

FEDERAL DEFENDER FACT SHEET

Federal Defender offices throughout the country were recently informed that their budgets for Fiscal Year 2014 will be cut by 23 percent. **Absent some immediate action, Federal Defenders will begin the process this summer of laying off between a third and half of their staff.** They will also begin closing many offices. The cuts will result in irreparable damage to the criminal justice system, and paradoxically, greater expense to the taxpayer as indigent defendants are increasingly assigned private counsel from the Criminal Justice Act (CJA) Panel.

The cuts to Federal Defender offices and the catastrophic consequences that would attend them are avoidable -- even accepting congressional budget cuts mandated by sequestration. Currently, the Judiciary's Office of Finance and Budget is predicting a \$100 million shortfall in the Defender Services account for Fiscal Year 2014 -- roughly 10 percent of the Defender Services budget. The Defender Services budget is divided between the CJA Panel, Federal Defenders, and Administrative expenses. The Federal Defender allotment is usually just over half of the budget. In years past, any shortfall in the account was managed by delaying CJA Panel payments. But this year, the Budget and Executive Committees of the Judiciary plan to allocate all of the Defender Services cuts to Federal Defenders, leaving the budget for privately assigned counsel (the "CJA Panel") unaffected. It amounts to a "double sequestration" for Federal Defenders.

If the Judicial Conference instead chose to budget for the deferral of payments to the CJA Panel, as it has in years past and as the CJA Panel representatives themselves have endorsed, the catastrophe could be mitigated. The deferral of payments would only come at the end of Fiscal Year 2014 if Congress did not act to prevent them. Budgeting for deferrals would provide much needed time to prevent Federal Defenders from having to act precipitously this summer. And even if the deferrals come to pass, CJA counsel would ultimately still be paid; their payments would only be delayed. Budgeting for a deferral of nine weeks would solve the crisis.

Below are the essential facts about Federal Defenders and cost containment. Those facts demonstrate that Federal Defender offices have been models of efficiency and quality. Rather than subjecting them to unsustainable cuts, they should be held up as exemplars for government services.

The Consequences of the Cuts

Because Federal Defender offices must begin cutting in advance of the new fiscal year beginning on October 1, the following actions will take place this summer:

- Federal Defenders will begin laying off between a third and half of their staff, including attorneys, investigators, and paralegals.
- With reduced staff, Federal Defenders will begin to decline large numbers of cases. Those cases will then be assigned to CJA Panel attorneys at higher costs.

- Federal Defenders in over 20 states are already making plans to close offices. The offices to be closed are typically in smaller locations where the assignment of CJA counsel is not only more expensive but sometimes hard to accomplish at all because of a scarcity of qualified counsel.
- Federal Defenders will seek to be relieved in resource-intensive cases and will no longer act as discovery coordinators in multi-defendant cases, further exploding costs by increasing CJA expenses.
- 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.
- Federal Defenders have already ceased most training programs for their attorneys and for the CJA Panel, reducing the quality of representation.
- Federal Defenders' role in administering the Panel will shift to the Court and clerks.
- Federal Defenders' will be unable to respond to large-scale legal events like U.S. v. Booker and the massive numbers of crack re-sentencings.
- Costs, both human and fiscal, from mistakes and delays will increase.

Federal Defender Cost Comparison

The ultimate irony of cutting Federal Defender budgets is the increase in costs to the taxpayer. In districts across the country, the 23 percent cut to Federal Defenders will require thousands of federal criminal cases to be assigned to CJA Panel attorneys. CJA counsel are consistently more expensive than Federal Defenders, and the shift will cause the cost of indigent defense to explode.

A recent analysis confirms this fiscal danger. Defenders in six districts that range in size, type, and geography¹ analyzed the relative costs of Defender organization representation in comparison to the cost of CJA counsel representation. *See Figure 1, CJA vs. FPD Costs Per Case.*²

¹ They vary in size from the largest office in the country (District of Arizona), to a comparatively small office (ED Louisiana). The study includes both Federal Public Defender offices and Community Defender offices. Finally, the dockets in these districts vary greatly, from primarily immigration crimes to complex post-SEC white collar fraud offenses. Despite this diversity, the bargain remains a constant: each Defender office in this study costs considerably less than their CJA counterparts.

² There is no centralized national database that permits the ready comparison of Federal Defender costs versus costs of the Criminal Justice Act (CJA) panel. Defenders in these six districts accordingly compiled data from in-house paneling of cases, local clerk expenditure records, and other national and local sources. For the methodology used by each district for this study, see Exhibit B.

Fig.1 CJA vs. FPD Costs

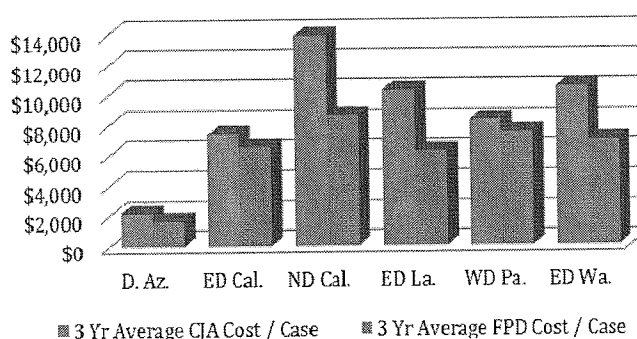
District	3 Yr Average CJA Cost / Case	3 Yr Average FPD Cost / Case	Average FPD Cost as % of CJA Cost (3 year Avg.)	Average Annual savings from FPD handling cases instead of CJA
D. Az.	\$2,194	\$1,658	75.6%	\$6,245,059.32
ED Cal.	\$7,406	\$6,558	88.6%	\$1,575,436.65
ND Cal.	\$13,906	\$8,642	62.1%	\$7,082,144.79
ED La.	\$10,306	\$6,265	60.8%	\$1,604,128.40
WD Pa.	\$8,305	\$7,491	90.2%	\$561,098.54
ED Wa.	\$10,497	\$6,944	66.2%	\$2,849,347.46
			Average:	Average:
			71.4%	\$3,319,535.86

On average, Defender offices in these six districts defend a federal criminal case for 71.4% of what the Judiciary spends for CJA counsel to defend a case. As illustrated below, the three year average cost for FPD cases in each of these districts is dramatically lower

than the cost for CJA representation. See Figure 2, *CJA vs. FPD Costs Per Case*. By representing indigent defendants in their districts, the six Defender offices studied saved the taxpayer over \$3.3 million a year in the last three fiscal years.³

Together, these Defender offices defend over 10,000 federal criminal cases annually. Twenty-three percent cuts to the operating budgets of these offices, and the resulting 33 to 50 percent reduction in staff, will require far more cases to be assigned to CJA counsel. As CJA counsel defend a greater percentage of cases (or all of them, in those districts whose Defender office may not survive the cuts), the cost of indigent defense will rise, inexorably and dramatically.

Fig. 2 CJA vs. FPD Costs Per Case



³ The assessment builds on earlier studies that reached the same conclusion: providing indigent defense representation through Defender organizations costs less. For example, in the Western District of Michigan the Federal Defender ascertained that CJA counsel costs 37% more than the Defender organization, when expenses for both were examined on a "weighted"-case basis. Similarly, an extensive analysis in the Central District of California revealed that the Federal Defender there defended cases for about half the cost of the Criminal Justice Act panel.

The demonstrable cost differentials revealed in every district studied will be multiplied throughout the country. There are over ninety Federal and Community Defender offices nationally. These Defender organizations consistently secure for the Judiciary efficient, skilled and economical defense of indigent cases. The economies arise from volume representation by experienced and trained defense counsel, employed by established institutional actors.

Federal Defender Cost Containmentment

For years, the understandable mantra from the Administrative Office of the U.S. Courts has been cost containment. By any measure, Federal Defenders have done a remarkable job of containing costs.

Nearly all Federal Defender office budgets break down roughly as follows: 80 percent salaries and benefits; 10 percent rent; and 10 percent for everything else, including interpreters, experts, investigatory expenses, information technology, and basic office equipment.

Rent is a fixed cost, and the amount of space Defenders use is tightly regulated by AO policy. The 10 percent "for everything else" has been cut to the bone in recent years, with Defenders taking such steps as negotiating heavily reduced rates from experts and eliminating travel and training expenses. There is nothing left to cut that is not absolutely required to provide effective assistance of counsel.

This means that the only place for Federal Defenders to cut is personnel. The number of personnel in any given office is subject to rigorous oversight. The Federal Defender program has many layers of oversight by the Defender Services Committee (DSC), the Office of Defender Services (ODS) and our Circuit Courts. Each office's budget and staffing levels is set annually by the DSC. Defenders may not add Assistant Federal Defender positions without DSC and ODS approval; FDOs also need Circuit approval before any new AFDP will be funded. Non-attorney staff must be approved by ODS before a position can be posted and filled. Defender offices are required to file multiple monthly reports, detailing spending, change in caseload and current staffing levels. We file an Annual Report of Operations, which is shared with our Chief Circuit Judges and, in many districts, our Chief District Judges. ODS conducts management assessments of Defender office every four years. A financial audit for Community Defenders by an outside audit team is conducted every year. FDOs are audited every four years and conduct an internal controls audit annually.

It must also be noted that when it comes to cost containment, Federal Defenders should not be falsely compared to other agencies within the Judiciary. Whereas other departments such as Pretrial Services and Probation may cut back on services such as mental health counseling, substance abuse treatment, and field supervision (which they are currently doing), Federal Defenders cannot simply choose to partially represent a client. They cannot cut back on necessary investigations, legal research, motions practice or the myriad other activities that are

necessary to carry out their constitutional obligation. Instead, their only recourse is to take fewer cases with the resulting higher costs described above.

The "Downstream" Costs

Federal Defenders also mitigate the costs associated with unnecessary incarceration and pretrial detention. High quality representation means that fewer defendants are unnecessarily incarcerated for longer than sufficient to achieve the goals of retribution, public safety, and rehabilitation. Every year of federal incarceration costs the taxpayer at least \$25,000 per inmate. Quality advocacy that brings to light circumstances of the defendant's offense or background demonstrating a justification for even a slight reduction in sentence can save enormous amounts of money. Federal Defender Offices throughout the country routinely open approximately 125,000 cases per year, including felonies, misdemeanors, supervised release violations, and appeals. **If Federal Defenders save an average of just one month of incarceration per client, the annual savings amount to \$260 million.** That staggering amount is more than double the amount being cut from the entire Defender Services account in 2014.

In addition, when Defender attorneys are furloughed or laid off, hearings and trials necessarily must be continued either because of the attorney's temporary absence or the time associated with transferring a case. When hearings are continued for defendants in custody, the taxpayer must foot an additional \$2,221.22 (Bureau of Prisons facilities) to \$3,500 (private prisons) per defendant per month for the added costs of pretrial detention. Even if a defendant is not in custody, Pretrial Supervision spends \$220.29 per each out-of-custody defendant per month.

This means that if one FPD Office has 10 in-custody clients whose hearings are continued just one month due to furloughs or layoffs, the taxpayer ends up spending \$22,000 - \$35,000 per month it otherwise should not have to spend.

The Legacy of Federal Defenders

Cuts of the magnitude planned for this year will have long-lasting impacts on the federal criminal justice system. The Federal Defender program was established in 1970 in order to establish a much needed "counterpart to federal prosecutors in U.S. Attorney's Offices and an institutional resource for providing defense counsel in those districts (or combination of adjacent districts) where at least 200 persons annually require appointment of counsel." See Administrative Office of the U.S. Courts, *Appointment of Counsel*, found at <http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel.aspx>.

Since that time Federal Defenders have been models of quality and efficiency. Federal judges, the General Accounting Office, and studies by the Rand Corporation all confirm that Federal Defender organizations provide high quality representation that allows the courts to

operate efficiently while saving the taxpayer money. *See* Rand Corporation, "Case Weights for Federal Defender Organizations" (2011).

A survey of federal judges conducted by Seventh Circuit Judge Richard Posner and Professor Albert Yoon published in the Stanford Law Review two years ago showed that of all types of attorneys, civil and criminal, federal judges ranked federal public defenders the highest, slightly above federal prosecutors and well above private counsel. *See* Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317, 325 (2011).

Federal Defenders have been able to handle their heavy workload at such a low cost because they have been fortunate to recruit outstanding talent, including numerous former judicial law clerks from the United States Supreme Court, federal Courts of Appeals and District Courts, a host of former top state public defenders, and law firm associates who distinguished themselves in their practices before joining the Federal Defenders. They have all chosen to work for Federal Defenders for a fraction of what they could earn in the private sector because they are dedicated to their work on behalf of the indigent.

The talent drain this year and for years to come will be devastating. It will be a lasting stain on the Judiciary's commitment to equal justice. And it will be done in the name of cost cutting, when in fact, costs will rise.

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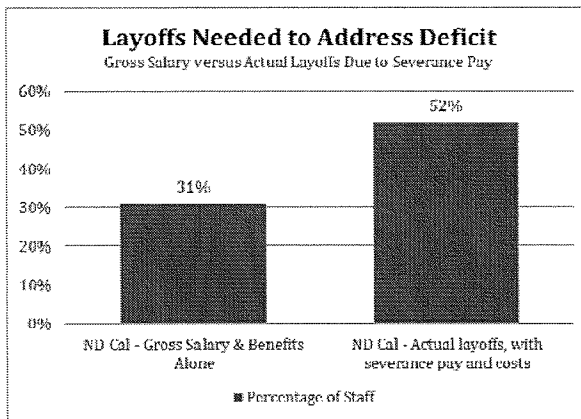
Exhibit A

Severance and Notice Costs Amplify Defender Reductions

The projected twenty-three percent budget cuts will have a particularly devastating impact because unavoidable severance costs amplify the number of staff that must be terminated, and notice requirements to GSA.

Defenders must absorb three mandatory costs⁴ when laying-off staff:

1. Severance pay;
2. Vacation hour lump-sum payoff;
3. Unemployment claims.



One Defender's recent calculations well-illustrate this problem. The Defender for the Northern District of California has identified each staff member to be laid off to meet the 23% budget cut, and has calculated their precise severance pay, vacation lump-sum payoffs, and anticipated unemployment insurance claims.

Without those severance costs, that Defender would have to lay-off 31% of his staff to absorb a 23% cut. *With* these mandatory severance costs, he will be forced to lay off **52% of his staff** – more than half his office.

Put differently, the unavoidable costs of layoffs – severance pay, lump-sum vacation payoffs, and unemployment claims – mean that this Defender will be required to lay-off an additional 20% of his staff over the percentage required if a lay-off simply recouped all salary and benefits. Other Defenders who have done these calculations, or have laid-off staff in Fiscal 2013, report similar costs associated with severance.

Other cost-containment measures have similar limitations. For example, many Defenders will be forced to completely close-down branch offices if the 23% cuts take place. Unfortunately, many Operating Agreements (leases) with GSA contain four-month notice provisions. Therefore, if a Defender gives notice on October 1, 2013⁵ that Defender will still be obligated to pay rent

⁴ Very new employees do not receive severance pay. Because of years of hiring freezes and layoffs in Fiscal 2013, however, new employees are a very small proportion of most Defender's staff.

⁵ October 1, 2013, is the first day of Fiscal Year 2014.

(for empty office space) until February 1, 2014. As a result, the Defender will only save 75% of the rent funds for that property next fiscal year.

Twenty-three percent cuts forced into one Fiscal Year will devastate the Defender program, because the severance and notice costs required for layoffs and abandoning property will dramatically amplify the overall reduction of staff and office space. This will force a commensurate reduction of service, and necessarily require that a far greater proportion of indigent defense in districts be undertaken by (comparatively-expensive) Criminal Justice Act panel attorneys.

Exhibit B

Methodology, Six-District Study

CASE NUMBER DATA: The data regarding the number of CJA cases represents the best available information about the number of defendants represented by CJA counsel in each of the districts in each of the three fiscal years analyzed. Defender offices that make panel assignments (D. Az, ND Cal., ED La., WD Pa.) were able to review internal appointment records and obtain the number of cases assigned to the panel. In WA-E, the District Court clerk's office was able to provide the number of defendants represented by CJA counsel in each of the fiscal years. The CJA case numbers from the remaining district (ED Cal.) were obtained from DSMIS (Defender Services Management Information System): a national case-management and cost database. Because DSMIS is linked to the existing 6X CJA Panel Attorney Payment System (soon to be replaced by the new eCJA VPS), the CJA case numbers data in DSMIS is not limited to the number of CJA representations. Instead, the number includes the number of all vouchers – those entered at the time of appointment and those entered thereafter for interim payments, experts, and transcripts. As a result, DSMIS over-counts the number of CJA representations in a fiscal year and, consequently, results in a lower CJA cost per case than would be determined if only if the number of defendants represented were included.

The data regarding the number of Defender cases represents the number of cases opened by each office in each of the fiscal years. Because the available data regarding the number of CJA representations does not include appeals appointments, Defender offices also did not include appellate openings.⁶ The case numbers (and cost data) for both CJA and Defenders do not include capital habeas representations because, in districts with Capital Habeas Units (CHU), the panel does not handle many, if any, such cases, and in districts without CHUs, the Defenders may not handle many, if any, such cases. As a result, including capital habeas cases in the analysis would hinder the ability to provide a meaningful cost comparison. Finally, in all but one district (ND Cal.), capital trial representations were included in both CJA and Defender data. Because the ND Cal. office did not undertake any capital trial representations during the three-year time period (with the exception of a short period at the end of Fiscal 2012), and the CJA panel did, those cases – and the associated costs – were deducted from CJA totals so as not to unduly inflate the CJA cost-per-case in that district (and survey-wide).

COST DATA: The total annual CJA cost was obtained from DSMIS, and includes the total amount of all vouchers paid to CJA counsel for trial level representation during the fiscal year. Also included are Government Travel Account (GTA) expenses, which were obtained from CJA payment summaries provided by District Court clerks' offices.

⁶ In one district (ED Cal.), it was not possible to remove appellate representations and costs from the panel case numbers, so the Defender case number and cost data for that district also includes appellate openings and related costs.

The total annual cost for Defenders was obtained from regularly-generated financial reports (Financial Accounting System for Tomorrow (FAS4T) and Electronic Status of Funds Reports (ESFRs), and represents the total expenditures made by each of the offices during the fiscal year.

As noted, appellate representations are not included in either CJA or Defender case numbers, and the cost of appellate representation by the CJA panel is not included in the CJA annual cost figure. Accordingly, where able, Defenders removed salary and benefit costs of appeals dedicated staff to allow for a more accurate cost comparison.⁷

Finally, the six-district analysis provides cost per case data for cases initiated in each of the three fiscal years. That is, the case number data reports cases opened in a Defender office, or cases assigned to the CJA during the fiscal year. Cost data for both Defenders and CJA counsel represent the actual amount paid to each during each fiscal year. Some portion of both the amounts paid to CJA counsel and Defender expenditures undoubtedly relate to representations that began in preceding fiscal years and to those that will continue into the next; however, because the cost data for the Defender offices and CJA counsel both include this “carry-over,” it does not affect the comparative cost analysis.

⁷ This was not possible in one district (ND Cal.), where there is no dedicated appellate staff. As a result, all appeal costs are included in the Defender data for this district -- even though appeal openings are not included -- thereby increasing the relative actual cost per case in that district and survey-wide.