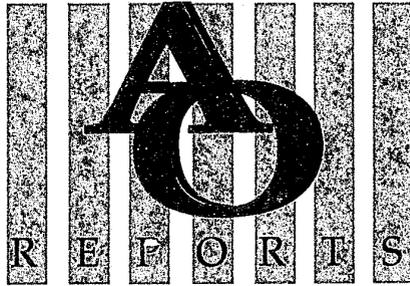


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JUDICIAL DEVELOPMENTS,
TRENDS, STUDIES, AND STATISTICS
FROM THE ADMINISTRATIVE OFFICE
OF THE UNITED STATES COURTS

FEDERAL DEFENDER
SERVICES:
A STATUS REPORT

L. Ralph Mecham, Director
Administrative Office of the U. S. Courts

AUGUST 1993

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**U.S. Department of Justice
National Institute of Justice**

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JUDICIAL DEVELOPMENTS,
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OF THE UNITED STATES COURTS

REPORT 1
AUGUST 1993

Federal Defender Services: A Status Report

"The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him." Justice Hugo Black, some 30 years ago, in the Supreme Court decision Gideon v. Wainwright.

The federal defender and appointed counsel program provides representation to individuals who have been charged with a federal crime but who cannot pay for an attorney's services. This program gives meaning and substance to the Sixth Amendment constitutional right: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

To ensure this right of representation, in 1964 Congress established within the judicial branch a program to provide compensation and reimbursement for expenses for attorneys appointed to represent in federal criminal proceedings persons who cannot afford to pay for such services. That legislation is the Criminal Justice Act of 1964. The Supreme Court has recognized that adequate representation also includes the provision of expert, investigative, and other related services. About 85 percent of criminal cases prosecuted in the federal courts require the services of court-appointed counsel, either private attorneys or staff of federal defender organizations.

Before the Criminal Justice Act was passed, the judiciary was forced to rely completely on the contributions lawyers provided at no charge. Securing attorneys was a significant administra-

tive burden on the courts, and substantial economic sacrifice was often imposed on the attorneys. The lack of economic support also threatened the quality of representation.

Representation under the Act was provided originally only by private attorneys and attorneys designated by bar associations and legal-aid agencies. Compensation for their services was paid on a case-by-case basis.

Private attorneys who provide representation under the Criminal Justice Act are commonly referred to as "panel" attorneys. The origin of this term is in the language of the Act itself: "Counsel furnishing representation under the [district court] plan shall be selected from a panel of attorneys . . ." Each district maintains a list, or panel, of attorneys from which appointments are made.

Based on a study by Dallin H. Oaks (then a professor at the University of Chicago School of Law), jointly commissioned in 1967 by the Department of Justice and the Judicial Conference of the United States, Congress amended the Criminal Justice Act in 1970 to provide for two types of federal defender organizations: federal public defender organizations staffed by salaried federal employees, and community defender organizations staffed by salaried employees of a local non-profit defender grantee agency. These federal defender organizations were to consist of attorneys who would provide defense representation on a full-time basis. The 1970 amendment also mandated the continued appointment of private attorneys, including appointments in a substantial number of the cases in districts with federal defender organizations.

The administrative burden on judges associated with the appointment and payment of panel attorneys through the Criminal Justice Act appointment system is eliminated in cases in which

defendants are represented by lawyers in federal defender organizations. Many defender organizations also help to train and advise panel attorneys on substantive criminal-law matters. Currently, 42 federal public defender organizations serve 47 of 94 federal court districts; nine community defender organizations serve another 10 of the 94 districts.

Since 1988, 19 death-penalty resource centers serving 47 districts have been established. Death-penalty resource centers are specialized community defender organizations that provide direct representation in some death-penalty cases and encourage private attorneys to accept assignments in others by offering them training and expert advice. By helping to collect and review records and by identifying pertinent legal issues, these organizations can minimize the time and resources that private attorneys must devote to death-penalty cases, thereby reducing the time and cost of litigation.

The Criminal Justice Act provides for wide distribution of oversight responsibilities and authority for the administration of federal defender organizations and panel attorneys. District courts, courts of appeals, judicial councils, the Judicial Conference of the United States, the Judicial Conference Committee on Defender Services, and the Defender Services Division of the Administrative Office of the United States Courts share oversight responsibilities.

The Defender Services Division of the Administrative Office oversees the expenditure of funds appropriated by Congress; administers the federal defender and appointed counsel program; and provides policy, legal, management, and fiscal advice to the Committee on Defender Services of the Judicial Conference, judicial officers and employees, private attorneys, and federal defenders and their staffs.

• Compensation for Panel Attorneys •

The Defender Services appropriation from Congress supports the provision of constitutionally required defense services to persons charged with crimes in federal court. Demand for services is solely a function of charges initiated by U.S. Attorneys and the need to ensure the constitutional rights of citizens. Policies and actions of the U.S. Attorneys determine the number, type, and nature of criminal prosecutions. The judiciary is

obligated to furnish representation to financially eligible persons in those cases. Increases in the Defender Services appropriation are thus reactive and, therefore, largely outside the control of the judicial branch.

The Criminal Justice Act, as enacted in 1964, limited compensation for attorneys to a maximum in-court rate of \$15 an hour and an out-of-court rate of \$10 an hour. These maximums were doubled in 1970. With the enactment of an amendment in 1984, attorneys were authorized to receive a maximum compensation rate of \$60 per hour for in-court time, and \$40 per hour for out-of-court time. In 1986, the compensation provision was amended again, authorizing the Judicial Conference to set a higher maximum hourly rate, not to exceed \$75, for particular districts ("alternative rates") and to raise the maximum hourly rates, based on federal cost-of-living increases.

Because of insufficient funds in the judiciary's Defender Services appropriation, alternative rates are being paid in only 16 districts, and increases based on federal cost-of-living increases have not been implemented at all. During the past two fiscal years, funding shortfalls have led to the suspension of all payments for compensation of panel attorneys, experts, investigators, and other service providers associated with them for a period of several weeks. In the current fiscal year, payments to panel attorneys and service providers they engage ceased in May, four months before the end of the fiscal year, and resumed in July, after Congress passed a supplemental appropriation.

The Anti-Drug Abuse Act of 1988 changed the compensation provisions for attorneys providing representation in federal death-penalty cases. The Act authorized presiding judicial officers to fix hourly rates and approve compensation and expenses in amounts deemed reasonably necessary to secure the services of qualified attorneys.

To guide courts in setting compensation in death-penalty cases, and in the interest of fiscal economy, the Judicial Conference established a guideline compensation range of \$75 to \$125 per hour for in-court and out-of-court time in death-penalty cases. These rates are intended to ensure that experienced and qualified attorneys accept appointments in death-penalty cases.

To be compensated and reimbursed for expenses, panel attorneys, and those providing investigative, expert, and other services, must submit claims that specify the hours spent on each case and the expenses incurred. The presiding circuit, district, or magistrate judge must approve the claims. The Criminal Justice Act designates

maximum compensation limits for attorneys, not including reimbursement for expenses, for all categories of cases other than those involving the death penalty. Payments in excess of these limits must be approved by the chief judge of the Court of Appeals or by his or her designee.

Compensation for attorneys under the Criminal Justice Act has been, and remains, substantially below prevailing market rates. In many locations it does not even cover basic office overhead costs. Many lawyers have declined appointments or resigned as panel attorneys due to the economic pressure associated with the rates of compensation authorized under the Criminal Justice Act. Many others accept assignments at a financial sacrifice.

• Judicial Conference • Recommendations

The Judicial Conference of the United States, the policy-making body for the judicial branch, recently completed an extensive review of the Criminal Justice Act and the federal defender program. The comprehensive study assessed the effectiveness of the program, and the Conference reported the results of the study to the judiciary committees of Congress in March 1993. The report makes numerous recommendations for program improvements, including fully funding the program, maximizing the number of representations assigned to defender organizations, and increasing compensation rates for panel attorneys.

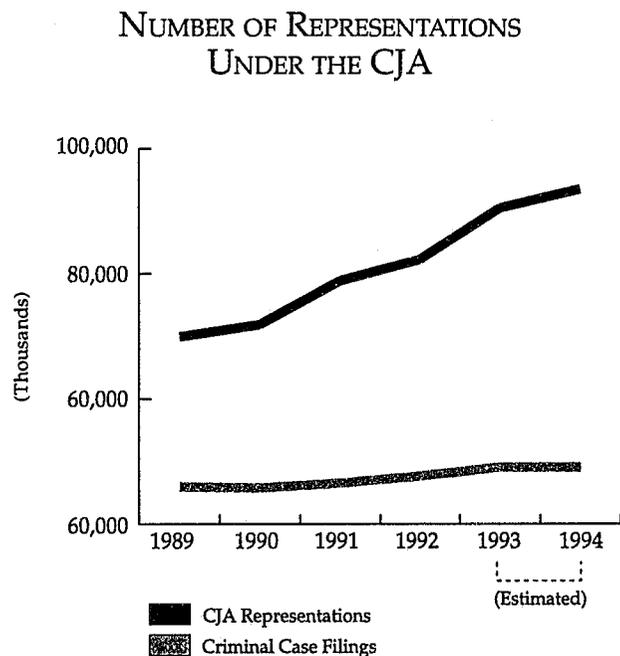
Because federal defender organizations consistently furnish high-quality representation to defendants and reduce both costs and the administrative burden on the courts, the report reiterated a September 1992 Judicial Conference recommendation that Congress amend the Act to eliminate the requirement that a district have at least 200 appointments a year under the Criminal Justice Act to qualify for a defender organization. The report also recommends that a federal defender organization be established in all judicial districts, or a combination of districts, where such an organization would be cost effective, where more than a specified number of appointments is made each year, or where the interest of effective representation otherwise requires establishing such an organization.

Except in the 16 districts where the higher alternative panel attorney compensation rates have been implemented, panel attorney rates have not

been increased since 1984. The report recommends that the Congress provide sufficient funds in the Defender Services appropriation to allow the Judicial Conference to set compensation for panel attorneys at a level that includes reasonable office overhead and fair compensation, plus appropriate cost-of-living adjustments.

• Workload, Crime Legislation • and Prosecution Initiatives

Although criminal case filings have not risen substantially over the last three years, the number of representations under the Criminal Justice Act did rise and is expected to continue to increase. This is, in part, a result of the prosecution of cases involving multiple defendants, each of whom is entitled to representation by either a federal defender or a panel attorney. The growth in the number of multiple defendant prosecutions has a dual impact on the cost of providing defense services. These cases increase not only the number of representations and the demand for services under the Criminal Justice Act, but also the cost per representation because they are generally more time consuming and complex.



Federal defender organizations are generally precluded from representing more than one

defendant in a multiple defendant case due to ethical constraints. The consequent need to appoint panel attorneys to represent the remaining defendants results in additional costs.

CRIME LEGISLATION. Crime legislation enacted over the past several years has had a substantial impact on the cost of providing defense services. The Sentencing Reform Act of 1984 and the "sentencing guidelines" resulting from it have profoundly altered federal criminal practice and dramatically enhanced workloads of federal defenders and panel attorneys, increasing, in most cases, the time needed to provide defense representation.

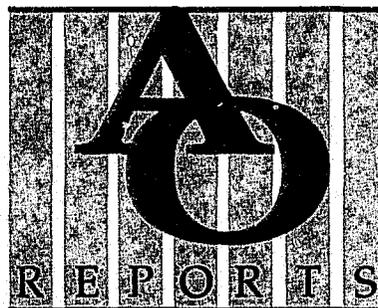
Based on the criminal history of the offender as well as the gravity of the current conviction, the sentencing guidelines provide a range within which the judge selects a sentence. Guideline sentences may be appealed. Trial court judges may depart from the guideline sentences as long as they state their reasons for doing so; such departures are subject to appellate review for "reasonableness."

The representation of individuals under these "guidelines" is significantly more time consuming than was the case before they were established. The frequent amendments to the guidelines (434 amendments between their effective date in November 1987 and November 1991) and their complex nature require attorneys to commit substantially more time to studying and applying the guidelines and to out-of-court preparation for cases. Many panel attorneys have simply not been able to maintain proficiency in federal criminal practice under this system. The need to investigate fully and litigate sentencing factors, which lengthen or shorten the sentence, also significantly increases the cost of each case.

The filing of criminal appeals also continues to rise, due, at least in part, to the impact of the sentencing guidelines. The sentencing guidelines are still being amended, and questions of interpretation have dramatically increased the number of appeals in criminal cases. Criminal appeals rose by 18 percent in 1990, by five percent in 1991, and by nine percent in 1992. Appeals of criminal cases involving only sentencing issues increased 21 percent in 1991.

Representations in criminal appeals under the Criminal Justice Act have similarly increased; they rose about 90 percent between 1987 and 1992. This added activity is without question based primarily on the sentencing guidelines.

Prosecution efforts under the Racketeer Influenced and Corrupt Organizations Act, the



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DIRECTOR
L. Ralph Mecham

EXECUTIVE EDITOR
Steven R. Schlesinger

EDITOR-IN-CHIEF
Sharon F. Marsh

DESIGN AND PRODUCTION
Linda L. Stanton

Contributing to this issue:

Theodore J. Lidz, Chief
Defender Services Division

*Please direct all inquiries
to the Executive Editor, AO Reports,
at the address above.*



Continuing Criminal Enterprise Act, and the Armed Career Criminal Act have similarly added to the cost of providing defense services. Prosecutions under these laws often involve lengthy multiple-defendant trials and appeals in which an

attorney representing one defendant may have to devote substantial time to reviewing evidence, attending proceedings, and reviewing records that are related to another defendant's case but could impact the case against his or her client. These cases are complicated further by the charging of many of these defendants as "career offenders" under the sentencing guidelines. As a result, defense attorneys must review and challenge all

United States Courts projects that these laws will cost the judiciary \$4.6 million in fiscal year 1993 (\$1.21 million for Defender Services). Thereafter, the annual cost to the judiciary is projected to be \$9.21 million (\$2.53 million for Defender Services).

PROSECUTION INITIATIVES. The number and complexity of Criminal Justice Act cases are substantially affected by the prosecution policies of the Depart-

CRIMINAL JUSTICE ACT REPRESENTATIONS IN APPEALS CASES

Year	Number of Appeals	Percent Increase
1987	3,341	—
1988	4,418	32.2%
1989	5,198	17.7%
1990	5,431	4.5%
1991	5,790	6.6%
1992	6,302	8.8%

prior convictions as well as the underlying charges.

There has been growing concern that the application of the asset forfeiture provisions of federal law is rendering increasing numbers of persons eligible for appointment of counsel pursuant to the Criminal Justice Act. Although the impact of asset forfeiture laws on the Defender Services Program has not been quantified, the cost to the appropriation is potentially substantial. Thus, the Judicial Conference has recommended that, at a minimum, the Defender Services appropriation should be reimbursed from the Department of Justice's asset forfeiture fund for those costs associated with providing representation for defendants whose assets have been seized by the Department and who have become eligible for representation under the Criminal Justice Act.

Also, recently enacted crime legislation, including the Anti-Car Theft Act of 1992, the Child Support Recovery Act of 1992, and the Animal Enterprise Protection Act of 1992, will have an impact on the resources required by the judiciary and the Defender Services Program. The Judicial Impact Office of the Administrative Office of the

Department of Justice. Department of Justice initiatives aimed at curbing violent crime, drug trafficking, and white-collar crime, as well as increases in funding for law enforcement and prosecution, have greatly enhanced the number and complexity of criminal filings and the resulting cost of providing defense services. The impact of the review of Department of Justice prosecution and sentencing policies recently initiated by Attorney General Janet Reno remains to be seen.

In recent years, the Department of Justice has initiated Project Triggerlock and Operation Weed and Seed, two programs meant to help reduce violent crime. Project Triggerlock targets for prosecution in federal court dangerous, repeat weapons offenders, in order to take advantage of the more stringent federal mandatory minimum sentences. Project Triggerlock requires that each U.S. Attorney's office establish a task force of prosecutors who, with the help of the Federal Bureau of Investigation, the Drug Enforcement Administration, and investigators from the Bureau of Alcohol, Tobacco and Firearms, as well as state and local authorities, are responsible for identify-

ing, apprehending, and prosecuting violent offenders who use guns. In its first year (April 1991 through April 1992), Project Triggerlock produced more than 6,450 arrests.

Operation Weed and Seed is a multi-agency approach to combating violent crime, drug use, and gang activity in high-crime neighborhoods. In addition to community revitalization efforts, it involves a massive effort by federal, state, and local law-enforcement agencies to remove violent individuals and drug dealers from a targeted area.

Both of these initiatives increase the complexity and cost of defense services, as arrests in conjunction with Project Triggerlock are frequently prosecuted under the Armed Career Criminal Act and prosecutions under Operation Weed and Seed often involve defendants classified as "career offenders" under the sentencing guidelines. These programs also often rely upon the use of state law-enforcement resources for the development and presentation of cases in federal court, thereby creating more cases to which defense attorneys must respond.

The Organized Crime Drug Enforcement Task Force Program is a multi-agency drug investigation and prosecution program aimed at identifying and prosecuting members of high-level drug trafficking organizations, many of which are international in scope. These task forces have existed nationwide since 1982 and coordinate the use of federal, state, and local law-enforcement resources in prosecution efforts. Increased spending by the Department of Justice on this program has had a significant effect on defense costs; many of the defendants indicted in connection with this program are charged under the Racketeer Influenced and Corrupt Organizations Act and the Continuing Criminal Enterprise Act.

Statements by Attorney General Janet Reno suggest that during fiscal year 1994 the Department of Justice will increase efforts to investigate and prosecute white-collar crimes. As has been demonstrated by the prosecutions related to failed savings and loan institutions, these cases are extremely lengthy and expensive to prosecute and defend.

DEATH PENALTY LITIGATION. Death-penalty litigation is extremely complex, requiring counsel to possess not only expertise in the evidentiary and procedural issues of non-capital cases but also a familiarity with the myriad of issues and procedures unique to capital litigation. The need for this expertise has become heightened in the wake of new case law limiting habeas corpus review of

state death-penalty cases. Habeas corpus litigation involves review of a case by federal courts after other avenues of appeal have been exhausted.

McCleskey v. Zant, 499 U.S. ___, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991), requires that all constitutional claims be researched, investigated, and raised in the first federal habeas corpus petition. Issues not addressed in initial petitions may be barred from subsequent consideration. As a result, appointed attorneys in death-penalty cases must research, prepare, and present all possible relevant issues in the first federal habeas petition. This requires the commitment of a great amount of attorney hours and resources in a short time.

In re Blodgett, 502 U.S. ___, 112 S.Ct. 674, 116 L.Ed.2d 669 (1992), further reduced the time in which habeas corpus counsel must meet the investigatory standards of *McCleskey*. *In re Blodgett* strongly implies that lower federal courts are obliged to expedite death-penalty cases. Thus, the responsibilities of appointed attorneys, which were increased by *McCleskey*, must be carried out in less time than was previously permitted, requiring more defense work in a shorter time frame.

• Administrative Accomplishments •

The judiciary has made a substantial commitment to providing training to the more than 13,000 private attorneys nationwide who represent defendants in federal court under the Criminal Justice Act. Experienced panel attorneys have been designated to serve as local training coordinators in districts that do not have a federal defender organization. The coordinators help the judiciary develop and produce training programs for local panel attorneys, and assist in the distribution of written materials covering both substantive criminal law and Criminal Justice Act administrative procedures. In the past year, 35 local training programs for panel attorneys were held. Also, this year the judiciary is co-producing and sponsoring four regional training seminars for panel attorneys.

The Sentencing Guidelines Training Group, established within the office of the Federal Public Defender for the District of Columbia, became operational in the latter part of fiscal year 1992. The group operates a hotline to respond to questions relating to the sentencing guidelines and provides training on the guidelines to panel attorneys and federal defenders.

During the past year, the judiciary established four new federal defender organizations

and nine branch offices of existing defender organizations. Because defender organizations generally provide lower-cost services than do private attorneys, an increase in the number of defender organizations reduces the number of private panel attorney representations and the overall cost of providing services under the Criminal Justice Act.

• The FY 1993 Appropriation •

The fiscal year 1993 appropriation for Defender Services is \$215,121,000, which is \$6,750,000 less than the total of the fiscal year 1992 appropriation and \$88,725,000 less than the initial request for fiscal year 1993. The judiciary has requested supplemental funding in the amount of \$64,800,000 to support projected costs of panel attorney representation.

Because the supplemental appropriation was not enacted before funding was exhausted, payments to panel attorneys and service providers they engage were suspended in May but were resumed in July following enactment of a \$55 million supplemental appropriation.

Suspension of payments to panel attorneys, as has occurred in this and the previous two fiscal years, undermines the confidence of panel attor-

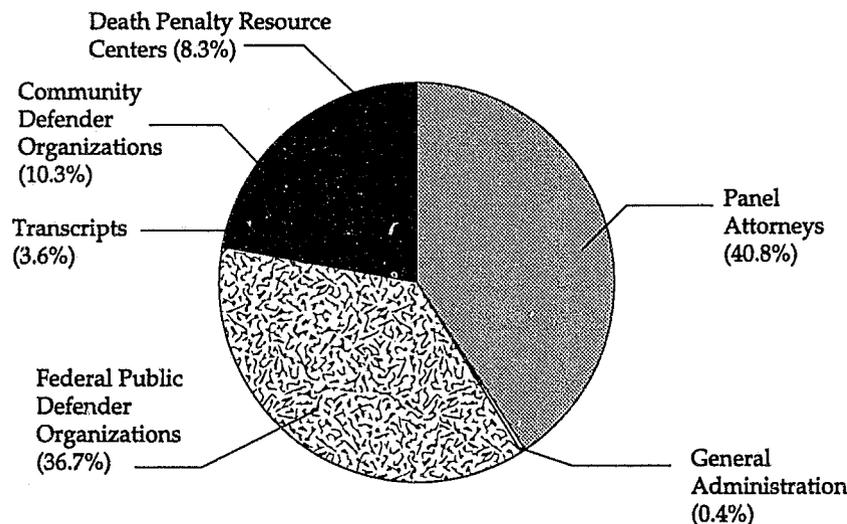
neys in the government's commitment to this program. This, in turn, makes it more difficult for judges to find qualified attorneys who are willing to accept appointments, particularly in protracted and complex cases. Such developments compromise the Sixth Amendment assistance of counsel provision of the Constitution.

Even if attorneys could be persuaded or ordered to provide representation, they might not be able to secure the services of interpreters, psychiatrists, or other experts. Many such experts are likely to refuse to provide services without compensation, which will result in delays of proceedings where such services are necessary for an adequate defense.

If funds are not made available for the compensation of attorneys and experts, a significant number of cases may not be able to proceed to trial without violating the rights of individuals to an adequate defense. This would compel the courts to postpone trials or to dismiss charges against defendants who would otherwise be deprived of their constitutional right to effective assistance of counsel.

Because our criminal justice system is adversarial, it functions as intended only when those who prosecute and those who defend are performing effectively. The funding difficulties described here must be resolved if we are to

FISCAL YEAR 1993 DEFENDER SERVICES APPORTIONMENT OF FUNDS



Note: Does not total to 100% because of rounding. Includes \$215,121,000 in 1993 funds plus \$2,500,000 in prior year funds.

maintain the constitutional checks on government power and guarantee the rights of all of our citizens to due process, equal

access to justice, fair and impartial trials, and effective assistance of counsel in criminal proceedings.

This report on federal defender services is the inaugural issue of a new series of periodic publications called AO Reports. In this series, we at the Administrative Office of the United States Courts aim to augment our communication with judges and court personnel, executive and legislative branch members and staff, members of the legal and public policy communities, the media and the public by highlighting important developments in the federal judicial branch. Our goal is to portray the challenges facing this branch of government and to describe its accomplishments and, thereby, to increase understanding, both inside and outside of the court family, of current topics of interest in the federal judiciary.



L. Ralph Mecham, Director
Administrative Office of the U.S. Courts



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