

Kansas Federal Public Defender

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Honorable Jerry Moran
Member, Committee on Appropriations
Dirksen Senate Office Building
Room 521
Washington, D.C. 20510

Re: Federal Public Defense FY 2024 Appropriations

Dear Senator Moran,

I am your constituent and the Federal Public Defender for the District of Kansas. In these capacities, I write to express my deep concern about Fiscal Year 2024's appropriation for federal public defense, which is part of the judiciary. The current Senate mark will devastate federal public defense. We represent about 90% of people charged in federal court, people who are too poor to afford to hire counsel. The hybrid system of public defenders and private counsel (known as the CJA panel) is the most effective and cost-efficient means to deliver constitutionally mandated representation. This shortfall will cripple our program, it will cost more than it will save, and it will have a cascading impact of delay and disruption within the criminal legal system.

Even after cutting to the bone important programming—such as cybersecurity-focused IT improvements and training initiatives—the federal defender program needs a total appropriation of **\$1,518,910,000** simply to maintain current operations. This number is **\$136.3 million** more than the current Senate appropriations mark and **\$107.9 million** more than the House mark.

This predicament is not the result of any hostility to the Sixth Amendment or to the critical function that federal public defenders serve, but a simple, technical appropriations glitch. The federal public defense budgetary crisis is distinct from and worse than the judiciary's overall funding because of this glitch. Federal defenders don't have a direct role in the appropriation process, so we are now scrambling to make sure that Congress is fully aware of the impact if this mistake is not remedied.

Here is the glitch: Our total FY 2023 obligations were \$1,493,510,000.¹ Going into FY 2023, the federal defender program had an unusually large offset from a post-pandemic carryforward of \$110.8 million. Mindful of this offset, Congress appropriated \$1,382,680,000 for FY 2023.

¹ For convenience, I have included a chart below to summarize these numbers.

Combined with the \$110.8 million carryforward, this provided \$1,493,480,000—matching the federal defenders’ funding.

In FY 2024, the appropriations process overlooked the FY 2023 carryforward. Both the Senate and the House² used the FY 2023 *enacted* appropriation (\$1.383 billion) as the budgetary benchmark—ignoring that that enacted appropriation was *artificially low* because of our unique \$110.8 million pandemic-era carryforward. This mistake leaves us with tens of millions of dollars *less* in 2024 than we had in 2023, and with far less than we need to carry out the defense function.

Here is why this matters: The magnitude of the shortfall will threaten the loss of at least 500 on-board FTE from the total federal public defender program of about 4,200. Conservatively, we could lose at least 12% of our on-board staff. If this burden shifts to the CJA panel, payment for appointed cases—which many small firms rely on for overhead and operations—will be deferred for months. Short-term, this will imperil our constitutional mission of representing poor people charged with crimes, as cases are delayed, dockets are clogged, and people remain in pretrial custody far longer than necessary. Long-term, the devastation is incalculable. Our commodity is people—attorneys, investigators, social workers, and support staff. Salary, benefits, and space are 90 percent of our budget. When we lose funding, we lose people. It is that simple. Just as it did in 2013’s sequestration, it will take us *years* to rebuild.

And we are already understaffed. A Judicial Conference-commissioned work-measurement study found that we needed to *add* hundreds of positions to do our work, not lay hundreds of people off. According to the work-measurement study, we could be understaffed by over 800 FTE if the current FY 2024 Senate appropriations mark goes into effect.

Our workload is primarily reactive to the Department of Justice and what cases it chooses to prosecute and when. It follows that funding parity between the prosecution and defense is critical. In your role as the ranking member on the subcommittee on CJS, you ensured our counterparts at the Department of Justice that the Senate mark would provide enough funding to pay DOJ salaries and expenses, enough to avoid layoffs, and enough to fund federal law enforcement.³ In contrast, the Senate mark will leave federal public defense reeling and forced to cut staff. The consequences of the Senate mark may have been an appropriations mistake, but the impact is a critical inequity between the prosecution and defense.

Ironically, this will cost the public far more than the immediate savings in FY 2024. We will lose experienced staff with years of institutional knowledge. As our offices are depleted, more cases will be assigned to the CJA panel, which is paid an hourly rate. They, too, have limits and may be stretched beyond capacity. Without lawyers available to take cases, the system will be hobbled.

² As noted above, the House mark was slightly higher than the Senate’s, with a 2.1% increase across the judiciary; but this also falls far short of the needed funding, and will cost significant staff for federal defenders and weeks of delayed payments for private counsel. This is also reflected on the attached chart.

³ <https://www.appropriations.senate.gov/hearings/full-committee-markup-of-fiscal-year-2024-legislative-branch-commerce-justice-science-and-related-agencies-and-financial-services-and-general-government-appropriations-acts> at 55:38 to 56:30.

People will lose confidence in the outcomes and in the system, spurring more appeals and collateral attacks. When the defense function is disrupted and diminished, the whole system unravels.

It will impair our ability to achieve better outcomes for our clients. Better outcomes for our clients almost always translate into savings for the system. Pretrial release, shorter sentences, successful supervision—all benefit our clients and their families and all are direct and significant financial savings. In 2017, the judiciary calculated that the average yearly cost of imprisonment is eight times the cost of the average yearly cost of supervising someone in the community.⁴

It is a bitter irony that this coincides with the sixtieth anniversary of *Gideon v. Wainwright*, which recognized that both the affluent and the poor should have a lawyer. Underfunding public defense, especially when the prosecution's funding remains intact, threatens the quality, timeliness, and consistency of our representation. And the unequal treatment of the prosecution and defense threatens confidence in our legal system at a time when we need to be building credibility.

It is too early to assess the damage to the District of Kansas if the Senate mark remains so low. We have offices in Topeka, Wichita, and Kansas City, Kansas, and about 40 on-board staff, including 18 lawyers. Over the years, we have represented thousands of Kansans who were too poor to afford their own lawyer. What we do know is that this is already an urgent situation. We are already under a hard hiring freeze as the result of the low Senate and House marks. We are already making decisions about our work in anticipation of the shortfall.

Please give us an opportunity to meet with you or your staff. Thank you for your time and consideration.

Respectfully,



Melody Brannon
Federal Public Defender

⁴ See U.S. Courts, *Incarceration Costs Significantly More than Supervision* (Aug. 17, 2017), <https://www.uscourts.gov/news/2017/08/17/incarceration-costs-significantly-more-supervision>.

