October 2, 2013

Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Thank you for inviting me to testify at the recent hearing on "The Federal Judgeship Act of 2013" before the Senate Judiciary Subcommittee on Bankruptcy and the Courts. I am pleased to answer written questions from Senators Chris Coons and Amy Klobuchar, and I write on behalf of the Judicial Conference of the United States to transmit answers.

As I testified to during the hearing, the Federal Judiciary has seen a 39 percent increase in filings at the district court level and a 34 percent increase in filings at the appellate level since the last comprehensive judgeship legislation was approved by Congress in 1990. And yet, there has been only a 4 percent increase in district court judgeships over this time. More judgeships are needed to handle this growth in an efficient and expeditious manner. Because the Judiciary is unable to control the amount of work that comes through courthouse doors, we can only request that the requisite resources be available to fairly adjudicate each case presented.

The jurisdiction of the Judicial Conference Committee on Judicial Resources relates to issues of human resource administration, including the need for additional Article III judges. Senator Klobuchar's first question, however, in part addresses the impact the sequester has had on the Federal Judiciary. As this issue is within the jurisdiction of the Judicial Conference Committee on the Budget, I have conferred with Judge Julia Smith Gibbons, that Committee's chair, in answering the question.

With this context as background, answers to the Subcommittee members' questions follow. I respectfully request that this letter be made a part of the hearing record as well.

Sincerely,

Timothy M. Tymkovich

Timothy Tymkovich

Enclosures

Answer to Senator Chris Coons' question

Question:
During the hearing you briefly addressed some of the criticisms regarding the Conference's methodology used when evaluating a district's request for additional judgeships. Would you provide a more detailed response regarding how your committee assesses the need for judgeships and whether the assessment accurately reflects both the in-court and out-of-court duties of a judge?

Answer:
As detailed in my written testimony, the Judicial Conference reviews the Article III judgeship needs of the courts biennially using a six-step review process that involves the individual court requesting additional resources, that court's circuit judicial council, the Judicial Resources Committee's Subcommittee on Judicial Statistics, the full Judicial Resources Committee, and the Judicial Conference. The Conference will never go beyond the individual court's request, or consider additional resources in the absence of a request, despite the fact that the caseload may indicate otherwise.

The recommendations are based in large part on a numerical caseload standard. For the district courts, the Conference standard is 430 weighted filings per authorized judgeship after accounting for the additional judgeships requested by the court. For the courts of appeals, the Conference uses a standard of 500 adjusted filings per panel, also after accounting for the additional judgeships requested by the court.

The numeric standards represent the caseload at which the Conference begins to consider requests for additional judgeships. They are the starting points in the process, not the end points. Indeed, they are considered with other court-specific information to develop a thorough assessment of the judgeship needs of each court that submits a request for additional judgeships. Circumstances that are unique, transitory, or ambiguous are carefully considered so as not to result in an overstatement or understatement of the court's judgeship needs.

The caseload standard for the district courts is based on weighted filings statistics which account for the different amounts of time district judges require to resolve various types of criminal and civil cases. The current case weights have been in effect since 2004, when the Federal Judicial Center (FJC) completed an event-based study which included both in-court and out-of-court time required to resolve cases. The comprehensive study took into account how often the following events occur in cases, as well as the average time it takes district judges to handle them: trials and evidentiary hearings; non-evidentiary hearings and conferences; research, reading, and writing on orders responding to particular motions; and preparation for proceedings such as trials or sentencing hearings.

The method used by the FJC incorporated both empirical docketing data from courts' management reports and time data from statistical reports that the district judges prepare, and consensus time expenditure information from experienced judges. The study resulted in case weights that, when applied to 2003 national case filings, showed a five percent reduction in the national weighted caseload from the previous weights which had been in effect since 1993. A time-study had been used to develop the 1993 case weights.

In making judgeship recommendations, the Judicial Conference has accepted the FJC's event-based methodology. A time-study, as suggested by the Government Accountability Office (GAO) in its 2003 report, is not believed to be justified for several reasons. The event-based methodology provides accurate results in addition to providing significant resource savings as well as the ability to update case weights more frequently and efficiently when needed. Indeed, in their own report, the GAO noted these significant advantages of reduced judicial burden (allowing judges to focus on cases), cost savings, and faster development of case weights. Given the accuracy and the additional advantages resulting from the event-based study, the resource-intensive costs of a time-study are not considered to be warranted.

The standard of 500 adjusted filings per panel for the courts of appeals has been recognized outside the Judicial Conference as a useful and appropriate standard for assessing the judgeship needs of the courts of appeals. Data from the FJC support the 500 adjusted filings standard. Those data show that because only a very small percentage of pro se cases receive oral argument or a published opinion, it is reasonable to conclude that pro se cases contribute significantly less to the judicial workload. Additionally, Professor Arthur Hellman of the University of Pittsburgh School of Law, a noted expert on federal court issues, testified before a House Judiciary Subcommittee in 2003 that the one-third adjustment of pro se cases is "justified." Professor Hellman also testified that the 500 adjusted filings per panel standard is "quite defensible" and that the Conference has taken a "conservative approach" in assessing requests for new appellate judgeships.

Answers to Senator Amy Klobuchar's Questions

Question:
I have heard from the judges and public defenders and others in my state and elsewhere about the negative impact that sequestration has had on the courts, and about the impact of existing judicial vacancies. I would imagine those two factors only multiply the impact of the need for more judgeships. What has been the combined impact of sequestration, judicial vacancies, and too few judgeships?

Answer:
The sequestration cuts that took effect March 1, 2013, have had a devastating impact on federal court operations nationwide. The five 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.

As a result of sequestration, funding allocations sent out to nearly 400 court units nationwide were cut 10 percent below the FY 2012 level. Due to flat budgets followed by sequestration, on a national basis, court staffing levels in clerks of court and probation and pretrial services offices are down nearly 2,500 staff since July 2011, an 11 percent decline. This includes 1,000 staff the courts have lost so far in FY 2013 (through August 2013). 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.

We are particularly concerned about sequestration cuts to the Judiciary's probation and pretrial services program and the impact on public safety. Sequestration has reduced funding for probation and pretrial services officer staffing throughout the courts, which means less deterrence, detection, and response to possible resumed criminal activity by federal defendants and offenders in the community. In addition, law enforcement funding to support GPS and other electronic monitoring of potentially dangerous defendants and offenders has been cut 20 percent. Equivalent cuts to funding for drug testing, substance abuse and mental health treatment of federal defendants and offenders have also been made, increasing further the risk to public safety.

We are also concerned about the $52 million sequestration cut to the Judiciary's Defender Services program. Sequestration cuts threaten the ability of the Judiciary to fulfill a fundamental right guaranteed to all individuals under the Sixth Amendment: the right to

court-appointed counsel for criminal defendants who lack the financial resources to hire an attorney. Cuts to federal defender organizations threaten delays in the progress of cases, which may violate Constitutional and statutory speedy trial mandates. Sequestration has resulted in payments to private panel attorneys being suspended the last two weeks in FY 2013, and federal defender offices have implemented staffing reductions and widespread furloughs. The uncertainty of the availability of federal defender attorneys and the anticipated suspension of panel attorney payments will create the real possibility that panel attorneys may decline to accept Criminal Justice Act appointments in cases that otherwise would have been represented by federal defender offices.

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. A high level of security for judges, prosecutors, defense counsel, jurors and litigants entering our courthouses must be maintained.

Along with the severe operational concerns resulting from the sequester, the Federal Judiciary continues to lack the requisite number of federal judges able to handle the growing caseload in the federal courts. Simply put, the Judicial Conference believes that all judicial vacancies should be filled unless otherwise stated. However, because the authority to appoint and confirm a federal judge exists outside the Federal Judiciary along with the fact that the number of vacancies in a court may vary at any given time, the Conference's survey process presumes each court is working with its full complement of statutorily authorized judgeships. Consequently, the caseload standards that the Conference uses as the threshold for considering judgeship requests is based on the caseload per authorized judgeship, regardless of whether a given judgeship is currently occupied by a sitting judge.

During FY 2012, weighted filings exceeded 600 per judgeship in 17 district courts in which the Conference is recommending additional judgeships. The weighted caseload exceeded 700 per judgeship in five of these courts, including three with over 1,000 weighted filings per authorized judgeship. On those courts where vacancies exist, the burden placed on the sitting judges is even higher than the enormous weighted filings per authorized judgeship statistics, and the resulting judgeship recommendations, would reveal. For example, during FY 2012 the District of Arizona had 712 weighted filings per authorized judgeships. As of September 20, 2013, six of the court's 13 authorized judgeships are vacant. As a result, the number of weighted filings exceeds 1,300 per active judge, more than three times the Conference standard for considering requests for additional judgeships.

The lack of new judgeships is having a tremendous impact on our courts. For example, in the Eastern District of California, parties seeking civil jury trials have to wait, on average, almost four years. The impact of the sequester and the severe operational concerns that now exist as a result have only compounded judicial resource shortages already experienced by the Federal Judiciary. In fact, in many ways, if continued, these effects would exacerbate the delays and problems courts are dealing with today. To ensure the Federal Judiciary is able to continue to effectively and expeditiously administer justice, adequate resources and funding must be made available.

Question:
At what point does a delay in justice, due to overwhelmed courts, become a substantive impediment to justice? Have we reached that point in some of the districts and circuits?

Answer:
Yes, we have reached that point in some courts. During FY 2012, three district courts experienced over 1,000 weighted filings per authorized judgeship, and five district courts (the District of Delaware, the Eastern District of California, the Eastern District of Texas, the Western District of Texas, and the District of Arizona) have averaged over 700 weighted filings per judgeship over the past three years. These extremely high caseloads often result in an impediment to justice. As Judge Sue Robinson noted in her written statement to the Subcommittee, "I can tell you that I'm double- and even triple-booked for patent trials through 2015, that I have 327 patent cases on my personal docket with 141 pending motions. I have two law clerks who assist me with my patent docket. We cannot keep this level of work up indefinitely and do our jobs well. Indeed, the statistics are starting to demonstrate a downward trend in terms of our ability, as a Court, to resolve motions and get to trial timely."

In the Eastern District of California, even with extensive use of magistrate and senior judges and the assistance of numerous visiting judges, parties seeking civil jury trials wait, on average, almost four years from filing for their trial to begin; nearly two years longer than the national average. Additionally, in courts with heavy criminal caseloads, civil cases often languish because judges are forced to concentrate on criminal prosecutions to ensure that Speedy Trial Act requirements are met. As a result, litigants may accept less than advantageous settlements rather than go to trial because of the lengthy delays due to the extremely high caseloads and lack of needed judicial resources.