

A Reply to *Judicial Participation in Plea Bargaining: A Dispute Resolution Perspective*

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In response to Rishi Raj Batra, *Judicial Participation in Plea Bargaining: A Dispute Resolution Perspective*, 76 OHIO ST. L.J. 565 (2015).

My colleague and friend Rishi Batra wrote an interesting article proposing that judges take a more active role in criminal plea bargaining to safeguard the process.¹ Specifically, he noted some structural problems with the appointment and compensation of the defense attorneys that inhibited the best representation.² This tension, in turn, reduced incentives for effective plea bargaining on behalf of criminal defendants. He made several recommendations to enhance the use of judges in plea negotiations without diminishing their roles as judges.³

As an initial matter, I would agree that anything to enhance the fairness of the criminal plea bargaining system is a net gain for the defendants themselves and society as a whole. Nonetheless, there are a couple of practical considerations that should be addressed. First, I tend to disagree with some of the assertions about criminal defense attorneys and their motivations.⁴ Second, I question the logistics of the approach suggested in the article.⁵

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¹ See Rishi Raj Batra, *Judicial Participation in Plea Bargaining: A Dispute Resolution Perspective*, 76 OHIO ST. L.J. 565 (2015).

² *Id.* at 567.

³ *Id.* at 587–96.

⁴ *Id.* at 568–72.

⁵ *Id.* at 588–89.

I. MISCONCEPTIONS ABOUT DEFENSE ATTORNEYS DO NOT SUPPORT THE NEED FOR A NEW APPROACH TO PLEA NEGOTIATIONS

Regarding Professor Batra's notions about criminal defense attorneys, he asserted that they have limited motivation and do not want to upset other actors within the criminal justice system.⁶ If there are indeed examples of defense attorneys engaging in legal malpractice and violating legal ethics, they are not explicitly addressed in the article. More importantly, if there are such improprieties by the defense attorney, then the judge, the prosecutor, or any other attorney cognizant of the problem has an ethical obligation to report any misconduct to the proper authorities.⁷

Additionally, the article maintained that defense attorneys have no incentive to enhance their reputation because they are either public defenders or taking mostly court-appointed matters.⁸ In my experience, public defenders are often some of the most dedicated and diligent criminal defense attorneys around. Although they can have huge caseloads and fall victim to being overworked, they have significant knowledge about the types of criminal prosecutions that they handle such that they are often some of the most qualified defense attorneys one can have.⁹ Similarly, court-appointed attorneys will not keep getting appointments if their performance is at best lackluster or leads to reversals on appeal or in habeas petitions. No judge will continue to appoint deficient attorneys. Indeed, my former colleagues and I would periodically purge bad defense attorneys from the lists of attorney to be appointed. Judges care about the process to ensure just outcomes.

Of course, money can be a powerful incentive for defense attorneys. Public defenders receive a salary, but court-appointed attorneys must work for whatever rate is determined by the applicable legislature. At the federal level, pursuant to the Criminal Justice Act of 1964,¹⁰ the hourly rate is only \$127 per hour in non-capital cases.¹¹ In my experience appointing attorneys, many of them found this rate attractive and seemingly competitive. State courts typically pay court-appointed attorneys in non-capital cases much less. For example, in 2002, Louisiana paid such attorneys \$42 per hour whereas Idaho paid them \$50 per hour.¹² By way of comparison, the court-appointed rate in federal courts in

⁶ *Id.* at 568–69.

⁷ MODEL RULES OF PROFESSIONAL CONDUCT r. 8.3 (AM. BAR ASS'N 2013).

⁸ Batra, *supra* note 1, at 568–69.

⁹ When I was on the bench, my colleagues and I would joke that if we ever needed a criminal defense attorney, we would seek to establish poverty so that we could seek the Federal Public Defender.

¹⁰ 18 U.S.C. § 3006A (2012).

¹¹ 7 ADMIN. OFFICE OF THE U.S. COURTS, GUIDE TO JUDICIARY POLICY pt. A, § 230 (2015), <http://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-2-ss-230-compensation-and-expenses> [<http://perma.cc/9JHA-XCF4>].

¹² THE SPANGENBERG GROUP, RATES OF COMPENSATION PAID TO COURT-APPOINTED COUNSEL IN NON-CAPITAL FELONY CASES AT TRIAL: A STATE-BY-STATE OVERVIEW 4 (2002), <http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sc>

2002 was \$90 per hour.¹³ Court-appointed attorneys in Montana earn between \$40 and \$60 per hour; in Nebraska the rate is typically \$60 per hour; in Seattle the hourly rate was only \$43.50.¹⁴ Some states use a flat rate system like Missouri where each attorney receives \$500 “for each non-capital felony not handled by a public defender.”¹⁵

Professor Batra also posits that “[a] defense counsel who is unprepared in a plea negotiation, who does not counter any offer from the prosecution, or who does not introduce any mitigating evidence will go undetected.”¹⁶ Of course, the criminal appeals system in conjunction with habeas petitions is designed to address criminal defense attorneys who are unprepared or failed to introduce mitigating evidence.¹⁷

II. THERE ARE LOGISTICAL CONCERNS REGARDING THE APPROACH PROPOSED TO PLEA NEGOTIATIONS

As the article notes, in the federal court system, in which I have my experience, the judges are not allowed to be involved with the plea agreement negotiations.¹⁸ Notwithstanding this ban in the Federal Rules of Criminal Procedure, there are other factors, including the logistics of the article’s proposal, that call into question the involvement of judges in plea bargain negotiations.

If federal judges are allowed to participate in criminal plea bargains, they would still have to limit their roles insofar as presiding over prosecutions in which they previously participated in the plea bargain process. Federal magistrate judges often mediate civil matters, but typically do not handle the merits of an action that they mediated that did not settle.¹⁹ Similarly, federal

laid/indigentdefense/compensationratesnoncapital2002_narrative.authcheckdam.pdf [http://perma.cc/QU5E-6ZXY] (prepared for the Bar Information Program of the American Bar Association’s Standing Committee on Legal Aid and Indigent Defendants).

¹³ *Id.* at 13

¹⁴ *Id.* at 5–6.

¹⁵ *Id.* at 8.

¹⁶ Batra, *supra* note 1, at 571. (citing Rishi Batra, Lafler *and* Frye: A New Constitutional Standard for Negotiation, 14 CARDOZO J. CONFLICT RESOL. 309, 326–31 (2013).

¹⁷ See, e.g., Wiggins v. Smith, 539 U.S. 510, 537–38 (2003) (reversing appellate court, finding that “available mitigating evidence, taken as a whole, ‘might well have influenced the jury’s appraisal’ of Wiggins’ moral culpability”); Williams v. Taylor, 529 U.S. 362, 390 (2000) (finding that habeas petitioner “was denied his constitutionally guaranteed right to the effective assistance of counsel when his trial lawyers failed to investigate and to present substantial mitigating evidence to the sentencing jury”).

¹⁸ FED. R. CRIM. P. 11(c)(1) (“The court must not participate in these discussions.”); see also United States v. Davila, 133 S. Ct. 2139, 2140 (2013).

¹⁹ Black v. Kendig, 227 F. Supp. 2d 153, 155–57 (D.D.C. 2002) (holding that a magistrate judge must recuse himself from action in which he had previously mediated to avoid the appearance of unfairness); accord Kearny v. Milwaukee Cty., No. 05-C-834, 2007

judges involved in criminal plea bargain negotiations cannot be involved in any facet of the case after the plea bargaining is concluded.²⁰

This ban on continued participation, where a judge had previously been involved, would present problems. For example, in the state of Texas, there are many places where there would only be a single magistrate judge. Professor Batra is unclear about the timing for this proposed judicial involvement in plea bargains, but even if it occurred after arraignments, a magistrate judge could be asked to handle subsequent matters like suppression hearings or taking a guilty plea in prosecutions that could not be resolved by plea negotiations.

For example, in the Galveston Division of the United States District Court for the Southern District of Texas, there is only one magistrate judge.²¹ If the magistrate judge handles the plea negotiations, it would be difficult for that same judge to handle any subsequent matters involving the same prosecution. This issue is further compounded by the fact that there is only a single district judge handling matters in Galveston and that person splits time with the Victoria Division as well.²² Similarly, the United States District Court for the Western District of Texas raises similar staffing concerns. The Alpine Division does not have an assigned district judge and has only one magistrate judge assigned to it.²³ Both the Waco Division and the Midland Division have just one district judge and one magistrate judge each.²⁴

Turning to the United States District Court for the Northern District of Texas, one finds a similar situation. The Wichita Falls Division only has a part-time magistrate judge.²⁵ The Abilene Division is served by a single magistrate judge who also covers the San Angelo Division, but there is no permanent district judge in either division.²⁶ The Amarillo Division has a magistrate judge

WL 3171395, at *2–3 (E.D. Wis. Oct. 26, 2007). *But see* SEC v. Sunwest Mgmt., Inc., Civ. No. 09-6056-HO, 2009 WL 1065053, at *5 (D. Or. Apr. 20, 2009) (ruling that a magistrate judge need not recuse himself from an action after serving as mediator); *accord* Garrett v. Delta Queen Steamboat Co., Civil Action No. 05-1492-CJB-SS, 2007 WL 837177, at *3 (E.D. La. Mar. 14, 2007).

²⁰ Batra, *supra* note 1, at 573.

²¹ *Offices, Galveston Division*, U.S. DISTRICT & BANKR. CT., SOUTHERN DISTRICT TEX., <http://www.txs.uscourts.gov/offices/galveston-division> [<http://perma.cc/FHK7-AXYU>] (last visited Sept. 10, 2015).

²² *Offices, Victoria Division*, U.S. DISTRICT & BANKR. CT., SOUTHERN DISTRICT TEX., <http://www.txs.uscourts.gov/offices/victoria-division> [<http://perma.cc/CM46-KJKT>] (last visited Sept. 10, 2015).

²³ *Judges' Directory and Biographies*, U.S. DISTRICT CT., WESTERN DISTRICT TEX., <http://www.txwd.uscourts.gov/General/Judges/biographylist.asp> [<http://perma.cc/Z99B-Y2T9>] (last visited Sept. 10, 2015).

²⁴ *Id.*

²⁵ *Locations, Wichita Falls*, U.S. DISTRICT CT., NORTHERN DISTRICT TEX., <http://www.txnd.uscourts.gov/location/wichita-falls> [<http://perma.cc/WDH5-HZF3>] (last visited Sept. 10, 2015).

²⁶ *See Locations, Abilene*, U.S. DISTRICT CT., NORTHERN DISTRICT TEX., <http://www.txnd.uscourts.gov/location/abilene> [<http://perma.cc/8YEQ-FRZM>] (last visited Sept. 10, 2015); *Locations, San Angelo*, U.S. DISTRICT CT., NORTHERN DISTRICT TEX.,

and a district judge.²⁷ The Lubbock Division has a magistrate judge and a senior district judge.²⁸ Of course, major cities would have more magistrate judges to handle the work. Moreover, magistrate judges from other divisions could be asked to assist in circumstances in which there is a conflict because a magistrate judge has already handled the plea bargain negotiations. Still, such coverage does put a strain on magistrate judges who are already busy in their divisions to travel to another place to handle a discrete matter.

Other states present a starker picture of the staffing logistical problems. For example, the United States District Court for the District of North Dakota has a total of three magistrate judges and three district judges to serve the entire state, with one of each in both Fargo and Bismarck.²⁹ In the United States District Court for the District of Wyoming, there are currently three district judges and two magistrate judges.³⁰ One of the magistrate judges sits in Cheyenne, which is the seat of the court, and the other one presides in Mammoth Hot Springs inside Yellowstone National Park because there is a large misdemeanor criminal docket for a myriad of offenses.³¹ There are part-time magistrate judges in Casper, Jackson, Green River, and Lander, while there are two district judges in Cheyenne and one in Casper.³²

On some level, I may be just building up a straw figure to knock it down by addressing the logistical problems of federal judges being involved in plea negotiations. Clearly, they are barred from handling them pursuant to the Federal Rules of Criminal Procedure. Still, the logistical problems noted above resonate with state courts as well. There are plenty of state courts that do not have multiple judges to handle substantive matters in a prosecution if a judge involved in a plea negotiation feels recusal is appropriate, or if a party objects to the judge's continued involvement in the case. Ultimately, because in those

<http://www.txnd.uscourts.gov/location/san-angelo> [http://perma.cc/2NC5-QZVK] (last visited Sept. 10, 2015).

²⁷ *Locations, Amarillo*, U.S. DISTRICT CT., NORTHERN DISTRICT TEX., <http://www.txnd.uscourts.gov/location/amarillo> [http://perma.cc/5TP5-JFUE] (last visited Sept. 10, 2015).

²⁸ *Locations, Lubbock*, U.S. DISTRICT CT., NORTHERN DISTRICT TEX., <http://www.txnd.uscourts.gov/location/Lubbock> [http://perma.cc/PS2U-5EMJ] (last visited Sept. 10, 2015).

²⁹ *The Judges Chambers*, U.S. DISTRICT CT., DISTRICT N.C., <http://www.ndd.uscourts.gov/judges-chambers> [http://perma.cc/7T8Q-FN7K] (last visited Sept. 10, 2015).

³⁰ *About Wyoming and This District*, U.S. DISTRICT CT. WYO., <http://www.wyd.uscourts.gov/htmlpages/about.html> [http://perma.cc/S2BU-ZYAV] (last visited Sept. 10, 2015).

³¹ See *Bowen v. Johnston*, 306 U.S. 19, 22–23 (1939) (holding that federal courts have criminal jurisdiction over national parks); 16 U.S.C. § 3 (2012) (authorizing the Secretary of Interior to promulgate regulations “necessary or proper for the use and management of the parks . . . [that are] under the jurisdiction of the National Park Service”); see also Brian L. Owsley, *Issues Concerning Charges for Driving While Intoxicated in Texas Federal Courts*, 42 ST. MARY’S L.J. 411, 413–20 (2011).

³² *The Judges Chambers*, *supra* note 30.

areas where fewer judges exist, there can be logistical problems, and such problems can even arise in districts with more judges, the use of judges may not be an optimal approach.

III. CONCLUSION

Professor Batra's article provides an insightful solution to a problem regarding plea negotiations, and I tend to favor ideas that promote more equity in the criminal justice system. However, I am cautious about devoting so much time and energy toward this new approach in light of the judiciary's already limited resources. Utilizing judges so heavily in the plea negotiation process may enhance agreements, but in those cases that are not resolved, there can be significant logistical problems for the courts. If judges were to shoulder this burden, then additional resources and funds would be necessary to ensure that they do so properly. Such funds could just as easily be provided to hire more public defenders and increase the compensation rates for court-appointed attorneys.