

**STATEMENT OF W. WEST ALLEN  
CHAIR, GOVERNMENT RELATIONS COMMITTEE  
FEDERAL BAR ASSOCIATION**

**BEFORE THE SUBCOMMITTEE ON BANKRUPTCY AND THE COURTS  
COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE**

**JULY 23, 2013**

Good afternoon Mr. Chairman, Ranking Member Sessions, and Members of the Subcommittee:

Thank you, Chairman Coons, for convening this hearing and for your invitation to appear before you this afternoon.

I am West Allen, a federal court litigation partner with Lewis and Roca, LLP, in Las Vegas, Nevada. I serve as chair of the Government Relations Committee of the Federal Bar Association (FBA), whom you have kindly invited to testify.

The Federal Bar Association is the largest national association devoted to federal jurisprudence and the practice of law in our federal courts. I represent not only the 16,000 members of our legal association, but more broadly the collective interests of every individual citizen and business who are represented by lawyers in America's federal courts. My testimony today will therefore focus on The People and their right to a strong, independent American judiciary that upholds the rule of law.

It is we as The People, both individuals and businesses, who seek and expect justice in America's federal courts. Every day thousands of lawyers and clients appear in federal courthouses across the country to resolve disputes, ranging from multi-million dollar contractual claims and conflicts over patents on emerging technologies to the preservation of civil liberties and determinations of guilt or innocence for criminal defendants. These cases are being decided by able judges and juries for the singular and

sacred task of rendering fair, prompt and respected justice. The ability of our courts to discharge this duty is the hallmark of a civilized, orderly society.

Our Founding Fathers wisely recognized the compelling need for a strong Federal Judiciary, established as a separate, co-equal branch of government, sufficiently independent to assure the rule of law. But independence and promptness of decision-making are imperiled when the Federal Judiciary lacks the resources to properly discharge its Constitutional responsibilities.

Lawyers and The People they represent, who turn to our federal courts for justice, fear that the curtailment of court operations and services by the budget cuts of sequestration are diminishing the ability of the courts to timely and effectively render justice. The long tradition of excellence in the American Judiciary is in jeopardy. We believe that Congress must stand ready to fulfill its Constitutional obligation to provide the ready resources to assure that the Third Branch can honor its Constitutional responsibility to The People.

We are aware that the 2011 law establishing sequestration represents a ten-year budget-cutting process. At this point, without a grand bargain reached by the President and the Congress, we see the fault lines of a financial crisis emerging in the federal courts. The crisis has multiple implications. It has freedom-related implications for our rights under the Constitution. It has cost implications for us as taxpayers. And it has profound implications for our nation and its respect for the American Judiciary and the rule of law.

### **The Impact of Sequestration upon the Federal Courts**

Since the automatic budget cuts began in March, the nation collectively has little felt the direct impact of sequestration. That is because the Executive and Legislative Branches have undertaken actions that have tempered the impact of the budget cuts, relying upon budget maneuvering within remaining resources to deter significant cuts in high-profile federal operations and services. In some cases, this has even involved the use

of funds originally intended for future use to satisfy today's needs. Surviving the second year of sequestration, in FY 2014, will be much more difficult across the government, but especially for the federal courts where the citizens of this nation turn for justice.

As Judge Gibbons of the Budget Committee of the Judicial Conference of the United States has noted in her testimony, the federal courts for the last several years have captured the low-lying fruit of budget savings and are already an extraordinarily lean operation. The federal courts have been able to withstand the impact of the sequester in the first year largely because of the remarkable job that judges and court staff have performed by simply working harder and continuing to find further savings and efficiencies.

Those of us who know our way around a federal courthouse have witnessed numerous ways that the courts—including judges, clerk's offices, probation, pretrial services, federal defenders and support services—have worked tirelessly to maintain operations and service levels, despite budget cuts over the last several years. The construction and major renovation of federal courthouses has been considerably scaled back. The number of jobs within the federal court system has been trimmed by over two thousand positions in less than two years. Positions in clerk's offices, pretrial and probationer services, court security, defender services, case management and information technology, and other court operations have been eliminated through attrition and layoffs.

Set against the backdrop of these significant cost-containment efforts came sequestration earlier this spring. Sequestration reduced the Federal Judiciary's FY 2013 funding of \$7 billion by \$350 million below last year's funding level, about a five percent cut. The results of these cuts have varied from court to court, with furloughs of Federal Public Defender personnel the most prolific and visible consequence. Less visibly, cutbacks in court operations and services have continued and threaten to grow worse.

Lawyers and litigants have witnessed a variety of ways that sequestration has changed the federal courts. We have seen courts with reduced public access and fewer operational hours due to the inability to pay for clerks, or even overtime lighting and air conditioning. In some courts, the availability of court reporters has decreased. Court security personnel have been reduced. Information technology personnel are overworked and less available to assist in courtrooms. Courtroom equipment and technology maintenance has been delayed, and most new equipment purchases have been eliminated altogether. Some courts have simply run out of routine office supplies, such as paper and toner.

We fear that another round of budget cuts in FY 2014 will trigger a crisis in the capacity of the Federal Judiciary, an independent, co-equal branch of our government, to fulfill its Constitutional responsibilities. Remedial options are limited, other than laying off more personnel and reducing court hours and operations. These problems are generated by the relatively small size of the Federal Judiciary's budget and the labor-intensiveness of its operations. These constraints preclude the kinds of mitigating measures used by the Executive Branch in recent months to avoid service shutdowns and employee furloughs. There are no secondary program accounts in the Federal Judiciary's budget that can be tapped to relieve shortfalls. Fund reprogramming is unavailable because surplus funding within the Federal Judiciary is relatively nonexistent.

This means that for some federal court units, particularly in Federal Defender Offices, further layoffs and furloughs already are unavoidable. As Mr. Nachmanoff, the Federal Defender for the Eastern District of Virginia, will more fully discuss today, Federal Defender Offices are now scheduling as many as twenty days of furloughs of their attorneys and staff during the remainder of the fiscal year. Significant layoffs in Fiscal Year 2014, contributing to the further dismantling of Federal Defender operations, are likely without special relief made available by Congress.

### **The Impact of Budget Cuts upon Individuals and Businesses**

For civil litigators and their clients in federal court, sequestration's greatest impact is upon delay in judicial proceedings. As courts reduce their hours and staffing levels, delay in judicial proceedings becomes inevitable, simply because there are limits to how speedily courts can process and decide cases, especially when their caseloads are increasing. Waiting for judicial rulings on relatively simple motions for six months, eight months, even a year is no longer uncommon. Some courts are beginning to become unable to achieve same-day docketing, which has a direct impact on public access to court information and litigants' ability to obtain effective and timely direction from the court. Delay always means added costs for litigants, along with added uncertainty as to the outcome. This brings about costs to commerce and our economy itself.

Some federal litigators are witnessing a new courthouse culture of austerity emerging, one in which court staff have seemingly less time to be helpful to answer questions and be of assistance to litigators and litigants, largely because court staff have more to do than ever. The historically deep and abiding commitment of federal court staff to professionalism and in doing the very best they can to ensure the wheels of justice spin efficiently is the chief reason why the outlines of a financial crisis in the courts have not already grown wider.

However, the system is showing signs of weakness. Many judges already are choosing to forego trained administrative assistants who traditionally help lawyers and litigants, and rely instead on a law clerk primarily to assist with internal legal functions and judicial work. Some court clerks have outdated technology infrastructure and too few IT personnel to service these systems. More recently, lawyers in courts have experienced law clerks and even untrained law school externs performing civil proceeding functions as courts seek to handle their growing case loads.

The ever-expanding jurisdiction and case filings in most federal courts only exacerbates the problem of limited resources. In the Eastern District of California, for example, as of the end of fiscal year 2012, there were 1,427 pending cases per judge.

The recommended number of cases per federal judge is about 400. Along the Southwest border, caseloads are causing federal courts to literally burst at the seams due to the press of historically high criminal immigration filings. Immigration prosecutions in 2013 on average were up 52.8 percent from levels reported just five years ago in 2008. This remarkable increase in case filings is simply being absorbed by current federal judges serving in these U.S. border districts.

The bankruptcy courts are another prime example of the deteriorating impact of sequestration. Mr. Chairman, in your home state, the Bankruptcy Court in Delaware, a unit of the District Court, continues to be the busiest Bankruptcy Court in the United States for Chapter 11 filings. Since January 2012, its Chapter 11 filings have increased 38 percent. Many of these cases are complex cases, requiring considerable numbers of motion filings and hearings. Yet the Bankruptcy Court in Delaware has suffered budget cuts of 28% over the past three years. In the Clerk's Office alone, the hub of the court for filed paperwork and issued decisions, staffing has been reduced by 30 percent in the last 18 months, from 72 to 49 persons. On top of that, the Delaware Bankruptcy Court has furloughed all remaining staff of the Clerk's Office one day, every two weeks, without pay, equating to a 10% decrease in their salaries. Despite the efforts of the remaining court employees to keep up, the challenges are becoming increasingly insurmountable.

In addition, the Bankruptcy Court for the Southern District of New York, which is often the filing venue of choice for extensive and highly complex "mega" and "ultramega" Chapter 11 corporate reorganization cases, has experienced a 30% reduction in staffing over the past two years and has found its ability to provide the needed level of responsiveness to fast-moving business controversies further compromised by sequestration. While the court has historically conducted hearings whenever needed, even late into the night and on weekends, the inability to pay staff overtime now requires that all hearings end at 5:00 p.m. Meanwhile the judges and law clerks work even longer hours to adjudicate the matters brought before them. In addition, the court has closed its Records Department, reducing its ability to provide public access to court records, and is even printing documents on the back of chambers

copies of filings in its efforts to curtail spending and cut back further on operating costs. The livelihoods of debtor companies' employees and retirees, as well as the property and rights of creditors and other stakeholders of some of our nation's most important enterprises, depend on this bankruptcy court's ability to keep up with massive and difficult caseloads, administering justice in a timely fashion. Mr. Chairman, these courts clearly cannot provide the prompt attention that these cases deserve and require without financial resources adequate to meet the demands of their heavy and extraordinarily complex caseloads.

### **The Impact of Budget Cuts upon Public Safety**

Sequestration also threatens to endanger public safety, both in our courthouses and our streets. Our courthouses become unsafe when courts lack sufficient resources to deter and respond to potentially deadly behavior by dangerous criminal defendants awaiting or standing trial. This threatens the safety of all who daily come to our federal courthouses to participate in our judicial processes, whether litigants, witnesses, or members of the public at large.

The safety of our communities is also threatened when federal court personnel—particularly probation and pretrial service officers—are unable to properly monitor the activities and whereabouts of offenders and convicted felons.

We are concerned that an increasing number of probation offices are encountering a diminished ability to closely supervise offenders and ensure compliance with court orders. Fewer officers are available to conduct searches for contraband on offenders, monitor sex offenders' computer use, and handle 24/7 location monitoring of defendants. Recent statistics from the Eastern District of New York, for example, indicate that some probation officers are taking about a month longer to complete presentence investigation reports and are unable to complete the field work necessary to verify all presentence report material. Fewer officers in some offices are available to appear at sentencing hearings and assist judges with sentencing. Further, some probation offices have drastically cut drug and mental health treatment and other services for offenders.

Pretrial services offices similarly are becoming understaffed and underfunded as a result of sequestration. Some have had to switch to less rigorous methods of monitoring defendants placed on house arrest; for example, many defendants once tracked with active GPS technology are now monitored by passive GPS technology or radio frequency technology. Defendant drug testing has also been scaled back. While previous urine drug testing panels tested for up to eleven substances, some testing panels have been reduced to five. Pretrial services staffing and training have been dramatically reduced and essential training programs—such as to certify officers in Internet monitoring for sex offender cases—have been postponed. As a result, there has been a diminished response to criminal activity by defendants and offenders.

Ultimately, there can be no doubt that fewer precautions in guarding public safety will lead to an increase in the crime rate and personal harm, likely including even fatalities. As conditions deteriorate, they will create added costly law enforcement burdens and, most important, erode public confidence in our judicial system.

### **Criminal Justice Act and Federal Defender Representation**

Cost containment requires budget reductions that continue to assure the satisfaction of mission priorities. For the courts, their highest priorities are derived from Constitutional imperatives. The Sixth Amendment requires that criminal defendants have the right to effective representation and a speedy criminal trial.

As noted previously, sequestration has adversely impacted Federal Public Defenders. Sequestration also has adversely affected the work of Criminal Justice Act indigent defense panel (“CJA Panel”) attorneys. CJA Panel attorneys are private lawyers appointed and paid by the Court to represent indigent defendants in cases where the Federal Public Defender Office is unable to appear. In the past, this has been limited to cases in which the Federal Public Defender had a conflict of interest. The increasing unavailability of Federal Public Defender services, however, due to the furlough of



Federal Public Defender attorneys and staff, are causing greater assignment of cases to CJA Panel lawyers.

At the same time, budget cuts are already impacting CJA Panel compensation in ways that are discouraging attorneys from making their services available. Courts are beginning or about to begin to limit disbursements to CJA Panel attorneys through a variety of measures, including: delay in court compensation payments to CJA Panel attorneys and ancillary service providers; reductions in compensation for travel; cutbacks in the availability of experts and ancillary service providers. These actions adversely impact the availability and provision of effective defense representation. They also create significant practical and financial hardships on CJA Panel lawyers and ancillary service providers.

It is well-recognized that the cost of funding indigent defense through CJA Panel attorneys is greater than the cost of using Federal Defender attorneys. Downsizing our Federal Defender system is cost-inefficient at the very least, and dishonors the Sixth Amendment guarantee that every person accused of a crime has the right to an attorney for his or her defense, regardless of the ability to pay. Ninety percent of all individual criminal defendants in federal court are indigent.

### **The Duty of Congress to Address the Funding Needs of the Third Branch**

Congress historically has demonstrated a commitment to its Constitutional responsibility to preserve and sustain a strong, independent Federal Judiciary. Adequate funding for the federal courts has been made possible because Congress has recognized its duty to enable the Third Branch to perform its adjudicatory and public safety functions.

At the same time, the Federal Judiciary has demonstrated an earnest, aggressive commitment, especially over the last several years, to contain costs and live within its means. We should remember that despite the Constitutional relevance of our federal courts, funding for the Federal Judiciary represents a “miniscule” portion of the federal

budget—just 0.2 percent of the United States’ total federal budget of \$3.7 trillion. This means that for every taxpayer dollar, only two-tenths of one penny goes towards funding an entire branch of our federal government. Those fractions of a penny fund an American Judiciary that is the gold standard to the world. Without question, our federal courts are doing more with less, but will be unable to meet the gold standard without relief. Quite simply, the excellence of the federal judiciary is at risk. As Justice Anthony Kennedy so eloquently put it: “If judicial excellence is cast upon a sea of congressional indifference, the rule of law is imperiled.”

This is why the Federal Judiciary has requested a \$73 million emergency supplemental appropriation to help it squeeze through the remainder of the current fiscal year. Without emergency relief, the courts’ remedial options are limited, other than laying off more personnel and further reducing court hours, operations, and a multitude of services.

Restoration of funding for our federal courts to sustainable levels is essential to the provision of services that the public needs and deserves, and to the effective and responsible stewardship of our courts’ Constitutional role. We urge the Judiciary Committee and the Congress to assure the delivery of sufficient funds essential to the proper performance of that role.

### **Conclusion**

Members of the Committee, the impact of sequestration on the federal courts has the potential to give rise to a Constitutional crisis. Unlike any other government agency scrambling for scarce federal dollars, the American judiciary is a coordinate, Third Branch of The People’s form of government. The complete independence of courts of justice is peculiarly essential under our Constitution. It is the express Constitutional responsibility of Congress to safeguard this independence by adequately funding our federal courts. Thank you for your consideration of my remarks. I would be happy to answer any questions you may have.