

**Statement of Michael S. Nachmanoff  
Federal Public Defender for the Eastern District of Virginia  
On Behalf of the Federal Public and Community Defenders  
Before the Judiciary Committee  
Subcommittee on Bankruptcy and the Courts**

**Sequestering Justice: How the Budget Crisis is Undermining Our Courts  
July 23, 2013 Hearing**

Mr. Chairman and Members of the Subcommittee:

Thank you for holding this hearing and for providing me with the opportunity to speak on behalf of the Federal Public and Community Defenders. The Federal Defenders currently have offices in 91 of 94 judicial districts, and we represent thousands of indigent defendants across the country. I am the Federal Public Defender for the Eastern District of Virginia, and my colleagues and I represent the majority of criminal defendants in federal court.

If action is not taken immediately to save the program, the Federal Defender system will be devastated. It is a bitter irony that exactly fifty years after the United States Supreme Court established the right to appointed counsel in the landmark case of *Gideon v. Wainwright*, budget cuts have brought our program—a program regarded as the flagship of indigent defense in this country—to the brink of destruction. It is equally ironic that, in this time of limited resources when everyone agrees that government must be focused on what it can do well, we are crippling a program that serves as a model of quality, efficiency, and cost effectiveness.

As a result of both the sequester and cuts within the Judiciary this year, Federal Defenders have lost more than 200 employees, and by October 1, 2013, we will be operating at staffing levels approximately 10% below what is needed to meet workload demands. Nationwide, defenders have been forced to take up to 20 days (or one month) of furloughs. These furloughs are in addition to cuts in expert, investigative, and travel expenditures that are necessary to resolve cases efficiently.

In the coming months, the severity of the budget cuts will escalate, and our ability to fulfill our mission will be irreparably harmed. If relief is not provided quickly, Federal Defenders will be forced to terminate as many as one-third to one-half of their employees and close branch offices in FY 2014. These massive staffing losses will result in delays of criminal matters and the assignment of a greater number of cases to private attorneys, greatly increasing costs to the taxpayer.

These short-sighted cuts come on the heels of the Senate Appropriations Committee's announcement last week that it has approved an increase of \$79 million to the FY 2014 budget for U.S. Attorneys' offices for the express purpose of bringing more criminal cases in federal court.

### **Our Mission**

Providing a competent lawyer to all eligible criminal defendants is a bedrock principle of our criminal justice system. Our work is not a discretionary expenditure—it is a constitutional mandate. The Sixth Amendment requires the government to provide a lawyer to anyone charged with a serious crime who cannot afford to hire one. In federal court, approximately 90% of all criminal defendants qualify for court-appointed counsel. Federal Defenders represent approximately 60% of those defendants, while the remaining 40% are represented by private attorneys paid an hourly rate under the Criminal Justice Act.

Congress created the Federal Defender program more than forty years ago to improve the quality of representation in federal court through the establishment of Federal Defender offices staffed by public servants with expertise in federal criminal law. In accordance with that mission, my colleagues and I provide high-quality, efficient, and cost-effective representation for indigent defendants.

There are now 81 Federal and Community Defender offices around the country that represent indigent defendants in 91 federal judicial districts. We serve the courts by accepting appointment to represent defendants charged with crimes ranging from misdemeanors to death-eligible offenses. We represent clients in the district courts, on appeal to the circuit courts, and before the United States Supreme Court. In my own office, the Supreme Court has accepted four cases for decision in the past ten years, and we have prevailed in three of those cases.

It has been shown repeatedly that Federal Defenders provide representation at a lower cost to the government than private attorneys who are appointed under the Criminal Justice Act. *See Attachment 1.* Federal Defenders in eight districts have undertaken extensive cost studies of their offices versus panel representation. In those districts, Federal Defenders represent clients for roughly 10% to 35% less than the cost of appointed counsel. *See Attachment 2.* My own office handles more than 2,000 criminal cases a year and we do so better, and more cost effectively, than any other alternative.

Our ability to provide efficient representation comes from specialization in federal criminal law and the ability to maximize resources for the benefit of multiple clients. Furthermore, Federal Defenders have always run lean operations. And for the past

several years, we have implemented rigorous cost-containment measures in our offices, which include negotiating discounted expert fees well below market rates, using bilingual staff for interpretation needs, and limiting the replacement of needed equipment, among many other cost-saving initiatives.

In sum, there is no better, more efficient way for the federal government to meet its constitutional responsibility to provide effective assistance of counsel than through the Federal Public Defender program. This is why the impending destruction of this program makes no sense. Yet, absent congressional action, the Federal Defender program will be eviscerated.

### **FY 2013 Consequences**

As a consequence of sequestration, the Defender Services account was cut by \$52 million in FY 2013. These funds are a miniscule fraction of the entire federal budget, but the loss of them was devastating to Federal Defenders. The already lean budgets of Federal Defender organizations were cut by more than 9%, and those cuts had to be absorbed over only seven months, almost doubling their effect. Federal Defenders were forced to furlough and lay off staff while cutting necessary expenditures for training, computer equipment, and travel.

Nearly all Federal Defender budgets are comprised of 80% salaries and benefits, 10% rent, and 10% other expenditures such as expert services, investigative costs, and case-related travel. Because rent is a fixed cost and other expenditures already have been slashed in recent years, Federal Defenders had no choice but to cut the people who do the work required by our Constitution.

On a national level, these furloughs and layoffs have created administrative and docket management burdens for federal courts across the country. Federal Defenders have asked to postpone cases because they lack resources to pay necessary expenses and because attorneys and other staff have been furloughed.

The crisis has also created unmanageable workloads for Federal Defender staff—attorneys are struggling to handle their own cases in addition to those of furloughed or laid-off attorneys. Many of these attorneys already have significantly higher caseloads than their DOJ counterparts: in the Southern and Eastern Districts of New York, for example, the ratio of prosecutors to public defenders is more than 7 to 1.

The Office of the Federal Public Defender for the Eastern District of Virginia is no exception. Like many of my colleagues, we have lost 10% of our staff to layoffs, early retirements, and the voluntary activation of a military reservist over the past six months.

We have been forced to decline resource-intensive cases, including those involving extensive discovery or death penalty eligibility, and to eliminate training programs. Over the next few months, I expect to lay off between 30% and 40% of needed staff, approximately 16 to 22 positions, if the anticipated budget cuts are not averted. The program as a whole stands to lose more than 900 employees in FY 2014 and FY 2015. *See Attachments 3 and 4.*

In the Northern District of Illinois, 19 federal defenders handle the majority of indigent defense cases brought by 152 federal prosecutors (an 8 to 1 ratio). In the last year, this district has seen a 50% increase in complex fraud cases, which are often multi-defendant cases with high volumes of electronically-stored discovery. The Illinois Federal Defender has managed budget cuts by forgoing pension contributions, freezing pay, and eliminating the purchase of all equipment, including needed computer upgrades.

The Office of the Federal Public Defender in Arizona has lost 25 staff positions, including 11 attorneys, since February 2013. The reduction in staffing required the office to decline hundreds of cases on the border, which now have been shifted to private attorneys at greater cost.

These examples illustrate the immediate effects of the fiscal crisis on Federal Defender offices. Further cuts in FY 2014 will destroy Federal Defenders' ability to accomplish the mission that Congress envisioned when it created the program.

### **FY 2014 Consequences**

The budget shortfall for FY 2014 is expected to more than double to \$127 million. Meanwhile, adequately funding Federal Defender organizations requires less than 0.05% of total federal spending. The \$27.6 billion proposed budget of the Justice Department dwarfs the requested \$1.068 billion budget for the Federal Defenders and CJA Panel. In other words, cuts to the Federal Defender program amount to a negligible portion of the federal budget, but their impact is huge.

After already losing 9% of their budgets this year, Federal Defender offices throughout the country face additional cuts beginning October 1, 2013. Absent some immediate action, Federal Defenders will have to accelerate the process of eliminating as many as 33% to 50% of their employees because all other available measures to reduce costs have been taken. These layoffs of attorneys and staff will force Federal Defenders to slash the number of cases they handle—cases that will then be assigned to private attorneys at higher costs.

In addition, Federal Defenders in at least 20 districts are making plans to close offices. The offices to be closed are typically in less-populated regions where the assignment of CJA counsel is not only more expensive but sometimes hard to accomplish at all because of a scarcity of qualified attorneys. The inability to appoint Federal Defenders will lengthen the time required to resolve cases.

Federal Defenders will need to withdraw from large resource-intensive cases and will no longer coordinate discovery in multi-defendant cases. This will further increase CJA expenses. We will have to stop participating in re-entry and diversionary courts. Those courts lower recidivism rates, improve public safety, and reduce costs from incarceration. Federal Defenders' role in administering the CJA Panel will shift to the Court and Clerk's office.

Federal Defenders will be unable to respond to large-scale legal events like the Supreme Court's *Booker* decision that mandatory sentencing guidelines are unconstitutional or legislation such as the Fair Sentencing Act that required retroactive changes to racially discriminatory crack sentencing laws.

In sum, impending cuts to the Federal Defender program will irreparably damage the criminal justice system, and paradoxically, increase the cost to taxpayers. Moreover, these cuts threaten to erode our system of justice by diminishing the quality of representation of both innocent and guilty defendants in federal court. The integrity of our adversarial judicial process is undermined by the imbalance between a fully-funded prosecution and a defense crippled by budget cuts.

Providing adequate funding for indigent defense is a necessity, not a luxury—a Sixth Amendment right, not a mere discretionary expenditure. By any measure, the Federal Defender program is a model of efficiency and should receive Congress's full support. The only question is whether the government will dismantle the current system in favor of a less efficient and more costly alternative.

# **Attachment One**

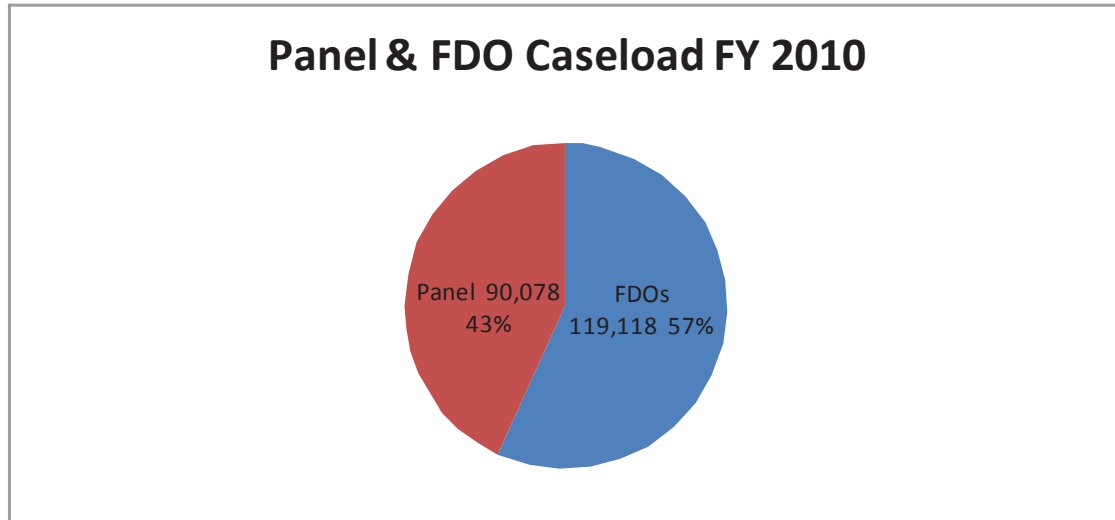
**Cost Comparison:**  
**Defender Organizations and CJA Panel**  
**Administrative Office of the United States Courts**

**Statement of Michael S. Nachmanoff**  
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## CJA Caseload

FDOs have consistently been appointed in about 60 percent of the cases.



## Cost per Representation

	<b>FDO</b>	<b>Panel</b>
FY 2010	\$ 4,178	\$ 4,441
FY 2009	\$ 3,794	\$ 4,109
FY 2008	\$ 3,499	\$ 3,646
<b>Excludes Capital Habeas</b>		

- These are average amounts. Actual costs per case vary considerably for such reasons as location and distribution of the case mix.

# **Attachment Two**

## **Cost Comparison:** **Defender Organizations and CJA Panel** **Federal Defender Costs Fact Sheet**

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**FEDERAL DEFENDER COSTS FACT SHEET**

The ultimate irony of cutting Federal Defender budgets is the increase in costs to the taxpayer. In districts across the country, the anticipated 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 geography<sup>1</sup> 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.<sup>2</sup>

**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
			<b>Average:</b>	<b>Average:</b>
			71.4%	\$3,319,535.86

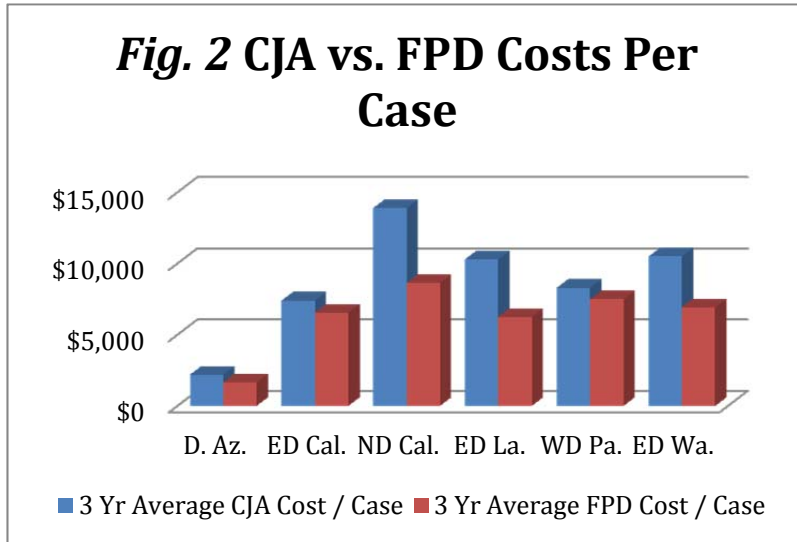
On average, Defender offices in these six districts defend a federal criminal case for 71.4% of what the Judiciary spends for CJA counsel to defend a case. As illustrated below, the three year average cost for FPD cases in each of these districts is dramatically lower than the cost for CJA representation. 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.<sup>3</sup>

<sup>1</sup> 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.

<sup>2</sup> 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 A.

<sup>3</sup> 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

Together, these Defender offices defend over 10,000 federal criminal cases annually. The anticipated 2014 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.



The demonstrable cost differentials revealed in every district studied will be multiplied throughout the country. There are 81 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.

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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.

## Exhibit A

### 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.<sup>4</sup> 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.

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<sup>4</sup> 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.

Also included are Government Travel Account (GTA) expenses, which were obtained from CJA payment summaries provided by District Court clerks' offices.

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.<sup>5</sup>

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.

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<sup>5</sup> 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.

# **Attachment Three**

## **Financial Impact on Defender Organizations**

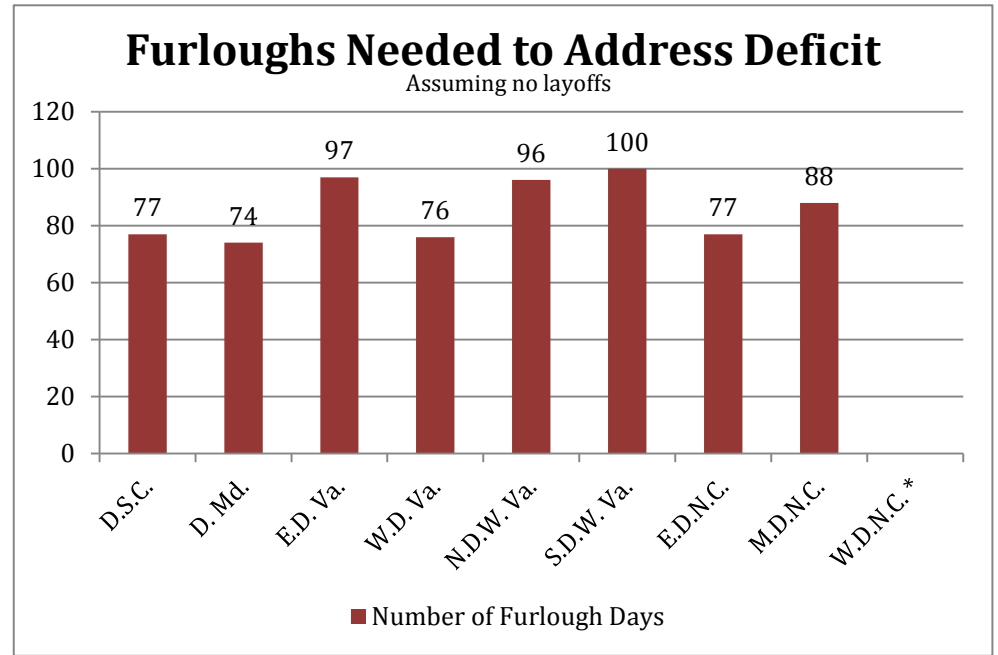
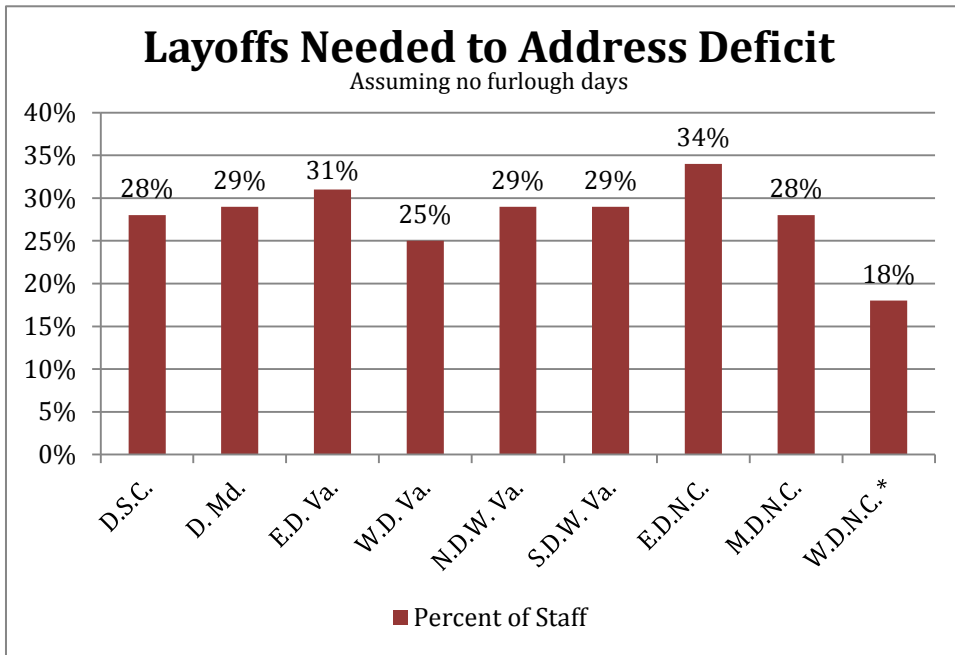
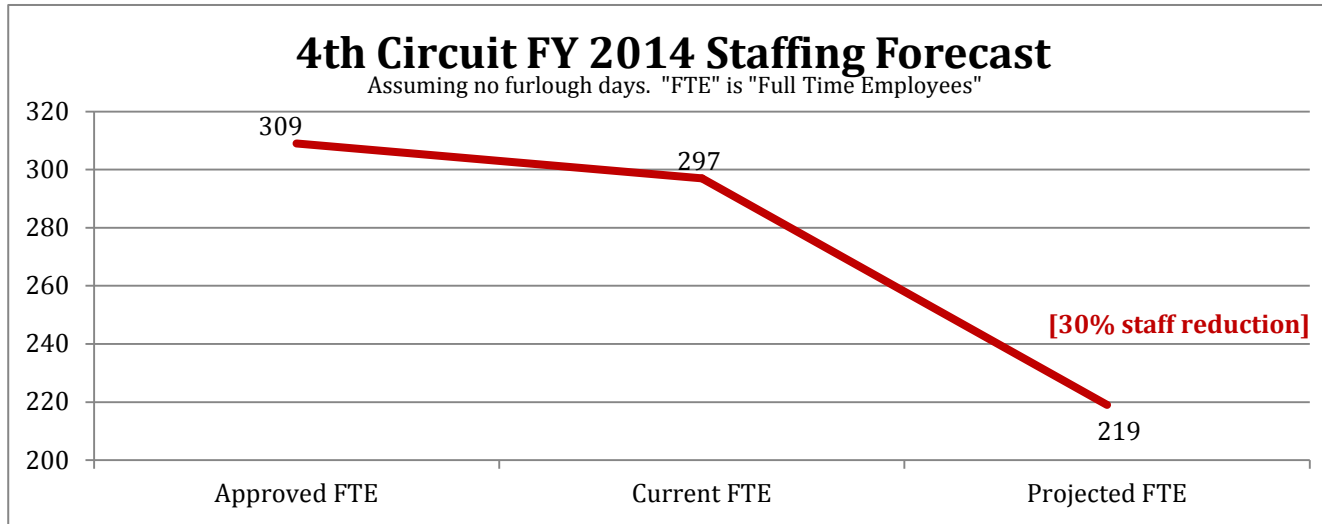
### **Fourth Circuit**

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# FOURTH CIRCUIT JUDICIAL CONFERENCE FEDERAL DEFENDER FUNDING CRISIS

(assumes flat funding and no panel attorney shortfalls in FY 2014)



\* W.D.N.C. anticipates avoiding furloughs in FY 2014 based on layoffs of seven employees in FY 2013.

# **Attachment Four**

## **Projected Federal Defender Staffing Levels through September 30, 2015**

**Administrative Office of the United States Courts**

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# On-board FDO Staffing Levels

(if sequestration funding levels remain in place through FY 2015 and no panel attorney shortfalls in FY 14 and FY 15)

