

Senate Judiciary Committee Hearing
“Sequestering Justice: How the Budget Crisis is Undermining Our Courts”

Questions for the Record Submitted by Senator Al Franken
For Mr. Michael Nachmanoff

Question 1. Do you believe that sequestration could make it more difficult for the judicial system to fulfill its constitutional obligations, including the right to speedy criminal trials, the right to counsel, and the right to jury trials? If so, please explain.

Response.

Sequestration cuts have created an unprecedented financial crisis adversely affecting the Judiciary’s ability to fulfill its constitutional duties, ensure public safety, and maintain the quality of our justice system. Without action from Congress, the impact on the Judiciary’s performance of its mission—which has already been severe in FY 2013—will be devastating and long lasting.

Current Judiciary staffing is the lowest it has been in 14 years, while the workload handled by the courts and Defender Services has seen significant growth over the same period of time. As a result of sequestration, Federal Defender offices already have reduced staffing levels by more than 6% and have implemented more than 12,500 furlough days over the past six months. These staffing reductions have resulted in slower processing of both criminal and civil cases. Federal Defenders have been forced to request the postponement of certain resource-intensive cases, causing delays in trials. Such delays require defendants to spend more time in costly pretrial detention facilities, increasing expense to the taxpayer. These are just a few examples of the harm inflicted on our judicial system as a direct result of sequestration. In a recent letter to congressional leaders, 87 chief judges of district courts—representing nearly every federal district in the country—detailed the extent of damage inflicted on the Judiciary by sequestration and flat funding.

If Congress does not restore funding to the Judiciary in FY 2014 through an anomaly or other supplemental funding, federal courts and the Federal Defender community will be unable to perform their constitutional and statutory duties.

Question 2. I have heard from the Federal Defender in Minnesota, who is concerned that sequestration could decimate her office and the public defender system. I share these concerns, and I think that the Federal Defender put it well when she wrote this: “That these things would happen on the 50th anniversary of the Supreme Court’s decision in *Gideon v. Wainwright*, the decision that made the Constitution’s promise of assistance to counsel real for all Americans, is nothing short of tragic.” Could you please share your thoughts on this issue?

Response.

I could not agree more with my colleague from Minnesota. The landmark *Gideon* case holds that equal access to justice under the law requires every defendant accused of a crime, whether rich or poor, have access to effective defense counsel. For the past forty years, the Federal Defender system has served this principle by providing high-quality, cost-effective representation for the indigent. Today, cuts are crippling the system that was created by Congress to carry out *Gideon*’s promise. If Congress does not provide the Judiciary with supplemental funding this year, sequestration will eviscerate the right to counsel guaranteed by the Sixth Amendment—and that is indeed a tragedy.

Question 3. In your written testimony, you say that the “integrity of our adversarial judicial process is undermined by the imbalance between a fully-funded prosecution and a defense crippled by budget cuts.” Do you think that Congress could reduce this disparity by calibrating the Office of the Federal Public Defender’s funding with that of the Justice Department?

Response.

Congress can and should address the disparity in funding between federal prosecutors and federal defenders. The adversarial model at the heart of our judicial system requires a balance of resources. This balance cannot exist, and the process cannot function properly, unless both sides are comparably staffed, resourced, and funded.

Unfortunately, balance does not exist in federal criminal court. The entire Defender Services Account (when fully funded) is just over \$1 billion, which is less than 4% of the \$27.5 billion allocated to the Department of Justice. At the same time that Federal Defender organizations are suffering furloughs, layoffs, and resource shortages due to sequestration, the Justice Department has avoided furloughs, and maintained or increased its prosecutions.

These funding disparities are especially troublesome because the Justice Department determines Federal Defenders’ workload. The Judiciary has no control over the number or nature of cases in which court-appointed counsel are required. As federal prosecutors continue to bring complex, multi-defendant cases, Defenders are constitutionally obligated to spend resources on investigation, travel, expert costs, and other litigation expenses, in order to provide the type of vigorous representation required by our adversarial system. Sequestration cuts threaten the Federal Defenders’ ability to accomplish their mission. When the scales of justice are so lopsided, an increase in wrongful convictions and imprisonment of the innocent will likely result. Ironically, these and other mistakes will create greater expenses down the line through retrials, appeals, and unlawful-detention proceedings.

Adequate funding for the Federal Defender community is not a divisive issue. All stakeholders in the criminal justice system—including 87 current chief judges of federal districts, more than 40 former federal judges and prosecutors, the National Association of Assistant U.S. Attorneys, Attorney General Eric Holder, and numerous members of Congress on both sides of the aisle—have expressed their unqualified support for a fully-funded Federal Defender program. It is time for Congress to respond to their concerns by providing adequate funding for the Judiciary this fall through an anomaly or other means.

Question 4. It seems to me that short-term spending cuts within the Office of the Federal Public Defender will result in long-run expenses. For example, the Office of the Federal Public Defender provides more effective and cost-efficient representation than do available alternatives. Do you agree with this assessment? If so, can you explain why the short-term cuts required by sequestration will actually increase costs to the judicial system in the long run?

Response.

Yes. For the past forty years, the Federal Defender program has consistently served as a model for efficiency and cost-effective representation. Unlike other branches of government, the Federal Defender system does not have ancillary projects or programs to cut—only personnel. Consequently, reductions in staffing have resulted in a greater number of cases being assigned to the CJA panel, incurring additional costs. Furloughs and layoffs of federal defenders also have caused delays in hearings and trials. When these delayed proceedings involve a defendant in custody, the taxpayer must foot an additional \$2,000-\$3,500 per defendant per month for the added costs of pretrial detention. In other words, for one furloughed federal defender who is forced to continue proceedings for 10 detained clients by one month, the government can incur an additional \$35,000 in detention costs. Federal courts around the country have experienced these types of delays in FY 2013.

Not only do cuts to the Federal Defenders increase judicial costs, but more importantly, a fully-funded Defender program will in fact save the government money. For example, Federal Defenders routinely participate in re-entry and diversionary courts for criminal defendants; these courts not only lower recidivism rates and improve public safety, they also lower costs associated with incarceration. Federal Defenders also save tremendous amounts of money through effective advocacy that results in lower sentences of imprisonment. Every year of federal incarceration costs the taxpayer at least \$25,000 per inmate. Of the roughly 125,000 cases that Federal Defender offices open per year, saving just one month of incarceration per client would yield annual savings of \$260 million.

These examples demonstrate that cuts to the Judiciary not only undermine justice, they are bad fiscal policy. Restoring funding to the Federal Defender program is the only financially responsible course of action. My colleagues and I strongly urge Congress to provide supplemental funding to the Judiciary in FY 2014 through an anomaly or some other funding mechanism.

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Questions for the Record Submitted by Senator Jeff Sessions
For Mr. Michael Nachmanoff

Question 1. It is my understanding that the Executive Committee of the Judicial Conference approved emergency measures intended to deal with sequestration for 2013 but that local offices determine how to implement the reductions. How much of the appropriation to the Judiciary goes to headquarters or centralized operations (including rent) and how much is distributed through a formula to local public defender offices?

Answer: Federal Defender Organizations suffered approximately 10% cuts to their FY 2013 budgets as a result of sequestration. In April, in an effort to mitigate the impact of these cuts, the Executive Committee of the Judicial Conference decided to provide a portion of supplemental funding approved by Congress in March 2013 to those same organizations. The funds were intended to reduce the number of furlough days to no more than 20 for the remainder of FY 2013. Each individual federal defender determined how to handle the shortfall in funding. Many chose a combination of furloughs and staff reductions.¹

With respect to how the Defender Services Appropriation is apportioned within the Judiciary, approximately 0.7% of the appropriation is managed centrally by the Administrative Office of the U.S. Courts. Federal Defender Organizations receive approximately 60% of the appropriation to pay for employee salaries, benefits and rent, as well as variable costs such as travel and litigation-related expenses. The Administrative Office does not pay rent for Federal Defender offices through centralized funds.

The Administrative Office of the U.S. Courts receives less than 2% of the entire appropriation for the Judiciary. Federal Defender Organizations receive approximately 8.6% of the entire Judiciary Appropriation.

¹ On August 16, 2013, the Executive Committee announced the adoption of measures to manage the projected shortfall in the Defender Services Account during the anticipated FY 2014 continuing resolution. This action will not affect FY 2013 budgets, but the Executive Committee is committed to providing FY 2014 funding at a level sufficient to maintain on-board staffing nationally, which will be approximately 10% below requirements for the program. In addition to the cuts in federal defender funding, the Executive Committee’s decision also included a temporary \$15 per hour reduction in rates to CJA attorneys and the deferral of up to four weeks of panel payments in FY 2014. Accordingly, the need for adequate funding from Congress through an anomaly or other funding mechanism is critical to fully fund the Federal Defender Organizations, eliminate potential deferrals of panel payments and bring the panel rates back up.

Question 2. How does your office determine what is classified as a “fixed cost”? Are attorney salaries fixed costs? If labor counts as a fixed cost, does that include hiring to replace those lost to attrition?

Answer: In my office, “fixed costs” are non-discretionary expenditures for employee salaries, benefits, and rent. This amount would include funds for employees hired to replace those who leave the office; however, I have hired only one employee in the last six months, a computer systems administrator (“CSA”), who began work in July 2013, because it is impossible to run the office without such an employee. I have not hired anyone to replace the five other employees who have left the office since January 2013.

Question 3. Has your office offered raises or merit increases since sequester went into effect?

Answer: No. As a consequence of sequestration, we have not provided raises or merit increases to any employee.

Question 4. What is the annual amount of funds provided for the Public Defender’s Office from FY2000 through FY2013, and what are they projected to be through FY2021 assuming the post-sequester levels in the Budget Control Act?

Answer: Attached is a chart which lists the annual appropriation for the Defender Services Account from Fiscal Year 2000 through Fiscal Year 2013. The chart also contains projected appropriation amounts through FY 2021, assuming that the appropriation for Defender Services is adjusted at the same rate as discretionary national spending.

Defender Services Funding

FY 2000 to FY 2013 (Actual)
FY 2014 to FY 2021 (Projected under the Budget Control Act)

Fiscal Year	Appropriation from Congress /1	Dollar Change	Percent Change	Total Obligations /1	Dollar Change	Percent Change
FY 2000	\$358,848,000			\$399,934,000		
FY 2001	\$435,000,000	\$76,152,000	21.2%	\$440,610,000	\$40,676,000	10.2%
FY 2002	\$500,671,000	\$65,671,000	15.1%	\$485,895,000	\$45,285,000	10.3%
FY 2003	\$538,461,000	\$37,790,000	7.5%	\$565,466,000	\$79,571,000	16.4%
FY 2004	\$604,477,000	\$66,016,000	12.3%	\$627,094,000	\$61,628,000	10.9%
FY 2005	\$676,385,000	\$71,908,000	11.9%	\$668,834,000	\$41,740,000	6.7%
FY 2006	\$717,000,000	\$40,615,000	6.0%	\$722,947,000	\$54,113,000	8.1%
FY 2007	\$776,283,000	\$59,283,000	8.3%	\$773,713,000	\$50,766,000	7.0%
FY 2008	\$835,601,000	\$59,318,000	7.6%	\$811,310,000	\$37,597,000	4.9%
FY 2009	\$849,400,000	\$13,799,000	1.7%	\$896,563,000	\$85,253,000	10.5%
FY 2010	\$977,748,000	\$128,348,000	15.1%	\$972,095,000	\$75,532,000	8.4%
FY 2011	\$1,025,693,000	\$47,945,000	4.9%	\$1,027,068,000	\$54,973,000	5.7%
FY 2012	\$1,031,000,000	\$5,307,000	0.5%	\$1,044,209,000	\$17,141,000	1.7%
FY 2013	\$986,055,000	-\$44,945,000	-4.4%	\$1,003,212,000	-\$40,997,000	-3.9%

Estimated Appropriations Based on Year-to-Year Changes in the Budget Control Act

Fiscal Year	Projected Appropriation from Congress	Dollar Change	Percent Change /2
FY 2014	\$971,092,823	-\$14,962,177	-1.5%
FY 2015	\$997,961,004	\$26,868,181	2.8%
FY 2016	\$1,017,152,562	\$19,191,558	1.9%
FY 2017	\$1,038,263,276	\$21,110,714	2.1%
FY 2018	\$1,061,293,145	\$23,029,869	2.2%
FY 2019	\$1,086,242,170	\$24,949,025	2.4%
FY 2020	\$1,109,272,039	\$23,029,869	2.1%
FY 2021	\$1,132,301,909	\$23,029,869	2.1%

/1 The dollar amounts have not been adjusted for inflation, and include funds for federal defender organizations, panel attorneys and program administration.

/2 The percent change from FY 2015 to FY 2021 assumes appropriations for Defender Services changes at the same rate as discretionary non-security spending.