

The Right Answer

The Newsletter of the Federal Career Service Division of the Federal Bar Association

A Word from the National President

Hon. Gustavo A. Gelpí

As president of the Federal Bar Association, I am honored to address you, the members of our Federal Career Service Division.

Like many of you, I have been a public employee for 22 years now. I began working for Uncle Sam in 1991, when I graduated from law school and was hired as a law clerk to the Hon. Juan M. Perez-Gimenez, U.S. district judge for the District of Puerto Rico. After two years of service, I became an assistant federal public defender until 1996, when I was detailed to work at the U.S. Sentencing Commission in our nation's capital. From 1997-2000, I took a "federal sabbatical," so to speak, and worked for the Puerto Rican state government at its justice department. For the last two of those years, I was honored to serve as Puerto Rico's solicitor general. Then in 2001, after an extremely brief stint in private practice, I was called back to federal service by appointment as a U.S. magistrate judge, a position I held for over five years.

In August 2006, I became a U.S. district judge when I was sworn in by my friend, mentor, and first boss Judge Perez-Gimenez. God willing, I will continue in office for at least 17 more years, until I retire or take senior judicial status. By then, I will have served 40 years in government, 36 of them in the service of the United States. While this may seem like a lot to some, it runs in my family. You see,

my grandmother, Maria Benitez, proudly served as a civilian employee for the U.S. Navy for 43 years, retiring when I was 6 years old.

For me, federal service is the most rewarding job one can hold. Whether we serve as judges, prosecutors, defenders, judge advocates, agency counsel, legislative counsel, or in any other legal position, we are all blessed to labor on behalf of the greatest democracy in the world. Every day, when we walk into our offices, we should remind ourselves that we are serving, and a part of, a system of laws for the people and by the people.

With these thoughts in mind, I thank your division for its support of our convention in Puerto Rico, and I look forward to spending this year supporting you and meeting those of you I do not know. Please do not hesitate to contact me at president@fedbar.org if I can be of any help. ■



Hon. Gustavo A. Gelpí is the 2013-14 national president of the Federal Bar Association.

In this Issue

- | | | |
|--|---|---|
| <p>2 What Comes After the Shutdown?</p> | <p>4 Law Clerk Authors: To Be or Not to Be</p> | <p>7 Save the Date! And Find the Perfect Employee for Your Firm, Agency, or Office: Register for the Greater Washington, D.C. Public-Service Career Fair</p> |
| <p>3 Happy (or Sad) 50th Anniversary to Clarence Gideon</p> | <p>5 Meet Kent Eiler</p> | |

What Comes After the Shutdown?

by Bruce Moyer

The 16-day government shutdown in early October was a nightmare for the nation and a totally unnecessary exercise in amateurish governance. Among federal attorneys, some lawyers were considered exempt by their agencies while others were furloughed. Now that everyone's back to work, here's a look at the budget agreement that emerged and what it means for federal attorneys and other federal employees.

There are three main components of the budget agreement: first, a Continuing Resolution that reopened government and generally extended funding at FY 2013 levels for a three-month period; second, a temporary lift of the debt ceiling; and third, the start-up of House-Senate negotiations to complete the FY 2014 budget and potentially achieve a larger deficit-reduction package. The first two components largely kick the can down the road. The third is a promising development fraught with uncertainty. Here are the details.

Continuing Resolution

The CR extends FY 2014 government funding at FY 2013 levels through January 15, 2014. For most agencies, this means "flat funding" for that period, which is a troublesome prospect if funding remains frozen at that level for the rest of the fiscal year. In January 2014, however, additional cuts are scheduled to kick in under the terms of the 2011 Budget Control Act that introduced the sequester. These additional cuts could create even greater challenges. All of this portends, for the time being, continued uncertainty about the long-range budget picture across agencies, including whether furloughs or even layoffs will become necessary next year.

On a positive note, the CR authorized retroactive pay for federal employees who were furloughed during the government shutdown. Those payments should be remitted during the remainder of October for most agencies.

Debt Ceiling

The budget agreement also raised the debt ceiling through February 7, 2014, with the Treasury Department maintaining its ability to use so-called "extraordinary measures" to extend the deadline. In the past, one of these extraordinary measures has involved temporarily not paying in-

terest on treasury securities within the Thrift Savings Program, then ultimately paying the interest and holding account-holders harmless after the ceiling impasse is bridged.

Budget Conference

Finally, the budget agreement calls for the convening of a House-Senate conference to reach a recommended budget resolution on FY 2014 by December 13. This will be the first time in five years that the House and Senate will sit down in conference, under "regular order"—the way things are supposed to work legislatively—to negotiate a budget resolution that sets the top-line numbers for federal spending and appropriations accounts. The final budget spending number likely will fall somewhere between the House GOP number, \$986B, and the Senate Democratic number, \$1,058B. Once the federal spending numbers are negotiated and approved through a budget resolution, the appropriations bills will begin to move, either singly or combined, through Congress.

These upcoming budget negotiations will bring Paul Ryan and Patty Murray, the respective chairs of the House and Senate budget committees, into the national spotlight through mid-December. The two have privately been trying to lay the groundwork for a deal since the beginning of the year, though House Republicans have been resistant to officially sitting down at the conference table until now.

What Happens to the Sequester?

The upcoming negotiations will also focus on the future of the sequester, along with potential changes in mandatory spending programs. Democrats will insist on dropping the sequester and seeking new revenue, which will bring into play potential changes in the tax code. Republicans, for their part, will be drawn to turning off the sequester, at least partially, because of the larger sequester cuts that defense is scheduled to take in 2014.

What About Federal Pay Raises and Benefits?

The outcome of the budget conference could have adverse consequences for federal employees in

Shutdown continued on page 6

Happy (or Sad) 50th Anniversary to Clarence Gideon

by Beth Ford

Never did it cross my mind that I would be concerned about the continued existence of federal defenders' offices or the continued payment of court-appointed panel attorneys at a rate many of us have worked so hard to raise. After all, this is the year of the 50th anniversary of the Supreme Court's decision in *Gideon v. Wainwright*, and we are within one year of celebrating the fiftieth anniversary of the Criminal Justice Act (CJA), which is the model for indigent representation around the world.

But here we are.

By way of background, approximately 90% of individuals prosecuted in federal court qualify for court-appointed counsel. The CJA requires district courts to decide how these indigent defendants will be represented, and in practice, public defenders' offices around the country are appointed on 45-75% of such cases. The remaining appointments go to qualified attorneys who are members of local CJA panels, and those panel appointments are made primarily where there is an actual or potential conflict of interest in representation due to multi-defendant indictments or cooperation. The CJA budget, which funds both federal defenders' offices and panel attorneys, is a line item in the judiciary's budget, and decisions about office budgets and staffing are made by various committees of the Judicial Conference.

Earlier this past summer, defenders' offices were told that their budgets would be slashed an additional 23% beyond the federal sequester in Fiscal Year (FY) 2014, an amount which would have decimated most of these already-embattled offices, causing them to lay off at least one-third of their staff. But there's another problem. When public defenders cannot take cases, panel attorneys must be appointed, even though panel attorneys cost more than public defenders pound for pound. The result is that our limited funds are spent even faster than they otherwise would be. That is not a wise budget move if saving money is the goal.

On August 16, the Executive Committee of the Judicial Conference made a difficult, balancing move to manage the shortage of funds on a short-term basis. Effective September 1, the hourly rate for panel attorneys was cut from \$125 to \$110, and at the end of FY 2014, payments to such attorneys will

be suspended for up to four weeks. That means that those 2014 vouchers will not be paid until 2015. In exchange, defenders' budgets were cut an additional 10% instead of the anticipated 23%.

The sequester's original 10% cut, which was effectively a 20% cut since it had to be absorbed over six months instead of a full year, has already resulted in (and will continue to result in) serious consequences that threaten the tenets of *Gideon* as well as Justice Hugo Black's proposition that all defendants should stand equal before the law. These consequences include permanent layoffs and extensive furloughs that have been forced upon defenders' offices. In fact, even high-profile cases—such as the ones involving Osama Bin Laden's son-in-law in New York and the accused Boston Marathon bomber—are facing continuances because the local federal defenders' offices there have had to furlough staff. These very severe measures of laying off and furloughing staff were taken in order to keep defenders' offices open during 2013.

Such measures, however, will not even begin to address the predicted budget crisis in store in 2014, a crisis that will have dire impacts upon indigent criminal defense in all federal courts. And like layoffs, furloughs, and the withholding of pension contributions, these are temporary, inadequate fixes to the budget woes facing the judiciary.

The only long-term solution is for Congress to approve a budget anomaly, or a special appropriation for FY 2014 and future years, that provides sufficient, appropriate funding for the CJA budget and the judiciary. An anomaly would enable our federal-defender programs and panel attorneys to continue to represent indigent defendants in the cost-efficient, competent manner that they have for almost 50 years and would allow the Executive Committee to reinstate the hourly rate of \$125 for panel attorneys as well as reimburse them in a timely manner for the good work they do. That is a small price to pay for invaluable constitutional rights. It is necessary, and it is overdue.

If you have any questions or would like to discuss this constitutional crisis, please call me at (865) 637-7979 or email me at Elizabeth_Ford@fd.org. ■

Elizabeth Ford is the federal community defender for the Eastern District of Tennessee.

Law Clerk Authors: To Be or Not to Be

by Danielle Mair

As a judicial law clerk, am I violating the Code of Conduct by writing this article? The short answer is “no.” Often, however, the question arises whether it is appropriate for current law clerks to publish articles in journals and law reviews while they are clerking.

Authoring articles may be a natural fit for many law clerks. After all, they are learned in the law. They are smart (and sometimes, witty) people. And they are trained in critical, analytical thinking and writing—it’s what they do every day. But on the job, they are ghostwriters, sometimes drafting opinions and orders for the judges they work for, but never disclosing publicly what cases they are working on or what they contribute to any written decision.

Off the job, law clerks are normal people who can do most normal things, but even when they aren’t working, law clerks are subject to the Code of Conduct for Judicial Employees. And Canon 4A of the Code of Conduct addresses the standard for a judicial employee’s outside activities (including writing) which the Federal Judicial Center explains as follows:

Canon 4A of the Code of Conduct sets the basic threshold for involvement by law clerks in *any outside activities*, including business, financial, and fiduciary activities. It permits you to undertake these activities as long as they do not interfere with the performance of your official duties or adversely reflect on the operation and dignity of the court. You may participate in charitable, religious, cultural, avocational, and recreational activities. If you write, lecture, or teach, you must have your judge’s permission, especially if the topic is controversial, law-related, or likely to be the subject of litigation.

Federal Judicial Center, *Maintaining the Public Trust: Ethics for Federal Judicial Law Clerks* 20 (3d ed. 2012) (emphasis in original).

In addition, a law clerk “may receive

compensation for a *series* of speeches or articles, as long as they are unrelated to your official duties.” *Id.* (emphasis in original). But a law clerk “may not . . . accept honoraria, which are defined as payments for a single appearance, speech, or article.” *Id.*

Therefore, while law clerks are not prohibited from writing and publishing works of their own, they must be mindful of how their written work might intersect with or reflect on their work as law clerks and, perhaps most importantly, ultimately reflect on the judges they work for. That is why law clerks *must* have their judge’s permission before setting pen to paper. So all you law clerks out there with interesting things to say, please do, but please do as I did in writing this article, first. Get permission from your judge, do not let your writing interfere with your job, read the Code of Conduct for Judicial Employees¹, adhere to all of its canons, and do not accept payment for your work unless you meet the “series” requirement. ■



Danielle Mair is a career judicial law clerk for Magistrate Judge Jeffrey J. Keyes in the U.S. District Court for the District of Minnesota. Mair has previously practiced in a large law firm in Minneapolis, focusing on patent and complex litigation in federal courts, and has previously clerked for three state court appellate judges in Minnesota as well as U.S. District Court Judge Donovan W. Frank. As a law clerk for Magistrate Judge Keyes, she has participated in the review of numerous, complex criminal and civil matters, including multi-district and class-action litigation, and she has participated in several settlement discussions in complex civil cases.

Endnotes

¹ See The Code of Conduct for Judicial Employees, located at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02A-Ch03.pdf>.

Meet Kent Eiler



Kent Eiler is a man of many talents and responsibilities. By day, he is a senior associate at Tully Rinckey PLLC in New York, where he specializes in military law and provides sound legal representation to veterans and servicemembers worldwide. But by night,

he may just be Batman, given his multi-faceted background, his wide-ranging commitments, and his steadfast dedication to the common good.

His firm, which is known for its military-law practice, has a remarkable history, having been founded in the back bedroom of a ski home by Mathew Tully, an in-house lawyer at Morgan Stanley who escaped from the World Trade Center on 9/11, and later served in Iraq and Afghanistan, earning a Purple Heart and Bronze Star.

Kent brings a valuable perspective to his firm, having served in the Air Force as both a prosecutor and a defense attorney. First, he served as an assistant staff judge advocate, where he prosecuted over a dozen trials for serious criminal offenses across the country. Then, he served as area defense counsel in California, defending Air Force members at felony-level trials and administrative hearings. In both cases, he received a Commendation Medal for Meritorious Service.

Before joining the firm, Kent served as counsel to The Constitution Project's landmark Task Force on Detainee Treatment, a nonpartisan, blue-ribbon effort to investigate the federal government's detention policies over the last 20 years. In that capacity, he authored chapters of the Task Force's widely publicized April 2013 report and proposed findings and recommendations for its consideration.

In previous lives, moreover, he's served as a federal judicial extern in the Eastern District of New York, an intern at the U.S. Attorney's Office in the Southern District of New York, a legal aide in the New York Attorney General's Office, an in-

tern at the Legal Aid Society in New York, and a special assistant U.S. attorney with the U.S. Department of Justice.

Today, Kent continues to serve as a captain in the Air Force Reserves, where he regularly provides legal counsel and support to active-duty Air Force judge advocates, and he remains involved in military and veterans' issues beyond that. Not only does he represent veterans and servicemembers in military-justice and records-correction actions, but he is an accredited practitioner before the Department of Veterans Affairs, where he helps medically-disabled veterans obtain the benefits to which they're entitled. Finally, he is the 2013-14 president of the Pentagon Chapter, and in that role, he has been part of a group dedicated to revitalizing the chapter after a period of inactivity.

In particular, Kent coordinated the Pentagon Chapter's Jobs for JAGs program in 2012. The program was designed to promote civilian job opportunities for JAGs who were looking to transition from active duty to the private sector, and by all accounts, it was a success. "JAGs get great legal experience in the armed services," he says. "Unparalleled experience, really, and it was a privilege for me to try and connect employers with fellow JAGs who were coming out of the service and looking for opportunities."

Kent graduated from Northwestern University and Brooklyn Law School, with honors. He has spoken widely about his legal work on national television and radio programs such as C-SPAN's Washington Journal and NPR's Public Eye, and he has written for international publications such as *The Christian Science Monitor* and *The Wall Street Journal*.

Thank you, Kent, for all that you do. ■

Shutdown continued from page 2

several ways: by suspending the scheduled 1% pay increase scheduled to go into effect on January 1; by requiring additional, mandated retirement contributions, thereby reducing net pay; by using the alternative, “chained CPI” to measure inflation, which will negatively affect federal-retiree and other COLAs; or through any combination of the foregoing.

Without congressional intervention, President Obama’s plan to give a 1%, across-the-board raise to all federal employees will go into effect on January 1. Typically, Congress would cancel this plan in an appropriations bill or continuing resolution, though it could still block the raise in a budget resolution or another piece of legislation before the end of the year. The current continuing resolution, however, complicates things, as it funds government through January 15, two weeks past the date the pay raise is scheduled to go into effect. The President officially submitted his alternative federal pay plan in August, matching the 1% raise in pay rates to military servicemembers. The increase would apply only to the basic rate of pay, as locality pay levels would remain at their 2013 levels.

Finally, changes to Obamacare also will remain targets for Republicans in the upcoming budget negotiations. These include reductions in the government’s premium contribution for members of Congress and executive-branch political officials (but not for civil servants). Although there is a strong argument in defense of the premium contribution, including its consistency with private-sector employer contributions, House Republicans will continue to spotlight the premium contribution as a “subsidy”

and unfair perk that Washington politicians continue to preserve for themselves. If the GOP proposal becomes law, moreover, it may engender a slippery slope that threatens the government’s premium contribution for all federal employees.

Overall, the agreement ending the shutdown buys time to reach greater certainty on FY 2014 spending as well as a deficit-reduction deal that tapers the across-the-board sequester. But reaching a bipartisan, bicameral budget agreement will require Congress to learn from the mistakes it made in causing the shutdown and to embrace compromise on all fronts. These traits have recently been in short supply on Capitol Hill. ■



Bruce Moyer is the government relations counsel for FBA.

**SUBMIT
YOUR
WORK**

If you’d like to submit material for publication in subsequent issues of *The Right Answer*, please email Mani Dabiri at md@manidabiri.com. We’d love to review it!

Save the Date! And Find the Perfect Employee for Your Firm, Agency, or Office: Register for the Greater Washington, D.C. Public-Service Career Fair

January 2014						
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If you're looking for dedicated and diverse law students who aspire to public service, we invite you to register for the 12th Annual Washington, D.C./Baltimore Public-Service Career Fair.

The event will bring together scores of employers and hundreds of talented students to meet and discuss government and public-interest opportunities in the Washington, D.C. area. We hope that you too will join us for this special, one-day event on Friday, January 24, 2014, from 9:00 a.m. – 5:00 p.m. at George Mason University School of Law. Lunch will be provided between the morning and afternoon sessions.

The career fair is hosted by seven area law schools and the Federal Bar Association. Employers can choose to hold formal rounds of 20-minute interviews, conduct informal table-talk sessions, or simply collect resumes to review on their own time. Even if your group is unable to attend, the fair can collect resumes on your behalf and forward them to you after the event. Last year's event brought together close to 100 employers and 300+ students, so please register now.

There is no fee to participate in the fair. Just go to law-dcpscf-csm.symplicity.com to register online and set up your employer profile. It's quick and easy. You can also find more information about the fair on the [website](#) for the George Mason University Law School, or if you have additional questions, you can contact our coordinator, Joanna Bettis Craig of the George Mason University School of Law, at lawcareer@gmu.edu or (703) 993-8020. The deadline to register is December 13, 2013.

We hope to see you there! ■

2014 Midyear Meeting

March 29, 2014
Westin Arlington Gateway
Arlington, VA



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Chair



Mani Dabiri
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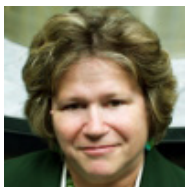


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