

FEDERAL PUBLIC DEFENDER

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Honorable Kathleen Cardone
Chair, Ad Hoc Committee to Review
the Criminal Justice Act Program
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE
Washington, DC 20544

Re: Testimony of Jon M. Sands, Federal Public Defender, District of Arizona

I thank the Committee for its hard work and attention. I appreciate the opportunity to testify. I appear before you as the Federal Defender for the District of Arizona and as Chair of the Defender Services Advisory Group (DSAG). DSAG is the elected body that represents the Federal Defender and Community Defender Organizations (FDO) and appointed counsel under the Criminal Justice Act (CJA) within the Administrative Office of the United States Courts (AO). I have been the Federal Defender for the District of Arizona since 2004.

This written submission focuses on the relationship of the FDO within the Judiciary and under the oversight of the AO. As of this submission, the Committee will have held seven hearings across the country. It has heard from present and past defenders, CJA counsel, defense lawyers, judges, U.S. Attorneys, and administrators. The written submissions have been lengthy; the testimony has been extensive. The conclusion is that the Judiciary and the AO must change the present structure.

I wish to convey what the FDO believes needs to be changed to preserve the independence and integrity of the FDO and CJA. I submit to the Committee the views of the FDO as to the necessary reforms for the CJA. As stated in my letter to the Chair on March 25, 2016, an overwhelming percentage of all FDOs believe that any change must contain the following features:

- Direct Federal Defender and CJA Panel representation on any national governing body;

- Direct Federal Defender and CJA Panel representation in the preparation and presentation of the Defender Services budget to Congress;
- A national administrative governing body that has a mission solely devoted to criminal defense with jurisdiction over all key management decisions, including budget, staffing, resource allocation, data management, and policies and procedures generally;
- An information-technology system that is strictly separated from any personnel not employed by a distinct defender organization;
- A system for CJA Panel attorneys to receive payment and authorization for payment for outside services that does not involve approval by judges;
- A system for the selection of CJA Panel members and the heads of Federal and Community Defender Offices that does not involve judicial approval, with the obvious understanding that the Court always retains the ultimate authority regarding the admission of any attorney to practice before the Court.

Independence is the American Bar Association's first principle of any public defender system. The principle requires that: "The public defense function, including the selecting, funding, and payment of defense counsel, [be] independent."¹ This independence goes to integrity. When the CJA was passed, the accompanying Senate Report anticipated that the FDO would eventually have to be independent. Placement in the Judiciary was temporary and fraught with hazards. As the Report warned, "It would be just as inappropriate to place the direction of the defender system in the judicial arm of the U.S. Court as it would be in the prosecutorial arm."² Yet, that is where we now are.

Independence recognizes that we have a constitutional mission separate and apart from the Courts and the AO. We represent indigent individuals facing federal prosecution. Our districts vary enormously in size, population, and types of representations. What stays true for all is that those we represent place their constitutional rights in our care. We both stand next to our clients in court and stand up for them against the charges. Our role is to challenge the prosecution, test the evidence, and advocate before the Courts. We cannot serve both the Courts and our clients. Integrity requires independence.

¹ ABA, *Ten Principles of a Public Defender System*, Feb. 2002, at 1.

² Sen. Rep. No. 91-790, 91st Cong. (cited by David Patton, Executive Director of the Federal Defenders of New York, in his letter to the Committee, March 25, 2016).

To meet these values, many of the FDO and CJA advocate what used to be unthinkable: independence. We recognize the hazards and dangers of being a separate organization, outside of the protection of the Judiciary. Yet, after our experiences as detailed in our submissions and testimony, judicial protection may be a chimera. The Prado Committee, in its report as far back as 1993, recognized this dilemma.³ Defenders and CJA believe we can be our own effective advocates. To achieve independence will require legislation, of course, and is a task that may take years to accomplish. Yet, a recommendation from this Committee will start the process.

Although many urge this Committee to recommend independence for the FDO, we recognize that may not be achievable in the near term. As a pragmatic and practical matter, the Committee can recommend that certain steps be undertaken immediately to realize some of the critical features stated above and ameliorate troubling concerns. If we cannot be completely independent, we can have special status within the Judiciary.

An immediate solution is to strive for a resumption of a special relationship within the AO. Defenders should be recognized as having a fiduciary position, not as a service to the judges, but as a vital constitutional requirement separate from the hierarchical organization designed to allow the courts to operate efficiently. To achieve this, the following should occur:

- The DSO chief position should be elevated to an Assistant Director;
- The Defender Services Committee (DSC) of the Judicial Conference should have its authority over staffing defender offices restored;
- The FDO and CJA should be appointed to DSC as voting members;
- Defenders should be allowed to appear and advocate, in conjunction with the budget staff and budget committee, for their own funding line before Congress;
- Data management must be restored to FDO control.

The FDO is aware that we also must take steps to ensure the independence and integrity of our program. Chief among these is use of analytical data to chart our future. Analytical data are key to allocating resources, planning, and assuring resources for our mission. In partnership with the DSO, we have put forward a plan to prepare for the future:

³ Committee to Review the Criminal Justice Act Program, Report of the Committee to Review the Criminal Justice Act, at 47-50 (Jan. 29, 1993).

- Appoint a Special Deputy of Operational Analytics and Information Management;
- Expand the role of Budget Analyst staff;
- Provide FDO with transparent access to operational data through data analytic technology;
- Revise and simplify timekeeping by reducing the number of task codes in dData (12 task codes);
- Develop uniform training and clear guidance on weighted case openings;
- Calendar and circulate regular status reports to DSAG on operational analytics and work measurement initiatives;
- Retain RAND for continuation of case weight updates and studies; and
- Increase FDO involvement via Advisory and Working Groups.⁴

In laying out these recommendations, I am guided by the comments, concerns, and criticism expressed by the other witnesses. The purpose of these recommendations is to establish a way toward future independence, and to take the necessary steps to start the journey.

In conclusion, I express my gratitude to the Committee and its members for their dedication and commitment to this study.

Sincerely,



Jon M. Sands
Federal Public Defender
District of Arizona, and
Chair, Defender Services Advisory Group

⁴ Letter and Action Plan submitted to DSO on August 21, 2015, by DSAG.