

**STATEMENT OF SHARON PROST
CHIEF JUDGE, UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
BEFORE THE SUBCOMMITTEE ON
FINANCIAL SERVICES AND GENERAL GOVERNMENT
OF THE COMMITTEE ON APPROPRIATIONS
OF THE UNITED STATES SENATE**

March 24, 2015

Chairman Boozman, Senator Coons, and members of the Committee, thank you for affording me the opportunity to submit this statement in support of the United States Court of Appeals for the Federal Circuit's fiscal year 2016 budget request. I am Sharon Prost, and my tenure as Chief Judge began on May 31, 2014. This is my first budget statement to you on behalf of the court.

As you know, the United States Court of Appeals for the Federal Circuit is located in Washington, D.C., and the court has exclusive nationwide jurisdiction over a large and diverse subject area. The Federal Circuit's jurisdiction includes appeals in all patent cases nationwide, all government contract cases, all international trade cases, all government personnel cases, all cases involving monetary claims against the United States under the Tucker Acts, veterans' cases, and many others.

Appeals to the Federal Circuit come from all of the 94 United States District Courts, the United States Court of Federal Claims, the United States Court of International Trade, and the United States Court of Appeals for Veterans Claims. The court also hears appeals from certain administrative agency decisions, including the United States Merit Systems Protection Board, the Board of Contract Appeals, the Patent Trial and Appeal Board, and the Trademark Trial and Appeals Board. In addition, the court reviews decisions of the United States International Trade Commission, the Office of Compliance, and the Government Accountability Office Personnel Appeals Board.

At the outset, let me say that our court fully appreciates and embraces the need to reduce the federal deficit and contain federal spending. The Federal Circuit has worked diligently to do its part by finding cost-effective

ways to meet its national mission. During my tenure as Chief Judge of the Federal Circuit, I pledge to continue to find new ways to control the court's operating expenses. Under my leadership, the Federal Circuit will be a vigilant steward of its appropriation, applying not only sound fiscal, procurement and personnel practices, but innovative ones as well. Indeed, these principals have consistently guided the court.

In fiscal year 2013, the court managed through the sequestration and rescission of funds without resorting to the staff furloughs that many other courts imposed. This was accomplished by a hiring freeze and the leveraging of funding from staff and chambers vacancies. Understanding that this was only a short-term strategy, the court prepared to meet the need for continuing fiscal austerity by reconstructing our Mediation Services by increasing our reliance on expert volunteer mediators. We were then able to close our mediation satellite office in the Kluczynski Federal Building in Chicago and permanently release three full-time employees. Last fiscal year, the court began a reorganization to address further staff attrition caused by the retirement of a number of our retirement-eligible staff, trying like many courts and other organizations to do more work with fewer people. In the course of this reorganization, we determined that the level of staff reduction we experienced over the past two years is not permanently sustainable. We need to fill our remaining vacancies by the end of fiscal year 2015. In doing so, however, we will remain below our historic staffing level. This occurs at a time when our case load is demonstrably rising due to structural changes in the court's caseload, principally because of recent amendments in the law relating to patent litigation.

Before I continue with my fiscal year 2016 statement, let me extend my sincere appreciation to the Committee for recognizing the Federal Circuit's needs in the enacted appropriation for the court in fiscal year 2015. The court will be able to fulfill its mission of timely adjudication of cases during this fiscal year because the funds you appropriated will allow us to proceed with recovering from the sequestration's impact.

For fiscal year 2016, I respectfully ask that Congress provide the funds I have identified as necessary for the court to sustain current services and to continue to operate in an efficient and effective manner. With this goal in mind, the Federal Circuit's 2016 budget request totals \$33,763,000, which

includes \$2,922,000 for mandatory expenses and \$30,841,000 for discretionary expenses. The discretionary request of \$30,841,000 is slightly less than a 2.1 percent increase over the fiscal year 2015 enacted appropriation for discretionary expenses of \$30,212,000.

For the fifth fiscal year in a row, the Federal Circuit's budget request includes no request for programmatic or staff increases. I am requesting only sufficient funds to provide for the essential, ongoing operations of the court. One hundred percent of the 2.1 percent budget increase requested for 2016 is to pay for adjustments to the base budget needed to maintain current services. These adjustments include projected salaries and benefits increases for staff, staff promotions and within-grade increases, general inflationary adjustments, and the increasing cost of library services and computer-assisted legal research.

I recognize and fully appreciate the relentless pressure on Congress to contain and reduce government spending. At the same time, the court also recognizes that the administration of justice and this court's unique impact on the economy and on those veterans and federal employees who seek relief from this court, would suffer if funds are insufficient to keep the court properly staffed and fully functional. In this regard, I note further that our judges are aging and three are now eligible to elect senior status. As you know, when a judge opts for senior status, this court must provide two staff positions to support the judge's continuing work. In recent years, we have used vacant positions within the court's staff to fill senior judge needs. Having already absorbed a permanent staff reduction, we will no longer have this flexibility when all of our current vacancies are filled later this year. If one or more judges elect senior status, I may need to request funding sufficient to fill existing, but currently vacant, Full-Time Equivalent (FTE) positions, or be forced to release two permanent employees in order to hire staff for any new senior judge. I will closely monitor this situation, and will notify you of any emergent need as soon as I am able.

For fiscal year 2015, the Federal Circuit currently has sufficient resources to address the caseload. As I noted previously, however, structural changes have occurred in litigation within the jurisdiction of the court that have begun to increase the Federal Circuit's caseload. Last year, the court experienced its highest caseload in five years. Early indications are that this

year will equal or surpass last year. Moreover, the predominant increase is in complex patent cases, so the impact is larger than any raw numeric increase might support.

The context of what appears to be a permanent, structural increase in our caseload begins with the *Leahy-Smith America Invents Act*, Pub. L. No. 112-29 (the AIA) enacted on September 16, 2011. As a result of changes to patent practice in the AIA, the Federal Circuit has begun to see what we expect to be a significant and long-term increase in the patent appellate caseload. The U.S. Patent and Trademark Office (USPTO) is implementing the America Invents Act (AIA) in a manner that makes it easier for American entrepreneurs and businesses to bring their inventions to the marketplace sooner, converting their ideas into new products and new jobs. As you know, the intent of the AIA is to help companies and inventors avoid costly delays and unnecessary litigation, and allow them focus instead on innovation and job creation. A number of important provisions of the law went into effect in September, 2012, twelve months after the law was enacted.

The success of the AIA depends on the Federal Circuit, which will have to resolve each of the many statutory interpretation questions posed by the new law. The AIA provides for patentability trials before the USPTO at the newly created Patent Trial and Appeal Board (PTAB), which is also tasked with working through a substantial backlog of appeals from conventional patent examination decisions. The statute provides that all of the appealed cases of the new PTAB come to the Federal Circuit for review. Only one AIA trial decision was rendered by the PTAB in 2013. In comparison, however, by early February of 2015, the PTAB had generated 254 final written decisions from the more than 800 pending trials. The AIA trial work of the PTAB is expected to combine with other USPTO appeals to produce a very significant increase in cases in fiscal year 2016 for review by the Federal Circuit. We have already begun to see the impact. This past year USPTO patent appeals nearly doubled over the preceding year, from 110 to 212. This was accompanied by an increase in patent appeals from the United States District Courts, for a total increase of about 176 patent cases. While the numeric rise in cases does not yet appear unmanageable, the district court and PTAB patent cases are typically the most complicated and time consuming cases on the court's docket because the patents at issue are technically complex. Thus,

the actual increase in appellate work is under-represented by last year's statistical increase of cases viewed in isolation.

Based on the complexity of patent practice under the AIA, and the case load evidence to date, it is clear that there will be a sustained and progressive increase in our patent caseload. This is further confirmed by the fact that the USPTO has increased the number of administrative judges threefold, as well as attorneys in its solicitor's office. While facing the potential for a permanent increase in our caseload will be a challenge, it would be premature to request additional resources at this time. As a result, in our fiscal year 2016 budget, I have not requested any additional funding to address the already increasing patent case load.

At the same time, however, I am keenly aware that the Federal Circuit would be defeating the purpose of the AIA if delays occur in the appeal process that impede American inventors and businesses from bringing their products to market and resolving their disputes as swiftly as possible. It would indeed be unfortunate if the Federal Circuit is unable to process appeals from the PTAB expeditiously due to a lack of well-qualified staff resulting from insufficient funds. I will monitor the Federal Circuit's patent caseload carefully and I will not hesitate to notify you of any need for additional resources.

Just as the AIA has apparently resulted in a structural increase in the Federal Circuit's caseload, the United States Department of Veterans Affairs (VA) is accelerating the processing of disability cases and pension claims that is also likely to result in a long-term increase in our caseload. Of 380,000 backlogged veterans' appeals, 67,000 have reached the Board of Veterans' Appeals, and approximately 200,000 of the remainder are expected to follow. With the benefit of 60 veterans law judges and more than 400 supporting counsel because of increased funding by Congress, the Board decided 55,000 cases in fiscal year 2014 and is expected to decide approximately 57,000 cases in fiscal year 2015. While backlogs at the Board will continue, it is clear that decisions by the Board are accelerating.

Despite the fact that the Board significantly increased the number of decisions in 2014, the number of appeals to the United States Court of Appeals for Veterans Claims (the Veterans Court) increased by just over 200 cases. This relatively small increase, however, does not readily reflect that the

appeals rate that generated the increase occurred largely in the last six months of fiscal year 2014. Should appeals through fiscal year 2015 continue at the same rate, the Veterans Court will receive more than 1,000 additional appeals this year and as many as 1,000 more in 2016. As you know, this increasing pool of cases will ultimately result in decisions that are appealable to the Federal Circuit, and this number does not include several hundred decisions the Veterans Court will issue on petitions.

Thus far, the Federal Circuit has not seen a marked increase in appeals from the Veterans Court. Nevertheless, with the mechanisms in place to dispose of increasingly large numbers of cases by the Veterans Court, I fully expect that the number of appeals to the Federal Circuit will increase this year and continue in fiscal year 2016. Prudence, therefore, dictates that this source of the Federal Circuit's caseload be carefully monitored as a potential structural change in our caseload. It is, however, too early to assess with specificity the magnitude of that increase, and as a result, I have not requested any increase in resources to address it. Recognizing that delayed justice for our veterans and their families is unacceptable, I will monitor the caseload increases from the Veterans Court, and I will notify you as soon as I believe additional resources are needed by the Federal Circuit.

Last year's budget statement cited a third source of caseload increase at the Federal Circuit, characterized as being imminent, though likely temporary. The sequestration in fiscal year 2013 resulted in a flood of furlough appeals being filed with the Merit Systems Protection Board (MSPB) by federal employees who were furloughed because of automatic spending cuts. As of September of 2013, more than 32,000 furlough appeals had been filed at the MSPB. This was in addition to the average of 6,000 appeals received annually on other matters that are appealable to MSPB under the law. While MSPB is poised to make significant progress in processing the existing inventory of appeals in fiscal year 2015, it is likely MSPB will start fiscal year 2016 with a significant number of appeals in the regional offices and petitions for review at headquarters. As these appeals and petitions result in decisions, if a federal employee's case fails at the MSPB, that employee may appeal to the Federal Circuit.

The Federal Circuit has yet not received a significant portion of MSPB furlough cases and it is impossible to predict with certainty how many of these

appeals might survive MSPB review. Nevertheless, it is prudent to plan for a significant number of these cases to be appealed to the Federal Circuit and, given the permanent increase in staff at the MSPB and its view that its caseload will be at historic levels in 2015 and beyond due to changes in the law, I cannot discount that these circumstances do, indeed, portend a third structural change that will drive an increase in the Federal Circuit's caseload. In acknowledging this, however, I do not anticipate such a large increase in MSPB cases in 2016 that would require resources beyond those I have requested in our annual appropriation. I will rely on prudent management of the resources you provide, recognizing that it will be my duty to request more, if it becomes clear that more is needed. In the interim, the impending furlough cases serve to reinforce the need for the Federal Circuit to complete filling current staff vacancies and training those new employees so that they are able to respond to the organizational stress an increase in MSPB cases seems likely to impose in the foreseeable future.

Finally, I would like to address the court's plan to reduce facilities costs. House Report 113-172 required this court to report on a plan by July of 2014. That report was developed in consultation with the Judicial Conference of the United States and the General Services Administration and was delivered on time. Consistent with that plan, the court is pursuing actionable alternatives to reduce, reallocate and reconfigure existing space that will support a reduction in facilities costs. I note that we have already met the 3 percent reduction goal set by the Judicial Conference of the United States for the federal judiciary at large. While I believe there are still some prudent and achievable measures that the court can pursue on its own, ultimately, to make any further significant reduction in facilities costs, the Federal Circuit may have to request additional funding targeted for facilities alteration or perhaps new leases.

Chairman Boozman, I would be pleased to provide any additional information that the Committee may require or to meet with Committee members or staff to discuss our budget request in further detail. Thank you for this opportunity to present my views.