



**STATEMENT**

of

**JAMES R. SILKENAT**

President of the

**AMERICAN BAR ASSOCIATION**

before the

**UNITED STATES HOUSE OF REPRESENTATIVES**

**JUDICIARY COMMITTEE FORUM**

on

**“EXAMINING THE IMPACT OF THE GOVERNMENT  
SHUTDOWN AND SEQUESTRATION ON THE  
PROVISION OF JUSTICE”**

October 8, 2013

My name is James Silkenat. I am a partner in the New York law firm of Sullivan & Worcester and am President of the American Bar Association, a voluntary bar association comprised of almost 400,000 members nationwide.

Thank you for inviting the ABA to participate in this forum to discuss the adverse effects of the government shutdown and sequestration on access to justice throughout the nation. This is a discussion we need to have in public forums again and again to be sure that all Americans know what is at stake if Congress fails to provide the federal judiciary with the funds it needs to fulfill its crucial constitutional and statutory functions. The ABA has long advocated for adequate resources for the judiciary, and our concern for the judiciary grows each day. I will start with some general comments on the nature of the judicial function, then address the preeminent issue of the moment – the government shutdown – and end with a discussion of sequestration. Even though the effects of the shutdown require discussion, I want to make clear from the start that the ABA believes that the funding cuts mandated by sequestration pose the greatest challenges to the fair administration of justice and the timely resolution of disputes.

### **The Judicial Function**

The federal judiciary's annual appropriation must be sufficient to enable it to carry out the many justice functions assigned to it by the Constitution and Congress. In addition to the actual adjudication of all cases filed in federal court, the federal judiciary is responsible for pretrial diversion programs and supervising defendants awaiting trial; providing representation for indigent criminal defendants; securing jurors for jury trials; supervising criminals on post-conviction release; and ensuring the safety of all those who work at or enter federal court facilities. These are vast responsibilities that generate workloads over which the judiciary has no control. For example, last year, over 350,000 cases were filed in the district courts and courts of appeals, and 1,200,000 cases in bankruptcy courts; 109,000 cases were opened in the pretrial services system; 132,000 persons were under post-conviction supervision; and over 137,000 indigent criminal defendants were represented by federal defenders.

For the federal court system to operate efficiently, effectively, and fairly, there must be sufficient funding to handle the caseload generated by each of these essential judicial functions. Inadequate funding of any one function will have a negative ripple effect on the rest of the judicial system, a

phenomenon amply demonstrated by the effect that funding cuts to defender services has had on the operation of the courts.

### **The Government Shutdown**

On the first day of the shutdown, I issued a statement on behalf of the ABA stating that the failure of Congress to compromise on a budget imperils justice in our country and calling on members of Congress to immediately resolve the situation. The political brinksmanship that brought our government to a standstill reflects the same intransigence and unwillingness to compromise that imposed sequestration on government programs and activities, including all activities of the federal judiciary.

This is certainly not the first time there has been a lapse in appropriations or a government shutdown.<sup>1</sup> What distinguishes this from prior ones is that it comes on the heels of a year of difficult and unprecedented funding cuts and staff reductions mandated by sequestration.

The judiciary, unlike most other federal entities, did not have to implement a shutdown plan on October 1. The Executive Committee of the Judicial Conference of the U.S. Courts authorized the use of funding from filing fees and long-term (“no-year”) appropriations to keep the courts in operation. The Administrative Office of the U.S. Courts (AO) estimated that funding from those sources would be sufficient to keep the courts operating and prevent staff furloughs for approximately 10 business days, or through October 15.

If the shutdown continues beyond October 15, the judiciary will operate under the terms of the Anti-Deficiency Act, which allows “essential work” to continue during a lapse in appropriations. “Essential work” in the context of the judiciary includes: 1) activities necessary to support the exercise of the Article III judicial power (i.e., the resolution of cases in which there is a constitutional or statutory grant of jurisdiction); 2) emergency activities necessary for the safety of human life and the protection of property; and (3) activities otherwise authorized by law (e.g., judicial salaries, funding for jurors and the federal defender program). While the Judicial

---

<sup>1</sup> Congressional Research Service, *Federal Funding Gaps: A Brief Overview*, by Jessica Tollestrup, CRS Report RS20348, September 23, 2010. According to the report, there have been 17 government funding gaps since 1977; most were short in duration and did not result in a government-wide shutdown. The report also notes that there has only been four fiscal years since 1955 for which all regular appropriation measures were enacted on time – 1977, 1989, 1995, and 1997.

Conference has issued detailed guidance with respect to the application of this standard, it does not provide a definitive list of essential judicial functions because in a decentralized court system, it is the prerogative of each court to make those determinations.

Appellate, district, and bankruptcy courts and federal defender organizations will continue to perform those operations that are integral to the exercise of Article III judicial powers and will determine the court staff and probation and pretrial services officers necessary to support the exercise of those powers. Staff performing essential functions will be required to report to work in a non-pay status and all other staff will be furloughed for the duration of the shutdown.

Jury trials will continue to operate as necessary to assist the courts in the performance of judicial duties. After funds run out, jurors who are impaneled will be notified that because of the government shutdown, payment for their services will be delayed. Similarly, for the duration of the shutdown, judges will be continue to appoint Criminal Justice Act (CJA) panel attorneys as needed with the understanding that payment for their services and for court-related expenses will be deferred until a FY 2014 funding bill is enacted.

Even though the courts will remain open and will conduct essential business throughout the shutdown, it will not be business as usual for reasons intrinsic and extrinsic to court operations.

Courts already are operating with minimal staffing and insufficient funding as a result of sequestration; furloughing nonessential staff will further reduce the limited resources with which the courts are expected to perform their many critical core functions. As employees are furloughed and case backlogs increase, access to justice will be delayed.

Another adverse effect of the shutdown is the financial impact on furloughed court employees who won't receive their paychecks (unless Congress passes legislation to restore back pay) and those who are required to work but will not be paid until the shutdown is resolved. Some of these employees were furloughed without pay last fiscal year as a result of sequestration. How long will it take before demoralized employees resign because of the financial uncertainty and fiscal austerity under which the courts are being forced to operate?

If the shutdown persists, additional personnel cuts to federal defender offices likely will require more cases to be assigned to CJA panel attorneys, who have not been paid since September 17,

when FY 2013 funds ran out. How long will they be willing to take cases, knowing that payment for both their time and case-related costs will not be forthcoming until Congress resolves the budget impasse and makes sufficient funds available to the courts to pay for indigent defense?

Courts, of course, do not operate in a vacuum. The most prominent example is the Department of Justice (DOJ), the highest-volume litigator in the federal courts. Last Monday, DOJ released its FY 2014 contingency plan, which states that criminal litigation will continue without interruption, but “[c]ivil litigation will be curtailed or postponed to the extent this can be done without compromising to a significant degree the safety of human life or the protection of property.”<sup>2</sup> As a result, federal prosecutors across the nation started filing requests for delays, many in cases with major implications for businesses and civil liberties.

For example, last week a stay in proceedings was requested in a closely watched bench trial in Idaho in which the Federal Trade Commission (FTC) is seeking to block a hospital chain from buying a physicians group. FTC lawyers won a delay in a contested merger case in which the commission sued to block the merger of two glass-bottle manufacturers. DOJ has requested stays in the 2010 lawsuit filed by the American Civil Liberties Union to find out more about U.S. drone strikes abroad, and in a voting rights lawsuit challenging a voter photo ID law in Corpus Christi, Texas.

In New York, my home state, Judge Loretta Preska, the chief judge of the Southern District of New York, took a more dramatic step and granted the Justice Department’s request for a stay in almost all of the civil cases on the court’s docket. Sara Shudofsky, chief of the civil division for the Manhattan U.S. Attorney’s office, explained that she asked for the stay because the shutdown has left the office with only enough assistants and support staff to provide assistance to the government’s trial team in a whistleblower suit against a unit of Bank of America.

While prosecution of criminal cases generally will proceed as scheduled, we know of one case where a stay has been granted and suspect that more will ensue if the shutdown lasts for a significant amount of time. In a death penalty appeal by a man convicted of killing a University

---

<sup>2</sup> *Shutdown leads to delay in death penalty appeal*, by Dave Kolpack, JAMESTOWN SUN, October 04, 2013, accessible at: <http://www.jamestownsun.com/event/article/id/196611/group/News/>

of North Dakota student, U.S. District Judge Ralph Erickson of the District of North Dakota gave the government two additional months to file its response brief because of the government shutdown.

Agency furloughs during the shutdown also will affect access to justice and the work of the federal courts. Individuals with claims arising from administrative determinations made by the Social Security Administration or the Equal Employment Opportunity Commission, for example, may experience delays before they can appeal their final determinations in a federal court.

The government shutdown, by the way, also is affecting the federally funded local court system of the District of Columbia. About one-third of the employees of the D.C. courts are being furloughed and the District's local government is tapping reserve funds to temporarily avoid shuttering additional operations of the courts.<sup>3</sup>

### **Sequestration**

As stated previously, the ABA firmly believes that the funding cuts mandated by sequestration are the core problem and pose the greatest threat to the fair administration of justice and the timely resolution of disputes. The judiciary cannot sustain its operations and fully serve the public with FY 2013 funding levels. My deep concern over the judiciary's mounting funding crisis propelled me to send an action alert to every member of the ABA as soon as I took over the presidency of the ABA this past August.

Senator Coons summarized the situation facing the third branch succinctly in his opening statement at the hearing of the Senate Judiciary Subcommittee on Bankruptcy and the Courts on June 23: "The sequester is slowing the pace, increasing the cost, and potentially eroding the quality and delivery of justice in our country. Congress' disappointing inability so far to responsibly replace the sequester and save the courts from these draconian cuts is eroding our fundamental constitutional right."

---

<sup>3</sup> *D.C. Courts to Furlough One-Third of Employees During Shutdown*, THE BLOG OF LEGAL TIMES, (Oct. 1, 2013), <http://legaltimes.typepad.com/blt/2013/10/dc-courts-to-furlough-one-third-of-employees-during-shutdown.html>

Defender Services, which provide counsel to indigent criminal defendants, suffered a \$52 million funding reduction this past year because of sequestration. To meet that reduction, payments to CJA panel attorneys were suspended for the last two weeks of the fiscal year and federal defender offices were required to make staffing reductions and impose furloughs on remaining employees for an average of 15 days. These staffing cuts have been significant and often crippling: between October 2012 and June 2013, defender offices downsized by more than 6 percent, and, from March through mid-September, their remaining employees were furloughed for over 12,500 days.<sup>4</sup>

As a result of sequestration cuts, courts have had to continue to downsize and furlough staff in clerks' offices and probation and pretrial services as well. This is a process that began in 2011 and has resulted in the loss of over 2,700 staff members as of the end of September. According to the AO, these staffing cuts are resulting in slower processing of civil and bankruptcy claims, a development that invariably will harm individuals, small businesses, and corporations.

Sequestration also has required courts across the country to scale back programs and services that, in the long-run, save the government money. These include pretrial diversion programs; drug testing and counseling; use of electronic monitoring and other alternatives to incarceration; post-conviction supervision; and programs and services authorized under the Second Chance Act. It also has resulted in a 30 percent cut in funding for court security systems and equipment, as well as a cut in the hours worked by court security personnel who are needed to assure the safety of all those who do business in our federal courthouses.

An increasing number of judges are speaking out individually and in concert. Last month, 86 federal judges sent a letter to Vice President Joseph Biden in his capacity as President of the Senate explaining with piercing clarity how justice already has been transformed and warning that their "constitutional duties, public safety, and the quality of the justice system will be profoundly compromised by any further cuts."<sup>5</sup>

---

<sup>4</sup> Letter of Judge John Bates, Secretary of the Judicial Conference of the United States, to the President of the United States, September 10, 2013, accessible at: [http://news.uscourts.gov/sites/default/files/Letter-President-FY14\\_Funding\\_0.pdf](http://news.uscourts.gov/sites/default/files/Letter-President-FY14_Funding_0.pdf)

<sup>5</sup> Letter of 86 Federal Judges to Honorable Joseph R. Biden, Jr., August 13, 2013, accessible at: <http://news.uscourts.gov/sites/default/files/Chief-Judges-Letter-to-Joseph-Biden.pdf>

After a year of experience under sequestration, lawyers echo these same sentiments. We now know firsthand that the timely administration of justice has been severely strained by the FY 2013 \$350 million funding cut and that the failure to restore these cuts will imperil access to our justice system and will degrade the quality of justice in our nation and the judiciary's ability to implement the rule of law.

### **Cost Containment**

In keeping with a long-standing directive from Congress, and in recognition of the budget constraints under which the entire government must function, the judiciary has continued to vigorously pursue and implement cost-containment strategies. It is important to this discussion to highlight their efforts.

In the spring, the Judicial Conference revised its records retention policy, which is expected to result in a savings of over \$7.7 million in 10 years. This past month, the Conference endorsed a "No Net New" policy under which any increase in square footage within a circuit would need to be offset by an equivalent reduction in square footage within the same fiscal year. These changes take effect immediately.

The Conference also voted to impose a three-percent space reduction target by the end of FY 2018 and agreed to seek legislation, such as the Justice Safety Valve Act of 2013 (S. 619), which is designed to restore judges' sentencing discretion and avoid the costs associated with mandatory minimum sentences and legislation to permit the early termination of supervision of inmates who are "compassionately" released from prison. The ABA is on record in support of both of these legislative proposals.

### **The Path Forward**

The Judicial Conference has prepared plans in the event that judicial funding is held flat for the remainder of FY 2014. Most notably, the plan calls for each court's allotment of its Salaries and Expenses account to be decreased by approximately three percent after accounting for must-pay items such as compensation for judges and rental payments to GSA. In keeping with an earlier decision of the Executive Committee of the Judicial Conference, to avoid further cuts to staffing levels in federal defender organizations, absent additional funding from Congress, CJA hourly



rates will be reduced by \$15 per hour for all of FY 2014, and CJA panel attorney payments will be deferred for up to four weeks at the end of FY 2015 if necessary.

Flat funding would have dire consequences for the judiciary, but an even worse one lingers in the background: unless the House and Senate agree to a budget that meets discretionary spending caps mandated in the Budget Control Act of 2011 or enact an alternative bipartisan deficit reduction plan, the federal courts could be subject to yet another round of across-the-board budget cuts that will be even more severe than those currently in place.

Even though their bills are more symbolic than operational, we believe the House and Senate appropriators got it right this spring: they sent a clear message to their colleagues that the judiciary needs to be treated as a funding priority when they approved FY 2014 appropriation bills to increase funding for the courts by 5.5 percent and 7.5 percent, respectively, over FY 2013 sequestration levels. Even congressional leaders who crafted the ill-fated continuing resolutions adopted by each chamber just before the end of the fiscal year agreed on the need to increase the judiciary's FY 2014 funding by an amount that would pay for last fiscal year's shortfall in the Defender Services account. The proposed increase over flat funding, though small, at least acknowledges the seriousness of the budget shortfall and is a small step in the right direction.

The federal judiciary is essential to preserving our constitutional democracy, security, and freedom; restoration of funding cuts must not be delayed or denied. Regardless of the outcome of ongoing fiscal negotiations or the vehicle used to fund the government for the rest of the fiscal year, Congress needs to provide the federal judiciary with a sufficient and certain FY 2014 appropriation. Our federal courts must be able to plan for and execute their essential constitutional and statutory functions in a fair, efficient, and timely manner. To accomplish this, the ABA urges Congress to protect the judiciary from future deficit reduction and to enact a FY 2014 appropriation that is no less than the amount recommended by the House Appropriations Committee this past summer.

Thank you for the opportunity to present these comments.