it.

And, as under present law, the chief counsel would be prohibited from distributing his reports, any of his reports that are laid out and specified in the bill, to anybody, any other agency, department, or any person first other than the President and the Congress. It prohibits him from distributing it to anybody before they distribute it to the Congress and the President.

With respect to the budget line item requirement, I think it accomplishes a number of congressional objectives. First, it showcases congressional intent to elevate the level and the stature of this new office. Second, it demonstrates to the small business community that it is doing these things. And, third, it signals to the new chief counsel's office that we the Congress are going to provide you with the authority, with the power, to accomplish all your objectives.

One other item that I want to touch briefly on is the new office location. I think it would be desirable, and I think it would be appropriate to do so.

Sharing the same office space with the Administrator may leave some with the impression that the chief counsel does report to the Administrator, which has not been the case and would not be the case under the bill. So I think it would simplify any misunderstanding and make it clear that that is not the case in this situation.

I lay out in my speech a number of issues that the Committee should take into account in deciding where it should locate, but I will not bore the Committee with those details right now because they are in my paper.

Mr. Chairman, those are about the only oral comments I have. They are very quick. I have been away from the chief counsel in office for a long time, and it is hard to recall some of the issues, okay. But I do appreciate your bringing some of us old gray hairs back to the table.

In conclusion, let me just say that I think the draft bill would make it better for Advocacy to accomplish its objectives as outlined by the Congress.

And I want to thank you again for inviting me. I also want to note that I am grateful to former President Bush for the opportunity to serve as the third chief counsel.

[Mr. Kerester's statement may be found in appendix.]

Chairman MANZULLO. Gray hairs are a sign of wisdom.

Thank you very much for your testimony, Mr. Kerester. Our next witness is Keith Cole. He is a partner in the law firm of Swidler Berlin Shereff Friedman. Mr. Cole?

STATEMENT OF KEITH COLE, A PARTNER IN THE LAW FIRM OF SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

Mr. COLE. Thank you, Mr. Chairman and members of the Committee.

To begin with, I would like to state for the record that I am not testifying today on behalf of my law firm or any particular client, but solely on my own behalf.

Next week, on March 29th, it will be the fifth anniversary of the enactment of SBREFA, legislation that—I was lucky enough to par-

ticipate in its drafting. Over the last five years, I have been involved in several rule-makings in which the Office of Advocacy actively participated. These include both high profile rule-makings like EPA's rule to revise the ozone and particulate matter NAACS standards, as well as less controversial rule-makings.

My overall impression is that the Office of Advocacy continues to do a good job raising with the various federal agencies the deficiencies of the Reg Flex analyses prepared by those agencies.

I have observed as the Advocate has pursued some of these issues to the highest level of the executive branch in an effort to make the voice of small business heard. However, I have also observed that the Office of Advocacy must, in some cases, pick and choose its battles.

When the SBA or other federal agencies propose regulations that run counter to the interests of small business or shirk their duties under the Reg Flex Act, the Advocate faces conflicting pressures.

While SBREFA has increased the tools available to the Advocate, it has not reduced the pressures facing that office. In fact, the strengthened tools provided by SBREFA may actually increase the pressures on the Advocate.

Especially in high profile situations, the Advocate continues to risk a long-term loss of influence within the administration team if he or she pushes the small business agenda beyond a certain point.

The chief lesson that I take away from this is that, given the position of the Office of Advocacy, there will always be tensions between the interests of small businesses affected by pending rule-making, and the long-term interests of the small business community in having an effective advocate in the executive rule-making.

There is no simple answer to this dilemma. The question is, can we strengthen the position of the Office of Advocacy in dealing with these pressures?

Let me turn to my comments on the discussion draft. To begin with, Mr. Chairman, let me compliment you and your staff on the work that is gone into the discussion draft. I believe that with some minor modifications the enactment of this legislation could provide significant benefits to the small business community.

First, the discussion draft would provide greater statutory independence for the Office of Advocacy. With the independence of the office more firmly established in statute, the Advocate will, I believe, have a strengthened hand to develop and advance the cause of small business in federal agency rulemakings. I might go even further to make the advocacy removable in his position only for cause.

Second, the draft establishes important new functions for the Office of Advocacy. I believe that the authority to issue regulations governing compliance with the Reg Flex Act is particularly important. No one in the federal government knows more about what is needed as part of a well done Reg Flex analysis than the staff of the Office of Advocacy.

Agencies throughout the executive branch would benefit greatly from the experience of the staff in the form of government-wide guidance on compliance with Reg Flex. This is a good government reform that is long overdue.

Third, I believe that the transfer of duties of the Regulatory Enforcement Ombudsman to the Office of Advocacy is appropriate.

The Ombudsman was established with great hopes by SBREFA in 1996. However I have been somewhat disappointed by the effectiveness, or lack thereof, of the Ombudsman. I view this as a troubled program in need of reform, and I believe the changes made by the draft would bring new life and energy to the position of Ombudsman as well as the Regulatory Enforcement Fairness Boards.

Fourth, I believe the abolition of the regional advocates and the transfer of these positions to the Office of Advocacy is appropriate and will provide a needed boost in revenues available to the Advocate. This, again, is a good government reform that is long overdue.

Lastly, I believe that expanded rights of the Office to participate in agency adjudications will allow the small business community's voice to be heard in areas where it has not been heard before.

Now let me turn to a couple of issues where I think we could see some improvements. First, as Congresswoman Velazquez mentioned, there is benefit to simplicity. And, by focusing the statutory mission of the Office of Advocacy, I believe you will give the Advocate a stronger mandate in dealing with other federal agencies and give small businesses a better chance to have their voices heard.

The draft currently lists some 14 functions, plus 5 additional functions of the Office of Advocacy, and many of these functions have multiple sub parts.

I am concerned that this diffuse mission will hamper the effectiveness of the office, and I strongly urge you to rewrite this portion of the bill to more narrowly focus the mission of the advocate.

I believe the primary mission of the Office should be to enhance the environment for small business success by ensuring federal agency compliance with the Reg Flex Act.

In support of this mission, there are a number of activities that the office should be directed to take. First, to examine the role of small business in the U.S. economy. Second, to measure the effects of regulation on small business, including tax regulations. Third, to commenting on proposed agency regulations and agencies' review of their regulations. Finally, to develop proposals for changes in agency policies to enhance small business success. That list of four missions is a much more focused mission statement than what is currently in the draft.

Second, I believe additional personnel are needed at the new Office of Advocacy. I do not know if I would define the structure of the positions within the Advocate's office in as detailed a fashion as the draft does.

Third, and without defining the internal structure of the Office, I would ensure that the economic research functions of the Office are conducted to serve the overall mission, particularly in support of ensuring agency compliance with Reg Flex.

Finally, with regard to the role of the Office in setting small business size standards for agencies that choose not to use the standards in their rule-makings, I would suggest that you ensure judicial review of these decisions take place within any litigation over the underlying rule-making.

With that, I thank you for the opportunity to testify and look forward to your questions.

[Mr. Cole's statement may be found in appendix.]

Chairman MANZULLO. Thank you very much. Our next witness is Mr. John Satagaj, president of the Small Business Legislative Counsel.

STATEMENT OF JOHN SATAGAJ, PRESIDENT, SMALL BUSINESS LEGISLATIVE COUNSEL

Mr. SATAGAJ. Good morning, everybody. When you have children, and they are growing up, you often wonder what they are going to look like when they become adults. Well, you are looking at the child of the Office of Advocacy grown up.

My career started for better or worse—I do not know what it comes out, started in the Office of Advocacy in 1978. So I have lived with the office. I have grown up with the office and now continue to serve the small business community. I got the bug when I went to the Office of Advocacy, and I have lived that ever since.

So I think I have a unique perspective on the office that is a little different than the two chief counsels and, of course, the other folks who work in the small business community.

It comes down to this. Being an advocate for small business is an art. And like all art, you cannot create art purely by painting by the numbers. It is something that is part of the person as well as it is the position.

So, as we go forward, the most important thing we are going to do is probably select a chief counsel because it is the person more than the position that truly makes the office.

But like any great artist, we have to give them the tools to be a great artist. You have got to have the paint, you have got to have the supplies in order to be an artist. And that is what this legislation is all about, is giving the tools to the chief counsel to perform the art of advocacy.

And already you are hearing things amongst my colleagues here, and I am sure Giovanni, as well, will hit the same theme, that the draft headed in the right direction of giving us that, giving the chief counsel the ability to perform the art because, ironically, the one thing we are doing here is we are saying to the chief counsel, "We are putting you between the rock and a hard place. That is your job. You have to go out there, and you have to advocate for small business, but you have to do it in a way that you have to make progress within an administration."

Jere, Tom and Frank and Milt Stewart before them worked as artists. They could do that. And that is what we need to do, is give the chief counsel the ability to perform the art.

I think they are all issued, and I think if you check Frank's pocket, you will see some smoke to go along with the mirror he's carried all the time because that is part of the job.

The second point I want to hit is economic research. It is one of the most important things the Office of Advocacy does.

As the chairman knows, last year we had a good little tussle with the IRS about cash accounting when they came in here. And some of you will remember the hearing when they were throwing out all kinds of numbers about how many businesses are already okay under the cash accounting method.

I was able to take some data from the State of Small Business report and some SOI, statistics of income, data and counteract that. And the chairman and I, we exchanged a bunch of letters back and forth with the Treasury.

If it was not for some of the data that we got out of the Office of Advocacy, we would not have made the progress we made there. We still have a way to go. We have legislation to correct the cash accounting problem, I might note. But it is that data that helps us.

Frequently, for example, I am asked about financing a small business. What is small business doing with their money? Where do they use it?

I am still using, thanks to Frank Swain over there, a 1984 copy of the State of Small Business that had the last good report that broke it down on the data on financing in a way, in terms of retained earnings and how you use depreciation. And it was Frank's great work at that time that helped that.

I do not know when the most recent one of these was published. I happen to have the 1995 addition, the Catalog of Small Business Research. I go through this thing all the time, looking for data that I can use because we all can tell horror stories. But providing the factual data is incredibly important. And giving the Office of Advocacy the tool for basic small business research as well as public policy research is very important.

And, finally, my third point is about the regulatory function. I support bringing the ombudsman in, consolidating.

It is important that we speak with a strong voice, those of us who represent small business, whether it is us in the private sector, you on the Hill here, or in the agencies.

Keith knows. I kept calling him up while he was drafting the legislation on SBREFA and said, "We have got to clone Karen Brown, the EPA advocate."

I think it was certainly our hope that SBREFA would do some of that, that we would get the strong advocates in the agency if we created a structure. We probably should have invested more in cloning than we did in that because we probably would be further along.

And Keith has addressed some issues. I think we need to tighten that whole area up, and so I support it.

Finally, I wanted to return where I began my remarks, as much as we do in terms of the legislation, it is the new chief counsel who is most important to us. And I am sure the administration is working hard on bringing us a permanent chief counsel.

In the interim, we need a strong chief counsel who understands small business, has a lot of experience, who can keep this running until we get to that point—I am confident that is going to happen—and then get us a permanent chief counsel who has a depth of knowledge, good technical skills, good legal skills, good communications skills, and, most importantly, a passion for small business.

That is why I was so thrilled that the chairman is here because when we had the hearing last year on cash accounting, I said, "There is a guy I really want to work with because he brings some passion to the table."

And thank you very much.

[Mr. Satagaj's statement may be found in appendix.]

Chairman MANZULLO. Thank you very much. Our next witness is Giovanni Coratolo. Mr. Coratolo is at the Small Business Center of the United States Chamber of Commerce.

STATEMENT OF GIOVANNI CORATOLO, SMALL BUSINESS CENTER, U.S. CHAMBER OF COMMERCE

Mr. CORATOLO. Thank you, Chairman Manzullo, ranking member Velazquez, other members of the Small Business Committee.

I am Giovanni Coratolo, director of Small Business Policy for the U.S. Chamber of Commerce. The Chamber commends this Committee for its dedication and interest in having this hearing to explore ways to improve the Office of Advocacy.

Like the others here today, I truly believe the passion of small business is important. With the right person and with a well-defined mission and armed with the tools to work effectively on behalf of small business within the administration, the chief counsel can have a profound impact on the regulatory process.

In many cases, the ability to interact with an agency at the earliest stages of rule-making and nip a problem in the bud before the agency becomes staunchly committed to a concept that would have dramatically negative consequences for small businesses. Understanding unintended consequences of the regulation before it goes into effect will help protect small businesses before flawed rules are published.

Recently, we have seen the Clinton administration finalize 29,000 pages of regulations. We are seeing the current administration struggling to understand them and attempt to either affirm or to find a way to reverse and mitigate them. A truly independent chief counsel for advocacy would prove invaluable in this process. Unfortunately, we are sitting here today without a chief counsel when we need him or her the most.

Now let me turn to the draft proposal and some of the fixes that it purports to advise.

First, like others, we feel that the continuity of leadership for the office is important. Having the chief counsel continue serving until the successor is in place reduces the likelihood of gaps in the leadership of the office. This can have profound impacts on the morale within the office and the momentum.

Second, specifying a line item for funding is also important. Certainly, in order to have a chief counsel that can provide a strong, independent voice for small business, separate line item funding is a must.

Funding for the office must be directly related to the checks and balances of the budget process and not subject to the political pressures of agency initiatives and pet projects.

Thirdly, it needs the tools to make the difference in the regulatory process. With the passage of the original Regulatory Flexibility Act of 1980 and its broadening under SBREFA, small businesses were given expanded rights in dealing with federal agencies, both in the rule-making process and the regulatory enforcement environment.

In a recent appeals decision, we have seen this authority erode under the National Ambient Air Quality Standards issued by EPA.

Advocacy's views expressed in an amicus curiae brief were not given deference. This draft legislation proposes to cure that.

Fourth, providing the chief counsel with adequate funds to commission economic research projects—and you have heard John mention this. This is very important to small business. We feel that much is gained by the research that advocacy performs on behalf of small business.

When Congress and policy makers better understand the role that small enterprises play in our economy and the impact that their decisions have on the vitality of smaller employers, they become more sensitive to the concerns of the small business community.

Although this is not contained in the draft legislation, we would encourage the continuation of the line item for economic research. This way there can be no doubt as to the amount Congress will allocate toward the important function of the chief counsel's office.

And fifth, consolidating the Regulatory Fairness, the RegFair program, under the chief counsel's direction. This has been mentioned before by some of my colleagues. We too feel this could be very important, certainly in this era of budget constraints. Having these two functions—which they are simultaneous in their missions at times—consolidated under chief counsel could be very, very important.

So, again, to just reemphasize, I think the mission has to be tightened, and, certainly, under the right person, with the passion of small business, I think we can have very effective leadership.

Thank you.

[Mr. Coratolo's statement may be found in appendix.]

Chairman MANZULLO. Thank you very much. We are going to go into recess until we come back from the floor, if you do not mind. Hopefully, it will not be too long, but the first vote is a motion to adjourn. That does not sound too promising.

[Recess.]

Chairman MANZULLO. We could reconvene. Congressman Velazquez?

Ms. VELAZQUEZ. Thank you, Mr. Chairman.

Mr. Chairman, several of my questions that I wanted to ask today were for Ms. Ryan. And then last night around 9:00 or 1:00 we found out that that changed and that Susan Walthall would be the person testifying. And I agree with you, that given the lateness, it would be unfair to the members who have not time to review her testimony to have her testify today.

But I hope that before we move to markup the bill, we could have someone from the Advocacy office to be here to share with us the administration's view on this legislation so that we could have their input.

And I would also like to see someone from the Office of Advocacy to be here because, under your bill, we are going to move that office into the Advocacy office—the ombudsman, yeah.

So I would hope that we could have another hearing where we could have the administration input and then the ombudsman's office to have their input.

And I would like to ask for Mr. Frank Swain and Thomas Kerester, your indulgence in answering questions that I was planning to make to the Office of Advocacy.

So my first question is to Mr. Cole. Last year you came before this Committee, and you testified that the best direction will be to create a commission. Is that your position today?

Mr. COLE. My position is that we need legislation to increase the independence and firmly establish the independence of the advocate.

I think there are a variety of ways to go about achieving that. We could do it through a commission. We could do it through forming an independent office.

I think there are trade-offs with each of these, and one of the benefits of the commission is it is a model that is more firmly established. We have commissions for federal trade, federal elections, consumer product safety. This is a model that is well understood.

So I still think that a commission might be the ideal solution, but I am not someone who lets the perfect be the enemy of the good. If this bill is the way the Committee chooses to move forward this year, I think it makes a contribution to small business by grounding the independence of the office in the statute.

Ms. VELAZQUEZ. So your position, in terms of the creation of the commission change, I guess, in light of the new legislation that we have before us?

Mr. COLE. No, it does not change. I believe that it is still the best solution.

Ms. VELAZQUEZ. Mm-hmm.

Mr. COLE. But I believe that this independent office is an improvement over the current situation. So I would support the enactment of this legislation and with the changes we have talked about, specifically, the kind of narrowing and focusing of the mission.

Ms. VELAZQUEZ. Okay. Thank you. Mr. Swain and Mr. Kerester, how important a role do you see the administrator and the chief counsel playing in the move to make Advocacy more independent?

Mr. SWAIN. Ms. Velazquez, I served with four different administrators, actually, five if you count the first administrator in the Bush administration. All of those people were supportive, gave me the budget support that I needed when I needed it.

But I think that the administrator's key role right now, the way the current system works, is basically to pass on the administrative requirement to the office. The administrator can either give or take away research money. They can either give or take away slots for personnel. And that is quite an influential role or could be quite an influential role.

It was not my experience that the administrator took any role at all in trying to adjust or moderate any of the positions that I took on the policy issues. Somebody mentioned before we had an informal understanding that I would keep the administrators informed of what I was doing, but they never said, "Do not do this."

You know, the OMB director called me up. And, in fact, the director did call Jim Sanders up several times and yell at me through him. But, you know, Mr. Sanders said, "That is the job of the advocate."

But I'll tell you, when you have the nominee for administrator up here, you will say to that person, "What do you want to be?" And, undoubtedly, that person will say, "I want to be the chief advocate for small business." And I do not think that any of them ever mean they want to be a chief counsel for Advocacy.

Ms. VELAZQUEZ. Mm-hmm.

Mr. SWAIN. But they want to be the point person for small business. So there is a lot of confusion built into the system, as Keith said.

The part of the bill that is really important—one part of the bill that 's really important is to get the budget out, separate, and I think that will make a huge difference. Otherwise, I think the administrator always has at least the potential of holding authority over the advocate's office.

Ms. VELAZQUEZ. Mr. Swain, do you believe we should wait to get their input before we finalize the proposal?

Mr. SWAIN. Unless you have to wait too long, and, hopefully, that will not be the case, I think it would be useful to get the input of the new Chief Counsel and the Administration.

I happen to know the person that has just been designated as the acting Chief Counsel, and she is a very capable individual. I would hope though that the Administration will soon nominate a Chief Counsel, that person will be confirmed, and you will be able to work directly with that person on legislation.

Ms. VELAZQUEZ. Mr. Thomas Kerester.

Mr. KERESTER. Although I was in office a short time, as I mentioned earlier, I did have a good working relationship with Pat Saiki, the administrator. And I can just relate a story to you about my independence, as she suggested I be.

At my public debut at the White House on May 2nd, the President announced a number of new IRS regulations with respect to depositing funds, taxes, by small business. I went back to the office, and I brought my staff together. We talked with a lot of small business people in the area and around the country, and we found these proposed regulations would be very, very disadvantageous to small business. So we wrote a very diplomatic letter to the Treasury, criticizing those regulations, which happened to make Wall Street Journal.

The administrator was advised of what we were doing, but we did not clear the letter with the administrator, nor with OMB.

Shortly after the letter arrived at the IRS, I had a call from a high level Treasury official saying, "How could you do this to the President for whom you work." I reminded them that I no longer worked for the President. I work for small business, and that is where we were.

Ms. VELAZQUEZ. Thank you. Mr. Cole, you your testimony, you are opposed to——

Chairman MANZULLO. We are beyond the five minutes.

Ms. VELAZQUEZ. Can I ask one more question?

Chairman MANZULLO. Sure.

Ms. VELAZQUEZ. Thank you. You indicate that you are opposed to the proposal of adding federal procurement duties to the Office of Advocacy. Can you please explain to me why do you not believe

that advocacy could be a useful tool in helping small businesses in the federal procurement process?

Mr. COLE. You began the hearing by talking about the need for focus in the mission of the office, and I am concerned that the current draft contains a listing of functions of the office that is so extensive as to dilute the direction. Frank Swain began his testimony talking about how, even in his day there were so many conflicting desires of people having for the office, that he had to pick and chose.

I know very well that there are problems in procurement that small business has faced. Perhaps it is my history with working on SBREFA that my focus has really been on how do we strengthen agency compliance with the Regulatory Flexibility Act.

I believe it would be most valuable to small business if we could get the Advocate to have a more focused mission. I have made some suggestions as to how to focus that, and my belief is that the mission should be focused on assessing the impact of regulations on small business.

Procurement is an important issue, but it would not be my top issue. I understand other folks may disagree, but in an effort to focus the Independent Office of Advocacy on a few core missions, I think it ought to be limited to agency compliance with Reg Flex.

Ms. VELAZQUEZ. Thank you.

Chairman MANZULLO. Thank you very much. I have got one question here. The Office of Advocacy statute says there is established within the Small Business Administration and Office of Advocacy. The management of the office shall be vested in the chief counsel for advocacy who shall be appointed from civilian life by the President with the advice and consent of the Senate.

Anybody want to try to answer me this question? Define what "appointed from civilian life" means? Does that mean somebody who has never served in government service, or somebody who served, left day one, then got appointed one day later? Does anybody know or want to try to define that?

Mr. SWAIN. I guess it is somebody that is not in the military.

Chairman MANZULLO. I do not think that is what that means.

Mr. SWAIN. I do not know. It may be a term of art. John.

Mr. SATAGAJ. We looked at this fact. As I alluded in my testimony, I did a few executive order drafts early on when I was at the office to try to fix it.

I think the thinking a the time—and I am putting words in somebody else's mouth—was more the interest in getting the experience of someone who had private sector experience.

Chairman MANZULLO. That is all I was saying.

Mr. SATAGAJ. Think it is, you know, the military. But someone from government, really, with no experience in the private sector.

So I—that was the intent, but I have never seen any true definition of it. We have been all operating on that assumption, is that we would like to see somebody with private sector experience.

Chairman MANZULLO. Thank you. We would change the statute, in our House draft, to the private sector. I am concerned about it because I think we will need the Senate to agree with that position. We want the Chief Counsel to be a tiger for the small business people, someone who dislikes government perhaps and is distrustful of

government. I am serious. Small business people do not like government. And the person who occupies that position has to have a small business mentality. Otherwise, I am not interested in he or she filling that position.

As Ms. Velazquez said we want a tiger in that office, somebody that is going to take the government to task.

Ms. VELAZQUEZ. But I like the government.

Chairman MANZULLO. We love America. But in terms of precisely the situation Mr. Kerester brought up, someone passes a regulation dramatically impacting small businesses in a Republican administration without taking the time even to talk to the small business people about it. Do you want to comment on what you said?

Mr. KERESTER. Mr. Chairman, I am happy to say that small businesses are not that type. IRS did change their rules. And I understand there is still a problem with IRS rules and regulations. I interpreted that to mean the private sector also.

Chairman MANZULLO. The private sector.

Mr. KERESTER. Without any basis, that was just my conclusion.

Chairman MANZULLO. Oh, okay. And that is the reason for it. Okay. Mr. Pascrell?

Mr. PASCRELL. A couple of areas, Mr. Chairman. First of all, I understand that when we do have a chief counsel, that we can bring the chief counsel back here and ask him about legislation that——

Chairman MANZULLO. Ms. Velazquez and I do not truly intend to move this bill until we have all of our homework done and all of the input from the administration.

Mr. PASCRELL. Thank you.

Ms. VELAZQUEZ. I promise you that.

Mr. PASCRELL. A couple of points. Mr. Coratolo, I am always interested in the Chamber of Commerce and its advocacy for small business and big business, whatever the case may be. And for the amount of legitimate criticism at times, harping at other times—my perception—about regulation, the House proposal gives the new office authority to exercise the right to intervene chief counsel in any adjudication or on on-the-record rule-making procedures.

Now how do you interpret the word "intervene?" How do you see that?

Mr. CORATOLO. Well, firstly——

Mr. PASCRELL. Excuse me. This is before any federal agency, not just in front of us. This could be in front of any agency. How do you see that?

Mr. CORATOLO. Well, firstly, under SBREFA, they have the authority with the SBREFA panels, and that certainly only applies to OSHA and EPA.

But intervening, I would think, would be applied to making sure that the Reg Flex analysis is done and done properly. And I think that is very important for small business.

Mr. PASCRELL. Do you think that has been done there? Under the present situation, under the present system, do you think that the chief counsel is carrying out this mandate?

Mr. CORATOLO. I think he attempts to carry it out. I think there is a lot of federal agencies that ignore their responsibilities and duties under the Reg Flex law that was strengthened under SBREFA.

Mr. PASCRELL. So you support a greater advocacy on behalf of small business, if we took a look at these rules before they became permanent on the record, that we could avoid a lot of the bureaucracy that exists and hurts business?

Mr. CORATOLO. Absolutely. I think there is a pride of authorship that occurs in rule-making. Once the rule is published and comes before the general public, I think there is a staunch uncompromising position taken by many of the agencies. Whereas, advocacy's best efforts have been working behind the scenes with the federal government and with federal agencies. And, hopefully, they have provided situations where flawed rules have not been pushed forward.

Mr. PASCRELL. Now my antennae go up whenever I hear of, you know 29,000 pages of regulations. That sounds very impressive. And I am not trying to be a wise guy here, but there are many regulations that need to be on the books, and many regulations need to be off the books. And that is what we are here for, trying, you know, to make some judgments.

But when you bundle—talk about bundling—all these regulations together and say this is, you know, the government at it's worst, and that is why we need to get the government off our back, it sends the wrong impression to the American people.

There are some areas that we deregulated because of your concurrence and other's concurrence. And now my folks in my district and many districts around America, "What the heck did you characters do up there in Washington?" Whether you are talking about telephones or whether you are talking about energy, a lot of things people are questioning.

We are saying, "Well, do not we want less government? Is not this the age of less government?" So we have got to deal with the—you know, the very, very specifics about what is and what is not and what should be.

And the second area I wanted to ask you about is, in what ways could an independent Office of Advocacy—if you can give me some specifics, I would appreciate it—have addressed certain issues in the past?

I mean, could you give an example of, if we had an advocacy office, a general counsel as you would like to describe it, define it, we could have presented something from happening? Could you give me an example?

Mr. CORATOLO. In other words, if we had an independent office that had specific line items?

Mr. PASCRELL. Correct, as you desire it.

Mr. CORATOLO. It would be hard to comment without giving due deference to the existing office and existing people.

I think the office having the flexibility of not being a tool of either administration, whether it is Republican or Democrat—and I think there are problems on both sides. I think Small Business has to have a voice that reflects the passion of small business and is not controlled by an aggressive administration, whether it is Democrat or Republican because there are abuses on both sides. And I apologize for not getting into specifics, but there could be abuses on both sides.

Mr. PASCRELL. The President, in the future, may not look to ABA for recommendations on judges, etcetera. Do you think we should establish it based—following up on what the chairman mentioned, that maybe should ask for a commission to recommend to the President some names as to who would fulfill general counsel's position? Might not that be a good idea?

Mr. CORATOLO. I am not enamored by the commission. I think the Office of Advocacy should work within the administration, within the executive branch. I think there is a great deal to be had, especially when you talk about the separation of powers issue. When you take it outside of the executive branch, you do not have the ability for the chief counsel to be plugged into the early rulemaking authority.

Mr. PASCRELL. You are not suggesting that it does not belong outside of the President's office?

Mr. CORATOLO. It belongs inside.

Mr. PASCRELL. It belongs inside.

Mr. CORATOLO. But it should be an independent voice.

Mr. PASCRELL. It should be an independent voice. Now how do we get an independent voice? How would you suggest we do that? You know, what should our recommendations be of getting this independent voice?

Mr. CORATOLO. Well, it should have a very tightly controlled mission. We should have, definitely, a line item for funding. There is no line item for funding right now. There is a line item for economic research, which is good. We would like to retain that line item for economic research. We would like to consolidate some of the programs. Certainly, I think all of these go to making it more independent.

Mr. PASCRELL. Well, would it be a bad idea if the business community recommended three names to the President, four names, five names, president select, not unlike the ABA?

Mr. CORATOLO. Certainly the recommendations, I think, are going to be there.

Mr. PASCRELL. And one last area, Mr. Chairman. I have to take exception with doing away, physically doing away with the regional offices, the regional advocates.

If anything, in the past four years, this committee has tried to get the government as close to the folks as possible. So either folks can get their hands around somebody's neck, or they can talk to somebody. And I am serious about that.

You know, to remove, physically remove the regional advocates, to me, does not in any way facilitate what we are attempting to do, hopefully, on both sides of this aisle. I do not know how you feel about that.

Mr. CORATOLO. We did not comment on that aspect of the legislation, and, to this point, we do not have a comment as far as doing away with regional advocates.

Mr. PASCRELL. Okay. Thank you very much.

Mr. CORATOLO. Thank you.

Chairman MANZULLO. Ms. Velazquez.

Ms. VELAZQUEZ. I thought that you did not let bureaucrats in Washington, so I do not understand. It is like, ironic to bring your

regional offices into Washington. We need to bring government close to the people. So you are right, Mr. Pascrell.

I would like to ask both gentlemen, Mr. Swain and Kerester, the following question.

The proposal we have under consideration today has many of the same positions as the legislation introduced by Mr. Connor last year. It physically removes the advocacy out of SBA, give autonomy to compliance regulations and consolidates the regulatory ombudsman into SBA.

In addition to that, it gives advocacy new authority over site standards and moves much of the contracting monetary authority from SBA into the Office of Advocacy.

The estimated cost last year, that we discussed last year, was $20 million. Because this includes most of Mr. Connor's bill and then some, it will probably cost, at minimum, $20 million.

My question to you and to the rest of the panel, how likely, given the fiscal climate that has seen SBA's own budget slashed by 43 percent, would the administration be willing to put up the increased funding for advocacy?

Mr. SWAIN. Well, of course, Congresswoman, I do not know the answer, so you are asking me to speculate, so I will.

Ms. VELAZQUEZ. Sure. Mr. Swain, if the office is out there as a totally independent agency, so it has to seek its own budget, it is going to be, candidly, a lot easier to have it suffer in the administration's request, this administration or any administration, and the Appropriations Committee.

I think it is going to be very easy to say, "Okay. The authorizing Committees think this ought to be a $22 or a $24 million agency. We are going to give it $12 million. Do the best you can." And then the $12 million gets cut back to $8 million and so on and so forth.

I think that that is more difficult to do, frankly, if it is within the umbrella of the SBA. That is just my speculation. I do not believe that this administration is going to be any harder on the SBA's salary and expense budget than any other administration. It just reflects the times that we are in and the budget rules that we have today. But that will be a continuing issue in any administration.

Ms. VELAZQUEZ. Mr. Kerester.

Mr. KERESTER. I am not familiar with the particular bill you are referring to, but I concur with Frank's comments.

Ms. VELAZQUEZ. It is the budget for SBA, you know, being cut by 43 percent.

Mr. KERESTER. The only comment I have is that small business is opposed to a larger and larger government, and now we are doing the opposite under the bill. We are creating more government. And I am not sure how the business community as a whole would respond to that, but I do support an independent office.

Ms. VELAZQUEZ. Thank you. Mr. Coratolo and Satagaj, would you be willing to go on record supporting a $20 million bill for the creation of an independent advocacy office?

Mr. CORATOLO. Well, as far as funding for the Office of Advocacy, we have not looked at any funding levels. And, at this time we would have to pass on going on record until we could actually look at what type of funding levels would be required in order to——

Ms. VELAZQUEZ. So, Mr. Coratolo, how could you come before our Committee and support a legislation without knowing, at least, the estimated cost of that legislation, especially coming from the U.S. Chamber of Commerce?

Mr. CORATOLO. Well, we philosophically looked at the legislation, and, there was no funding levels set within the legislation. Now we have lobbied every year to increase economic funds, along with John's group, for the Office of Advocacy. We have been very strong supporters. We have letters that have gone to the Appropriations Committee that have asked for full funding for the last two years.

Ms. VELAZQUEZ. But we are talking here, at a minimum, $20 million. So if that is what it takes, you will be willing, and you will engage your organization to encourage the administration to support $20 million for this?

Mr. CORATOLO. We have not looked at funding levels. Certainly, there is going to be a level of funding that is necessary in order to engage the mission. And we would be looking at supporting that level based on what we could review.

Mr. SATAGAJ. Well, the life of an advocate for small business is always chasing after dollars while holding government in line, and it is a challenge we face day in and day out. And I am going to tell you it is not easy to do it because, you know, as we go out, the part of the President's speech that he made before all you that resonated most with my members was restraining government, that we have been spending too much. So, you know, I hear that all the time on this.

On the other hand, we do need a voice for small business. If it takes $20 million, I hope we can find a way to find the $20 million if that is what it is going to take. But I am not going to kid you that it is a tough decision to even go back to my own members and say, "Listen, we want to restrain government."

And, indeed, I have been through the cuts in the SBA a thousand times and some of us that have been doing this a long time. And we take our whack in the small business community every time because our members believe in smaller government. So we will take the whack, but we also have to make sure the programs that we do fund for small business work.

It is not going to be an easy choice, and I know it creates some contradictions. But that is what we all get paid the big bucks for, is to make those decisions. And we are here to support small business. Let us do it.

And you know, we talk around things a lot here, but the cat is out of the bag in terms of we have an acting chief counsel coming on board, Susan Walthall, and Frank has mentioned it.

I think all of you on this Committee are going to be delighted to work with Ms. Walthall. I have known her for 23 years, and I can tell you that no one is as passionate about small business as she is, and as knowledgeable about the office. I think a lot of the questions you want to ask of advocacy you are going to get answers, and you are going to be thrilled regardless of whether you are a Democrat or Republican. We have an advocate for small business there in place. I think you are going to be delighted to work with her.

Chairman MANZULLO. Mr. Pascrell.

Ms. VELAZQUEZ. Thank you.

Mr. PASCRELL. I just had one comment, listening. We do not get the chamber in front of us that many times, and when you do, you want to ask too many questions, so I apologize.

Maybe this is not a question, but I was—I watched very carefully when this blueprint was printed and given out two weeks ago, a little over two weeks ago. And I did not hear one peep or read one word—and I try to read all the business magazines—of the associations that many of you represent responding to the proposed huge cut in small business.

Now we all want smaller government. We talk about it, and how you talk about it, we could make a case. We have got less federal employees now than we had eight years ago. I did not hear anything from the business community about that. But I understand the politics of the situation.

But, you know, I was driving down Main Street in Bloomfield in my district, Bloomfield, New Jersey, and I drove by the Bloomfield Rug and Carpet Company. It was a small store, and I remember going there with SBA folks two and a half years ago and, within two or three days, providing a small loan, $50,000, obviously guaranteed to help that company bid on projects it could not have bid on before. So not only was it sustaining itself, it was growing.

So why do we want less government? There is a very, very important role to be played—and I am not trying to proselytize here—for loans to people none of us have even heard about on back streets and front streets.

And for the business community to be quiet, you know, I am really—you know, who's ox is gored? If this is what this is going to be all about, then we are going to have a very cantankerous year ahead of us. There needs not to be any of that. We can work out things.

But this umbrella idea that government is evil or bad and is the source of all of our problems, you tell that to the carpet guy on Main Street in Bloomfield and a lot of people I can mention, small businesses, which is our backbone really, and how they are helped by the federal government because the SBA guaranteed a loan which they ordinarily could not have gotten.

What is your answer to the President about that? I am asking it rhetorically. But what is your answer to the President about that. Are these loans that we put together the last four years that have moved the women entrepreneurs and African-Americans and Hispanics—what is your word to them of what is to come down the pike at a time when they are going to need us more than ever maybe, the federal government, that is? What do you say to them.

And Mr. Chairman, you know, I prevail upon your good graces again.

Chairman MANZULLO. If the gentleman would yield, once the new administrator is confirmed by the Senate, then we are going to have a hearing on the budget, all the programs will be looked at. And the administration will have to defend whatever levels that is put in there.

Is there a question pending, or was that just a rhetorical question?

Mr. PASCRELL. Rhetorical.

Chairman MANZULLO. We want to thank everyone for coming. And it is going to take at least two more hearings in order to get the bill that we want. Mr. Cole, I appreciate your emphasis upon focus. You do not want a shotgun approach here. You want to be able to focus this office to make sure it accomplishes its intended purpose. And those of us here on the Committee appreciate the comments from everybody.

And everybody's comments will definitely be taken and weighed and taken into consideration as we continue to work on the draft of the bill. Thank you very much for coming.

[Whereupon, at 12:10 p.m., the committee was adjourned.]

DONALD A. MANZULLO, ILLINOIS
CHAIRMAN

NYDIA M. VELÁZQUEZ, NEW YORK

Congress of the United States
House of Representatives
107th Congress
Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515–6315

March 22, 2001

OPENING STATEMENT

CHAIRMAN DONALD A. MANZULLO
COMMITTEE ON SMALL BUSINESS

Improving and Strengthening the Office of Advocacy

Good morning and welcome to this hearing of the Committee on Small Business. A special welcome to those who have come some distance to participate and to attend this hearing.

Since its inception in 1976, the Office of Advocacy has had the difficult, but important, task of being an effective voice for small business within the executive branch of the Federal government. There have been a number of distinguished individuals who, as Chief Counsel, have directed the Office of Advocacy and who have left an admirable record of accomplishments, despite the lack of resources and limited authority.

Two of the former Chief Counsel are here with us today - Frank Swain and Thomas Kerester. We welcome their participation and the insight that they bring to this hearing.

Over time there have been various constructive suggestions to strengthen the Office of Advocacy and to make it more effective and independent. Some of these suggestions are contained in S.395, "The Independent Office of Advocacy Act of 2001," which was introduced in the Senate by the Chairman and Ranking Member of the Senate Committee on Small Business on February 27, of this year.

In the House of Representatives, we have drafted a bill for discussion that makes the Office of Advocacy more independent and provides that Office with greater resources and more authority to represent the interests of small businesses.

I want to work with my colleagues on both sides of Capitol Hill to pass a bill that produces real results for main street America.

Some of the features of the House draft include:

- **Empowering the Chief Counsel to issue regulations under the Regulatory Flexibility Act thereby putting teeth in the requirement that Federal agencies accurately measure the economic consequences of their actions before regulating small businesses.**
- **Transferring the Small Business and Agriculture Regulatory Enforcement Ombudsman to the Office of Advocacy thereby providing more muscle to protect small businesses from arbitrary and unconscionable enforcement actions by Federal agencies.**

- **Giving the Chief Counsel the right file comments in all rulemakings where the Federal agency has requested comments and to intervene in on the record rulemakings (where no fine or penalty is involved).**
- **Requiring that all Federal agencies publish the Chief Counsels comments about a proposed regulation, that they give such comments substantial weight, and that they make known any disagreements with the comments.**
- **Concentrating in the Office of Advocacy and under the leadership of the Chief Counsel the responsibility for combating contract bundling and providing an augmented staff, at no additional cost, to do an effective job.**

In short, the House draft concentrates on strengthening the Office of Advocacy and the Chief Counsel to combat three major problems facing small businesses - preventing needless and burdensome regulations, assisting small businesses that have been the victims of Federal agencies' unfair compliance and enforcement actions, and being the focal point for combating contract bundling.

Again thank you all for participating in this hearing. And thank you in the audience for attending this hearing.

DONALD A. MANZULLO, ILLINOIS
CHAIRMAN

NYDIA M. VELÁZQUEZ, NEW YORK

Congress of the United States
House of Representatives
107th Congress
Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515-6315

Congresswoman Nydia M. Velázquez
Ranking Democratic Member
Opening Statement Advocacy Hearing
March 22, 2001

Thank you, Mr. Chairman.

We all know the incredible job the Office of Advocacy has done to protect the interests of small business within the federal government. Whether they were saving $3 Billion dollars in regulatory reform for small business or overseeing the SBREFA process at EPA - - - the Office of Advocacy has done whatever is necessary to protect this bedrock of our economy from sometimes over-reaching federal policies. However, as Members of this Committee - - - it is our duty to review options which can improve the way federal agencies conduct the people's business. In this case, we must review these options knowing any determinations we make are done so with the best interests of small business squarely in mind.

Today is the first step in what I believe will be a critical undertaking for this Committee - - - and for America's small business community. This hearing provides a unique opportunity for us to take a " first-mover " approach towards strengthening Advocacy - - - by providing a powerful and independent presence for small businesses in America. As we begin our examination of how to make the Office of Advocacy more independent, it is crucial that we keep our "eye on the ball" during this process. We must do everything to ensure that small businesses have a voice and that their interests are given full weight in the deliberations of the federal government. Unfortunately, moves like simply providing Advocacy its own authorization line item and then calling that "independence" does absolutely nothing for small business. So, then how do we measure whether or not we have been successful in creating a more independent Office of Advocacy? The answer to that question is simple - - Have we reinforced the agency's ability to oversee the Reg Flex Act? But allow me to make one point crystal clear -- success isn't just in providing the tools - - - it's how effective you are in using those tools.

In fact, as is the case with this agency - - it's success can be traced directly to simplicity itself. Advocacy has been so incredibly effective because it has stayed true to its core mission of providing support to small businesses and entrepreneurs. Indeed, it is this "simplicity" that has been its guiding force and greatest strength. However, as this process moves forward today, many of the proposals we will hear would force Advocacy into a much greater role – which could lead to a decline in its effectiveness as an agency.

While some of these proposals, including having Advocacy take a more active role in the issues of federal procurement, are examined - - - I would caution Members that these enhancements should not come at a reduction in its responsibilities under the Reg Flex Act. We also need to have a frank discussion of resource allocation for a new and improved Advocacy. Unfortunately, with the current budgetary situation, which has seen SBA's operating budget slashed by 43%, is it realistic for any of us here today to assume that this Administration will support any new ventures? Probably not, considering that they have clearly demonstrated an unwillingness to meet even their current commitments.

My colleagues, these issues of funding and focus are so absolutely crucial that it will take the partnership of this Committee, our counterparts in the Senate, the President and his Administration. But, this partnership should also include elements that are not in place as of yet --- and those elements are the SBA Administrator and the Chief Advocate. For us to give this matter proper deliberation, these pieces are absolutely essential to our case - - - to be perfectly frank, we have to do this with their support and input. Without it, we are engaging in a "cart before the horse" type of action - - - which will lead us right back to where we are now. And believe me, in doing so, we reduce our own effectiveness - - - which is not something we can afford to do in the current economic and political climate.

Mr. Chairman, in closing, I would like to thank you for convening this hearing today on such a critically important issue to small business owners. I would also like to extend my appreciation to the panelists for their testimony today. Their commitment to protecting small businesses in this country deserves to be acknowledged and commended.

STATEMENT OF FRANK SWAIN
Before the HOUSE COMMITTEE ON SMALL BUSINESS
Regarding the SBA OFFICE OF ADVOCACY
March 22, 2001

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

Thank you very much for inviting me to participate in these hearings regarding the SBA Office of Advocacy and the pending legislation affecting the organization of that Office. I had the great pleasure and satisfaction of serving more than eight years as the Chief Counsel for Advocacy, having been nominated by President Ronald Reagan in July 1981. Since leaving the SBA I have had the opportunity to practice law with the firm of Baker & Daniels, and, as a private advocate for clients, to develop a keener sense of the very special and unique role of the public advocate for small business. This Committee's early focus on this subject reflects the importance of timely and effective advocacy to the Congress on issues important to small business.

Before commenting on the legislative proposals the Committee is reviewing, it might be useful to briefly review the background against which the Office was established. My understanding is that the SBA Office of Advocacy was initially established by a discretionary decision of an Administrator of the SBA in the Ford Administration in 1975. In the mid seventies, the Federal government was significantly expanding its regulatory activities. The EPA had just been established, OSHA was getting active, and Presidents Nixon and Ford's attempts to check inflation through various price controls had pushed the hand of Federal regulation into many areas of typical American business which had not previously had to worry about Washington, DC.

It was during President Carter's term that the additional pressures of the energy crisis and attempted regulatory solutions, as well as aggressive and anti-business "consumer protection" campaigns waged by the Federal Trade Commission and other agencies made it evident that small business had a very direct stake in what was going on in Washington. That statement, almost a cliche today, was in fact a new realization at the time. The groups representing small business were spread thin and could barely keep up with the new pressures. In 1975 when I spent a brief time as a student intern at the NFIB's Washington office, there were three employees.

With this rapidly accelerating Federal regulation and the tough economic conditions facing many small businesses, many in Congress looked to the SBA for leadership, just as farmers looked to the USDA and exporters looked to the Department of Commerce for representation within the Federal agency structure. However, the SBA was not able to respond to questions about the impact of minimum wage on small business, or the effect of various tax law changes. SBA focused on the improvement of lending and procurement programs, and the establishment of a small pilot program of small business development centers. But it did not have the capacity to respond to the Congress' or the trade associations' interests in broader more general policy questions.

Against that background Congress in 1979 and 1980 enacted several measures, including the Equal Access to Justice Act, the Regulatory Flexibility Act, and Public Law 96-302, which has essentially served as the charter of the SBA Office of Advocacy for the subsequent twenty years. It reflected the Congressional interest in getting better information about small business, and Congressional frustration that the SBA had not been responding to that challenge.

It occurs to me that the organization of the Office of Advocacy reflected a Congressional desire to have, in effect, a GAO for small business. The Congress is interested in smart, responsive and unbiased information about small business and policy impacts as it is debating legislation. Although Administration involvement in testimony does not necessarily make it any

different, the Congressional fear was that the small business Advocate would inevitably be tempted or directed to become an Administration advocate on particular issues. The current law's language insulating Advocacy statements and reports to Congress from OMB review is the clearest reflection of that desire. Over the years of my tenure as Chief Counsel, I appeared before this and other Congressional Committees nearly 100 times, with the mantra that my statement "did not necessarily represent the views of the Administration."

But the Congress, especially through the Regulatory Flexibility Act, also gave the Office of Advocacy significant regulatory review responsibilities. To review and affect the regulatory process is a different kind of challenge than affecting the legislative process. The analysis of the policy impacts of various proposals must in many cases be done quickly, and the conclusions communicated to regulators as early as possible in the process. As a private attorney I have relearned many times what every Chief Counsel knows – that unless you get in with the regulators to talk about issues and options before the proposal is published, your ability to affect the process in any meaningful way is significantly marginalized. The ability of the Chief Counsel, as an appointee of the President and a member of the Administration, to go into the offices of his colleague appointees who serve as Assistant Secretaries and key regulators in other Executive Branch agencies is a singular advantage, and one that I attempted to use often and aggressively.

Today this Committee is considering what it should do to further strengthen the Office of Advocacy. Many factors have changed and evolved in the more than twenty years since the Congress approved PL 96-302. In some ways the role of the Office has become better understood and accepted by Administrations and bureaucrats. The Congress, by enacting SBREFA and the amendments to the Regulatory Flexibility Act, has significantly strengthened the ability of private parties to identify and challenge regulations which are unnecessarily burdensome to small business. The private sector resources dedicated to representing small business and entrepreneurs have significantly expanded, both with the strengthening of the

efforts of existing business associations and the establishment of new groups and foundations dedicated to promoting and strengthening small business.

But many factors have not changed. We still have pressures on Federal agency budgets, more intense now than ever. There are still too many who believe the solution to society's issues is to regulate. We now are in the early months of a new Administration whose challenges include getting a grip on the aggressive regulatory activities that emerged, particularly in the final months, of the previous Administration.

What does the Office of Advocacy need now to better discharge its responsibilities in 2001? I believe it has three needs.

First, a degree of budget independence is clearly necessary. The SBA budget has a line item for Advocacy research, but not for the total budget of the office. The utilization of policy analysts and staff from the overall SBA salaries and expense budget is unclear and subject to constant negotiation with SBA administrative staff. A separate budget line item for the full office would clarify to the Congress and the small business community what the Administration recommendation is and what the Congressional decision is.

Secondly, although SBREFA has been a positive addition to small business regulatory tools, it has led to a more confusing situation as to who, inside the Federal government, is responsible for regulatory review from a small business perspective. It is time to rationalize and integrate the various regulatory fairness board and ombudsman structures into the Office of Advocacy. As structured today, these functions would appear to be parallel and to some degree duplicative of what an aggressive advocate should be doing.

Finally, and this may be self evident to some, but the Bush Administration should give great attention to nominating a Chief Counsel for Advocacy whose experience, judgement and temperament will result in success for small business and for the Administration. The Chief Counsel for Advocacy cannot be a "gadfly" - someone who constantly objects and preaches but accomplishes little. The Chief Counsel should be the person with the knowledge and authority

to establish and utilize regulatory review standards and policy analysis whose conclusions affect the process and the result, both within agencies, within the White House, and here before the Congress. That authority is conveyed by law, to be sure. But it is even more earned, by the individual, and by the Administration which he or she serves. My own hope is that an outstanding nomination will soon be announced, and that the Congress should work aggressively with that individual to ensure that the legal structure of the Office of Advocacy supports the Advocate's effectiveness, before Congress and within the Administration, to achieve better policy and regulations for small business and entrepreneurs.

I would be happy to respond to any specific questions of the Committee. Thank you for this opportunity.

(Mr. Swain has received no federal grants, contracts or subcontracts in the current and two preceding years.)

Testimony
Of
Thomas P. Kerester
Before The
House Committee on Small Business
March 22, 2001

Mr. Chairman and Members of the Committee, my name is Tom Kerester. I served as the Chief Counsel for Advocacy from May 1992 until January 19, 1993 under former President George Bush.

My term of office was short and demanding, but rewarding; it was sometimes frustrating, but fulfilling; it was stimulating, yet exhausting. It renewed my faith in small business, in the entrepreneurial spirit, and in my belief that "as small business goes, so goes the nation".

I appreciate the Committee's invitation to comment on the Discussion Draft bill to improve small business advocacy, and I applaud the Committee's efforts on behalf of small business. I am testifying as the former Advocate; I am not testifying on behalf of any other person, company, group or association. I have not had any federal grant, contract or subcontract in the current or two preceding years.

Currently I am a Real Estate Consultant on residential and commercial properties with Coldwell Banker Stevens, Realtors in Northern Virginia. As a real estate Consultant, I am an independent contractor, and face many of the issues which millions of other small businesses face on a daily basis.

For more than 20 years, Advocacy has served a unique and useful role in the federal government. Because of the complexity of our dynamic economy, Advocacy is

needed more today than it has been in the past. Its role, authority and stature should be expanded and increased. They would be under the Draft Bill. And accordingly, I would encourage enactment of such a bill.

As I said in my testimony before this Committee in April 1995, the greatest challenge facing the millions of small business owners is gaining the public recognition from policy makers at all levels of government that small business is the force – the engine – that drives our economy. Members of this Committee know better than I that small business makes significant contributions to the workforce, to technology, and to our gross national product. The Draft Bill goes a long way toward achieving the long overdue recognition deserved by the small business community and Advocacy.

Advocacy deserves the support of every Executive Branch, regardless of Party, and most importantly, the full support of the Congress. From everything I have heard and have read, Advocacy continues to enjoy the enthusiastic support of the more than 20 million small business owners that transcends party lines.

When I look at the "Background Paper on The Office of Advocacy 1994 - 2000" prepared by Advocacy, I marvel at the accomplishments of that office with its limited, but dedicated and professional staff. As an early participant in the small business movement to establish an Office of Advocacy, I can truly say that Frank Swain's and Milton Stewart's accomplishments are likewise memorable for their significant achievements on behalf of small business.

Because of the limited time available, I want to focus on only a few key issues of the bill which could be couched under three headings: powers and functions of the new Chief Counsel, the budget line item requirement, and the new office relocation.

Thomas P. Kerester
Committee on Small Business
March 22, 2001

Power and functions of the new Chief Counsel

The powers and functions set forth in the Draft Bill that prompted my immediate and wholehearted support of the bill could be described in four categories: clarification of the role of Advocacy, expansion of that role, oversight required under that role, and accountability of the new Chief Counsel.

Clarification. In the Draft Bill, the Congress again makes it abundantly clear that it will not tolerate costly and burdensome regulations proposed by some overzealous Federal bureaucrats. The Bill provides for a more powerful "Watchdog with teeth" to overturn those rules and regulations and the methods by which that "Watchdog" can take action.

Expansion of powers and functions. To ensure compliance with the provisions of this Bill, the Congress expands the functions and powers of the new Chief Counsel. Under the Bill, the Chief Counsel is armed with a wider array of legal mechanisms to compel compliance with the intent of Congress.

Oversight. To carry out those expanded responsibilities, the Bill grants authority to the Chief Counsel to appoint or employ the appropriate number of individuals to fully carry out those responsibilities in a timely manner. The oversight authority granted is far-reaching and gives the Chief Counsel the tools and mechanisms to ensure compliance with the provisions under this Draft Bill.

Accountability. Under the Bill, the Chief Counsel is held accountable to the President and the Congress for the performance of that office, and is to discharge that responsibility in a variety of required reports and other reports deemed appropriate by

the Chief Counsel. The Chief Counsel would be specifically prohibited from transmitting any report required or authorized by this new law to the Office of Management and Budget, or to any other agency of the Federal Government for any purpose before transmittal of such reports to the President and to Congress. By such accountability, the President and the Congress can assure the small business community that the Chief Counsel has carried out fully the Congressional mandate of that Office.

Budget line item requirement

The new budget line item requirement for the new Independent Office of the Chief Counsel accomplishes a number of congressional objectives. **First**, it showcases Congressional intent to elevate the stature of the new office within the Federal bureaucracy, and in state and local jurisdictions. **Second**, it demonstrates to the small business community more forcefully its intent to curb complex forms, and costly and burdensome rules and regulations through a truly independent office of Advocacy. **Third**, it signals to the new Chief Counsel's office that Congress will provide the necessary resources for Advocacy to fully carry out its new and expanded responsibilities.

New Office Location

With the proposed changes for the Office of Chief Counsel, a new location would appear appropriate and desirable. Sharing space with the Administrator of the Small Business Administration may leave some with the impression that Advocacy will operate as usual, and in the minds of some, that means under the supervision and control of the Administrator. This clearly would not be the case under the Draft Bill,

and, therefore, separate facilities would be appropriate for the new office of Chief Counsel to achieve the desired results intended under the Bill..

Based on my experience as an Advocate and as a commercial realtor, any discussion of a new location for the Chief Counsel's Office, should consider, at a minimum, the following issues: employment base, Chief Counsel client base, transportation, and the sub-market dynamics. These thoughts are not intended to be exhaustive, but merely representative of some of the issues that Congress and others will want to consider in selecting a new location. Nor was there an attempt to prioritize the issues. A number of alternate sites that readily come to mind are: Crystal City, Pentagon City, Rosslyn, and the Court House area in Arlington.

Employment base. The accessibility and the ease thereof, of the new office to the full and part-time administrative and professional staff is crucial. Related thereto are the relative costs of transportation and the travel time involved.

Client base. The Chief Counsel's office will continue to serve a wide range of clients, and ready access to that future office for such clients will help determine the amount of interface those clients will have with the Chief Counsel's office. Some of those clients would include the small business community, researchers from the Academic and other communities, executive branch employees, and of course, Members of Congress and their staffs.

Transportation. Ready access to Reagan National Airport, the Metro, VRE, and major freeways is crucial to staff and visitors. Time and costs of transportation are always of major concern to employees and visitors. Ready access to other government facilities, such as the Pentagon, would facilitate more involvement with Advocacy.

Sub-market dynamics. The issues related to the Sub-market dynamics would include the tenant base, available parking space, surrounding amenities including restaurants, hotels, and the availability of sufficient office space for current and future requirements. Local jurisdictional support would also be of primary importance.

Conclusion

In conclusion, Advocacy is a major player in the legislative and regulatory arena; it can and should be a greater force in protecting the interests of small business. The Draft Bill would give Advocacy the added power, authority, recognition and resources to more fully, effectively and efficiently protect the interests of small business at all levels of government, including the courts, on legislative and regulatory issues.

Again, Mr. Chairman and Members of the Committee, I want to thank you for your kind invitation to participate in this hearing on ways to improve the Office of Advocacy. With enactment of a bill similar to the Draft Bill, Advocacy will be able to wrap its arms around the many issues impacting small business, flex its muscle in the Federal bureaucracy, and thereby achieve proper recognition for small business and the role it plays in driving this economy.

I am grateful to former President George Bush for the opportunity to serve as the third Chief Counsel for Advocacy.

Testimony of Keith N. Cole
Before the
House Committee on Small Business
March 22, 2001

Mr. Chairman, Members of the Committee:

My name is Keith Cole, and I am a Partner in the law firm of Swidler Berlin Shereff Friedman, LLP. I appreciate the opportunity to testify at today's hearing on the Small Business Administration's Office of the Chief Counsel for Advocacy and the discussion draft of legislation that would transfer the functions of the Advocate to an independent Office of Advocacy.

I would like to state for the record that I am not testifying today on behalf of my law firm, or any particular client, but solely on my own behalf. My testimony is based on my expertise as former Regulatory Affairs Counsel to the Senate Committee on Small Business, and my experience in the private sector since leaving Capitol Hill. While in the private sector, I have followed closely the Office of Advocacy's efforts to implement the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act, commonly known as SBREFA.

At earlier hearings before this Committee, I have testified about the need for SBREFA, the Congressional intent in passing SBREFA, and SBREFA implementation. Today's testimony will focus on my experience with the Office of Advocacy and its efforts to ensure that other Federal agencies comply with the rulemaking requirements of the Reg Flex Act, and the need to enhance the independence of the Office.

Lessons from the Office of Advocacy's Role in Rulemakings

Next week, on March 29th, it will be the fifth anniversary of the enactment of SBREFA. Over the past five years, I have been involved in several rulemakings in which the Office of Advocacy actively participated. These include both high profile rulemakings like the EPA's rule revising the ozone and particulate matter NAAQS, and less controversial rulemakings. My overall impression is that the Office of Advocacy does a good job raising with the various federal agencies the deficiencies of the Reg Flex analyses prepared by these agencies. I have observed as the Advocate has pursued some of these issues to the highest levels of the Executive Branch in an effort to make the voice of small business heard.

However, I have also observed that the Office of Advocacy must pick and choose its battles. Part of this is due to resource constraints, which face any organization, but resource constraints alone are not the full story. As an office within the Small Business Administration, the Office of Advocacy must report to the SBA Administrator. When SBA or federal agencies propose regulations that run counter to the interest of small business or shirk their duties under Reg Flex, the Advocate faces conflicting pressures. Does his loyalty lie with small business or the

Administrator? And even if his loyalty is truly with small business, without a statutory basis to protect the Office of Advocacy's independence, each Advocate must consider the long-term effects of pushing too hard on behalf of small business.

As an "advocate from within," the Office of Advocacy power depends to some extent on remaining part of the team. Will the other players on the administration team continue to agree to work with the Advocate in future rulemakings if the Advocate goes beyond what the administration considers to be "reasonable" advocacy for small business? Looked at from this perspective, it may be that the best interests of small business to occasionally pull some punches, that in the long run, the interests of small business generally will be maximized if the Advocate would not push too hard or too often for the interests of particular small businesses.

While SBREFA has increased the tools available to the Advocate, it has not reduced the conflicting pressures facing the office. In fact, the strengthened tools provided by SBREFA may actually increase the pressures on the Advocate. Especially in high profile situations, the Advocate continues to risk a long-term loss of influence on the Administration team if he - or she - pushes the small business agenda beyond a certain point. The chief lesson that I have learned is that given the position of the Office of Advocacy, and its hybrid role as an independent advocate and a team player, there will always be tensions between the interests of small businesses affected by a pending rulemaking, and the long-term interest of the small business community in having an effective advocate in executive rulemakings.

Comments on the Discussion Draft

Mr. Chairman, let me complement you and your staff on the work that has obviously gone into the discussion draft. I believe that with some minor modifications, the enactment of this legislation could bring significant benefits to the small business community. I don't believe we would see drastic changes overnight, but over the long term, I believe the benefits would be readily apparent.

First, the discussion draft would provide greater statutory independence for the Office of Advocacy. With the independence of the Office more firmly established in statute, the Advocate will have a strengthened hand to zealously advance the cause of small business in federal agency rulemakings. I would also suggest that the Small Business Administration will benefit by this legislation. By removing the advocacy functions from the Small Business Administration, the draft will also allow the SBA to focus on what it is good at. Although I might go further to make the Advocate removable only for cause.

Second, the draft establishes important new functions for the Office of Advocacy. I believe that the authority to issue regulations governing compliance with the Reg Flex Act is particularly important. No one in the Federal government knows more about what is needed as part of a well-done Regulatory Flexibility Analysis than the staff on the Office of Advocacy. Agencies throughout the executive branch would benefit greatly from the experience of the staff in the form

of government-wide guidance on compliance with Reg Flex. This is a "good government" reform that is long overdue.

Third, I believe that the transfer of the duties of the Regulatory Enforcement Ombudsman to the Office of Advocacy is appropriate. The Ombudsman was established with great hopes by SBREFA in 1996. However, I must say that I have been disappointed by the effectiveness - or lack there of - of the Ombudsman. I view this as a troubled program in need of reform. I believe the changes made by the draft would bring new life and energy into the position of Ombudsman as well as the Regulatory Enforcement Fairness Boards.

Fourth, I believe that the abolition of the Regional Advocates and the transfer of these positions to the Office of Advocacy will consolidate the Office and provide a needed boost in the resources available to the Advocate, without requiring any additional funding. Again, this is a good government reform that is long overdue.

Lastly, I believe that the expanded rights of the Office to file comments and participate in agency adjudications with allow the small business community's voice to be heard in areas where it has not be heard before.

However, there are also a few areas where I think improvements could be made in the draft.

First, I think you should take this opportunity to more clearly establish the mission of the Office. By focusing the statutory mission of the Office, you will give the Advocate a stronger mandate in dealing with other Federal agencies and give small businesses a better chance of having their voices heard. The draft currently lists some 14 function, plus 5 "additional functions". I am concerned that this diffuse mission will hamper the effectiveness of the Office, and I strongly urge you to rewrite this portion of the bill to more narrowly focus the mission of the Office.

I believe the primary mission of the Office should be to enhance the environment for small business success by ensuring federal agency compliance with the Regulatory Flexibility Act. In support of this mission, there are a number of activities the office should by directed to take, namely: 1) to examine the role of small business in the U.S. economy, 2) to measure the effects of regulation (including tax regulations) on small business, 3) commenting on proposed agency regulations and agencies' review of their regulations, and 4) develop proposals for changes in agency policies and activities to enhance small business success. In keeping with this focused mission, I believe that you should reconsider whether the Office should involve itself in setting SBA size standards or the federal procurement process.

Second, while the Office clearly needs additional personnel to fulfill its mission under SBREFA and its expanded mission under the draft, I do not know if I would define the structure of the positions under the Advocate is as great a detail as does the draft. I would give the Advocate a deputy, and leave it at that.

Third, and again without defining the internal structure of the Office, I would specifically ensure that the economic research functions of the Office are conducted to serve the Office's mission - particularly in support of ensuring agency compliance with the Reg. Flex. Act.

Finally, with regard to the role of the Office in setting small business size standards for agencies that choose not to use the standard small business designations in rulemaking. If you choose to involve the Office in this process, I would suggest that you ensure that judicial review of these decisions take place within any litigation over the underlying rulemaking.

With these changes, I think you this legislation has the potential to significantly benefit small businesses for years to come.

Thank you very much for the opportunity to testify.

Testimony of John S. Satagaj
before the
Committee on Small Business
United States House of Representative

on the
Office of Advocacy

March 22, 2001

On behalf of the Small Business Legislative Council (SBLC), I would like to offer the following observations about the role of the Chief Counsel for Advocacy for Small Business.

The SBLC is a permanent, independent coalition of nearly 80 trade and professional associations that share a common commitment to the future of small business. Our members represent the interests of small businesses in such diverse economic sectors as manufacturing, retailing, distribution, professional and technical services, construction, transportation, and agriculture. Our policies are developed through a consensus among our membership. Individual associations may express their own views.

Now 24 years old, SBLC, not coincidentally, was born just about the same time as the Office of Advocacy. For those of us dedicated to small business, the mid to late 1970's marks the beginning of the "modern era" of small business' involvement in public policy. Coincidentally, it also marks the beginning of my professional and personal commitment to small business.

I came to Washington 24 years ago, not because of politics or small business, but, fresh out of law school, I followed my wife here so she could get her Master's Degree in Urban Planning. Naively, I thought there would be plenty of jobs for lawyers. Turns out, for a lawyer with no particular nexus to politics, it was not so easy. Primarily by happenstance and luck I found myself at the Small Business Administration and was able to finagle myself a job with the first Chief Counsel for Advocacy, Milt Stewart, who was hiring the first staff. I was probably the most junior of professionals on the staff. I knew almost nothing about small business.

I make note of this, because perhaps more than anyone else in this town, my career and the Office of Advocacy are closely entwined. Since bitten with the small business bug, I have not deviated from the path -- it is my career and my passion.

Ironically, it was not long after joining the Office of Advocacy that I was "tasked" to draft Executive Orders to accomplish much of what is found in your proposed legislation. At the time it was our conclusion we had the best chance of moving forward with an Executive Order as opposed to legislation as a matter of expediency. I don't know whether it is a good or bad sign, but the issues regarding the office are much the same today as they were back then. Having drafted several different versions, I understand the drafting challenges. We never did get the Executive Order approved.

We believe our goal in defining the role of Chief Counsel should be to strike a delicate balance regarding the independence and stature of the Chief Counsel that, ironically, requires the Chief Counsel to constantly walk a fine line between independence and "team" player. The Office of Advocacy is never going to have the resources or stature to change the course of "big" issues. If we isolate the Chief Counsel so he or she has independence to challenge Administration policy, we also forfeit the right to make incremental changes in policy. If we raise the stature by placing the Chief Counsel at a cabinet level or in the White House, it will be virtually impossible for the Chief Counsel to contradict an Administration. If we replace the Chief Counsel with a Commission, we will lose the flexibility and adaptability characteristics of an effective Chief Counsel.

Our view is the Chief Counsel has to be able to "turn on a dime." The winds of small business policy shift often. The authority has to be vested in one individual without someone looking over their shoulder. SBLC, for example, tracks some 40 or 50 issues. The Chief Counsel follows even more issues. One day you are throwing your efforts into health care costs or estate tax repeal, and the next day you are working on contract bundling and federal prison industry competition.

No matter how much we legislate the path of the regulatory process, public policy is shaped as much through the informal nuances of the public policy process as it is by formal rulemaking. Being part of the informal network and being a trusted part of that network is an invaluable role for the Chief Counsel. Of course, that role has regularly placed both Republican and Democratic Chief Counsels between the proverbial rock and the hard place.

We do need to give the Chief Counsel more funding. The Chief Counsel's funding must be independent and under the Chief Counsel's control. The Chief Counsel must be "housed" some place where the Office can tap additional administrative and clerical resources. Even with the independent line item, the funding won't be enough.

You gave the Chief Counsel some important leverage when you provided for judicial review of agencies' actions under the Regulatory Flexibility Act. I can remember when the original Regulatory Flexibility Act was being debated. I had the task of developing various drafts of what the Office of Advocacy thought might be the best approach to the law. I lost count of the versions. I remember well the roll of the dice decision we and our friends made, to drop

judicial review to secure passage of "reg flex." Of the professional decisions on behalf of small business in which I was involved (admittedly in that case as a minor player), it was one that I regretted for a long time. Almost immediately, I found myself working to correct that flaw and you know how many years it took us to fix it. It is the stick of judicial intervention that helps the Chief Counsel secure cooperation of agencies in the informal part of rulemaking. It is not a perfect "stick" by any means; certainly it did not produce the desired result in the OSHA ergonomics or EPA Clean Air process.

I cannot overemphasize the critical nature of the research managed by the Chief Counsel. Every day I am asked questions about what is the "real" impact of an issue on small business. We all know how to collect anecdotal information, but hard facts are hard to come by. I believe the State of Small Business Report should be given even more stature and funding, and it should serve as the springboard for more and better research. As an example, in 1984, the report included an analysis of the sources of funding for small business. To my knowledge, that was the last time such an analysis was done. If you thumbed through all the reports, you could probably identify another dozen subjects that are begging for updating.

Just last year, Chairman Manzullo and I tussled with the Treasury Department regarding the impact of cash accounting on small business. What a painful experience it was! Using some State of Small Business data with the IRS' own Statistics of Income, I was able to cobble together some information that demonstrated the Treasury's portrait of the small business community and tax accounting policy really was not as rosy as it looked.

We believe the Chief Counsel must be a lawyer and must have a demonstrated ability to handle the technical issues. As I have alluded to in this testimony, I don't know how many small business bills I have drafted over the last 23 years. Mind you, they are not necessarily the versions embraced by any legislator, but I don't believe you can shape the policy without knowing how to articulate it yourself.

I also alluded to the number of issues in which the Chief Counsel may become involved. Notwithstanding the role of staff, the Chief Counsel must be able to talk the talk of tax policy one day, and antitrust policy the next, and environmental policy the next.

I am proud to say SBLC played some modest role in the enactment of the Small Business Regulatory Enforcement Fairness Act (SBREFA). For the most part, it has worked out as we hoped. One of the weaker areas of implementation is the whole Ombudsman operation. We now think it is a duplication of effort and we need to sharpen the focus by consolidation. I might add we are disappointed how the other agencies have handled implementation of their own responsibilities. We pushed hard for SBREFA to force agencies to "clone" Karen Brown, the long time advocate for small business at the Environmental Protection Agency. SBREFA tried to create an institutional structure that would produce similar results. It now looks like we would have been better off throwing more resources at the science of cloning. We would like to see that whole government-wide structure tightened up so that we have effective voices inside the agencies working in close concert with the Chief Counsel for Advocacy.

Finally, while we believe we need to help strengthen the Office of Advocacy, it is more important to pick a Chief Counsel with the integrity and judgment we trust and then trust that person's judgment, rather than create a process or institution that produces a predictable position but no results.

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Association of Small Business Development Centers
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Business Advertising Council
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National Ornamental & Miscellaneous Metals Association
National Paperbox Association
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National Society of Accountants
National Tooling and Machining Association
National Wood Flooring Association
Organization for the Promotion and Advancement of Small Telephone Companies
Painting and Decorating Contractors of America
Petroleum Marketers Association of America
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Statement on
IMPROVING THE OFFICE OF ADVOCACY
before the
HOUSE SMALL BUSINESS COMMITTEE
for the
U.S. CHAMBER OF COMMERCE
by
GIOVANNI CORATOLO
March 22, 2001

Chairman Manzullo and members of the Committee, I am Giovanni Coratolo, Director of Small Business Policy for the U.S. Chamber of Commerce. The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector and region. Over ninety-six percent of the Chamber members are small businesses with fewer than 100 employees. The Chamber commends this Committee for its dedication and interest in having this hearing to explore ways to improve the Office of Advocacy and create a stronger voice for our nation's 24 million small businesses.

Over the past decade the importance of small businesses to the foundation of economic growth and prosperity has been unprecedented. As economic statistics confirm, maintaining a healthy environment for small businesses to proliferate contributes greatly to raising our standard of living. Small enterprises and startups are the seed corn for our future economic prosperity.

Unfortunately, as we have seen the growing importance in the vitality and stability of small business, we have also seen federal agencies continue to propose regulations that impose disproportionate burdens on smaller employers. The cumulative cost of compliance with federal regulations can be formidable for many small businesses and, in some instances, it may be fatal.

Since the establishment of the Chief Counsel for the Office of Advocacy in 1976, we have seen the growing necessity to have a strong small business advocate within the executive branch of government. With a well defined mission and armed with the tools to work effectively on behalf of small business within the administration, the Chief Counsel can have a profound impact on the regulatory process.

In many cases, the ability to interact with an agency in the earliest stages of rulemaking can nip a problem in the bud before an agency becomes staunchly committed to a concept that would have dramatically negative consequences for small businesses. Understanding unintended consequences of a regulation before it goes into effect will help protect small business before flawed rules are published.

Recently, we have seen the Clinton administration finalize twenty-nine thousand pages of regulations in the Federal Register in its waning hours. We are seeing the current administration struggling to understand them and attempt to either affirm or find a way to reverse and mitigate their impact on smaller employers. A truly independent Chief Counsel for Advocacy would prove invaluable in this process.

Now let me turn to the draft proposal and some of the fixes that it purports to provide. We believe that the bill is a good reflection of the needs of small business and protects the office from being used as a partisan tool of an incumbent administration.

The draft version of the "Small Business Advocacy Improvement Act" has several provisions that will strengthen the Office. **First, providing for continuity of leadership for the Office.** Having the Chief Counsel continue serving until a successor is in place reduces the likelihood of gaps in the leadership of the Office. As we have seen both presently and in the past, vacancies in the position can have a negative impact in the momentum and morale within the Office.

Second, specifying a line item for funding for the Office within the President's Budget. In order to have a Chief Counsel that can provide a strong independent voice for small business, separate line item funding is a must. Funding for the Office must be directly related to the checks and balances of the budget process and not subject to the political pressures of agency initiatives and pet projects.

Third, giving the Office the power, authority and tools to make a difference in the regulatory process. With the passage of the original Regulatory Flexibility Act of 1980 (Reg Flex Act) and its broadening under the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), small businesses were given expanded rights in dealing with federal agencies both in the rule making process and the regulatory enforcement environment.

The U.S. Chamber of Commerce endorsed the passage of these small business provisions but we feel that this has had only remedial effects on improving the regulatory impact on small business. Much more must continue to be done to ameliorate the burdens of regulation on small business.

In a recent appeals court decision involving the National Ambient Air Quality Standards issued by the Environmental Protection Agency, Advocacy's views expressed in an amicus curiae brief concerning the agency's adherence to Reg Flex requirement was not given deference. Also, many federal agencies have not lived up to their responsibilities under Chapter 6, Title 5 of the United States Code. The draft legislation corrects a technicality in SBREFA and places the Chief Counsel directly in charge of evaluating agency performance under Chapter 6, Title 5.

Fourth, providing the Chief Counsel with adequate funds to commission economic research projects involving areas of concern to small business. We feel that much can be gained by the research that Advocacy performs on behalf of small business. When Congress and policy makers better understand the role that small enterprises play in our economy or the impact that their decisions have on the vitality of smaller employers, they become more sensitive to the concerns of the small business community. Although this is not contained in the draft legislation, we would encourage the continuation of the line item for economic research as a subset of the total funding line item for Advocacy. This way there can be no doubt as to the amount Congress will allocate toward this important function of the Chief Council's office.

Fifth, consolidating the Regulatory Fairness (RegFair) program under the Chief Counsel's direction. We feel the program can best be served by stepping back and viewing the totality of SBREFA and the regulatory process. The two departments within the Federal Government that are tasked to carry out the responsibilities to the small business community under SBREFA are the Office of Advocacy and the Office of the National Ombudsman. Each office must engage in duplicative and simultaneous efforts in their mission to encourage federal agencies to invoke a friendlier environment for small business to comply with the plethora of federal regulation.

Each office must establish an outreach into the small business community in order to achieve their respective objectives. The Office of Advocacy needs feedback from small business owners in the early stages of rulemaking to determine what impact these rules will have and if there are alternative ways of achieving the same agency objectives while mitigating its impact on small business. The National Ombudsman needs the same small business outreach in order to fulfill the objectives of that program. Each office must deal with high level contacts within federal agencies to act as a liaison for the small business community.

We strongly feel the interests of the small business community would be best served by combining the RegFair program under the Office of Advocacy's General Council and have one coordinated force to administer the rights that SBREFA has created. In this time of budget restraints, diluting the effectiveness of the full potential of SBREFA with two programs does not maximize the potency and effectiveness that could be accomplished under the guidance and direction of one office.

The Chamber appreciates the ability to comment on these important changes for small business. We especially applaud the interest shown by this Committee through hearings such as this that clearly signal that Congress will do all that it can to make sure that small businesses will have a stronger voice and fair representation in front of all branches of government. Thank you again Chairman Manzullo.

U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

Testimony of

Mary K. Ryan
Deputy Chief Counsel for Advocacy
U.S. Small Business Administration

Before the

Small Business Committee

U. S. House of Representatives

On The

Small Business Advocacy Improvement Act

March 22, 2001

FEDERAL RECYCLING PROGRAM PRINTED ON RECYCLED PAPER

Mr. Chairman, Members of the Committee, my name is Mary K. Ryan, Deputy Chief Counsel for Advocacy. I have been in this position since June 1994. This service entitles me, I believe, to brag somewhat on the accomplishments of the Office discussed in the report I am distributing at this hearing - *Background Paper on the Office of Advocacy, 1994-2000.* However, let it be clear that the accomplishments are not personal to me. I take no credit for them. Rather, they are the accomplishments of the Chief Counsel during this time period and of a very dedicated staff, truly committed to small business, to good government and to sound public policy. My job has been largely ministerial – that is, to "keep the trains running – and running on time."

The nearly seven years I have spent in the Office of Advocacy also gives me some standing to address the bill you are considering: the *Small Business Advocacy Improvement Act.*

Before proceeding, however, let me state that, consistent with the Office's independence within the SBA and the Administration, the views expressed here are my own and do not necessarily reflect the views of SBA or the Administration. Also, be assured that I have not discussed my testimony with anyone other than current staff of the Office of Advocacy and the staff of the Committee. Nor have I cleared the testimony with anyone in the Administration.

Introduction

With some notable exceptions, nearly all of the duties and responsibilities assigned to what would be a newly formulated Independent Office of Small Business Advocacy are identical to those originally assigned to the Office of Advocacy when

Congress created it in 1976.[1] As such, much of the day-to-day operations of the Office will remain the same. However, given the proposed reformulation, it might be helpful to revisit the policy underpinnings of why the Office of Advocacy was established in the first place in order to evaluate how the proposal reinforces those policy underpinnings.

Competition Essential to Capitalism – The Importance of Small Business

Congress has a long history of re-affirming the importance of preserving competition. In preambles to laws it has enacted, Congress has made findings that competition keeps capitalism efficient and fosters innovation and has recognized that small business is the primary source of competition.[2] Preserving competition then means that the birth and growth of small business should be *en*couraged and that anti-competitive practices or barriers that harm small business' entry, development and growth must be *dis*couraged.

This congressional commitment to preserving competition was first embodied in laws prohibiting unfair and monopolistic trade practices (Sherman Antitrust Act, Clayton Act, Federal Trade Commission Act and Robinson-Patman Act). Secondly, when Congress enacted the Small Business Act in 1953 – not a proscriptive law but rather a law to address imperfections in financial markets that erect barriers to small business growth - it stated the following in the Act's preamble:

> The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment is assured…Such… well being cannot be realized unless the actual and potential capacity of small business is encouraged and

[1] 15 U. S. C. 634 *et seq.*
[2] Small business is also the major source of the net new jobs in the economy, creating approximately 75% of the net new jobs.

developed…[3]

Then, in 1976, recognizing that small business needed a voice in policy deliberations that included, but transcended, the financial issues within the purview of the Small Business Administration (SBA), Congress established the independent Office of Advocacy within the SBA. One of the Office's primary functions, re-iterated in the current proposal (Sec. 4(c)(1)), is to:

> [E]xamine the role of small business in the American economy and the contribution which small business can make in improving competition…restraining inflation, spurring production, expanding employment opportunities, increasing productivity, promoting exports, stimulating innovation and entrepreneurship, and providing an avenue through which new and untested products and services can be brought to the marketplace…[4]

This was followed by findings made by the Congress when it enacted the Regulatory Flexibility Act in 1980[5] that included the following:

> …(4) the failure to recognize differences in the scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity;
> (5) unnecessary regulations create entry barriers in many industries and discourage potential entrepreneurs from introducing beneficial products and processes;
> (6) the practice of treating all regulated businesses, organizations…as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems, and, in some cases, to actions inconsistent with the legislative intent of health, safety, environmental and economic welfare legislation…[6]

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[3] 15 U.S.C. § 631 (a) (DECLARATION OF POLICY)
[4] 15 U.S.C. § 634b.
[5] 5 U. S. C. § 601 *et seq.*
[6] Public Law 96-354, Sec. 2 (a)

The Office of Advocacy is but a part of the government mosaic created by Congress to preserve competition, each with a separate, distinct - but interlocking role.

The Office of Advocacy's Unique Role

Congress assigned to the Office of Advocacy a very unique role – to be an *independent* voice for small business in the formulation of public policy to ensure that public policy did not inadvertently erect barriers to competition. The regulatory overview responsibilities of the Office involve policies related to taxes, environment, labor and workplace safety, health and product safety, natural resources, procurement, industrial safety, telecommunications, and banking and securities – namely, the work of some 20 regulatory agencies. Advocacy has been successful, working with others, to persuade agencies to alter their regulatory proposals in order to mitigate small business impacts without compromising public policy objectives. This has resulted in regulatory savings of over $20 billion in a three year period.[7]

For the most part, the workload of the office is *reactive* to the initiatives of the Congress and the regulatory agencies. [8]

But there are two realities – barriers – that have to be addressed constantly:

1. Not all policy makers understand or accept the important role played by small business in maintaining competition. Members of this Committee may find this difficult to accept, given your understanding of the role of small business. But the reality is that many policy makers are familiar

[7] See *20 Years of the Regulatory Flexibility Act – Rulemaking in a Dynamic Economy,* Office of Advocacy, January 2001 www@sba.gov/advo

[8] A large part of the Office's work is also *proactive* in response to research results that document issues that can be addressed by changes in Administration or Congressional policies, such as changes to pension laws or tax laws that could encourage small businesses to provide benefits to employees.

only with the literature produced by business schools and other research that address *big* business issues. The adverse long term impacts of industrial concentration on competition, price, innovation and choice are not readily understood. Thus, a large part of our advocacy effort is spent reviewing basic economics with agency staff. In this context, independent small business research takes on a very special level of importance.

2. Laws to ensure a level playing field for small business, such as the Regulatory Flexibility Act (RFA), are often interpreted by some policy makers as establishing *special treatment* for small business at the expense of other important public policy concerns. Much effort has to be expended explaining to agencies that Congress did not mandate special treatment for small business. Rather, Congress mandated that agencies examine policies and regulatory proposals, as well as alternatives, to ensure the avoidance of anti-competitive or inequitable impacts *without compromising the specific public policy agendas assigned to them by Congress.*

Advocacy's Mission – Consensus at Both Ends of Pennsylvania Avenue

It is in the context of its special role in preserving competition and ensuring that policy makers understand the important role played by small business in our capitalistic system that Advocacy strives for consensus at both ends of Pennsylvania Avenue. Being an *effective* spokesperson for small business means being politic – understanding the art of governance – but never *partisan.*

Consensus is not always readily achieved, as Members of the Committee well understand. It can take years to arrive at consensus, particularly on contentious issues. Witness the time it took to garner support within Congress and the Administration on an amendment to the RFA that allows the courts to review agency compliance with the law. The issue was first raised during the debates in 1980 over the adoption of the RFA. The issue surfaced again at the 1986 White House Conference on Small Business (WHCSB) and again at the 1995 WHCSB. Judicial review, an issue consistently supported by the Office of Advocacy to the best of my knowledge, became part of the RFA in 1996 – four Administrations, nine Congresses, and 16 years after the issue first surfaced!

During that time, Advocacy was constant in its commitment to this important small business issue. Two former Chief Counsels who are testifying today can provide additional insight on the independent role played by Advocacy on just this one issue.

Independence – How Is It Measured?

During my tenure with the Office, I watched a Chief Counsel work diligently with the Administration and the Congress to ensure that none of the positions taken by the Office could be characterized as politically partisan. The importance of working with both sides of the aisle was a rubric engrained in our operation. The Office established credibility by providing the same information to both the Administration and the Congress. Care was taken to avoid public disagreements – Why? To keep the doors open to discussion, debate and the exchange of views. As the Chief Counsel testified at length last June before this Committee:

> "The key to building consensus is never to view any position taken by the Congress or the Administration or a regulatory agency as cast in stone. The challenge is always to find new arguments and

new data in support of reforms and initiatives that help small business." [9]

While public disagreements may be some evidence of *independence*, they are not the total measure of independence. Our *modus operandi* was to be perceived by the Administration, the Congress and the regulatory agencies as working with them as an ally – not an adversary - toward the development of sound public policy. This approach also ensured Advocacy received invitations to early policy deliberations, a phenomenon that continues on the increase even today. Here I am talking about early access that occurs with other agencies, access that is in addition to and independent of the SBREFA panels mandated for EPA and OSHA. Access to early deliberations is crucial if administrative initiatives are to be tailored to the concerns of small business. Establishing credibility in such deliberations also ensures that doors will open to Advocacy when it wishes to *initiate* policy discussions with specific agencies. Witness the work that Advocacy did with executive branch agencies and the Congress to implement the recommendations of the 1995 WHCSB. About 90% of the recommendations were implemented – an impressive record – nearly all of the work on which was initiated by the Office of Advocacy.

While it is easy to look for a list of public disagreements, either with the Congress or the Administration, as a measure of independence, the work of the Office in early policy deliberations is often invisible but is equally important. Although invisible, the work should not be overlooked nor its importance minimized. It is here that Advocacy has had some major successes and the *entree* to policy councils needs to be nurtured and preserved.

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[9] Testimony of Jere W. Glover, Chief Counsel for Advocacy, U. S. Small Business Administration before the Small Business Committee, U. S. House of Representatives, June 21, 2000 – copy attached.

This is not to say that public disagreements have not occurred. They have. And the previous Chief Counsel has testified on several occasions about the positions he took at variance with the Administration. A list of these appears as Appendix "D" in the *Background Paper on the Office of Advocacy 1994-2000.* Disagreements involved procurement issues, tax issues, bankruptcy, among others. The Chief Counsels testifying today will be able to provide additional examples of disagreement with the Administration.

Despite all of this, the fact that the Chief Counsel is appointed by the President causes some skeptics to question the independence of the Chief Counsel. Such skepticism will probably always exist but, in my experience, has been kept at bay by the Chief Counsel working impartially with both the Majority and the Minority. One obvious conclusion is that a Chief Counsel's personal commitment to the independence of the Office is a critical element in the preservation of that independence.

Options to Institutionalize Independence

Assuredly there are ways to strengthen the independence of the Office of Advocacy.

Thirty Day Advance Notice to Congress.[10] The draft bill under consideration by this Committee and the bill passed by the Senate Small Business Committee contain a provision requiring 30-days advance notice to the Congress of Presidential intent to remove the Chief Counsel. This provides some insurance of independence. But since Congress is not reserving to itself the right to veto the President's decision, Presidential constitutional prerogatives are intact.

[10] See Statutory Construction Issues attachment for additional questions on this issue.

Concurrent Submission of Advocacy's Budget. Simultaneous submission of Advocacy's budget to the Congress and to the Office of Management and Budget and a line item for the budget in the President's submission to Congress is a major step toward institutionalizing the independence of the Office. Being constrained by limitations in SBA's budget has been a problem both for SBA and Advocacy. SBA has an obligation to fulfill its significant statutory missions and fund its programs, while balancing Advocacy's needs – not always an easy task. Speaking for myself, I would think that any Chief Counsel would welcome the opportunity to construct and defend an independent Advocacy budget, and present to the Congress a document in support of that budget that would be similar to the *Background Paper on the Office of Advocacy, 1994-2000* which I distributed this morning. That report documents everything the Office has accomplished in a six year period, measures the impact of Advocacy's work on regulatory reforms and reports on the impact of Advocacy's research. As we know, the budget process is often where policy gets decided. Advocacy would welcome the opportunity to defend its actions and justify its financing and staffing needs rather than having to rely on another party to do so on its behalf.

Transfer of the Ombudsman Function and Staff to Advocacy. While this proposed transfer does not enhance *per se* the independence of the office, the proposed transfer is consistent with Advocacy's overall small business policy mission. In fact, it is consistent with a specific responsibility Congress assigned to the Office in 1976 and which is unchanged by the proposal before the Committee, namely:

> "...serve as a focal point for the receipt of complaints criticisms...concerning the policies and activities of the Administration and any other Federal agency which

affects small business..."[11]

When the position of the Small Business and Agriculture Regulatory Enforcement Ombudsman was created by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), there was extensive discussion as to whether the SBA Administrator should appoint the Chief Counsel as the Ombudsman. Later, when a vacancy occurred in the position, the issue was again raised. At that time a memorandum was written delineating the "pro's" and "con's" of appointing different individuals. That memorandum is contained in Appendix "R" of the *Background Paper on the Office of Advocacy 1994-2000.*

My personal conclusion was that the appointment of the Chief Counsel to the position would change the dynamics of the relationship between the Chief Counsel and the SBA Administrator and would impinge somewhat on the Chief Counsel's independence. Under SBREFA, the Ombudsman reports directly to the SBA Administrator and submits requisite reports to the Administrator. I viewed this as a danger to the Chief Counsel's independence – a view not wholly but somewhat endorsed by others on the staff.

Under the proposal before the Committee, the Chief Counsel would appoint the Ombudsman and the members of the Small Business Regulatory Fairness Boards. The entire function would then be accountable to the Chief Counsel. Moreover, the enforcement policy focus of the Ombudsman and the Boards is consistent with Advocacy's overall policy mission. This reformulation addresses my concern.

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[11] 15 U. S C. §634c(1)

Issues in Need of Additional Discussion

Attached to this testimony is a list of Statutory Construction Issues that need to be addressed. My comments here are limited to policy issues that need to be highlighted.

Early Access to Policy Deliberations. The re-constituted Office of Advocacy will remain in the Executive Branch of government, presumably an arm of the Administration, at least that is how I interpret the proposed bill. Being part of the Administration has worked to Advocacy's advantage in the past by ensuring early access to policy deliberations at the White House, at OMB and elsewhere. In creating an entity completely apart from the SBA, is there a risk that Advocacy will lose early access to deliberations in the Administration?[12] I do not know the answer but the issue should be addressed. As stated earlier in this testimony, Advocacy has had major successes when it had access to internal discussions. We do not want to lose this access, although I recognize that success in policy deliberations depends on quality of performance and the information provided as much as on having early access.

Due Deference to Advocacy Positions. The proposed bill directs agencies to give "substantial weight" to Advocacy comments. The bill also gives Advocacy rulemaking authority. This may be enough to ensure that the Courts give due deference to Advocacy comments on rules. *A clear congressional statement to this effect would nevertheless be helpful.*

Elimination of Advocacy Field Offices. As I read the bill, it eliminates the positions of Regional Advocates and transfers other regional incumbents[13] to

[12] In this context, concurrent submission of Advocacy's budget to OMB and the Congress may be a problem.
[13] Ombudsman and bundling staff

Washington. The Regulatory Fairness Boards remain attached to SBA regional offices, to be serviced by SBA staff pursuant to a Memorandum of Understanding to be negotiated between the SBA Administrator and the Chief Counsel.

As for the Regional Advocates, I have concerns about eliminating the positions. Without people dispersed throughout the country, Advocacy could be handicapped in knowing what issues are on the horizon or who are the emerging small business leaders. One of our regional advocates brought to our attention the U. S. Post Office's rule on commercial mailbox facilities long before the issue reached the attention of national trade associations. In addition, because of technology, small business access to the federal government, no matter where the business is situated geographically, is becoming easier and easier and outreach can be dramatically expanded – that is, if we can identify who they are. For instance, many, not necessarily all, of the Small Business Advocacy Review panels required by the Small Business Regulatory Enforcement Fairness Act (SBREFA)[14] address issues affecting small entities that are not readily identifiable from Washington. One panel comes to mind and that was the panel addressing water pollution caused by concentrated animal feedlot operations. If we had not had regional advocates on site, our selection of small entities to be consulted by the panel would have been far less effective than it was. This is but one example of how regional advocates can enhance the SBREFA work of Advocacy.

Regional Advocates have also been the major organizers of Advocacy's most recent conferences held to highlight and recognize small business initiatives at the state and local level. They were able to involve state officials because of their close working

[14] 5 U. S. C. § 601 *et seq.*

relationships with the Governors and their staffs. These conferences provide a major forum for showcasing initiatives, for networking between small businesses and state policymakers, and for encouraging more state and local involvement in small business growth and development. The Advocates also provide assistance to individual businesspeople encountering problems with the federal government.

And I would be remiss if I did not discuss the major role played by the Advocates in the 1995 WHCSB. For well over a year, they worked with small businesses to ensure small businesses knew about the conference and how to get involved, that local small business issues were considered, that work at both the state and regional conferences was based on solid information and that small business questions were adequately answered. This work continued through the national conference. The advocates' outreach to the small business community in all 50 states and the U. S. territories helped make the conference a success and helped small business delegates to the conference understand that the time devoted to this effort was time well spent.

Finally, the management of the Regional Fairness Boards is to be transferred to Advocacy. The Boards need to be serviced. Under the proposal, this is to be accomplished through an MOU. I query whether accountability and quality can be maintained when staff is not directly responsible to the manager of the program, namely the Chief Counsel or to a designee accountable to the Chief Counsel.

Transfer of SBA's Bundling Responsibilities and Staff to Advocacy (Including Some Procurement Goaling Responsibilities). Advocacy has a lengthy record of involvement with procurement policies and reforms, and with contract bundling in particular. We fought many battles on reforms both with the Congress and the

Administration, but with little success. At the risk of oversimplifying the issue, the effort to reduce the government's overhead costs ruled the day regardless of the larger question as to what the role of procurement dollars should be in the government's overall economic policy. One of Advocacy's responses was the development and pilot testing of PRO-*Net*, an Internet data base of information on small firms seeking government contracts. It was designed to overcome contracting officers' allegations that they cannot find qualified small businesses with which to explore contracting possibilities. Once tested and found to be a workable decision-making vehicle, Advocacy turned the project over to the program operations within SBA.

Advocacy is aware that contract bundling is perhaps one of the most troubling issues for small business. Working with congressional staff, the Chief Counsel has intervened in several major bundled contracts with notable success in expanding small business' participation. Advocacy has also funded research on bundling, our most recent report published last October. In addition, we published data on the government contract awards made by the 2200 federal procurement centers. Again at the risk of oversimplifying, the data are not encouraging – small business is losing ground.

But having said this, I am not sure what the transfer of bundling responsibilities and staff to Advocacy will accomplish or whether it could undermine or weaken SBA's overall procurement responsibilities under the laws it administers. This is a major change about which I am uneasy. The unease is due in large part to the fact that I have not had any hands-on experience with the program and do not know what problem this proposal is intended to correct. My unease is also due to the fact that Advocacy, to date, has not

been responsible for managing any program. Advocacy's role has been to evaluate procurement policy through independent research.

It bears noting that the SBA staff working on bundling issues are located in the field in order to facilitate day-to-day contact with contracting officials and to oversee procurement activities at centers throughout the country. As I understand the proposal before us, these staff would be transferred to Washington. If so, it is not clear to me how transferring the staff to Washington enhances efforts to discourage or challenge the bundling decisions being made by contracting officers in the field.

Since the staff to whom bundling responsibilities have been assigned, also work on other SBA contracting issues, it bears repeating that the issue that needs to be addressed is whether this transfer weakens SBA's leverage in managing the overall program. I have similar concerns about Advocacy assuming some goaling responsibilities. I assume that more information will be gleaned from the SBA itself and from the hearings you have scheduled for late Spring – early Summer.

Budget Impact – Resource Issues. The proposal has a budget impact greater than a mere direct dollar-for-dollar salaries and benefits transfer from SBA's budget. Certain economies will be lost if Advocacy is required to maintain official facilities independent of the SBA. SBA currently provides significant support services that go beyond rent, utilities, etc. These services are payroll, contracting, technological support for computers, servers and web sites, maintenance, to mention just a few. The attached Statutory Construction Issues document goes into this budget issue in a little more detail to highlight what is involved in making the Office of Advocacy totally separate from SBA.

This issue is raised not to argue against the change but rather to ensure that the budget implications of the proposed changes are fully understood.

Conclusion

Greater institutionalization of the Office of Advocacy is welcomed to ensure that the independence of the Office is preserved. Having said this, it still remains a truism that the level of independence to a large extent is dependent on the leadership of the Chief Counsel. The previous Chief Counsels testifying today can provide insights on their independent efforts – battles they won and battles they lost. In my six plus years as Deputy, we lost some battles but we also won some big ones. We built on the 20 year history of the Office prior to our arrival and never lost sight of the obligation to be an independent voice for small business. I am proud to have served with a Chief Counsel who brought to the task extensive experience developing and managing small businesses, as well as earlier experience working in both the legislative and executive branches of government; who built upon the contributions and precedents of previous Chief Counsels; and who, using the totality of his experience, went on to build an impressive record of accomplishment on behalf of small business. Whatever can be done to institutionalize the processes that produced these accomplishments is most welcome and will be applauded by the small business community. I am sure that the new Chief Counsel to be appointed by President Bush will also thank you for your efforts and interest. After all, being Chief Counsel is probably one of the more satisfying jobs in the federal government and anything you can do to institutionalize its independence will make the job even more rewarding.

Thank you for the opportunity to testify and to be heard.

Attachments: (3)

Statutory Construction Issues
Testimony of Jere W. Glover, Chief Counsel, June 21, 2000
Background Paper on the Office of Advocacy 1994-2000

Attachment
Ryan Testimony
3/22/01

STATUTORY CONSTRUCTION ISSUES
(Page by Page and General analysis)

Page by Page

Sec. 4 (b)(2)(B)(ii) and (iii) Removal and Continuation of Service
Page 7

- How would these two provisions work together?
- Is not the language in (iii) (continuation of service) more appropriate with a fixed term?
- If the latter and if a fixed term is desirable, could the Chief Counsel be re-appointed?

Sec. 4(c)(10)
Page 11

Recommendations and reports are to be submitted to the SBA Administrator.

- What is the underlying legislative intent of this requirement? No one should infer from this question any reluctance or disagreement with the provision. The issue is just what is it that the Congress wishes to accomplish with this?
- Stated another way, what does Congress intend that the Administrator do with the recommendations and reports?

Sec. 4(c)(13)
Page 11

Counsel agencies on how to reach contracting and subcontracting goals.

- Is the intent of this to remove this function from SBA?
- Would this undermine the goal setting process, which remains with SBA?
- Should this not stay with the agency that has the clout to establish the goals and to work with the agencies in setting those goals?

Sec. 4(g)[should be (I)](1)
Page 17

Good language in requiring agencies to give substantial weight to Advocacy comments. Point of clarification:

- as written, Advocacy's comments and the agency's rationale for rejecting them, have to be published in the Federal Register *before* a rule becomes final. Is this what is intended? A little awkward.

Sec. 4(k)(1) – Reports
Page 19

- *New report on evaluation of agency efforts to meet or achieve contracting and subcontracting goals* – Should this not remain with the agency responsible for negotiating goals to give the agency clout in negotiating the goals in the first place?
- *Annual report on the state of small business* - Is this intended to replace the President's report or is it a separate report? If the former, then the Small Business Act needs to be amended to delete the President's obligation to do an annual report on the state of small business – a report that goes through extensive executive branch clearance, which is contrary to the prohibition in (3), i.e. that no reports are to be submitted to OMB, etc. before they are sent to Congress

Sec.5(a)(1) – Size Standards
Page 20

Point of clarification: The SBA still retains the authority to set small business size standards under the Small Business Act and the Small Business Investment Act. Advocacy is given authority to set standards for RFA purposes. Is this correct?

This means, then, that agencies wishing to use a different size standard in a regulation must still get the Administrator's advance approval to use a different size standard?

If this interpretation is not correct, then what is the value of SBA size standards? The prohibition and advance approval give teeth to the SBA size standards. It gives SBA clout to enforce size standards. If the clout is removed, how are the standards to be enforced and have they lost significant public policy value?