Written Testimony of John Gleeson
to the Judicial Conference of the United States
Ad Hoc Committee to Review the Criminal Justice Act Program
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Introduction

Thank you, Judge Cardone, for the opportunity to testify before this Committee. I applaud the very significant work you and your colleagues are doing, and I thank you all for devoting your valuable time to the effort.

I am a district judge in the Eastern District of New York, and I sit in Brooklyn. I have been on the bench more than 21 years, and immediately before my appointment I spent ten years as an Assistant United States Attorney, also in Brooklyn. From 1999 to 2008, I was a member of the Defender Services Committee ("DSC") of the Judicial Conference, and I chaired that committee for the last three of those years.

At the outset, let me say that in our effort to do the best we can to handle our caseloads, I believe all of us in the trenches of the criminal justice system too easily lose sight of the fact that ours is arguably the most punitive one in the world. We have the dubious distinction of being among the world leaders in the percentage of the population we imprison and the length of time we imprison them for, and we are wildly out of proportion when compared to nations that are otherwise similar to ours. The stakes for criminal defendants are so much higher here than in comparable places. As a result, we need to be especially vigilant in our effort to provide high quality, independent, properly-resourced counsel to the defendants in our courtrooms.

I know that one focus of this committee's work is whether there ought to structural change in the way our system provides an effective advocate to the 80% of federal defendants who cannot afford to retain counsel. Though I have views on that subject, and indeed we explored it carefully when I was a member of the DSC, I'll not burden this committee with those views here. As an institution, we're not even good at incremental change, even when the need for it is clear. In my view any fundamental alteration of the status quo is simply not realistic, at least at this time. So I respectfully set forth below for your consideration a few ideas about changes that might be made within the existing framework to improve the quality of the Defender program.

Structure Within the AO

The importance of the 2013 restructuring in the AO, which amounted to a significant demotion of the Director of the Office of Defender Services, and of the program itself, cannot be overstated. Tone matters in everything, and those demotions—less than a decade after the elevation of the Director and the program to a "distinct, high-level status" within the AO—conveyed to everyone involved in federal criminal justice that the judiciary now cares less about providing an adequate defense to federal defendants. The suddenness of the change, and the fact that it was done with characteristic opacity, that is, without any warning or consultation with the new Director herself, made the move all the more callous and demoralizing. The stated reasons for the reorganization, even taken at face value, are dwarfed by the effect described above. That administrative mistake should be reversed.

Opacity Within the AO and the JCUS

As judges, our natural instinct is that all parties with a stake in the outcome of a decision receive notice and an opportunity to be heard. We correctly believe that our decisions are not only better and fairer when that happens, but they are more likely to be perceived as such, and respected. That basic principle does not play the role it ought to play in how we run our branch.

As mentioned above, I was a member of the Defender Services Committee for nine years, and its chair for three years. Yet I never once met with the Executive Committee of the Judicial Conference to discuss any of the numerous important issues facing the Defender program, and to my knowledge neither did my predecessors. Though I have no doubt that the judges on the Executive Committee acted in the best interests of the judiciary—and meant also to act in the best interests of the Defender program (though those interests were frequently in tension)—that committee made numerous key decisions that deeply affected the program (including annual funding requests) without affording the DSC a sufficient opportunity to be heard.

The defects in that process have multiple adverse effects. They demoralize the hardworking members of the DSC and staff who take their important work seriously. By extension it also demoralizes the defense community, and it made our stewardship of the Defenders and the panel attorneys more difficult. We all recognized that the Executive Committee needed to balance competing interests, and that the interests of the Defender program would on occasion be subordinated to what the Executive Committee felt were more compelling interests. But it's much easier to accept such outcomes when you've been heard.

The process also produced mistakes, at least when the issues were viewed from the perspective of the Defender program. An Executive Committee communication with the

Attorney General about the timing of decisions whether to seek the death penalty was directly contrary to the interests of the federal capital defense bar, yet the communication was made without seeking any input from the DSC or staff. The testimony before the Appropriations Committee by the Budget Committee Chair contained a flatly incorrect (and very damaging) statement that panel attorneys had taken a page from the physicians' playbook, and were performing unnecessary and costly tasks to avoid malpractice actions. These and many other errors the direct result of excluding the DSC and staff from the process of making decisions that impact the Defender program.

The fix sounds easy because it is. There needs to be greater transparency and communication within the AO and the Judicial Conference. If we're going to fulfill our responsibility to deliver the defense guaranteed by the Sixth Amendment, we need to accord the judges and staff of the Defender program the stature, authority, deference, access, and voice that is commensurate with the importance of their mission.

Panel Attorney Hourly Rate

Few things are more important to the Defender program than obtaining and maintaining an appropriate hourly rate for panel attorneys. In my view, the judiciary has not done enough in this regard. Indeed, this may the issue as to which the built-in conflict of interest between the judiciary and the Defender program is most acute. I have no doubt that our tepid advocacy in support of raising the hourly rate is due at least in part to the belief that the cost of funding an appropriate rate will be borne by the other spending accounts in the judiciary.

Quite a few years ago, by accident, I learned the hourly rate the government was paying private counsel to represent a corrections officer in a *Bivens* action before me. It was $250 per

hour. At stake in that case was a relatively small amount of money damages sought by an inmate, yet the government was paying outside counsel an hourly rate more than twice what it pays when the rest of a criminal defendant's life at liberty is at stake, and indeed substantially more than we pay in capital cases, when the defendant's *life* is at stake. This is but one of numerous persuasive arguments that place in stark relief how poorly we fund federal criminal defense. As an institution, we have not advocated as well as we could to help right that wrong.

Hourly rates for panel attorneys ought to have locality adjustments. The $127 rate no doubt attracts high quality lawyers in many parts of the country. Not in New York. In New York it attracts good lawyers who essentially perform the work in part *pro bono*, and it also attracts lawyers who cannot themselves attract paying clients. Too often we lose good panel attorneys, or fail in our efforts to recruit them, because the differential between their rates for paying clients and the hourly rate is too great. There is no good reason not to build locality adjustments into the rate. It is easily accomplished by other components of the government, and the need for it is glaring.

Finally, the currently prevailing hourly rate—whatever it happens to be—is always the product of decades of extremely hard work by (among others) the DSC and the staff it works with. Incremental increases are obtained through herculean efforts. Because the rate has never been sufficient, the efforts to raise it should never cease. And it ought to be a cardinal rule within the branch that the hourly rate is *never* lowered, not even temporarily, as it was during sequestration. We should never convey to Congress that it is alright to lower, even for a moment, an hourly rate that is perennially too low as it is.

Voucher Review

If the built-in conflict created by lodging the responsibility to deliver indigent defense in the judiciary is most acute centrally when it comes to the hourly rate we pay panel attorneys, it is most acute locally with respect to voucher review. It makes many lawyers anxious when the voucher they will submit at the end of the case will be reviewed (and perhaps cut) by the presiding judge. It makes many judges anxious as well; they feel awkward intruding into and second-guessing the defense function, not only by examining the voucher, but by having to decide requests for investigators, experts, or other support services.

I respectfully suggest that the use of case budgeting specialists, who have served the judiciary and the defense bar well in capital and "mega-cases," be expanded to cover routine voucher review as well. Though judges would retain ultimate approval authority and responsibility, experience with case budgeting specialists has shown that the authority is more easily and fairly exercised when requests for support services, and the vouchers themselves, are reviewed in the first instance by a specialist who was once a respected member of the defense bar. The practice also has the virtue of producing consistency (*i.e.*, it eliminates unwarranted disparities in the approval of vouchers) and ensures that panel attorneys do not pay excessive hourly rates for support services. I and my colleagues have frequently called in this way upon Jerry Tritz, the extremely able case budgeting specialist in our circuit, even in routine cases. This improvement would not involve additional expense, as it would essentially transfer much of the work that is currently performed in Clerks' offices and chambers to the case budgeting specialists.

Communications With District Judges Regarding Cost Containment

The judiciary needs to show greater sensitivity to the risk that well-meaning judges will attempt to balance the judiciary's budget on the backs of panel attorneys. Especially in tough budget times, we district judges are inundated by communications forecasting fiscal doom and referring to cost containment imperatives. But a district judge has no real control over any of the actual expenditures of our branch, with one exception: we can cut vouchers. In tight budget times, we're like carpenters who have been encouraged to use our hammers, but there's only one nail to use them on.

I respectfully suggest that district judges should be affirmatively encouraged *not* to try to balance the judiciary's budget by cutting vouchers. As an institution, we have shown our ability to contain costs through centralized management, and there is a broad array of programs that can be (and are) considered collectively when we need to contain costs. We should not be telling district judges—implicitly or otherwise—to help cut costs when we know that they can only inflict their cost-cutting in this one way.

Parity With Prosecutors

- *Defender Ex Officio on the Sentencing Commission*

The Judicial Conference should be relentless in its effort to obtain an *ex officio* Defender seat on the United States Sentencing Commission. The absence of parity in this regard doesn't just create the appearance problem. It also adversely affects the quality of the Commission's decisions. It's not enough to say that the Defenders have the ability to weigh in on Commission policy. Their seat at the table should look and be the same as DOJ's seat. I'm aware that the Judicial Conference requested Congress to cure this defect many years ago (my recollection is

2003, and our timing was poor; that was the year the PROTECT Act booted *judges* off the Commission). The issue should be raised over and over again until this structural defect in the Commission is rectified.

- *Defenders Detailees to Congress*

Similarly, the work of the Congress is improved by DOJ "detailees." When I was an AUSA, several of my colleagues were detailed to the Senate Judiciary Committee, where they lent their hands-on prosecutorial expertise to the legislative process. A former law clerk who was an AUSA did the same in 2014, and indeed he recently became a full-time member of the staff of that committee. Congress should benefit from the hands-on defense perspective as well. Again, this is not just a matter of appearances, and of conveying to the Defender program that it is just as important as our national prosecution program, although that is an important message. The quality of the legislation will improve when the members of Congress are informed by the perspective of all the stakeholders.

- *Training*

The judiciary should establish a defender training facility that is comparable to the National Advocacy Center ("NAC"), where federal prosecutors go for training. An ideal location for such a training center would be a law school, particularly if the training programs were scheduled for the summer months. I believe many law schools would be eager and proud to be associated with the training of Defenders and panel attorneys.

Support Services for Panel Attorneys

There are too many districts in which panel attorneys virtually never seek funding for investigations or experts. As I understand the problem from speaking to defenders and panel

attorneys around the country, it's less a matter of judges refusing to authorize such services than it is a cultural understanding that they simply won't be sought (though the culture may well be based on the widespread belief that they won't be approved).

This phenomenon not only deprives the panel attorneys' clients of needed services, it creates a two-tiered indigent defense system within the district. Defenders have budgets that allow them to retain or permanently hire such support personnel without court approval. Thus, the quality of the defense a client will receive can depend in substantial part on whether his representation is handled by the Defender or by a panel attorney.

Old habits die hard, but that doesn't mean we shouldn't try to change the bad ones. Defenders, as part of their training responsibilities, should encourage the panel attorneys in their districts to seek the support services they need to best represent their clients. The judiciary, through FJC-sponsored and other training programs, should encourage the judges in the districts where investigators and experts are never or rarely sought to be receptive to such requests.

Conclusion

Thank you again for the opportunity to present these thoughts to you. There are many important issues the Judicial Conference and the AO address each year, but none is more important than the goal of providing the kind of independent, quality, and properly supported defense counsel that our Constitution requires. I'm optimistic that the work of this committee will further that goal. Thank you for your service to the judiciary and our country.