

Testimony

For

Ad Hoc Committee to Review the Criminal Justice Act Program

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BACKGROUND

Thank you for the opportunity to present my views on administration of the Criminal Justice Act. I come before you after having served as the Federal Defender for the District of Oregon for 31 years, from 1983 to 2014. During my tenure the office grew from a staff of 9 to 80 employees. In addition to supervising the Defender Office, I was responsible for administering the Criminal Justice Act Panel in Oregon which grew from fewer than 40 to more than 120 members.

While serving as the Federal Defender in Oregon I was deeply involved on administration of the CJA program nationally. I served as a member of the Federal Defender Advisory Group from the late 1980s through the mid-1990s and as the chair of the group in 1992-93. I was co-chair of the national Performance Work Measurement Group from the late 1990s through the early 2000s. I worked extensively with the Administrative Office on national budget and performance issues throughout my tenure. In addition, I served on the Ninth Circuit Court of Appeals Capital Case Budgeting Committee from approximately 2004 through my retirement in 2014.

Since retiring as Federal Defender, I have been working part-time as Legal Director of the new Oregon Innocence Project and as an attorney in private practice. I have several CJA assignments as well as retained work.

ANALYSIS

CHANGES IN NATIONAL GOVERNANCE

Governance of the Defender Program has changed significantly in the past five years. The changes have occurred within the Judicial Conference of the United States (JCUS) and the Administrative Office (AO). Those changes threaten the independence

of the defense function within the Judicial Branch and, concomitantly, the ability of Defenders and Panel Attorneys to provide quality representation.

For the first twenty-five years of my tenure, the JCUS and AO treated the Defender Program as if they had a fiduciary obligation to ensure adequate funding and quality representation. JCUS delegated to its Defender Services Committee the responsibility for determining the appropriate level of funding for the program as a whole and for each individual Defender Office. That changed several years ago. JCUS stripped the Defender Services Committee of its responsibility and turned its budgetary role into an advisory one. Responsibilities were assumed by the Executive, Budget, and Judicial Resources Committees.

That shift severely compromises the independence of the defense function. Instead of preparing and presenting the Defender Program budget as an independent entity within the Judiciary budget, the Defender budget is now part of an overall zero sum game. The perception appears to be that if the Defenders get more money, other parts of the judiciary get less. Without an independent voice and without judges acting out of a fiduciary responsibility to the Defenders, the Defender budget suffers. Decisions about staffing in Defender Offices and the level of resources needed by Panel Attorneys are now made based on the imperatives of the zero sum game rather than on the resources needed for proper representation.

A second part of the shift within JCUS involves the pressure generated by the national shift, whether explicit or implicit, that is brought to bear on all judges to cut costs. When judges focus on the bottom line of dollars rather than the quality of representation, quality suffers.

In the zero sum game, the Defender Program is at a distinct disadvantage. Probation and Pre-trial Officers are employees of the district court. Defenders are not. Judges can, and are expected to, control the operations of “their” probation officers. Under the Sixth Amendment, they cannot play the same role with defense attorneys. The shift toward integration of the Defender Program within the Judiciary as just one more program creates a context within which it is viewed as something to control in the same way as the other Judiciary programs. That shift limits the ability of defense attorneys to make independent judgment about the needs of their clients.

The second shift that has adversely impacted the program occurred within the AO. For years, the Defender Services Division had a special relationship within the AO. When Director Meacham retired, that started to change. The Division Director, Ted Lidz was able to stem the tide of those changes when the Division was upgraded to an Office

within the AO and he became a Deputy Director. Immediately after he retired and Cait Clarke was hired, the position of the Office of Defender Services was downgraded. The loss of status within the AO and loss of access to the Director compounds the problems the Defender Program encounters with the change within the JCUS.

QUALITY OF REPRESENTATION

As I listen to Defenders and judges from around the country, it is apparent that virtually all believe that they are doing a good job and providing quality and fair defense and judicial services and decisions. My perspective after working in the federal system for thirty-three years is that there are significant variations in the approach to and quality of representation throughout the country. It is difficult to quantify quality based on, e.g. number of departures or variances in sentences, because of the tremendous variations in charging and plea policies in prosecutors' offices.

Some of the differences are visible in staffing ratios and use of investigative, paralegal, and expert services. Some of the differences are visible in the effort put into cases that are generally similar across the country, e.g. illegal reentry cases. In some districts, virtually no investigation or mitigation work is done. In others, no lawyer would take a client for a plea without exploring these issues.

The relationship between resources and quality of representation should be viewed in the context of the major changes in the nature of the federal criminal work and case loads. The number of federal prosecutions has risen dramatically. So too has the complexity of the cases. The increasing complexity is seen in both the types of cases prosecuted (more white collar, terrorism, and multi-district drug cases) and the change in the nature of what used to be the staple of cases—bank robbery, federal frauds, small drug cases. Even the least complex cases now often involve voluminous cell telephone and computer records.

The reality is that federal criminal defense has become more and more specialized and complex. It is increasingly difficult for attorneys who may be comfortable in a state courtroom to provide competent representation in a federal case when they have no experience with the federal procedural rules, substantive law, and sentencing law.

THE OREGON APPROACH

One way to maximize independence of the defense function and quality of representation is through utilization of the Federal Defender in governance of the

Criminal Justice Act in each district. Oregon led the way in this regard, delegating responsibility for administration of the CJA to the Federal Defender. While Defenders in many districts now are involved in constituting the CJA panels, training, and selection of attorneys for individual cases, Oregon's Defender continues to have a far larger role than is true in most districts. In Oregon, the Defender reviews all Panel Attorney motions for expert and investigative services and all vouchers submitted for payment.

Full Defender involvement in the resource issues enhances independence and quality in several ways. First, the increased Defender role reduces the role of the judges. Second, involvement of the Defender means that a person with expertise in the defense function is determining what level of resources is necessary. Third, the Defender is in a position to work with Panel attorneys to assist them in making resource requests and ensuring that they are both reasonable and sufficient in a manner that judges cannot. Fourth, the Defender is in a position to intercede for the panel attorneys with the court in a manner that would make most attorneys in private practice uncomfortable.

The Oregon approach has been praised and held out as a model in a number of studies and reports including a Vera Institute study and a Best Practices monograph put out by the Office of Defense Services.

CONCLUSION

The overall quality of representation provided by Federal Defenders remains high. The overall quality of representation provided by CJA Panel attorneys has improved markedly in the past decade as additional resources have been made available for training and more Defenders have become involved in CJA panel management.

The placement of the Defender program within the Judiciary is an uneasy compromise. While judges are responsible for implementation of the Sixth Amendment in many respects, they are not advocates for any individual client. There is an inherent conflict when judges are involved in resource allocation decisions—which necessarily impact defense strategy—in any individual case and in a systemic way that impacts individual cases. While funding for the defense function benefits from the fact that the Judiciary has constitutional standing as the third branch of government, when judges and the AO view all resource decisions for the judicial branch through the same lens, the independence of the defense function and quality of representation suffer.

On the national level, I recommend—at the least—that the Defender Program be established as a separate unit with the AO with a director who has direct access to the

Director of the AO and to the Congress. The Defender Director should have the authority to utilize the resources of the AO as she or he believes is appropriate. Authority over the Defender program budget should be restored to the Defender Services Committee. A Federal Public Defender, a Community Defender, and a panel attorney should be added as voting members of the committee. The other JCUS committees need to be taken out of the budget and resource allocation processes entirely.

On the local level, I recommend that review of individual resource needs for Defender and Panel cases be removed from the judges who hear the defendants' cases. The Federal Defenders should be adequately funded to review all panel attorney resource requests and payment vouchers and recommend approval to a different judge.

Thank you for your consideration of these views.