

**FEDERAL PUBLIC DEFENDER
DISTRICT OF NEW JERSEY**

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

Re: Testimony of Richard Coughlin, Federal Public Defender, District of New Jersey

Dear Judge Cardone:

Thank you for the invitation to address the Committee. I have worked in the Federal Public Defender Office for the District of New Jersey for just over 31 years – about ten times the length of time I anticipated when I was hired as an Assistant Federal Defender in February 1985. After serving in that position for 12 years, I was appointed in 1997 by the United States Court of Appeals for the Third Circuit to my first term as Federal Public Defender.¹ I have since been reappointed, following review by a Circuit reappointment/review committee on four occasions. During my time as the Federal Defender, I have served on numerous local committees, taught at local, regional and national seminars, and for approximately ten years – 2005 to 2015 – was a member of the Performance Measurement Working Group (PMWG). I welcome the opportunity to share my experiences, concerns, and perspectives with the Committee. It is my understanding that the focus of the Committee at this hearing is the structure of the CJA program, so I have tailored my comments with that in mind.

¹ Until approximately 2001, the District of Delaware Federal Public Defender Office was managed by the District Of New Jersey Federal Defender Office.

A. History and Description of the Federal Public Defender Office for the District of New Jersey

The District of New Jersey encompasses an area of 8,722 square miles, and nearly nine million people; New Jersey is the most densely populated state in the country. The District is divided into three vicinages corresponding to the location of the Federal Courthouses: Newark, Trenton, and Camden. The New Jersey Federal Public Defender Office was established in 1973 and maintains staffed offices in each vicinage.

- 1985. By the time I left the New Jersey Attorney General's Office to fill a vacancy in the Camden Federal Defender Office in 1985, there were seven attorneys in the Office (five in Newark, one in Trenton, and one, me, Camden). The support staff totaled six.
- Through 2012. In the years that followed, as the caseload grew in both volume and complexity, the number of attorneys and other staff increased, so that by 2012 – just prior to sequestration and other budget cuts, the Office consisted of 49 people – 22 Assistant Federal Defenders (12 Newark, 4 Trenton, 6 Camden), four Research and Writing Attorneys, nine Investigators, two Paralegals, two Systems Administrators, and nine Administrative Assistants and other support staff.
- 2012 through February 2014. In response to the looming budget crisis and a falling caseload, two support positions were eliminated before sequestration, so that by February 2013, there were 47 employees. By February of 2014, the Office staff had fallen to 39, including 19 Assistant Defenders.
- Current Structure of Office 2016. Following the completion of the Work Measurement Study, five positions were restored, and I expect to fill a new Research and Writing Attorney position shortly. The current distribution of 45 employees consists of 22 Assistant Federal Defenders, five Research and Writing Attorneys, five Paralegals, six Investigators, two Systems Administrators, and five Administrators.

Although the bulk of the caseload consists of a fairly typical mix of federal prosecutions, *e.g.* guns, drugs, child pornography, bank robbery, and bank frauds, the range of cases in just the last year has included clients charged with racketeering,

securities fraud, anti-trust violations, environmental crimes, government contract fraud, and terrorism. In addition to the District Courts, the Office also provides representation to defendants charged with misdemeanors at the combined Fort Dix/McGuire/Lakehurst military base, and at the Sandy Hook National Recreation Area. We also accept direct appointments from the Third Circuit for clients who have no counsel for appeal, either because the trial attorney has withdrawn or because the client has asked for new counsel. All the Federal Defender Offices in the Third Circuit, except for the Virgin Islands, participate in the program. The appointments can arise from a case that was prosecuted in any district in the Circuit.

B. Relationship of District Court and Federal Public Defender

The relationship between the District Court and the Federal Public Defender is excellent and largely reflective of the overall environment in the District, where professionalism, independence, and a healthy respect for the right to counsel are expected. During the darkest days of sequestration, every participant in the process offered support and reasonable accommodation. Due to the need for everyone in the Office to take 13 furlough days, the Court agreed to refrain from scheduling hearings on Fridays unless absolutely necessary. The Court offered further accommodation to our staff and at all times expressed a willingness to do whatever was possible so that we had the time and resources required to insure that our clients' rights and interests were protected.

And, frankly, that spirit has been in evidence in the resolution of many other issues that have arisen over the years. Rather than taking an adversarial tack or assuming a position of benign indifference, the District Court typically asks whether it can provide assistance in developing mechanisms that will promote a fair resolution of issues. For example, every time an opportunity has arisen to revisit the often overly harsh sentencing decisions of the past, the Court has not hesitated to obtain lists from

the Sentencing Commission, provide access to presentence reports and statements of reasons, issue standing appointment orders, and participate in meetings with my Office and the United States Attorney Office to establish procedures for prompt resolution of motions.²

Perhaps most importantly, I am not aware of any instances where someone from my Office or the CJA Panel has ever hesitated to raise an issue or make a colorable argument on behalf of a client because they were afraid there may be negative consequences for the Office, or in the case of Panel attorneys, their membership on the panel. To the contrary, it is my impression that the judges expect and welcome forceful, sometimes creative advocacy, and would be troubled by anything less.

C. Relationship with CJA Panel

The Federal Defender Office in the District of New Jersey does not manage the Panel, nor do we process or review vouchers. Instead, our relationship with the Panel is limited primarily to ad hoc case consultation and training. The training consists of an annual one-day seminar, and occasional hour-long sessions on discrete topics. The only other formal involvement is in connection with the District CJA Selection and Management Committee. The committee consists of two judges from each vicinage, the President of the New Jersey ACDL, the President of the Federal Bar Association, the District CJA representative, several CJA panel members, and the Federal Public

² The cooperation by the United States Attorney Office in these matters cannot be overstated. Whenever possible, common ground has been found, so that litigation has been limited to matters that were truly subject to dispute. To his credit, the current United States Attorney has capitalized on the overall atmosphere of professionalism and goodwill that has long existed in the District by establishing an ad hoc committee of representatives from his Office and the criminal defense bar. The Committee meets several times a year to discuss issues of general concern and tries to develop solutions to common problems. Most recently, the Committee developed a new Standing Order for Discovery that was approved and adopted by the District Court.

Defender. The committee meets annually to review Panel applications and address any issues of concern. Most recently, the committee adopted a new training panel plan that is designed to increase diversity and insure that as Panel attorneys retire or withdraw, a pool of high-quality replacements exists.

There is very little history of voucher-cutting in the District, and to the best of my knowledge, when it has occurred, attorneys have been notified in advance and afforded an opportunity to respond with a further explanation or justification. The main issue in recent years has been whether Panel attorneys are receiving a sufficient number of cases to remain invested in the program. The concern is that particularly for newer Panel members, if they are not receiving three to five cases a year, the incentive to remain current on federal criminal law issues will diminish. The newer Panel attorneys typically do not have the foundation that comes with years of federal practice that might otherwise allow them to respond efficiently and effectively when a new case is assigned. In the end, if this circumstance persists, it is easy to see how it would likely lead to both higher case costs and worse outcomes for clients.

The larger institutional concern is the role the Court plays in approving requests for experts, investigators, and other services. This has always struck me as a dubious arrangement. Expert approvals have also been the single most common topic of inquiry I have received from judges and Panel attorneys. The idea that an attorney must reveal his/her trial or investigative strategy to the District Judge presiding over the case is, in my view, fraught with conflict. In my office, if an attorney has reason to believe that a mental health evaluation may provide useful mitigation for use at sentencing, the funds are obligated and the evaluation takes place. If it turns out the evaluation results are not helpful, neither the fact of the evaluation nor the results are known to the Court. In contrast, a Panel attorney must justify the evaluation to the Judge and either disclose an unhelpful report or disclose nothing – and allow the Court to draw its own conclusion.

Likewise at trial, a request from an attorney in my office for the services of a forensic accountant, a fingerprint expert, an eyewitness identification expert, a DNA expert, or some other service, is granted as long as there is an adequate justification. Again, in contrast to a Panel attorney, both the fact of the analysis and the results are held in confidence unless a decision is made to use them at trial. If I were the client of a Panel attorney, I would be deeply troubled by an arrangement that conditions expert assistance upon disclosure to and permission from the trial judge. The government, private attorneys, and the Public Defender are allowed to develop and litigate cases at their discretion, within whatever reasonable fiscal constraints exist. Only Panel attorneys are required to obtain permission to pursue investigation and litigation strategies from the judge who is hearing the case. The arrangement is unfair, and no doubt has a chilling effect on Panel attorneys, and undermines confidence in the system.

The solution to this problem is obviously not to give Panel attorneys discretion to hire at will. Attorneys in Defender Offices must justify requests for expert services, Defender Offices are subject to routine audits, and Federal Public Defender management practices are subject to review by the Court of Appeals when a Defender applies for reappointment. As a result, there are ample checks within the system that provide needed accountability. Nor do I believe that Federal Defenders should review Panel attorney requests for expert and other services. Given the fact that the requests often arise in cases where we represent a co-defendant, it would be highly improper in my view to require counsel for a co-defendant to reveal his or her strategy to me.

Instead, perhaps a position or office modeled on the case-budgeting attorneys that have been established in some circuit and district courts could be used to review and approve expert requests. The short-term experience with the newly established Third Circuit case-budgeting attorney for mega-cases has been extremely positive. Requests for authorization to retain service providers have been narrowed, justifications have improved, and in the long run, it seems likely that the efficiencies achieved will

amply justify the existence of the position. Regardless of any efficiencies, savings, or even additional costs, Panel attorneys report that they feel less constrained making requests and explaining the need for the service to the case-budgeting attorney. They feel they are better able to represent the interests of their clients, which in the end, should be of greatest concern. At a minimum, pilot projects based on this model should be considered to determine whether they are a viable solution.

D. Relationship with the Administrative Office (AO)

Under the current system, there exists what I regard as a not-quite-wary-arm's-length relationship between Defenders and the AO, including the Defender Services Office (DSO). Due partly to this less-than-full embrace, it is my impression that DSO often believes that its efforts and tribulations are underappreciated by the Defender community. And to be honest, I suspect that perception is largely accurate and attributable to several factors. First, although the subject matter of the battles described by DSO relate to important matters, too often the characterizations wind up sounding more like bureaucratic turf battles, rather than issues that concern the immediate needs of our clients and offices. As a result, the context, content, and consequences get lost in the noise.

Second, location matters. Most Defenders are simply too far removed geographically from Washington to feel invested in the issues that arise. The distance impedes real-time communication, which leaves those not directly involved feeling like a spectator. As a result, the impression can be that Defenders regard what occurs at the AO as of little or no concern. In fact, in at least some cases, Defenders appreciate the importance of the issue, but have no means to affect the outcome.

Third, Defenders often simply have no idea what issues are percolating at DSO, or even worse, only come to appreciate the significance after the fact. As a result, the

issues play out as acronym-filled mysteries, which require more energy to decipher than seems warranted by the potential reward.

Finally, until recently, the distance, obtuseness, and seemingly low stakes of many issues were somewhat welcome. Defender Offices were adequately funded, engagement with Washington was minimal, *e.g.* audits, assessments and occasional surveys. Relative ignorance was bliss. The balance, however, has shifted dramatically over the last couple of years, and collective Defender anxiety and suspicion has risen in concert. This atmosphere, it seems, has also contributed to a brain drain through an accelerated rate of retirements and other defections.

The litany of slights large and small are now well known to the Committee: demotion of DSO; undermining the program before Congress; lack of consultation with the Defender community; wild, misplaced, utterly groundless assumptions about Defender workloads to the point where it seemed no amount of money to study the Defender program would be too much if only it revealed the waste that it was assumed was surely there; stripping the Defender Services Committee (DSC) of jurisdiction over budgeting and staffing (issues that go the heart of the program and our ability to represent our clients); exclusion from the clemency project; and finally, the data merge that – both in fact and in appearance – threatened the confidentiality of privileged information.

Individually, each of these developments would have been troubling. Together, they reveal what appears to be a seismic shift in how the CJA program is perceived by at least a powerful and motivated cadre within the AO. That is, rather than assuming the position of a fiduciary with a duty to protect and promote the existence of an independent, well-funded indigent defense system, the relationship has morphed into something closer to that of an employer/employee model. Even if it is agreed that such a monumental change in the relationship was not intended, the fact is that it has

occurred. The wounds, moreover, have been largely self-inflicted, and the damage can only be repaired by concrete steps that not only restore the status quo, but that also establish mechanisms that provide a greater opportunity for a meaningful Defender voice in both matters that affect the independence and quality of the program, as well as issues that relate to the treatment and interests of our clients.

E. Structural Issues

Restoring DSO to its former position, returning staffing and budget jurisdiction to the DSC, and correcting the Defender data miscue are all necessary to restore morale and confidence in the direction of the program. Those steps are also the minimum needed to begin to secure at least the appearance of independence for the defense function. Beyond those basics, this critical juncture provides an opportunity to implement meaningful changes to insure the vitality of the program and reflect the growth that has occurred.

It is worth remembering that although all but three districts are now served by Federal Defender Offices, that breadth of coverage is a fairly recent phenomenon. Even as recently as the *Prado* Committee, there were only 40 Federal Public Defender Offices and 9 Community Defender Organizations that provided representation in 56 of the 94 districts. (*Prado* Report at 21-22.) Yet, the governing and advisory structures have not evolved as the program has grown. DSAG, for example, has seven Federal and Community Defender positions, including one who represents Federal Public Defenders in the First, Second, and Third Circuits (12 Defender Offices). The Advisory Group should be expanded to insure that a full cross-section of Defender views and perspectives are represented.

Not only has the membership been static in the face of significant change, but so has the role of the Defender advisory and working groups. Rather than being viewed as

resources to draw upon to address critical budget issues and substantive legal developments, the perception is that Defender groups are ignored and hidden. Defenders, through their advisory and working groups, should be permitted to address budget and policy issues, both within the AO and to outside organizations, including Congress and the Sentencing Commission. This is so regardless of whether the Defender position is at odds with Judicial Conference Policy, particularly as it relates to procedures and substantive legal issues that impact our clients. In those circumstances, a more complete discussion of the issues within and outside the AO will likely lead to more informed decisions and better results.

My views on the structure of the program are certainly shaped by my experience in the Third Circuit and District of New Jersey. Although there have been bumps along the way, a spirit of professional collaboration and mutual respect have helped establish and maintain boundaries between the Federal Defender and the District and Circuit Courts. The defense function is regarded as a vital and helpful part of the criminal justice system. I am aware, of course, through my time as a member of PMWG and years in the system, that the longstanding professional relationship between my office and the Third Circuit/District of New Jersey, while hardly unique, is not universal. Problems reflecting a less generous view of Defender independence and the defense function have had profoundly troubling consequences in many places. (And to be fair, Defender mismanagement has at times provided an unwelcome platform for judicial intervention.) That history – together with the recent cascade of negative developments at the AO, the budget struggles, the seemingly endless staffing studies, and the persistent denial of reasonable Defender requests to be afforded mechanisms that allow our views, concerns, and perspectives to be heard – has predictably generated tremendous frustration.

Despite that frustration, I remain convinced that remaining within the judiciary is in the best interests of the program and our clients. I say this assuming, at a minimum, that there will be a restoration of DSO and DSC positions and authority. I have reviewed the *Prado* report as well as some of the proposed options that have been circulated in connection with this Committee's inquiry, and while the proposals have some theoretical allure, I am not persuaded that the establishment of national and local boards will address Defender frustrations and promote Defender independence more effectively than a reversion to the previous DSO/DSC status quo, along with the establishment of mechanisms that insure meaningful participation by Defenders in the governing process.

Aside from the macro issues relating to the exclusion of Defenders from budget, staffing, and policy processes, in my view, many of the problems associated with judicial interference with local Defender management will persist regardless of the structure. At the micro level, the enthusiasm for wholesale change seems to be driven at least in part by a belief that the current structure encourages or enables untoward judicial interference with Defender management. In its most simple form, the idea is that because the CJA program is within the judiciary, some judges and AO staff view Defenders as court employees, not much different (though less well compensated) than clerks and probation officers. As such, the perception is that if the structure is changed, such conduct will be eliminated, or at least greatly reduced. While I understand the argument and appreciate the concern, I am not so sure that the conclusion is warranted. If a district or circuit judge is upset about the performance or management of a defender office, and that judge is under the impression that she or he can effect change by resorting to threats or intimidation, the existence of an outside board is unlikely to make a difference. No structure will dissuade a judge who is so inclined from overstepping reasonable bounds. In my mind, the main difference the national/local board structure would make in most circumstances is that in addition to voicing her or his displeasure to the Defender, the judge would also communicate the complaint to the

local board. In the end, the Defender is going to have to find a way to manage relations with a difficult judge or group of judges, and will be measured by the management of the office. This raises another issue that a shift to a wholly independent structure would ideally affect – the perceived or actual consequences to a Defender who resists unwarranted judicial interference. Under the current system, again in most basic terms, the concern is that because a Defender is subject to removal by judges, there is a fear that a Defender might avoid conflict to save her or his job, or might be removed because she or he stood their ground. Although this is a real concern – and the job can be difficult enough without adding a Profile in Courage ordeal that requires a choice between employment and honor – I am not persuaded that a change in structure would provide a real solution. My doubt arises from the fact that I do not believe that there is something inherent in the current structure that causes or promotes the episodes of judicial intervention that are most problematic, nor am I convinced that a local board or some other mechanism will materially insulate a Defender from such intrusions or the potential consequences.

Moreover, I believe that whatever gains would be accomplished by the adoption of an entirely new structure outside the judiciary, would be dwarfed by the risks to the program that greater exposure and centralization would bring. I am concerned, for example, that a national board or independent governing authority would inevitably lead to a more top-down structure. Likewise, while in an ideal world an independent local board would protect a Defender from judicial interference, my impression is that in the real world, such boards have not always been quite as stalwart as might be hoped, and have in fact on occasion been a different source of interference. So it would be necessary to balance whatever gains associated with appearances of independence from the judiciary that would be achieved through a new structure, against the loss of local management independence that now exists. More importantly, when budget or management trouble has arisen in the past, it has almost always been the case that the judiciary, *i.e.* the Judges, have stood up for the program and the values embodied in the

Sixth Amendment. That protection would almost surely be compromised, if not lost completely, because the Courts would no longer occupy a position of trust with respect to the program.

F. Conclusion

If the question presented was considered in a vacuum, or if this was 1970 and Defender Offices were just being established, my views about the structure of the program would likely be different. My experience, however, leads me in a different direction than those who believe wholesale change is necessary. As outlined above, to some extent I suppose I view some of the proposed models as projecting more of an aura of independence than actually doing much to insulate Defenders or improve our ability to represent our clients. And while the suggestion of a semi-independent entity associated with the judiciary has some surface appeal, I have doubts about the utility of the Federal Judicial Center or some other purely local, standalone entity as a model for a program that includes more than 80 offices of varying size, each responding to different institutional needs, while representing the distinct interests of individual clients. The problems we face are substantial and must be addressed. My preference would be to do so within the existing framework.

Certainly changes should be made to provide Panel attorneys with greater case-related autonomy. The current practice is so obviously fraught with problems that it is difficult to understand how it has persisted for so long. It may be that the Criminal Justice Act itself reflects a time before federal criminal practice became so complex that experts and service providers were both routine and expensive. That is, when cases were simple and discovery was limited, there was little need for outside help. Those days, however, are long gone, and the need is urgent to develop mechanisms that reflect the practice today while insuring that public money is not misused. Again, however, it is my belief that alternatives short of removing the program from the Judiciary can address those issues.

Thank you again for the time the Committee has devoted to these issues.

Respectfully,

Richard Coughlin

RICHARD COUGHLIN
Federal Public Defender