

FEDERAL PUBLIC DEFENDER

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

Dear Judge Cardone and Honorable Members of the Committee:

I am the Federal Public Defender for the Eastern District of Virginia and have served in this position since April 2015. Although I have only recently been appointed as the Federal Public Defender, I have worked in this Office since 2002, and became the First Assistant in 2009. Because I have been in my current position for only a short period of time, I had few preconceived ideas about the structure of our program before the Committee began its work.

Let me start by saying something you already know. To comply with the Sixth Amendment, our criminal justice system should ensure that indigent defendants facing criminal charges are provided with experienced defense counsel who have sufficient resources to adequately represent their clients. In federal court, our current system usually meets this constitutional obligation, and does not face (other than during the Sequester) the severe funding challenges that afflict many state public defender systems. *See, e.g., Campbell Robertson, In Louisiana, the Poor Lack Legal Defense*, N.Y. Times, Mar. 20, 2016, at A1. There is much, in other words, to commend about the way that the Criminal Justice Act affords legal counsel to indigent defendants in federal courts around the country.

Nonetheless, as you have been told many times, structural reform of the administration of federal indigent defense services is necessary to guarantee the continued health and viability of our adversarial system of criminal justice. Our adversarial system necessarily depends upon the recognition that the defense function must maintain “professional independence” and “freedom [from] state control” in order to serve as an “effective and independent advocate” for criminal

defendants. *Polk County v. Dodson*, 454 U.S. 312, 321-22 (1981).

These principles, as the Committee has heard, are in some tension with Congress's designation of the Judiciary to administer the Criminal Justice Act. In other words, either in the context of CJA vouchers, or the budget for indigent defense generally, the judiciary acts not as a neutral and detached decision-maker between two equal parties, but rather as the exclusive arbiter of funding for only one side of the adversarial system. The principle of professional independence described in *Polk County* suggests that a healthy adversarial system requires that the judiciary not serve as the exclusive arbiter of funding for criminal defense — even though many federal judges are enthusiastic supporters of the defense function and have done everything that they could to ensure adequate funding for our program.

Nonetheless, re-creating the bureaucratic institutions that support the provision of federal indigent defense is no small task. At present the Administrative Office of the U.S. Courts is responsible for the overall financial management, human resources administration, administrative reporting, internal auditing and accountability, space and facilities, and information technology support for Federal Defender Offices. The creation of a separate bureaucratic structure outside of the Judiciary — when, as described below, the program may have to become smaller, not bigger — would take time and care. The question that must be answered is whether an independent structure would be able to ensure financial stability and accountability as well as or better than the current system.

My suggestions with respect to the structure of the program are the following:

The Committee should recommend intermediate steps designed to promote the independence of the defense function, such as:

- (i) Defender and CJA attorney participation in the selection of CJA panel members;
- (ii) The hiring of a panel administrator to promote transparency with respect to the assignment of cases to the CJA panel;
- (iii) Defender and CJA attorney committee participation in resolving issues related to CJA vouchers and requests for expert or other assistance;
- (iv) Institutional protections within the Administrative Office designed to protect the independence of Defender Services;
- (v) Segregation of the information generated by the defender program within the Administrative Office.

Even modest steps to protect the independence of the defense function will

not succeed unless institutional stake-holders generally, and judges in particular, are educated and persuaded that professional independence of the defense is a value to be protected and encouraged.

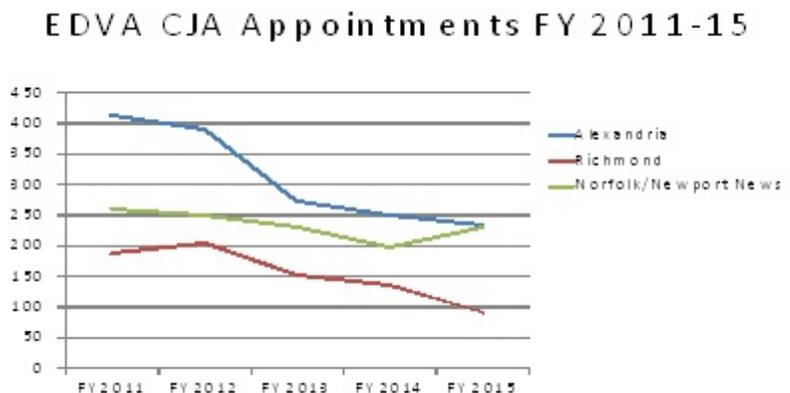
Structural independence of the defense function from the judiciary—in selection of panel members, budget, federal defender selection and hiring, and management—should be a long-term goal.

I. Background on Federal Criminal Practice in the Eastern District of Virginia.

The Eastern District of Virginia is made up of four divisions — Alexandria, Richmond, Norfolk, and Newport News.¹ The District has one of the busiest criminal dockets in the country, apart from the border states, and a well-earned reputation for judges who appreciate the prompt resolution of cases and disfavor continuances.

In the past fiscal year in this District, there were 3,484 court appointments in criminal cases, of which 559 went to the CJA panel and 2,925 went to the Office of the Federal Public Defender (FPD). Over one thousand of the appointments to the FPD, however, were made in relation to old cases for the purpose of determining whether a defendant was eligible for a sentence reduction based upon the retroactive amendments to the sentencing guidelines. Excluding such cases, approximately 77% of the criminal appointments were assigned to the FPD, and 23% went to the CJA panel.

Within the District, of the 559 cases assigned in FY 2015 to the CJA panel, 235 were made in Alexandria, 232 were made in Norfolk/Newport News, and only 92 were made in the Richmond division. These numbers are significantly below what they have been historically:



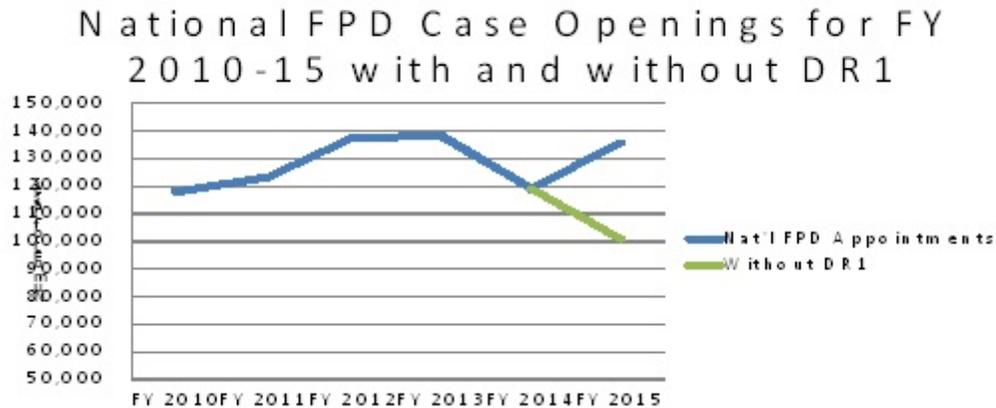
¹ Judges from the Norfolk division travel to the Newport News division to cover dockets in that division.

This reduction in appointments to the CJA panel is consistent with a national trend resulting in fewer federal criminal cases generally:



Naturally, this trend has also resulted in fewer appointments to the Office of the Federal Public Defender.

Although the latest data from the Administrative Office indicates an almost 25 percent increase in national Federal Defender case openings between FY 2014 and FY 2015, much of that increase can be attributed to retroactive sentence reduction cases, which are known by the code DR1. Excluding such cases suggests that the national trend continues to show a reduction in criminal appointments nationwide:



To be clear, these trends may not continue in the future. Executive branch priorities have a significant impact on the number of federal criminal cases filed, and the head of the Executive branch is about to change.

Nonetheless, when making recommendations about the structure of federal indigent defense, the Committee should be aware that the entire program may, by necessity, have to become smaller in the future than it is today. This may pose a practical obstacle in the creation of new institutional structures at the same time that the program diminishes in size.

II. Selection of the CJA Panel, Assignment of Cases, and Evaluation of Vouchers

The Federal Public Defender does not administer the panel in the Eastern District of Virginia. Cases are assigned by the Clerk's Office in each division.

In the Alexandria division, a committee consisting of two District judges, a Magistrate judge, two CJA panel members, and the Federal Defender review and determine additions or reductions in the CJA panel. In the other divisions, there is no committee that evaluates and selects the members of the CJA panel. There is no CJA or Federal Defender participation in issues related to vouchers, although the Fourth Circuit has recently hired a budgeting attorney to assist CJA lawyers in the preparation and approval of case budgets.

A number of CJA panel members have expressed to me relative satisfaction with respect to how the panel is administered. Juan Milanes, a CJA panel member who testified before the Committee in Miami, wrote in his written testimony that his "experience in the Eastern District of Virginia has been filled with mostly positive reinforcement from the bench." He noted that cases are promptly assigned, cases proceed promptly, and vouchers are processed quickly. He also noted that some judges even thank CJA counsel in open court for their service. His sole complaint is that he has experienced a decline in appointments, which is consistent with the overall reduction in appointments described above.

Other CJA panel members have, however, expressed frustration with voucher cutting. Numerous CJA panel members have told me that they reduce their time and expenditures themselves, before submitting their voucher, to improve the chances that it will be approved. One experienced attorney noted that "the AUSAs draw a full paycheck, as does the Court and your office, but for some reason panel counsel are expected to take the hit for the team."

Another panel member from another division, who described his experience on the panel as positive overall, noted that the maximum limits for experts are

“fantasy” because they are so far below the market for such services. The expert he hired in one case, he explained, ended up completing the work “as a charity case,” and he could not even pay the milage for the expert to drive to court to testify.

In another recent case, a district judge halted all deadlines in a death-penalty case because of the denial of the defense counsels’ request for approval of a budget that had been approved by the Fourth Circuit’s budget attorney. Once the request was reconsidered, the district judge permitted the case to proceed.

Federal judges understandably take seriously their responsibility to ensure that CJA lawyers do not engage in excessive and unnecessary expenditures of time and money. And even under the current system, many judges in this District “never cut a penny,” as one CJA lawyer told me, likely because of the recognition that the CJA hourly rate and cap are well below the market for their services.

At the same time, the Committee should recommend an alternative to the current system. CJA panel members are often hindered in their effort to serve as independent and zealous advocates for their clients by a system that imposes arbitrarily low limits on the amounts they can expend on behalf of their clients and requires the approval of their funding from the same person who adjudicated their case.

Conclusion

As I said at the outset, there are many things about the provision of indigent defense in federal court of which we can all be proud. But ultimately the service is provided to indigent clients to satisfy their Sixth Amendment right to counsel. Indigent defense is not a service provided to the Court, and the defense function should not be funded and controlled as if it were another program administered by the Judiciary. That is why I believe that the Committee should recommend structural independence as a long-term goal, and intermediate steps designed to protect the professional independence of FPD employees and CJA panel members so that they can continue to serve as zealous and independent advocates on behalf of their clients.

Yours very truly,



Jeremy C. Kamens