NACDL Testimony

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Testimony by NACDL member, Richard Kammen, before the House Appropriations Subcommittee on the Defender Services Appropriation for FY 1996

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The National Association of Criminal Defense Lawyers (NACDL),[(1)] thanks the Subcommittee for this opportunity to offer testimony and the following written statement concerning the Defender Services Appropriation for fiscal year 1996.

Introduction

The Defender Services Appropriation funds the Federal government's Sixth Amendment obligation to provide counsel to represent defendants unable to hire their own attorney.[(2)] In addition to attorneys, the appropriation enables the government to fulfill its Fifth Amendment duty to provide such defendants with the "basic tools,"[(3)] and the "raw materials"[(4)] necessary to contest the prosecution's case within our country's adversary system of justice. These services are mandated by the United States Constitution; they are not "discretionary."

Two years ago, the Judicial Conference of the United States reported to Congress the results of its extensive review of the Criminal Justice Act (CJA):

There is no question that the single most important problem to confront the CJA program in recent years is that sufficient funding has not been appropriated to meet the increasing costs of providing the Constitutionally mandated services that the program was created to provide.[(5)]

Years of insufficient funding has resulted in a flawed federal criminal justice system, with:

- Inadequate funding for existing federal defender organizations and death penalty resource programs;

- Unreasonable compensation for CJA "panel" attorneys;
- Failure to open federal defender organizations in each district; and
- Inadequate training for panel attorneys.[6]

NACDL strongly agrees with these findings of the Judicial Conference Report. Without adequate — and long overdue — Defender Services funding, the constitutional mandates of Due Process and Effective Assistance of Counsel cannot be fulfilled.[7] This is at least inefficient: when constitutional violations occur, charges will be dismissed; convictions will be reversed. Moreover, without adequate funding, the judicial branch will be unable to perform the functions necessary to the separation of powers paradigm on which our constitutional form of government is based. The chronic underfunding of the Judiciary in recent years, relative to its increased workload, has led the Judicial Conference Committee on Long Range Planning to note:

Separation of powers principles require that no branch of government deprive another of either the powers or resources it needs to perform its core functions. Discharge of the judicial function as an independent branch requires resources sufficient for the judiciary to perform all its constitutional and statutory mandates. Unlike several state judiciaries, which have asserted an inherent right to compel funding beyond regular appropriations for judicial functions, federal courts depend on the Congress to provide them with sufficient resources. Chronic failure to provide adequate resources puts federal judges in the unfortunate position of supplicants, constantly begging the Congress for funds.[8]

Judicial administrators have stretched inadequate appropriations as far as they can.[9] Judges as jurists, however, may not be so accommodating to infringements on the separation of powers paradigm.[10] If underfunding continues, the "supplicant" role may wear thin; a constitutional crisis could develop. The *Proposed Long Range Plan for the Federal Courts* offers this contingency in its chapter on "Confronting the Alternative Future":

If caseload volume renders the courts of appeals and district courts unable to deliver timely, well-reasoned decisions and speedy trials with procedural fairness, the Judicial Conference should consider seeking more extensive reductions in federal court jurisdiction to fulfill the mission of the federal courts [including:] Consistent with standards developed by the Judicial Conference, authorize district courts to decline jurisdiction in . . . criminal cases where state courts have concurrent jurisdiction and the federal interest is minimal.[11]

Within constitutional limits,[12] Congress is, of course, empowered to declare, wage and escalate War on Crime — and to fully fund the Executive component of those efforts.[13] In order to do so within the supreme law of the Constitution, however, the Judicial Branch, including the Defender

Services Budget, must also be fully funded.

Public Defenders

NACDL agrees with the Judicial Conference that each judicial district should have an adequately funded federal defender organization (Federal Defender or non-profit Community Defender).[(14)] Federal Defender offices provide consistently high quality representation because they specialize in federal criminal law, receive regular training through the Administrative Office and the Federal Judicial Center, and maintain ongoing professional relationships with the court and the other agencies involved in the criminal justice system. In many districts, defenders also provide training, legal advice, and administrative support to CJA panel attorneys.

Congress should appropriate funds sufficient to open defender offices in the districts now without such offices; to enable existing offices to keep up with the caseloads added by accelerating law enforcement and prosecution budgets; and to accommodate the increase in complexity driven by recent and expected substantive criminal legislation.

Post-Conviction Defender Organizations

Post-Conviction Defender Organizations (PCDOs) (formerly "Death Penalty Resource Centers") are community defender organizations serving 20 of the 38 death penalty states (50 federal judicial districts). Established as a cost-effective means of providing counsel, PCDOs specialize in state and federal death penalty representation — the law's most complex, burdensome and emotionally taxing specialty.

In addition to direct representation in some cases, PCDOs perform a number of functions which help to ensure that fair and complete capital habeas corpus petitions are promptly filed and competently processed by trained counsel. These organizations assist the courts by recruiting, for court appointment, attorneys willing and able to provide representation in these complicated and demanding cases, thus relieving the courts of the need to perform this difficult and often time-consuming task. In many states, PCDO assistance has enabled private attorneys to provide representation *pro bono* — without charge to the government. And where *pro bono* attorneys are not able to satisfy the need for counsel services, PCDO staff attorneys provide cost-effective representation in these most critical cases. Finally, where a PCDO does not have funds to hire enough staff to represent all of a state's death row population, and compensated counsel is required, the PCDO provides support services that reduce the cost of private attorney services.

In short, by providing competent, well-trained counsel, PCDOs reduce delay and, ultimately, the cost of processing capital cases in accordance with the constitutional requirements and procedures established by the Supreme Court. As the Judicial Conference Report puts it:

The Death Penalty Resource Centers have provided invaluable services in an appropriate and cost effective manner. They have facilitated the appointment of competent attorneys in capital cases and have brought a higher quality of representation to these cases. They have, moreover, streamlined the capital litigation process by expediting cases and avoiding costly repetitive legal proceedings. The resource centers demonstrate how the current flexible structure of the CJA program has allowed for the development of innovative uses of limited resources that facilitate the attorneys working within the program in delivering the kind of representation required to ensure the continued vitality of the Sixth Amendment in even the most complex and demanding cases.[(15)]

Funding for PCDOs comes from the Defender Services Appropriation and from non-CJA (state or private) resources sufficient to support the PCDO's work related to state court proceedings. The federal component of this funding needs to be greatly increased to fill the capital caseload needs, consistent with legislative demands for more Federal capital prosecutions and for faster processing of capital habeas cases.

CJA Panel Attorney Compensation

Anticipating inadequate Defender Services appropriations, the Judicial Conference, in 1988, decided that CJA panel attorney rate increases would be given its the lowest spending priority, in an attempt to stretch insufficient funds to cover a full fiscal year.[(16)] No rate increases have been implemented since then. In 1992, implementing CJA panel attorney rate increases was further discouraged by the Appropriations Committees:

While the conferees are not attempting to second guess the judgment of the members of the Judicial Conference concerning the need for increases in panel attorney rates, the constraints facing the conferees precluded the inclusion of such an increase in the conference agreement.[(17)]

Following that advice, budget requests for fiscal years 1994,[(18)] 1995,[(19)] and now for 1996, omit the funds necessary to implement rate increases provided by the CJA,[(20)] and established by the Judicial Conference,[(21)] but never implemented. As a result, CJA panel attorneys in most judicial districts are still paid at 1984 rates: $40 per hour for out-of-court work; $60 per hour for work in-court; averaging $45 per hour[(22)] ($30 in 1984 dollars).[(23)]

The cost of practicing law, in the meantime, has increased tremendously. The most recent $75 rate, approved in January, 1995, applies (if and when funded) to the District of South Dakota, a

low-cost area, where surveys conducted by the Defender Services Division show that the average overhead cost of a law office is $38 per hour, and the average private sector prevailing rates for criminal cases are $94 per hour in-court, $93 per hour out-of-court. In moderate-cost locations, the costs, and the prevailing sector rates, are notably higher. The cost of law office overhead in Vermont, for example, was $47 per hour in 1993.[(24)] A recent survey by the Tennessee Bar Association shows the average cost of office overhead of $46.81 per billable hour, and the average private sector prevailing rate for criminal cases of $115.84.[(25)] However, prevailing private sector rates and overhead costs in expensive metropolitan areas where the $75 CJA rates have been annually postponed for lack of federal appropriations (Miami, Dallas, Chicago, Philadelphia, Pittsburgh, St. Louis, Atlanta, Cleveland, Minneapolis, etc.) are much higher - effectively turning panel attorney service into a direct subsidy of the government's constitutional obligation to provide assistance of counsel to the indigent accused of crime.[(26)] The Judicial Conference has long recognized this problem:

The $40 and $60 hourly rates paid to CJA panel attorneys are seriously deficient. In many locations, they do not even cover the basic office overhead costs of law offices. Thus, many lawyers accept assignments of cases from the federal courts at a financial sacrifice to their livelihood.[(27)]

Of course, the problem is most acute in districts without a federal defender organization, where panel attorneys are often conscripted to fulfill the government's constitutional obligations, losing their livelihood, and risking bankruptcy in the process.[(28)]

Several state courts have held that such a taking of private property for public use, without just compensation, violates the "takings clause" of the Fifth Amendment, or state constitutional counterparts.[(29)] It is well settled that an attorney's professional skills are property. Under the Federal Constitution, "the right to practice law has been held to be a property right within the meaning of the due process and equal protection provisions of the fourteenth amendment."[(30)] "From this it follows that an attorney from whom services are demanded and by whom they are given has a property right in his fee for those services which . . . should be based on their just and reasonable value."[(31)]

The crux of the CJA panel attorney payment problem is this: The CJA, unlike the 1931 Davis-Bacon Act, does not require panel attorney payments reflecting, or even reasonably approximating, the prevailing private market wage. In fact, the $75 maximum rate is less than fifty percent of the value set by the private market in many locations. Continued payments at less than half of that statutory rate — and below the out-of-pocket cost of keeping an office open — continually violates the basic constitutional property rights of those panel attorneys who, after all, have the same rights and responsibilities of any other small business owner.[(32)]

Training for Panel Attorneys

As the costs of living generally — and practicing law in particular — have risen, and as federal criminal law has become more complex, time-consuming and specialized, the pool of qualified CJA panel attorneys has decreased because the rates in most areas have been frozen for over a decade. Some of the resulting problems are explained by the Judicial Conference Report:

Federal criminal law, including its sentencing aspects, has become exceedingly complex. It is no longer feasible for a state criminal defense lawyer to appear occasionally in a federal court and be expected to perform competently. Lack of knowledge of federal law and procedure can create very serious adverse consequences for criminal defendants.

In order to be an effective advocate in a federal criminal case today, it is essential that an attorney be knowledgeable in the federal sentencing guidelines. Unfortunately, however, information elicited by the Review Committee indicates that it is not uncommon for attorneys with little or no criminal experience to be appointed in federal cases, and a lack of training for panel attorneys was a common complaint cited in hearings before and correspondence to the review committee.[(33)]

Given the well-recognized, increasingly serious difficulty in recruiting qualified panel attorneys, the Judicial Conference proposed "only minimal qualification standards."[(34)] Even though quality control is essential, in districts stuck — since 1984 — at the $40/$60 rate, the Conference was forced to recognize that "specific requirements might render it difficult or impossible to find a sufficient number of attorneys to serve on the panel."[(35)] However, the *Proposed Long Range Plan for the Federal Courts* recommends against further delay in qualification standards: "The CJA does not establish qualification standards for attorneys serving on CJA panels. The practice of federal criminal law has become highly specialized. Defendants face increasingly lengthy prison terms. It is time for panel attorneys to be held to certain minimum qualifications."[(36)]

The solution to the chronic, systemic problem of a lack of qualified attorneys for indigents is to pay rates sufficient to attract qualified attorneys and, at the same time, to promulgate the qualification and experience standards that are well recognized to be necessary. The Judicial Conference's alternative — government-run and subsidized training programs[(37)] — is at best a short-term, out-dated and far from comprehensive plan. The true solution is to permit the market system to work: panel attorneys paid at a fair rate (even though far less than the market rate) can purchase from the private market the training necessary to competently fulfill the government's constitutional mandates. The Judicial Conference should set high standards; Congress should appropriate funding sufficient to enable panel attorneys to purchase the training necessary to obtain (and maintain) the skills necessary to the job. The whole criminal justice system will work efficiently then, to the benefit, including tax savings, of us all — and it will be a justice system worthy of its name.

Conclusion — the Future of the CJA

The Criminal Justice Act requires a "substantial proportion" of appointments to the private bar.[(38)] "'Substantial' shall usually be defined as approximately 25 percent of the appointments under the CJA annually throughout the district."[(39)] The American Bar Association also recommends "substantial participation by the private bar,"[(40)] in order to provide a broad-based constituency for improvement of the criminal justice system:

All lawyers, whether criminal practitioners or not, share in the responsibility of ensuring that the most visible legal institution in the Nation, the criminal justice system, is of the highest attainable quality. Increasingly, however, indigent defense in many cities is almost the exclusive responsibility of public defenders and a very small private bar. The remainder of the trial bar is not fulfilling its obligation to participate through the representation of indigent defendants, and as a result, the shunning of criminal defense practice deprives the criminal justice system of a powerful voice for criminal justice reform, because the influential lawyers are unfamiliar with the working of the criminal justice system.[(41)]

The private bar's participation in the federal criminal justice system is also necessary to counter the inherent trend, in any closed bureaucracy,[(42)] of ignoring or rejecting alternative, even critical, points of view; in other words, to provide for a healthy and efficient system of checks and balances.[(43)]

The combination contemplated by the CJA — approximately 25 percent private panel attorneys; 75 percent public defenders — is readily attainable. Defender offices can and should be opened in all federal districts, and should receive most (approximately 75 percent) of the appointments. The remaining cases should be assigned to panel attorneys who are willing (not conscripted), who are qualified (meeting high standards) and who are reasonably compensated (in order to maintain qualifications, pay necessary office overhead, and avoid destitution).

But still, the only way to obtain these goals — and to fulfill the government's constitutional mandate — is to fully fund the Criminal Justice Act. Because past appropriations have been grossly inadequate, and because the budget now proposed does not even purport to redress the dire need, NACDL urges this Committee to recommend — and the Congress to enact — an adequate Defender Services Appropriation of $400,000,000. This appropriation cannot be viewed in a vacuum. Aside from the constitutionally inherent values of a truly fair and efficient criminal justice system, compared to the institutional, economic inefficiencies inhering in inadequate funding for the procedurally imperative criminal defense attorney, the full and fair funding for such lawyers is a pittance to pay, and a societal bargain.

On behalf of the National Association of Criminal Defense Lawyers, I want to thank the subcommittee again for affording us this opportunity to be heard on this very important subject, and for considering our concerns and requests for congressional action.

Richard Kammen

NACDL

Footnotes:

1. The NACDL is a specialized bar association established in 1958. Our 8,700 direct members and 70 state and local affiliates include more than 28,000 private criminal defense attorneys, public defenders, and law professors. The Mission of the NACDL is to ensure justice and due process for persons accused of crime, to foster the integrity, independence, and expertise of the criminal defense profession, and to promote the fair administration of criminal justice.

2. ***Gideon v. Wainwright***, 372 U.S. 335 (1963); ***Johnson v. Zerbst***, 304 U.S. 458 (1938).

3. ***Britt v. North Carolina***, 404 U.S. 226, 227 (1971).

4. ***Ake v. Oklahoma***, 470 U.S. 68, 77 (1985).

5. *Report on the Federal Defender Program* 11 (March 1993). The *Report* is the result of an extensive study of the effectiveness of the Criminal Justice Act, as required by Section 318 of the Judicial Improvements Act of 1990. The *Report* is reprinted at 53 CrL (BNA) 2003 (April 14, 1993).

6. Id., at 12.

7. For example, the most recent state case declaring indigent defense appropriations constitutionally inadequate is ***Kennedy v. Carlson***, No. MC9200680, District Court for the County of Hennepin, Minnesota, Michigan (April 24, 1994), where Judge John C. Lindstrom invalidated the state public defender appropriation for failure to meet federal constitutional mandates: "In our adversarial system of justice, fairness and equality must be measured against the public resources available to each side, i.e. prosecution and defense. There is no legislative funding cap on prosecutorial resources. The integrity of the adversarial system is thereby seriously jeopardized." Opinion at 12.

8. *Proposed Long Range Plan for the Federal Courts* 86 (March 1995).

9. Last August, for example, the theme of the annual conference of the Ninth Circuit Court of Appeals was "Budgeting Justice: Financing the Federal Courts." The Judicial Conference Budget Committee Chair (and Chief Judge of the Eighth Circuit) Richard S. Arnold reported on the 1995 Judiciary appropriation: "It will run the train at a current service level, but will not take into account any workload increase" brought on by the 1994 Crime Bill. District of Oregon Chief Judge James A. Redden responded that Congress "loads up our dockets and makes our cases more complex. We have been getting Congress off the hook, but sometimes I think a train wreck is necessary." Slind-Flor, *9th Circuit Meeting: Money, Murder and Magistrates*, National Law Journal A7 (Aug. 29, 1994).

10. See, e.g., ***Plaut v. Spendthrift Farm, Inc.***, — U.S. — (April 18, 1995) (asserting the judicial function to negate legislative intrusion).

11. *Proposed Long Range Plan*, at 126.

12. See, e.g., ***United States v. Lopez***, — U.S. — (April 26, 1995) (reviewing, and enforcing, doctrine of limited federal power).

13. Last year, for example, the Senate Committee on Appropriations recommended budgets for the FBI, DEA, U.S. Attorneys and U.S. Marshals totaling $170,799,000 *more* than requested — as an "investment in federal law enforcement." Senate Report No. 103-309, 103d Cong., 2d Sess. 6-7 (July 14, 1994). The excess was trimmed in Conference to only $154,354,000 more than requested. House Report No. 103-708, 103d Cong., 2d Sess. 31-34 (Aug. 16, 1994). And on March 15, 1995, the Attorney General told the Senate Appropriations subcommittee, "We are escalating our fight against crime," and requested a 20 percent budget increase. Reuters Newswire.

14. *Report on the Federal Defender Program*, at 20-21.

15. *Report on the Federal Defender Program*, at 26.

16. *Reports of the Proceedings of the Judicial Conference* 75 (1988) ("In recognition of the possibility that the 'Defender Services' appropriation might be insufficient to fund fully the anticipated level of CJA activities, the Conference established . . . priorities for that appropriations account").

17. House Report No. 102-709, 102nd Cong., 2d Sess., at 75 (Sept. 28, 1992).

18. "In response to Congressional concerns over the limited funding available to meet CJA requirements and in order to assist Congress in its efforts to reduce governmental spending overall, the Judiciary is *not* intending in fiscal years 1993 or 1994 to implement the $75 per hour rate in the 72 districts for which that rate has been approved but not yet implemented and, therefore, is not seeking any fiscal year 1994 funds for this purpose." Hearings, House Appropriations Subcommittee for FY 1993, Part 4, The Judiciary, 498-99 (emphasis in original).

19. The Judiciary "is *not* seeking fiscal year 1995 funds to implement the $75 rate in the 72 districts for which that rate has been approved but not yet implemented." Hearings, House Appropriations Subcommittee for FY 1995, Part 4, The Judiciary, 384 (emphasis in original). However, the *Proposed Long Range Plan for the Federal Courts*, at 94, recommends: "At a minimum, adequate funding should be requested so that the Judicial Conference can adjust compensation rates up to the maximum amount authorized by law."

20. 18 U.S.C. § 3006A(d)(1), amended in 1986, provides for increasing the 1984 $60/$40 rates when the "Judicial Conference determines that a higher rate of not in excess of $75 per hour is justified for a circuit or for particular districts within a circuit. . . . The Judicial Conference shall develop guidelines for determining the maximum hourly rates for each circuit in accordance with the preceding sentence, with variations by district, where appropriate, taking into account such factors as the minimum range of the prevailing hourly rates for qualified attorneys in the district in which the representation is provided and the recommendations of the judicial councils of the circuits."

21. Following the CJA procedures, the Judicial Conference has established "alternative rates" of up to $75 per hour in 89 of the 94 federal districts "subject to the availability of funds, and subject to whatever priorities the Conference might establish for the use of available resources."

- $75 rate established in the following districts and court locations: Alaska, California (Central, Eastern (Sacramento and Fresno), Northern & Southern), Detroit, Michigan, New Jersey, Las Cruces, New Mexico, New York (Eastern and Southern), and Seattle, Washington; $70 rates in Hawaii; and $60 rates in Oregon and Las Vegas and Reno, Nevada. *Proceedings of the Judicial Conference* (*JCUS*) 16, 46, 75, 111 (1988).

- Extension of $75 rate to entire districts where previously limited to specific court locations, and to all districts in the Seventh Circuit (Wisconsin, Illinois & Indiana). *JCUS* 79, 108 (1990).

- $75 per hour approved for Alabama (Southern), Arizona, Connecticut, Florida, Georgia (Northern), Guam, Idaho, Kentucky, Louisiana, Maryland, Massachusetts, Michigan (Western), Mississippi, Missouri, Nevada, North Carolina (Western), Ohio, Oregon, Pennsylvania (Middle & Western), South Carolina, Tennessee, Texas, Virginia (Western), and West Virginia. *JCUS* 18, 47, 56-57, 73 (1991).

- $75 rates approved for Alabama (Northern & Middle), Arkansas (Eastern), Colorado, Delaware, Georgia (Middle & Southern), Iowa, Kansas, Minnesota, Montana, New Hampshire, New York (Western), North Carolina (Eastern & Middle), North Dakota, Northern Mariana Islands, Oklahoma, Pennsylvania (Eastern), Puerto Rico, Utah, Vermont, Virgin Islands, Washington (Eastern), Wyoming, and Hawaii. *JCUS* 21-22, 39

(1992).

- $75 rate approved for South Dakota. *JCUS* __ (1995).

The rates established after 1988 (for 73 districts) have not been implemented.

22. *Report on the Federal Defender Program*, at 4 ("The average compensation is about $45 per hour, since one in-court hour is reported for every three out-of-court hours").

23. The general cost of living, as measured by the Bureau of Labor Statistics, shows that a dollar's worth of goods and services in 1984 costs about $1.50 in 1995. Accordingly, most panel attorneys are paid barely over $30 per hour (compared to $45) in 1984 dollars — a $15 per hour rate cut that has crept into the system over the years.

24. ***State of Vermont v. Bacon***, — A.2d —, WL 74700, *24 (Vt. 1995) (Dooley, J., Dissenting).

25. ***State of Tennessee v. Mathews***, Criminal Court of Montgomery County, No. 33791, (March 18, 1995), at 1 (order setting a court-appointed hourly rate, in a capital case, at $100 per hour).

26. The Judicial Conference's *CJA Guidelines*, ¶ 2.28 A., excludes office overhead from those expenses reimbursed to panel attorneys: "The statutory fee is intended to include compensation for these general office expenses." Cf. ***State of Louisiana v. Green***, 631 So.2d 11, 13 (La. App. 1993) (setting an overhead rate of $30 per hour plus fees of $45 per hour, once annual *pro bono* donation exceeds 100 hours).

27. *Report on the Federal Defender Program*, at 30.

28. See, e.g., ***Bey v. United States,*** No. 93-8442, *cert. denied*, — U.S. — (June 23, 1994) (question presented: does conscription of panel attorneys to serve at a financial sacrifice violate the Constitution?).

29. See ***Pruett v. State***, 574 So.2d 1342, 1357 (Miss. 1990); ***Jewell v. Maynard***, 383 S.E.2d 536, 543 (W.Va. 1989); ***DeLisio v. Alaska Superior Court***, 740 P.2d 437, 441 (Ala. 1987); ***Stephan v. Smith***, 747 P.2d 816, 842 (Kan. 1987); *State ex rel.* ***Partain v. Oakley***, 227 S.E.2d 314 (W.Va. 1976).

30. ***Weiner v. Fulton County***, 148 S.E.2d 143, 145 (Ga.App.) (citing ***Schware v. Board of Bar Examiners***, 353 U.S. 232 (1957)), *cert. denied*, 385 U.S. 958 (1966). See also ***Konigsberg v. State Bar of California***, 353 U.S. 252 (1957).

31. ***Bias v. State***, 568 P.2d 1269, 1270 (Okl. 1977). See also ***Bedford v. Salt Lake County***, 447 P.2d 193, 195 (Ut. 1968); ***Warner v. Commonwealth***, 400 S.W.2d 209, 211 (Ky. 1966), *cert. denied*, 385 U.S. 858 (1966); *State ex rel.* ***Partain v. Oakley***, 227 S.E.2d 314 (W.Va. 1976); ***Abodeely v. County of Worcester***, 227 N.E.2d 486 (Mass. 1967); ***Knox County Council v. State***, 29 N.E.2d 405, 408 (Ind. 1940).

32. In ***FTC v. Superior Court Trial Lawyers Assn.***, 493 U.S. 411 (1990), for example, the Supreme Court held (unanimously) that panel attorneys are small businesses covered by the Anti-Trust laws. The House Republican's "Contract With America" calls for compensation under the Fifth Amendment when government regulations take 10 percent of property value. Where CJA payments reflect less than the cost of doing business, and less than a fourth of the private market rate, such a private property protection philosophy should apply.

33. *Report on the Federal Defender Program*, at 28. The *Report of the Committee to Review the Criminal Justice Act* is reprinted at 52 CrL (BNA) 2265 (March 10, 1993).

34. *Report on the Federal Defender Program*, at 28.

35. Id., at 27.

36. *Proposed Long Range Plan*, at 111.

37. *Study of the Federal Defender Program*, at 28.

38. 18 U.S.C. § 3006A(a)(3).

39. Administrative Office of the United States Courts, "Model Criminal Justice Act Plan," § VI.C (1991).

40. ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES (ABA Standard) 5-1.2 (3d ed. 1992).

41. ABA Standard 5-2.2 (Commentary).

42. The Judicial branch, in its administrative role, is exempt from most laws covering open meetings, public records, or freedom of information.

43. The institutional benefit of private bar participation is illustrated by *In re Snyder*, 472 U.S. 634 (1985), where the unanimous Supreme Court held that a private CJA panel attorney was not contemptuous for criticizing the administration of the CJA. "Officers of the court may appropriately express criticism on such matters." Government employees, however, may not be so protected. See ***Waters v. Churchill***, 114 S.Ct. 1878 (1994) (public employees can be summarily fired for criticism that could disrupt efficiency).

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