

Federal Criminal Justice Act Budget Cuts – Talking Points

Major Points

- Budget cuts are severely affecting federal indigent defense and threaten to decimate this system, which has been a national model for more than 40 years. These cuts will inevitably have a damaging effect on the ability of the system to provide effective representation to those entitled to appointed counsel.
- Furloughs and layoffs at federal defender offices already are creating administrative and docket management burdens for federal courts across the country. Scheduled cuts to the federal defender budget would result in a further personnel loss in federal defender offices.
- The federal “hybrid” system of indigent defense can only function if both components – federal defenders *and private panel attorneys* – are adequately funded. The Judicial Conference, which oversees the Federal Defender Services budget, has reduced the hourly rate paid to private panel attorneys and implemented lengthy payment deferrals, steps that will diminish the size and quality of the available pool of attorneys and cause hardships for those still willing to be appointed.
- In order to protect the Sixth Amendment guarantee to counsel and restore the efficiency and cost savings achieved when a district has a strong defender office working together with a strong and experienced panel of private attorneys, Congress must restore funding through an anomaly to the anticipated continuing budget resolution that appropriates \$1,098,000,000, the amount already approved by the Senate Appropriations Committee.
- On September 10, 2013, the House of Representatives Appropriations Committee introduced draft legislation for a Continuing Resolution to fund the government through December 15, 2013, which authorizes funding for the Defender Services Account in the amount of \$1.012 billion, including a \$26 million stopgap anomaly. This anomaly is essential to avoid depletion of the account during a short-term Continuing Resolution and to permit the Judiciary to meet its obligations. It will not, however, address the substantial shortfall in the Defender Services Account in FY 2014.

Effects of Budget Cuts on Federal Defenders

- *The severe budget cuts for Defender Services significantly affect federal public defender offices and their ability to take on cases.* Sequestration and cuts from within the Judiciary resulted in a \$51 million shortfall in FY 2013 for the Defender Services account. This figure represents approximately .001% of the federal budget, but it is a devastating amount for the federal defenders, and for the efficient and effective administration of our justice system. In effect, since February 2013 federal defender organizations have lost nearly 10% of their approved budgets. In FY 2014 federal defenders could suffer a further 10% budget cut.
- *On average, about 90 percent of a federal defender office’s budget is for fixed costs, i.e., personnel and rent.* The small remainder is used for operating expenses including hiring experts, postage, transcripts, and office equipment. No amount of good management can prevent severe staffing cuts in this situation. Further belt-tightening is not an option. In the words of D.C. federal defender A.J. Kramer, “We have nothing left to cut. We can’t not pay the rent, and . . . everything else is personnel. We can’t send a computer to court.”
- *Federal defenders across the country have been forced to take up to 20 furlough days each—the equivalent of a 10% pay cut—before the end of the fiscal year on September 30.* Concurrent with furloughs, federal defenders must also struggle to keep up with their cases, working more nights and weekends to make up for those who have been laid off and vacancies that cannot be filled. This additional workload is made more difficult by the fact that federal defenders already carry much heavier caseloads than prosecutors: in New York, for example, the ratio of prosecutors to defenders is 280 to 38 or more than 7 to 1.

- *Budget shortfalls have required some federal defender offices to lay off experienced attorneys and support staff.* The federal public defender office in Arizona lost 14 employees and has had to make other cut-backs of essential services. Its investigators have curtailed travel to interview witnesses and review crime scenes, and funds for experts have been drastically slashed. In Wisconsin, six attorneys were laid off, which represents a 22% reduction in staff. In the Eastern District of Pennsylvania, another five employees lost their jobs. In the Western District of Virginia, federal defenders have run out of funds for experts, interpreters, and court transcripts. Defenders in Florida, Illinois, Maryland, and others around the country have also been forced to lay off staff.
- *The system will lose its most experienced advocates.* The chief federal public defender in Columbus, Ohio, Steven Nolder, resigned to avoid laying off members of his staff. Chief federal defenders Ray Conrad (Kansas City, Missouri) and Virginia Schlueter (New Orleans) followed suit; both will retire early in an attempt to limit layoffs in their offices.
- *The impending additional 10% budget cut will require further layoffs and may require closing branch offices.* If the anticipated 10% cuts occur in FY 2014, federal defender offices could be forced to lay off additional staff. The chief federal defender for the Northern District of California has said he will be forced to close the Oakland office. Other federal defenders may be required to close branch offices, typically in smaller locations where there is a scarcity of qualified counsel. As a result, the cost of appointed counsel will likely increase, as lawyers throughout a district will be required to travel to these locations for court appearances and jail visits.

Budget Cuts to Federal Defenders Will Not Save Any Money and Will Result in Long-term Cost Increases for the Judiciary

- *Reassigning cases from federal defenders to CJA lawyers transfers the cost of providing representation and will not save any money.* Every federal defendant without resources to hire an attorney is entitled to government-paid counsel; therefore, the notion that savings can be achieved by reducing the federal public defender budget is specious. When the federal defenders cannot take a case, either due to resource constraints or conflicts, defendants are assigned private attorneys who are paid hourly rates for their work, as well as travel costs and other expenses. The Department of Justice has largely avoided the impact of sequestration, and there is no indication that the number of prosecutions is likely to decline dramatically in the near future.
- *The effects are already being felt. Judge Loretta Preska*, a George H.W. Bush appointee, cautioned that New York judges already have received requests from public defenders to be relieved from cases. Federal public defenders in Texas have warned that they anticipate having to withdraw from cases that require expert witnesses because they no longer have the budget to hire experts. Seven public defender offices in the Fourth Circuit have already turned down major case assignments or anticipate doing so as a result of the sequester. Defender offices across the country are turning down complex and high resource cases in order to continue providing the bulk of representations in their districts.
- *Inadequate representation will result in costly appeals and post-conviction proceedings.* Experienced and adequately resourced federal defenders help preserve the enforcement of constitutional protections designed to preserve the liberty of all citizens. In the wake of these severe budget cuts, remaining federal defenders will have less time and resources to prepare their cases. Mistakes that inevitably will arise create even more expenses in the system down the line, by way of appeals, *habeas corpus* proceedings, and retrial. As *Supreme Court Justice Stephen Breyer* has noted, it is “cheaper to have a decent lawyer in the first place.”

- *Some federal defenders will be forced to limit their roles in other cost saving programs.* Federal defenders will cease participation in re-entry and diversionary courts. Those courts lower recidivism rates, improve public safety, and reduce costs associated with incarceration. Additionally federal defenders will no longer be able to act as discovery coordinators and provide other shared services to panel attorneys in multi-defendant cases, introducing inefficiency and driving up costs.

Failing to Restore the Rates Paid to Appointed Private Attorneys Will Compound the Crisis

- *Participation by appointed private attorneys is essential to the health of public defense.* Appointed counsel ensures a highly qualified and elastic supply of lawyers, which avoids the high caseloads so prevalent in state public defender offices. This “hybrid” model is particularly essential in the federal system because of federal prosecutors' reliance upon conspiracy law and preference for multi-defendant indictments, where only one indigent defendant may be represented by the federal defender's office.
- *Recent cuts to the CJA budget are unprecedented and dangerous.* To avert further devastating cuts to the Federal Defender program, the Judicial Conference recently imposed a 4 week deferral on CJA panel payments as well as a \$15 per hour rate cut for the period from September 1, 2013 – September 30, 2014. This rate reduction undercuts years of work by the bar, the judiciary and Congress to bring the rate up to \$125/hour.
- *The current CJA rate is well below the median hourly rate charged by criminal defense lawyers for non-appointed cases.* Private attorneys who take on Criminal Justice Act (CJA) representations will now earn \$110 per hour in non-capital cases. But a 2009 survey estimates their average hourly overhead at \$70 per hour. Although overhead may have climbed in recent years, even based on this low 2009 figure, panel attorneys net an average of just \$40 per hour on CJA representations before taxes.
- *The current rate is also below the rate sanctioned by the Criminal Justice Act.* If Congress had regularly funded cost-of-living adjustments as provided by the statute, the rate would have reached \$139 per hour by 2013. The CJA rate has historically been much lower than the rate paid by other federal agencies to retain private counsel, including the rate paid by the Department of Justice for private counsel to represent current or former Department employees in criminal proceedings.
- The chair of the Judicial Conference Budget Committee testified in 2009 that the previous official rate of \$100 per hour was inadequate to attract and retain enough qualified attorneys to accept CJA appointments.

Budget Cuts Create Administrative and Docket Management Burdens for Courts

- ***U.S. District Court Judge Catherine Blake***, who serves as Chair of the Defender Services Committee that oversees federal public defenders and CJA counsel, predicts delays and postponements in criminal proceedings. Delayed trials mean defendants spend more time held in expensive pretrial detention facilities. Immigration and Customs Enforcement has already released 2,000 undocumented immigrants from detention facilities to save money. Delays could also mean timeframes that impact another constitutional right—the Sixth Amendment right to a speedy trial.
- *Delay of criminal cases—even high-profile prosecutions:* In New York, federal public defenders asked for a delay of the trial of Osama bin Laden's son-in-law because their lawyers are required to take furloughs. In the words of the district court judge assigned to the case, “[i]t's extremely troublesome to contemplate the possibility of a case of this nature being delayed because of sequestration. Let me say only that—stunning.” The federal defenders handling the Boston Marathon bombing case are facing three weeks of unpaid furloughs. In our nation's capital, where 90% of criminal defendants are indigent, judges are pushing back court dates. In one California district, the federal defender's office will close for much of

September due to budget shortfalls, requiring continuances for court appearances in all cases in which a federal defender is counsel.

- *Emergency closure measures by courthouses across the country:* D.C. Superior Court will stop scheduling most criminal matters on alternating Fridays, new arrests will not be processed on those days, and ongoing criminal trials will be recessed. **U.S. District Judge John E. Jones, of the Middle District of Pennsylvania**, a George W. Bush appointee, notes, "We are seeing presently the effect of furloughs in our federal defenders office. So we are ending up not being able to schedule criminal cases on particular days because of the unavailability of federal defenders." In the **District of Colorado**, **Chief Judge Marcia S. Krieger** issued an order that, through September 30, 2013, no hearings or trials in criminal cases (other than mandatory first appearances before a magistrate judge) will be heard on Fridays. The Central District of California will reduce court services on seven Fridays, from April through August in three of its divisions. Courts in Delaware, New York, Missouri, Kansas, Pennsylvania, and Utah have also chosen to limit their criminal calendars to accommodate federal defender furloughs.
- *Increased administrative burdens on district courts:* The chief public defender in the Northern District of California has indicated that sustained budget cuts will force his office to cease administration of the district's CJA panels and turn administration over to the court. The administrative burden will also increase substantially in districts where the court already administers the CJA panels, due to increased reliance on those panels as a result of federal defenders having to turn down cases.
- *Dismissal of criminal cases:* **Richard George Kopf in the District of Nebraska**, who was appointed in 1992 by George H.W. Bush, has warned that "failure to fund the judiciary, and most particularly the Federal Public Defenders and Criminal Justice Act counsel, may result in the guilty going unpunished." He is "seriously contemplating" dismissing criminal cases as a result of the funding crisis. **Justice Anthony Kennedy**, a Reagan appointee, has noted that starting to dismiss criminal prosecutions "is dangerous to the rule of law."
- *Loss of experienced defenders:* Judges who rely on federal defenders will be left without the benefit of these experienced advocates. As **D.C. District Court Judges Paul Friedman**, a Clinton appointee, and **Reggie Walton**, a George W. Bush appointee, explained in a co-authored *Washington Post* editorial, judges' confidence in sentencing depends on having a competent defense attorney. That is true in complex cases, where experience and efficiency are critical, as well as more clear-cut cases, where a seasoned attorney's counsel helps the defendant make rational choices about plea bargains.

Further Cuts Will Cripple the System

- *If Congress does not act, the financial crisis facing the federal indigent defense system will continue to worsen.* The budget shortfall for FY 2014 is expected to double to \$102 million. Meanwhile, adequately funding federal defender organizations requires less than 0.05% of total federal spending. The \$27.6 billion proposed budget of the Justice Department dwarfs the requested budget for federal defenders and CJA attorneys. In other words, cuts to federal indigent defense amount to an invisible slice of the federal budget, but their impact is huge.
- *If we continue on this path, both innocent and guilty defendants will not be adequately represented, eroding the foundation of the justice system that protects our pursuit of life, liberty, and property.* In the words of **Judge J. Curtis Joyner, chief judge for the Eastern District of Pennsylvania**, and a George H. W. Bush appointee, "Where we are headed is scary, it's really scary."