




NACDL Testimony

April 1, 1998

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 See also the related [press release](#) regarding Gerald Lefcourt's testimony.

Written Statement by Gerald B. Lefcourt, President

**on behalf of
National Association of Criminal Defense Lawyers (NACDL)**

Regarding the Fiscal year 1999 Appropriation for Defender Services

**Hearing before the House Appropriations Subcommittee on
Department of Commerce, Justice and State, and the Judiciary**

Mr. Chairman and Members of the Subcommittee:

The National Association of Criminal Defense Lawyers (NACDL),⁽¹⁾ appreciates this opportunity to offer our views concerning the Defender Services Appropriation for FY 1999.

Introduction -- Curbing Prosecutorial Abuse

This appropriation, a minuscule portion of the budget over which this Subcommittee has jurisdiction, must be considered within the broader context of a growing crisis of confidence in the fundamental fairness of the federal criminal justice system. Currently pending before the

House Judiciary Committee is H.R. 3396, authored by distinguished Representative Joseph M. McDade.⁽²⁾ A far-reaching reform bill, the "Citizens Protection Act of 1998" would go far toward curbing "the unfettered power of federal prosecutors and the dangers posed by **unethical, abusive and improper conduct** by U.S. Department of Justice employees."⁽³⁾ So too will your own panel's efforts to better "level the playing field" through a more realistic appropriation going to Defender Services.

The danger unchecked federal prosecutorial power poses to fundamental American values has been long been recognized.⁽⁴⁾ In a recent *Wall Street Journal* article, Arnold I. Burns, Deputy Attorney General in the Reagan administration, details recent abuses and declares: "It is time for a sober reassessment of the power we have concentrated in the hands of prosecutors and the alarming absence of effective checks and balances to prevent the widespread abuse of that power."⁽⁵⁾

Nationally-syndicated columnist Paul Craig Roberts, appearing locally in the *Washington Times*, also agrees with Rep. McDade's warning that "[a] win-at-all-costs attitude blinds [federal prosecutors] into suppressing exculpatory evidence, falsifying evidence, misleading grand juries, and other misconduct which most of the time goes unpunished."⁽⁶⁾ Mr. Roberts ties the upswing in prosecutorial misconduct to increases in appropriations to the Department of Justice:

A former assistant U.S. attorney described to me the extraordinary decline in prosecutorial ethics he has witnessed during his career. He laid the blame on the war on drugs, which resulted in the almost overnight expansion of the number of assistant U.S. attorneys from 1,200 to more than 7,000. There were not enough seasoned people to fill the posts, and the influx overwhelmed the ability of the Justice Department to inculcate a respect for justice and the majesty of law as opposed to a win-at-all costs attitude by the younger law school graduates.

As a result, Mr. Roberts believes "that increasingly many prosecutors are a bigger threat to the public than are criminals," and urges passage of the Citizens Protection Act.⁽⁷⁾

Wholly apart from substantive reform legislation such as H.R. 3396, this Subcommittee has the duty to ensure adequate funding for the court-appointed criminal defense lawyers who represent the targets of federal prosecutions. Theoretically, our age-old adversary system of justice includes, by wise design, built-in checks and balances including the defense attorney's role as society's watchdog. But with federal criminal caseloads swelling to numbers not seen since Prohibition,⁽⁸⁾ and with 85% of the defendants too poor to hire their own attorneys,⁽⁹⁾ that function has been severely compromised by many years of inadequate funding.

In particular, the private attorneys called upon to represent over 40% of the court-appointed cases⁽¹⁰⁾ have been denied cost-of-living increases added to the Criminal Justice Act in 1986. And the private attorneys in 77 of the 94 federal districts have been denied the basic rate

increases Congress included in 1986 -- and the Judicial Conference subsequently approved -- due to cancellation language in Reports of the Appropriation Committees. It is essential that such Report language be omitted henceforth, and that the Defender Services Appropriation be adequately funded to make the oversight theory of the adversary system a reality.

We believe it is essential to recognize the defense function as an integral part of America's criminal justice system if it is to ensure the Constitution's guarantee of fairness and due process to persons accused. To preserve and protect the integrity of that system, we strongly urge Congress to appropriate \$450,000,000 for Defender Services -- an amount necessary to begin the recovery from too many years of inadequate funding.

Funding the Constitutional Mandate

The Defender Services Appropriation funds the federal government's Sixth Amendment obligation to provide counsel to represent defendants unable to hire their own attorney.⁽¹¹⁾ In addition, the appropriation enables the government to fulfill its Fifth Amendment duty to provide such defendants with the "basic tools,"⁽¹²⁾ and the "raw materials"⁽¹³⁾ 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."

Five 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.⁽¹⁴⁾

Years of insufficient funding have resulted in federal criminal justice system with a number of shortcomings,⁽¹⁵⁾ including:

- Failure to fund federal defender organizations in all districts;
- Failure to fund cost-effective death penalty representation;
- Unreasonably low compensation for CJA "panel" attorneys; and
- Inadequate qualification standards for panel attorneys.

NACDL strongly agrees with those 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.

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).⁽¹⁶⁾ 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 continue 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

The poor quality of much of America's death penalty representation is a well-documented national disgrace and international embarrassment.⁽¹⁷⁾ Exacerbating that crisis, Congress, in 1996, excluded funding for the Post-Conviction Defender Organizations (PCDOs) non-profit community defender organizations which served 20 of the 38 death penalty states (50 federal judicial districts). That precipitous act, together with the accelerated scheduling mandated by the Antiterrorism and Effective Death Penalty Act of 1996, leaves hundreds of death row inmates without counsel, greatly increases the cost of representation for the rest, and has contributed to delay in the processing of capital cases.⁽¹⁸⁾ The Subcommittee should recommend retraction of that funding prohibition for fiscal year 1999.

Established as a cost-effective means of providing counsel, PCDOs specialized 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 performed a number of functions which help to ensure that fair and complete capital habeas corpus petitions were promptly filed and competently processed by trained counsel. Those organizations assisted the courts by recruiting counsel willing and able to provide representation in such 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 enabled private attorneys to provide representation *pro bono* -- without charge to the government. And where *pro bono* attorneys were not able to satisfy the need for counsel services, PCDO staff attorneys provided cost-effective representation in these most critical cases. Finally, where a PCDO did not have funds to hire enough staff to represent all of a state's death row population, the PCDO provided support services that greatly reduced the cost of assigning private attorneys.

In short, by providing competent, well-trained counsel, PCDOs reduced 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 put 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.⁽¹⁹⁾

Funding for PCDOs came 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 that funding should be restored in order to fill the growing capital caseload needs, consistent with legislative demands for more federal capital prosecutions and for faster processing of capital habeas cases.

CJA Panel Attorney Compensation

1986 amendments to the CJA authorized the Judicial Conference to adjust the 1984 panel attorney hourly rates, up to \$75 per hour:

Any attorney appointed . . . shall be compensated at a rate not exceeding \$60 per hour for time expended in court . . . and \$40 per hour for time expended out of court, unless 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.

That adjustment mechanism -- now 12 years old -- replaced the procedure adopted by Congress in 1970 authorizing hourly rate adjustments "not to exceed the minimum hourly scale established by a bar association for similar services rendered in the district."

This goal was subsequently frustrated by the abolishment of minimum bar fee schedules following the decision of the Supreme Court in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), which held that a minimum fee schedule promulgated and enforced by a bar association constitutes unlawful price-fixing in violation of the Sherman Act. The *Goldfarb* decision thus resulted in a collateral deactivation of the adjustment authority conferred by Congress in the Circuit Councils. . . . While the CJA Revision of 1984 removed the 1970 language authorizing judicial councils to set alternate hourly rates, it made no provision to replace this mechanism for affording flexibility to the CJA compensation scheme.⁽²⁰⁾

The 1970 mechanism Congress revised in 1986 was intended to ensure that panel payments are "neither a bonanza for some lawyers to get more than the going rate in that town, nor an empty

shell which will not be used because the rates are below the going charge in those towns. . . . [A]nd it is hoped it will reflect what the private practitioner charges in those jurisdictions." *United States v. Mills*, 713 F.2d 1249, at 1259, 1261 (7th Cir. 1983) (Swygert, J., dissenting, quoting Representative Abner Mikva).⁽²¹⁾

Despite that legislative intention to adjust the rates to avoid impoverishing panel attorneys -- and despite the fact that overhead costs have risen to exceed the base rates established 14 years ago -- except for a token \$5 raise in January, 1996, the Judicial Conference has postponed implementing higher rates in all but the first 16 districts to be approved, in 1988.⁽²²⁾

Seventy-five dollar rates (generally less than half the market rate, but more than the average cost of overhead) have been approved -- but postponed for lack of funding -- for the remaining judicial districts:

- In 1990, the \$75 rate was approved for all the districts in the Seventh Circuit (Wisconsin, Illinois & Indiana) and extended to entire districts where previously limited to specific court locations.⁽²³⁾ Due to inadequate funding, those approved rates have not been implemented.
- In 1991, \$75 per hour was approved for the Southern District of Alabama, Arizona, Connecticut, Florida, the Northern District of Georgia, Guam, Idaho, Kentucky, Louisiana, Maryland, Massachusetts, the Western District of Michigan, Mississippi, Missouri, Nevada, the Western District of North Carolina, Ohio, Oregon, the Middle & Western Districts of Pennsylvania, South Carolina, Tennessee, Texas, the Western District of Virginia and West Virginia.⁽²⁴⁾ Due to inadequate funding, those approved rates have not been implemented.
- The \$75 rate was approved in 1992 for the Northern & Middle Districts of Alabama, the Eastern District of Arkansas, Colorado, Delaware, the Middle & Southern Districts of Georgia, Iowa, Kansas, Minnesota, Montana, New Hampshire, the Western District of New York, the Eastern & Middle Districts of North Carolina, North Dakota, Northern Mariana Islands, Oklahoma, the Eastern District of Pennsylvania, Puerto Rico, Utah, Vermont, Virgin Islands, the Eastern District of Washington, Wyoming, and Hawaii.⁽²⁵⁾ Due to inadequate funding, those approved rates have not been implemented.
- And in 1995 the \$75 rate was approved for the Western District of Arkansas, Maine, Nebraska, South Dakota, and the Eastern District of Virginia.⁽²⁶⁾ Due to inadequate funding, those approved rates have not been implemented.

Except for the token \$5 increase to \$45 per hour for work out-of-court (generally two-thirds of the average billing) and \$65 for work in court, the rates established after 1988 for those 77 districts have been repeatedly postponed in compliance with Appropriations Committee Report language.⁽²⁷⁾ However, the cost of maintaining a law practice has not been postponed, but has steadily increased.

In the District of South Dakota, one of the least expensive locations, surveys conducted by the Defender Services Division show that the average overhead cost of a law office in 1994 was \$38 per hour.⁽²⁸⁾ In most locations, the costs are notably higher. Average law office overhead in New Hampshire, for example, was \$53 per hour back in 1992.⁽²⁹⁾ In Vermont, the overhead cost was \$47 per hour in 1993.⁽³⁰⁾ A 1994 survey by the Tennessee Bar Association showed the average cost of office overhead of \$46.81 per billable hour.⁽³¹⁾ In Texas, the average office overhead back in 1991 was \$64.25 per hour.⁽³²⁾ In Colorado, in 1992, \$46 per hour.⁽³³⁾ In Kentucky, in 1991, \$37 per hour.⁽³⁴⁾ In South Carolina, in 1991, \$50 per hour.⁽³⁵⁾ In Arkansas, \$47 per hour in 1992.⁽³⁶⁾ And in Maryland, in 1991, an average overhead cost of \$70 per hour.⁽³⁷⁾

Since those surveys were conducted, overhead costs have continued to rise. But the compensations rates have not, effectively turning panel attorney service, at \$45/65 per hour in most states, into a direct subsidy of the government's constitutional obligation to provide assistance of counsel to the indigent accused of crime.⁽³⁸⁾ 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.⁽³⁹⁾

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.⁽⁴⁰⁾

The crux of the CJA panel attorney payment problem is this: The CJA, unlike the 1931 Davis-Bacon Act for government construction projects,⁽⁴¹⁾ 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 most locations. Continued payments at a fraction 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.⁽⁴²⁾ While the public policy of paying prevailing wages for work on government construction projects is laudable, the policy of shirking the constitutional obligation to provide counsel to poor persons whose life and liberty the government seeks to forfeit is scandalous.

Qualification Standards 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 virtually frozen for nearly 15 years. 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.⁽⁴³⁾

Given the well-recognized, increasingly serious difficulty in recruiting qualified panel attorneys, the Judicial Conference proposed "only minimal qualification standards."⁽⁴⁴⁾ Even though quality control is essential, because most districts are stuck at barely above the \$40/\$60 rates established in 1984, 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."⁽⁴⁵⁾

However, the 1995 *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."⁽⁴⁶⁾ But with compensation at or below the cost of merely maintaining a law office, the continuing education necessary to meet minimum standards is an expense many lawyers cannot afford.

The clear solution is simply the market system: panel attorneys paid at a fair rate (even though substantially 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 do 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.

The Role of the Private Bar

The Criminal Justice Act requires a "substantial proportion" of appointments to the private bar.⁽⁴⁷⁾ "'Substantial' shall usually be defined as approximately 25 percent of the appointments under the CJA annually throughout the district."⁽⁴⁸⁾ The American Bar Association also recommends "substantial participation by the private bar,"⁽⁴⁹⁾ 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.⁽⁵⁰⁾

The private bar's participation in the federal criminal justice system is also necessary to counter the inherent trend, in any closed bureaucracy,⁽⁵¹⁾ 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.⁽⁵²⁾

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 the lion's share of the appointments. The remaining cases should be assigned to panel attorneys who are willing (not conscripted), who are qualified (meeting high competency standards) and who are reasonably compensated (in order to maintain qualifications, pay necessary office overhead, and avoid destitution).

Conclusion

The Defender Services Appropriation has been woefully underfunded for many years. During that same period, funding for federal law enforcement, prosecution and prison construction has grown dramatically. And, at the same time, criminal law and procedure have become more complex; death penalty litigation has expanded and accelerated, while funding for cost-effective capital representation has been eviscerated; and the costs of legal practice have escalated. This severe funding imbalance is a major factor in what Representative McDade identifies as the growing culture of "unethical, abusive and improper conduct by U.S. Department of Justice employees." Through the appropriations process, Congress has the opportunity -- indeed, the duty -- to take a major step toward reestablishing a system of fairness and accountability within America's criminal justice system.

The best 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 underfunded, and because the pending appropriation proposed by the Administration is demonstrably inadequate to redress the dire need, NACDL urges this Committee to recommend - - and the Congress to enact -- an adequate Defender Services Appropriation of no less than \$450,000,000. This appropriation cannot be viewed in a vacuum. The Constitution of the United States mandates a fair and efficient criminal justice system for all Americans. Full and fair funding to accomplish that is a pittance to pay. On the other hand, the consequences of *not* doing so are dire and go to the heart of everything our fragile democracy stands for.

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A 1967 graduate of Brooklyn Law School, Gerald B. Lefcourt is the President of the National Association of Criminal Defense Lawyers, a founder of the New York State Association of Criminal Defense Lawyers and past President of the New York Criminal Bar Association. Mr. Lefcourt is head of a four-lawyer firm in New York City, Gerald B. Lefcourt, P.C., specializing in the defense of criminal cases. Long considered one of the defense bar's leading spokesmen and most passionate advocates, he has defended clients as diverse as the Black Panthers, Abbie Hoffman, Harry Helmsley and former New York assembly Speaker Mel Miller.

Mr. Lefcourt is a lecturer, panelist and author of publications on a wide variety of legal subjects including asset forfeiture, legal ethics, wire-tapping, plea bargaining, subpoenas to lawyers, federal prosecutor ethics and representation of grand jury witnesses. In 1983, he was named by the NY Law Journal in "Who's Who in Criminal Defense Bar" as among New York's finest trial attorneys. The New York State Bar gave him their "Outstanding Practitioner" Award in 1985 and again in 1993. In 1993, the National Association of Criminal Defense Lawyers gave him the Robert C. Heeney Memorial Award -- their highest honor.

Neither Mr. Lefcourt nor NACDL has received any federal grant, contract or subcontract in the current and preceding two fiscal years.

Notes

1. NACDL is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime. A professional bar association founded in 1958, NACDL's almost 10,000 direct members -- and 80 state and local affiliate organizations with another 28,000 members -- include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system.

2. Introduced on March 5, 1998, H.R. 3396 gathered 33 co-sponsors as of March 27, 1998: Rep Murtha - 03/05/98; Rep King - 03/12/98; Rep English - 03/12/98 Rep Miller, D. - 03/12/98; Rep Parker - 03/12/98; Rep Hunter - 03/12/98; Rep Duncan - 03/12/98; Rep Schaefer - 03/12/98; Rep Traficant - 03/12/98; Rep Quinn - 03/12/98; Rep Saxton - 03/12/98; Rep Boehlert - 03/12/98; Rep Smith, R. - 03/12/98; Rep Lewis, J - 03/12/98; Rep Hefner - 03/12/98; Rep Stokes - 03/24/98; Rep Weldon, C. - 03/24/98; Rep Goodling - 03/24/98; Rep Sisisky - 03/24/98; Rep Rohrabacher - 03/24/98; Rep Moakley - 03/24/98; Rep Horn - 03/24/98; Rep Bachus - 03/24/98;

Rep Skeen - 03/24/98; Rep Ford - 03/24/98; Rep Baldacci - 03/24/98; Rep Mica - 03/26/98; Rep Cunningham - 03/26/98; Rep Pickett - 03/26/98; Rep Knollenberg - 03/26/98; Rep Clay - 03/27/98; Rep Callahan - 03/27/98; Rep LoBiondo - 03/27/98

3. Joseph M. McDade, "Safeguard Civil Liberties - *Require Ethical Conduct at Justice*," (letter to Members of Congress, March 25, 1998).

4. *See, e.g.*, Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (1969).

5. Arnold I. Burns, "What By-the-Book Prosecutors Can Get Away With," *Wall Street Journal*, A23 (March 23, 1998).

6. Paul Craig Roberts, "Ambition Above Justice," *Washington Times*, A18 (March 26, 1998).

7. *Id.*

8. "In 1997, filings of both criminal cases and defendants rose to their highest levels since 1933, the year the Prohibition Amendment was repealed. Case filings grew 5 percent to 50,363. . . . Defendant filings climbed 4 percent to 70,201. Criminal case terminations rose 3 percent. With filings outpacing terminations, the pending caseload grew 11 percent to 35,632." Administrative Office of the United States Courts, *Judicial Business of the United States Courts 1997* ("*Judicial Business 1997*").

9. "Through its defender services program, the Judiciary provides legal representation for defendants financially unable to retain counsel on their own. The right to counsel is guaranteed by the Sixth Amendment to the Constitution. Approximately 85 percent of criminal defendants in the federal courts require court-appointed counsel. The Judiciary has no control over the number of individuals for whom it must provide services. This is a function of congressional action, Department of Justice policies, and U.S. attorney practices."

Administrative Office of the United States Courts, *Report to Congress on the Optimal Utilization of Judicial Resources*, 36 (January, 1998).

10. *See Judicial Business 1997, supra*, at 25.

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

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

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

14. *Report on the Federal Defender Program* 11 (March 1993). 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).

15. *Report on the Federal Defender Program*, at 12.

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

17. *See, e.g.*, ABA, Resolution of the House of Delegates, Feb. 1997 (calling for a moratorium on imposition of the death penalty because of widespread defects, notably a failure to provide qualified and compensated defense counsel, investigators and experts); Int'l Comm'n of Jurists, Administration of the Death Penalty in the United States (June 1996).

18. *See, e.g.*, *Davis v. Thomas*, 266 Ga. 835, 471 S.E.2d 202 (1996) (describing the scramble to replace PCDO representation following de-funding, and ordering a continuance in a state *habeas* case).

19. *Report on the Federal Defender Program*, at 26. *See also*, U.S. General Accounting Office, Defender Services Program, 5 (July 1990) (finding that the PCDOs' average "cost per representation" was 46% of the cost of panel attorney death penalty representations).

20. House Report 99-417, 99th Cong., 1st Sess., (December 5, 1985) (Statement of Congressional Budget Office, appended to Report). *See* Cong. Record Vol. 131 (1985); 1986 USCCAN 61654; 1985 WL 25927 (Leg.Hist.).

21. *See* House Report 91-1546, 91st Cong., 2d Sess., (September 30, 1970); 116 Cong.Rec. 34,812, 34812 (1970); 1970 USCCAN 3982; 1970 WL 5700 (Leg.Hist.).

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

23. *JCUS* 79, 108 (1990).

24. *JCUS* 18, 47, 56-57, 73 (1991).

25. *JCUS* 21-22, 39 (1992).

26. *JCUS* 82 (1995).

27. *See, e.g.*, Senate Report No. 102-333, 102d Cong., 2d Sess., 82 (July 23, 1992) (Committee "does not approve" implementing statutory rate increases in FY 1993); House Report No. 102-709, 102nd Cong., 2d Sess., at 75 (Sept. 28, 1992) ("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" for FY 1993); Senate Report No. 103-105, 103rd Cong., 1st Sess., at 84 (July 22, 1993) (for FY 1994, the "Committee has not included, and does not approve . . . a 5-year catchup Federal pay comparability adjustment for panel attorneys. Similarly, the Committee continues to oppose expansion of the \$75 hourly out-of-court rate for

panel attorneys in districts outside the 16 currently receiving this rate"); House Report No. 103-293, 103rd Cong., 1st Sess., at 72 (Oct. 14, 1993) (same); Senate Report No. 103-309, 103rd Cong., 2d Sess., at 102 (July 14, 1994) (Committee "has not included . . . pay raise for panel attorneys in fiscal year 1994"); House Report 104-676, 104th Cong., 2d Sess., at 90 (July 16, 1996) ("Committee has not provided . . . for increases in the rate for panel attorneys" in FY 1997); House Report No. 105-207, 105th Cong., 1st Sess., at 101 (July , 1997) ("Committee has not provided for increases in the rate for panel attorneys" in FY 1998); House Report 105-405, 105th Cong., 1st Sess., at 167 (Nov. 13, 1997) (same).

28. Records of surveys conducted by the Administrative Office of the United States Courts.

29. *Id.*

30. *State of Vermont v. Bacon*, 163 Vt. 279, 315 (1995).

31. *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).

32. Records of surveys conducted by the Administrative Office of the United States Courts.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. 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." Compare, e.g., *State of Louisiana v. Green*, 631 So.2d 11, 13 (La. App. 1993) (setting an overhead expense reimbursement rate of \$30 per hour *in addition to* fees of \$45 per hour).

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

40. See, e.g., *Bey v. United States*, No. 93-8442, *cert. denied*, 114 S.Ct. 2714, *rehearing denied*, 115 S.Ct. 27 (1994) (question presented: "Does the continued compulsory service of attorneys . . . in an eight-month trial . . . violate the Sixth Amendment rights of the indigent defendants and/or the Fifth and Fourteenth Amendment rights of the appointed attorneys. . . ?"); Audrey Duff, "Slaves of St. Louis," *The American Lawyer*, 85 (Jan/Feb 1993).

41. See 40 U.S.C 276a, "Rate of wages for laborers and mechanics."

42. See *FTC v. Superior Court Trial Lawyers Assn.*, 493 U.S. 411 (1990) (CJA panel attorneys are small businesses covered by the Anti-Trust laws).
43. *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).
44. *Report on the Federal Defender Program*, at 28.
45. *Report on the Federal Defender Program*, at 27.
46. *Long Range Plan for the Federal Courts*, 120 (1995).
47. 18 U.S.C. 3006A(a)(3).
48. Administrative Office of the United States Courts, "Model Criminal Justice Act Plan," VI.C (1991).
49. ABA Standards for Criminal Justice, Providing Defense Services (ABA Standard) 5-1.2 (3d ed. 1992).
50. ABA Standard 5-2.2 (Commentary).
51. The Judicial branch, in its administrative role, is exempt from most laws covering open meetings, public records, or freedom of information.
52. 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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