

**STATEMENT OF
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COMMITTEE ON THE BUDGET OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
BEFORE THE SUBCOMMITTEE ON
BANKRUPTCY AND THE COURTS
OF THE
COMMITTEE ON THE JUDICIARY OF THE
UNITED STATES SENATE**

July 23, 2013

INTRODUCTION

Chairman Coons, Senator Sessions, and members of the Subcommittee, I am Judge Julia Gibbons of the Sixth Circuit Court of Appeals. Our court sits in Cincinnati, Ohio, and my resident chambers are in Memphis, Tennessee. In addition to my judicial duties I also chair the Judicial Conference Committee on the Budget, and I appreciate your invitation to appear today to discuss the financial crisis facing the federal courts. My testimony today will cover the impact of sequestration on the courts; the Judiciary's FY 2013 supplemental appropriations request that was transmitted to Congress in May; the consequences of flat funding for the Judiciary at sequestration levels in FY 2014; and our ongoing efforts to contain costs. Throughout my testimony, I will itemize the costs and dangers to the public resulting from inadequate Judiciary funding.

THE JUDICIARY'S CONSTITUTIONAL RESPONSIBILITIES

This Committee is uniquely positioned to understand the importance and role of the federal courts in our justice system. The Judiciary's work is a pillar of our democratic system of government. All of our work derives from performing functions assigned to us by the United States Constitution and statutes enacted by Congress. We must adjudicate all cases that are filed with the courts, we must protect the community by supervising defendants awaiting trial and criminals on post-conviction release, we must provide qualified defense counsel for defendants who cannot afford representation, we must pay jurors for costs associated with performing their civic duty, and we must ensure the safety and security of judges, court staff, litigants, and the public in federal court facilities. Our workload does not go away because of budget shortfalls. Deep funding cuts mean that the Judiciary cannot perform adequately its Constitutional and statutory responsibilities.

Our mission is critical to preservation of our democracy. It is carried out by the Judiciary's 35,000 dedicated judges, probation and pretrial services officers, clerks of court staff, federal defenders, law clerks, and other personnel. We look to Congress to recognize the uncontrollable nature of our workload and provide the resources needed to perform this essential work. If sufficient funding is not provided to the courts, we cannot provide the people of the

United States the type of justice system that has been a hallmark of our liberty throughout the nation's history.

IMPACT OF SEQUESTRATION CUTS ON THE FEDERAL COURTS

The sequestration cuts that took effect March 1, 2013, have had a devastating impact on federal court operations nationwide. The 5.0 percent across-the-board sequestration cut resulted in a nearly \$350 million reduction in Judiciary funding. To address sequestration, the Executive Committee of the Judicial Conference implemented a number of "emergency measures" for FY 2013. Many of these measures have been painful and difficult to implement and reflect one-time reductions that cannot be repeated if future funding levels remain flat or decline. The Judiciary cannot continue to operate at such drastically reduced funding levels without seriously compromising the Constitutional mission of the federal courts. These emergency measures represent the Judiciary's best effort to minimize the impact of sequestration cuts on the federal courts and the citizens it serves. Let me say at the outset that all aspects of court operations have been severely curtailed, and we do not have the surplus funding available within the Judiciary to transfer funds from one account to another.

As a result of sequestration, funding allocations sent out to nearly 400 court units nationwide were cut 10 percent below the FY 2012 level. We estimate clerks of court and probation and pretrial services offices will downsize by as many as 1,000 staff during FY 2013 due to this reduction in funding. Clerks of court and probation and pretrial services offices have already reduced staffing by nearly 2,100 staff between July 2011 and July 2013, a 10 percent staffing loss over this two year period. The current staffing level of 20,100 personnel in the courts is the lowest since 1999 despite significant workload growth since that time. In addition to downsizing, the courts have already incurred 36,000 furlough hours as of June 2013 and a total of 68,900 furlough hours are projected for FY 2013, which equates to 8,600 furlough days. We are still trying to ascertain the impact of these cuts on court operations, but we believe the staffing losses are resulting in the slower processing of civil and bankruptcy cases which will impact individuals, small businesses, and corporations seeking to resolve disputes in the federal courts.

Security at courthouses has suffered as well. Sequestration has resulted in a 30 percent cut in funding for court security systems and equipment and court security officers are being required to work reduced hours, thus creating security vulnerabilities throughout the federal court system. In addition, funding for the Judiciary's space and facilities program has been cut. Specifically, there will be instances around the country where new judges will not have office chambers due to sequestration, and funds for tenant improvements and cyclical maintenance such as carpet replacement, paint, etc. were zeroed out.

In our grand and petit jurors program, many courts have stopped supplying postage-paid return envelopes for prospective jurors to return their qualification questionnaires, which not only frustrates citizen-jurors, but reduces the response rates. This in turn forces the courts to spend more money mailing additional qualification questionnaires out to obtain sufficient qualified jurors. We know that more aggressive follow-up procedures lead to more diversity in

the qualified jury pools, so reductions in this area are impacting the courts' ability to ensure a fair cross-section of citizens to serve on juries.

While it is useful to measure cuts in terms of employee or program loss, ultimately the primary consequence of sequestration is not internal to the courts. Instead, it is the harm to commerce, orderly and prompt resolution of disputes, public safety, and Constitutional rights ranging from effective representation by counsel for criminal defendants to jury trial. I will now focus on two areas – one that directly affects public safety and one in which funding cuts directly threaten the loss of Constitutional rights.

SEQUESTRATION PUTS PUBLIC SAFETY AT RISK

We are very concerned about the impact of sequestration cuts on the Judiciary's probation and pretrial services program. Many people are unaware that the Judiciary employs nearly 6,000 law enforcement officers – probation and pretrial services officers – who play an important role in ensuring public safety. Our officers supervise individuals in the community after they have been convicted of a crime and subsequently released from prison, as well as supervise defendants awaiting trial. Workload in our probation and pretrial services program continues to grow. The number of convicted offenders under the supervision of federal probation officers hit a record 187,311 in 2012 and is on pace to reach 191,000 by 2014. At a time when workload in our probation and pretrial offices continues to grow, sequestration results in a 10 percent cut in their budget allocations.

Our probation and pretrial services officers do a great job. They are not only dealing with more cases, but they are tasked with supervising offenders who have escalating criminal histories and other criminogenic risk factors. Yet, taking risk level into account, our officers are driving revocation rates down and promoting positive, long-term behavioral change among persons under supervision. Officers accomplish this through a variety of research-proven techniques and strategies aimed at criminal thinking and values. At last measure, 77 percent of offenders remained free from arrest on any felony charge for three years following the start of supervision. Officers have also been instrumental in early detection of resumed criminal activity when it does occur, conducting thousands of field contacts, notifying the court of technical violations such as association with known felons, and, last year, performing more than 900 searches and seizures that resulted in guns, drugs, and other items being taken off the streets.

Due to sequestration and other budget pressures, staffing in probation and pretrial services offices is down nearly 600 staff (7 percent) since July 2011 to the current staffing level of 7,900. Cuts to officer staffing levels mean less deterrence, detection, and response to possible criminal activity by federal defendants and offenders in the community. Particularly troublesome is the 20 percent cut to the allotment category that covers treatment and testing services for offenders, electronic and GPS location monitoring, and reimburses officers for their field work related expenses. Continued underfunding of the probation and pretrial services program will reduce probation officers ability to promote positive behavior change, detect non-compliant behavior and generally protect the community.

The federal probation and pretrial services program is a cost-effective approach to supervising defendants awaiting trial and offenders on post-conviction release, costing less than \$10 per day per individual versus \$70-\$80 per day to house an offender or defendant in federal custody. Further, offenders on supervised release can gain employment to pay fines, restitution, and taxes as well as complete community service requirements.

Fundamental to our system of supervised release is ensuring the safety of the public. Indeed, public safety is our officers' primary responsibility. But sequestration cuts to the Judiciary's probation and pretrial services program put public safety at risk because reduced levels of officer supervision and electronic monitoring will result in an increase in violations and new crimes going undetected. Our probation and pretrial services program can only be effective if there are sufficient resources to ensure proper supervision of offenders and defendants in the community.

DEEP CUTS TO THE JUDICIARY'S COURT-APPOINTED COUNSEL PROGRAM

Sequestration threatens the ability of the Judiciary to fulfill a fundamental right guaranteed to all individuals under the Sixth Amendment and the Criminal Justice Act: the right to court-appointed counsel for criminal defendants who lack the financial resources to hire an attorney. Our nation recently celebrated the 50th anniversary of the 1963 landmark Supreme Court decision in *Gideon v. Wainwright*, which guaranteed an individual the right to court-appointed counsel. Approximately 90 percent of federal criminal defendants require court-appointed counsel. Funding cuts are threatening that very right, a right that has been a bedrock principle of our criminal justice system for half a century.

Sequestration cuts in FY 2013 resulted in a \$52 million cut to the Defender Services account. The primary options for absorbing the cut are reducing federal defender organization (FDO) staffing levels and/or deferring payments to private panel attorneys. Reducing FDO staff results in appointments being shifted to panel attorneys, thus increasing those costs, and deferring panel attorney payments into FY 2014 only adds to appropriations requirements in that year. The Judiciary's FY 2013 financial plan assumes a suspension of payments to private panel attorneys for the last 15 business days (3 weeks) of the fiscal year and FDO staff reductions and furloughs of employees for a national average of approximately 15 days over the last half of the fiscal year.

The Judiciary has no control over the number and nature of cases in which court-appointed counsel must provide a defense. The caseload is driven entirely by the prosecutorial policies and practices of the U.S. Department of Justice and its 93 United States Attorneys. We are aware that the U.S. Department of Justice is not furloughing staff; in fact it is hiring new staff, so the pace at which criminal cases requiring court-appointed counsel has continued unabated, while resources in the Defender Services program are diminishing. Between October 2012 and June 2013, FDOs downsized by about 160 staff, to 2,670 employees, a 6 percent decline. Since March 2013 other employees were furloughed for over 100,000 hours, which equates to 12,500 furlough days or the loss of another 50 staff. The cuts in this account create another problem as well. We fear that the anticipated suspension of panel attorney payments will

result in panel attorneys declining to accept Criminal Justice Act appointments – just at the time when we may need to make more panel attorney appointments due to FDO cuts. Ultimately, the cuts likely will produce delays in the progress of cases, which may violate Constitutional and statutory speedy trial mandates, potentially resulting in dismissal of criminal cases.

We can already see the impact of FDO staffing reductions on the federal courts. The federal defender office in New York City recently asked the federal district court to postpone the trial of Sulaiman Abu Ghaith (Osama bin Laden’s son-in-law) because of staff cutbacks. Federal courts in the District of Columbia, the District of New Mexico, the Western District of Texas, and the Western District of New York have stopped scheduling criminal matters on alternating Fridays because of FDO staffing shortages in those districts. These are just a few examples.

We have been asked by Members of Congress, the press, and others, why the Judiciary cannot transfer funds from other Judiciary accounts to help the Defender Services program. First, the Budget Control Act requires that sequestration cuts apply across-the-board to all non-exempt programs, projects, and activities, so we were forced to apply sequestration cuts to this program. Second, although we have the *authority* to transfer funds, under sequestration we do not have the *funding* to do so. Each Judiciary account, large and small, was hit hard by sequestration. Taking funds from other accounts to help the Defender Services account would further incapacitate the Judiciary in carrying out the essential activities supported by funding for the other accounts. Unlike many Executive Branch entities, we simply do not have surplus funding available within the Judiciary to transfer to Defender Services.

I will close on this topic by reiterating the importance of the Defender Services program in our criminal justice system and ask that Congress provide the funding needed to preserve the Constitutional right to court-appointed counsel.

FY 2013 SUPPLEMENTAL APPROPRIATIONS REQUEST

Subsequent to the implementation of the sequestration cuts, we reached out to Congress for help. On May 14, 2013, Judge Thomas Hogan, then-Director of the Administrative Office, and I transmitted to the Office of Management and Budget (OMB) and Congress a FY 2013 emergency supplemental appropriations request for \$72.9 million to address critical funding needs in the courts as a result of sequestration cuts. The President later formally transmitted the supplemental request to Congress as required by statute. We understand from OMB that our supplemental request was the only supplemental transmitted to Congress to address sequestration cuts.

The supplemental includes \$31.5 million for the Courts Salaries and Expenses account to avoid furloughs and staffing losses in clerks of court and probation and pretrial services offices during the fourth quarter of FY 2013 (\$18.5 million), and to partially restore sequestration cuts for drug testing and mental health treatment services for defendants awaiting trial and offenders released from prison (\$13.0 million). The remaining \$41.4 million is requested for Defender Services to avoid having to defer panel attorney payments for the last three weeks of the fiscal year (\$27.7 million), to avoid furloughs and staffing losses in federal defender organizations

during the fourth quarter of FY 2013 (\$8.7 million), and for costs associated with high-threat trials (\$5.0 million).

The Judiciary's \$72.9 million supplemental request represents only a fraction of the nearly \$350 million in sequestration cuts applied to Judiciary accounts on March 1, but to date Congress has taken no action. I urge Congress to give strong consideration to the Judiciary's supplemental appropriations request.

THE CONSEQUENCES OF FLAT FUNDING FOR FY 2014

Given the sharp disagreement between the White House and Senate and the House on federal spending matters in general, and on FY 2014 spending in particular, I am not optimistic at this time regarding FY 2014 funding for the federal courts. We find ourselves in the midst of a funding crisis, yet we are caught in a disagreement between the other two branches. Although we were pleased with the marks in the FY 2014 Financial Services and General Government appropriations bill reported out of the House Appropriations Committee last week, the contentious budget environment in Congress would appear to make a long-term or even full-year CR for FY 2014 a real possibility. Such a scenario would be devastating for the federal courts.

A hard freeze for FY 2014 at current sequestration funding levels would result in funding allocations for clerks of court and probation and pretrial services offices being reduced up to 7 percent below current levels which would result in an estimated loss of 1,800 additional employees through the end of FY 2014. This staffing loss would come on top of the nearly 2,100 staff the courts have already lost since July 2011 due to funding constraints, representing a potential 22 percent loss of on-board probation and pretrial services officers and clerks of court staff over a three year period. A staffing contraction of this magnitude would result in further reductions to supervision, monitoring, and treatment services for offenders released from prison and defendants on pretrial release. There would be a severe backlog in the processing of civil and bankruptcy cases; a drastic reduction in public hours in clerks' offices; and cancellation or significant delays in the implementation of critical information technology applications.

For the Defender Services program, because current FDO staffing levels do not meet workload requirements, and because of the projected deferral of FY 2013 panel attorney payments that must be paid in October 2013, a hard freeze in FY 2014 will necessitate steep cuts to the Judiciary's appointed-counsel program. At a hard freeze, funding for private panel attorneys representing indigent clients would run out the last three months of FY 2014, meaning attorneys would not receive payment for services rendered until the start of FY 2015. If payments to panel attorneys were not halted, steep cuts would instead have to be made to federal defender offices in the form of additional layoffs and furloughs, reducing staffing by as much as one-third below current levels. As I indicated earlier in my testimony, the availability of court-appointed counsel is a Constitutional right and there are no easy answers when it comes to applying cuts to this important program.

Flat funding at sequestration levels would result in a funding shortfall of \$45 million in the Court Security account. This would force the Judiciary to propose very difficult cuts to

security provided at courthouses by court security officers and the Federal Protective Service. Such cuts have the potential to put judges, court personnel, and the public who enter courthouses at serious risk. For example, courthouses that currently have security coverage 24 hours a day, seven days a week would have services reduced overnight and on the weekends. This includes many courthouses in large metropolitan cities, several of which regularly handle terrorism cases. In addition, every courthouse across the country would have to reduce security services and funding for security systems and equipment would be far below the level requested by the U.S. Marshals Service as necessary to provide adequate protection for the courts. Simply put, flat funding will force the Judiciary to consider deep cuts to security funding and raise serious concerns that such cuts may compromise the safety and security of the judicial process.

If a long-term or full-year CR for FY 2014 appears likely, the Judiciary will request that Congress provide a funding anomaly (exception) above a hard freeze funding level. While we have made every attempt to minimize the impact of sequestration on federal court operations nationwide, the emergency measures currently in place are not sustainable for another year. We would ask for this Committee's support of a CR funding anomaly for the Judiciary in FY 2014.

COST CONTAINMENT IN THE FEDERAL COURTS

The Judiciary is not a newcomer to cost-containment initiatives. The Judiciary continues to build on the cost-containment efforts we started in 2004. Over the last decade many of the cost-cutting initiatives have been implemented and have helped limit the growth in the Judiciary's budget. In fact, our FY 2014 budget request reflected a 2.6 percent increase, the Judiciary's lowest requested increase ever.

Controlling Space Costs

One of the Judiciary's biggest cost-containment successes to date has been limiting the growth in space rent costs. As a result of cost-containment initiatives over recent years, our FY 2014 budget request for GSA rent reflects a cost avoidance of approximately \$400 million below estimates made prior to implementation of our cost-containment initiatives. We have revamped our long-range space planning process to better prioritize space needs with an eye towards cost. With strong controls in place to limit the growth in space rent costs, we are now focusing on reducing the Judiciary's overall space footprint. GSA's cooperation is essential to our ability to reduce space. As the Judiciary's landlord, GSA must work closely with us on space reduction, including taking back excess space from us in a timely manner.

The Judiciary will also continue to look at releasing space in underutilized non-resident facilities based on Judicial Conference approved criteria and upon the recommendation of the appropriate circuit judicial council. A non-resident facility is defined as a facility with a courtroom that does not have a full-time circuit, district, magistrate, or bankruptcy judge in residence. Since 1996 the Judiciary has identified and closed five non-resident facilities. In addition, another 13 court facilities have been vacated for a variety of reasons. The most recent space reductions approved by the Judicial Conference at its September 2012 session will eventually result in the release of 56,000 square feet of space in six additional non-resident facilities with associated annual rent savings of approximately \$1.0 million.

We are pursuing other space reduction initiatives as well. The increased use of online legal research by court personnel offers an opportunity to reduce library-related costs in the areas of library staffing, space, and collections. We have also created financial incentives for courts across the country to identify and release excess space.

Cost Containment in Defender Services

The Judiciary continues to make real progress in containing the costs of providing effective representation. Our case budgeting initiative focuses on the 3 percent of panel attorney representations that account, disproportionately, for 30 percent of the total cost of all panel attorney representations. To specifically target these cases, the Judiciary is promoting the use of case budgeting for any non-capital “mega-case” – a representation in which total expenditures exceed \$30,000 – and for all federal capital prosecutions and capital post-conviction proceedings. Most importantly, the Defender Services program is funding case-budgeting attorneys in three circuits to work with judges and panel attorneys in developing budgets to ensure that the representation is provided in a cost-effective manner. A 2010 Federal Judicial Center study found that the savings from the three positions more than offset their costs. Additional case-budgeting positions were included in the Judiciary’s FY 2013 budget request but were not funded by Congress. The FY 2015 recommendation of the Budget Committee on which the Judicial Conference will act in September 2013 re-request these positions. In this budget environment, funding for these cost-saving positions is in clear jeopardy.

The Judiciary is making major progress in developing an electronic vouchering system, known as eCJA, to replace the current paper-based system for Criminal Justice Act payments to panel attorneys. These attorneys are paid on a per case, per hour basis and currently submit paper vouchers that are entered manually into a system and processed for payment. This is an inefficient process that can result in keying and payment errors. The new system will enable electronic preparation, submission, processing, and ultimately payment of vouchers; reduce voucher processing errors; and expedite voucher processing and payment. It will also provide judges with historical payment information to assist them in evaluating and approving vouchers. Development of this system is still underway.

We are collaborating with the Department of Justice (DOJ) to contain discovery costs in criminal cases (for both the DOJ and the Judiciary) by effectively managing electronically stored information (ESI). In FY 2012, broad national protocols were disseminated that were jointly developed, by the DOJ and the Administrative Office, for the cost-effective and efficient management of ESI in discovery. The Judiciary is optimistic that substantial cost avoidance will result from widespread use of the protocols – to help meet the rapidly changing technological challenges in this high-cost area of discovery – for federal defender and panel attorney cases – and for the DOJ.

We are now using a case weighting system to determine staffing requirements for federal defender organizations. Case weights act as a scientific and empirically-based methodology for determining the complexity of workload in the Defender Services program and allows for a more efficient allocation of limited resources. Case weights provide a fair, objective basis for identifying staffing needs based on disparate case types in federal defender organizations around

the country. Case weights will improve the utilization of resources in the Defender Services program.

Cost Containment Going Forward

While we are proud of our accomplishments to date in containing costs, we recognize that we are in an era of budget constraint. Accordingly, we have embarked on a new round of cost-containment initiatives. Our approach to cost containment is to continuously challenge our ways of doing business and to identify, wherever possible, ways to economize even further. To be candid, this can be a painful process as we are often proposing changes to long-established Judiciary policies and practices. But we are committed to doing everything we can to conserve resources and be good stewards of the taxpayers' money. We continue to take these difficult steps in the belief that they are essential to positioning the Judiciary for the fiscal realities of today and the future.

One of our new cost-containment initiatives is to maximize the implementation of shared administrative services among the courts of appeals, district courts, bankruptcy courts, and probation and pretrial services offices. We believe this will reduce the duplication caused by multiple human resources, procurement, financial management, and information technology staffs in a single judicial district or circuit. This effort will take several years to implement, but it should allow courts to partially absorb budget cuts by reducing administrative staffing and overhead costs and streamlining administrative processes, allowing them to minimize cuts to staff performing core operations.

I close on this topic by emphasizing that while cost containment has been helpful during the last several years of flat budgets, no amount of cost containment will offset the major reductions we face from sequestration. We believe we are doing our part by containing costs and limiting our request, but we have an essential job to perform and we look to the Congress to provide the funding we need to do our work.

CONCLUSION

Chairman Coons and Senator Sessions, I hope that my testimony today provides you with some insight into the impact of sequestration on the federal courts; the importance of Congress funding our supplemental appropriations request; the consequences of flat funding in FY 2014 at sequestration levels and the need for a funding anomaly for the Judiciary; and our ongoing commitment to containing costs.

We appreciate that Congress has difficult decisions to make regarding allocating scarce federal dollars among government agencies. We ask that Congress take into account the Judiciary's unique Constitutional role in our system of government and the importance to our citizenry of an open, accessible, and well-functioning federal court system. We believe, and I hope you agree, that the federal Judiciary is a vital component of what a free society affords its people, and a standard for the world to emulate. Finally, as a co-equal partner in this great democracy, we ask that Congress preserve our federal court system now and in the future by providing sufficient funding for the operation of the federal courts.

Thank you for the opportunity to appear today and for your continued support of the federal Judiciary. I would be happy to answer any questions the Subcommittee may have.