

**Ad hoc Committee to Review the Criminal Justice Act**  
**Public Hearing**  
**New Mexico State Capitol Building, Room 311**  
**490 Old Santa Fe Trail**  
**Santa Fe, New Mexico 87501**

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**Testimony of Richard L. Durbin, Jr., United States Attorney, Western District of Texas**

Judge Cardone, distinguished members of the Committee, good afternoon. My name is Richard Durbin. I am the United States Attorney for the Western District of Texas, serving by appointment of the Court for the Western District of Texas. I have been an Assistant U.S. Attorney in the Western District of Texas since 1983. During my tenure I have served as a line AUSA, Chief of the San Antonio Division, Chief of Narcotics, Appellate Chief, Chief of the Organized Crime Drug Enforcement Task Force (OCDETF), Chief of the Del Rio Division, Criminal Chief, First Assistant U.S. Attorney, and as the United States Attorney. Thank you for inviting me to appear before the Committee for the Review of the Criminal Justice Act.

I am here today to share my knowledge of (however limited it may be), experience with, and perspective on the operation of the Criminal Justice Act in the Western District of Texas. My comments are limited to my experience in the Western District of Texas and are not intended to reflect on the views of other U.S. Attorney's Offices on this subject matter. The scope of review, as I understand it, covers 14 areas, as well as issues specific to the Southwest Border, including border and tribal issues. At the outset, I would advise that I have little to offer about cases arising in what the Department of Justice generally refers to as "Indian Country." There are limited tribal lands in the Western District of Texas and very few cases arising in them. The Kickapoo Tribe, located near Eagle Pass, Texas, occupies recognized tribal lands, but they are subject to concurrent jurisdiction with state authorities and most criminal matters arising on Kickapoo lands are handled by the state and local authorities in Maverick County. The Isleta del Sur Pueblo, also referred to as the Tigua Tribe, do not occupy tribal land recognized by federal statute and almost all criminal matters arising among the Ysleta del Sur Pueblo are handled by state and local authorities in the city and county of El Paso.

Before I turn to the specific areas the Committee has identified for review, please allow me to give you some general background about the Western District of Texas. I believe this information, mostly statistical, will give you a sense of the enormity of the workload in the District, and also, a sense of how successful the CJA program is. The district has seven divisions in two time zones: San Antonio, Del Rio, El Paso, Austin, Midland, Pecos, and Waco. Three divisions are contiguous with Mexico: El Paso, Pecos, and Del Rio. In the Pecos Division, court

is held in two locations: the city of Pecos and the city of Alpine. The attorneys for both the U.S. Attorney's Office (USAO) and the Federal Public Defender's Office (FPD) office in Alpine travel to and from Pecos for court several times each week. The FPD has offices in the three border divisions, as well as San Antonio and Austin. The FPD does not have offices in Midland or Waco. The USAO has permanent staff in all seven divisions. (The numbers vary with attrition and hiring, but the criminal trial AUSAs, including supervisors, are distributed roughly as follows: Del Rio (11 AUSAs on board, two awaiting clearance); Pecos (4 AUSAs); El Paso (30 AUSAs); San Antonio (25 AUSAs); Austin (14 AUSAs); Midland (4 AUSAs); and Waco (5 AUSAs). The USAO also includes four AUSAs who handle criminal and civil asset forfeiture matters; and eight AUSAs who handle criminal appeals.)

During FY 2014, the USAO filed a total of 5790 indictments or informations (felonies) against 6601 defendants; during FY 2015, the USAO filed 5368 indictments or informations against 6361 defendants. The filings in the three border divisions were as follows:

Del Rio:       FY 14: 1524 indictments/informations against 1632 defendants;  
                  FY 15: 1450 indictments/informations against 1603 defendants (92.5% of the cases involved immigration violations; 5.1% were drug violations)

Pecos:         FY 14: 545 indictments/informations against 660 defendants;  
                  FY 15: 458 indictments/informations against 628 defendants (77.5% of the cases involved immigration violations; 19% were drug cases)

El Paso:       FY 14: 2311 indictments/informations against 2506 defendants;  
                  FY 15: 2138 indictments/informations against 2385 defendants (69.6% of the cases involved immigration violations; 25.9% were drug cases).

To get some sense of the proportion of cases handled by appointed counsel during FY 14 and FY 15, I have obtained some numbers from the FPD and the U.S. District Clerk. Unfortunately, three different offices of the government (the USAO, the District Clerk, and the FPD), all involved in tracking more or less the same activity, count the units of work differently. (As a caveat, the numbers should be taken as demonstrative, and not as precise or authoritative.) The Clerk reported as follows: For FY 14, there were 5813 attorney appointments in criminal cases, of which 3704 were CJA panel and 2109 FPD; for FY 15, 4299 attorney appointments were made in criminal cases, of which 2892 were CJA panel attorneys and 1407 were FPD. The FPD advised they were appointed to 6,785 cases in FY 14, and to 8,275 cases in FY 15. I have neither the time nor intelligence to fully understand the discrepancies among these counts. Some of the differences may reflect assignments to misdemeanor cases, which I have not counted in the USAO numbers. (The USAO prosecuted 12,296 defendants for immigration misdemeanors during FY 15. Most of these were filed in the three border divisions, and the FPD was appointed

in a very small percentage of them.) Other numbers for the FPD probably reflect work such as supervised release revocations and resentencings, another category I have not included here. In any event, the numbers show that appointed counsel handle a very large percentage of the representation in criminal cases in the district. They bear out the rough estimate given to me by the former Public Defender, U.S. Magistrate Judge Henry Bemporad, that as many as 80% of defendants in the Western District of Texas are represented by court appointed counsel.

Turning to the specific areas of review identified by the Committee, I will address those for which I have some knowledge or information. A number of the areas of inquiry are beyond my knowledge or experience, and I will not address those.

**1. The impact of judicial involvement in the selection and compensation of federal public defenders and the independence of federal public defender organizations.**

The current Federal Public Defender for the Western District of Texas was appointed in 2013, following her predecessor's appointment as a U.S. Magistrate Judge. The USAO had no involvement in her selection. As far as I am aware, the District Court did not solicit the views of the USAO on any of the candidates. From the outside, it appeared that the selection process took longer than one would have expected. Information in the legal community suggested that concerns held by the Court of Appeals about which city the FPD should reside in (San Antonio or El Paso) lengthened the selection process. I have no information whether this involvement in the selection process adversely affected the operation of the office or the performance of FPD personnel. By all appearances, the office continued to operate at its usual high level of proficiency and competence.

I have no knowledge of any judicial involvement in the compensation of the Federal Public Defender or her staff. I understand that the FPD's salary is fixed by statute. It is common knowledge that the FPD was hit especially hard by sequester in 2013, resulting in the departure of several very experienced and capable AFPDs. The departures were characterized as "retirements," but the extent to which they were voluntary may be open to dispute. It appears that the FPD was affected more severely by sequester than other federal agencies, both within the judiciary and in the Executive Branch. It is my understanding that the Administrative Office for U.S. Courts, and not judges in the District, made the budget decisions that adversely affected the FPD.

**2. Equal employment and diversity efforts in the federal defender organizations.**

The USAO has no direct knowledge of the FPD's hiring practices. By outward appearances, there do not appear to be any issues or problems in this area.

### **3. Judicial involvement in the appointment, compensation, and management of panel attorneys and investigators, experts, and other service providers.**

As far as I am aware, most of the appointments of counsel in the District are made according to a random rotation. Judges occasionally appoint specific attorneys to a defendant because of unique circumstances presented by the case calling for a particular lawyer's skill and expertise. I am not aware of any issues concerning the appointment process. As will be discussed below, compensation has been an issue in the community, but I cannot assess how significant it is. With respect to the appointment of investigators, experts and other service providers, I am not aware that the courts in this District involve themselves in deciding *which* investigators or experts might be engaged by appointed defense counsel. Rather, the issue seems to be a reluctance on the part of the courts to authorize the hiring of investigators or experts and to authorize payments adequate to cover necessary services. At least one person told me that the total amount the courts allow for expert compensation tends to be very low, perhaps because higher payments require specific justification.

The "management" of panel attorneys is a broad subject. All divisions except the Austin Division have written plans for the administration of the Criminal Justice Act. Generally, the plans establish a CJA Panel Committee for the division, which includes some combination of district and/or magistrate judges, public defender, and private attorneys. The panel committee reviews new applications for admission to the panel and may periodically review the performance of panel members. For example, the committee in San Antonio reviews about one-third of the panel members in some fashion each year. I do not know how formal the review is, but I understand the committee will solicit the opinion of judges and practicing lawyers about the attorneys under review. There may be good reasons that screening and review of panel attorneys is somewhat vague. On the one hand, the district judges and magistrate judges are in an excellent position to assess the competence, proficiency, and effectiveness of CJA panel members. On the other hand, there might be a natural and reasonable reluctance to take steps except in the most egregious cases to criticize or remove panel members based on competence out of concern that the action might invite unwarranted claims of ineffective assistance of counsel. A judge also might naturally be reluctant to make herself a witness to counsel's performance. Judges, of course, have the authority to sanction or otherwise address all attorneys who appear in their courts for misconduct and poor performance. Some U.S. Attorneys in other districts expressed the desire to have AUSA input into the assessment of panel lawyers, arguing that AUSAs have first-hand knowledge of defense attorneys' performance. I include this in my remarks, but with a few caveats. First, direct input from AUSAs could create appearance problems, and perhaps exacerbate the mistaken impression that government involvement taints the independence of court appointed counsel. Second, AUSAs might not always be in the best position to evaluate the necessity for or reasonableness of some actions taken by the defense. AUSAs do not always appreciate the difficulties in dealing with individual clients. Additionally,

because AUSAs must respond to those defense actions, their views might not always be entirely objective. Overall, it seems the balance has been well struck in the Western District of Texas, given that the vast majority of CJA attorneys perform competently and effectively. Although the process is opaque, it seems that attorneys who are not up to standards do not remain on the panel.

- 4. The adequacy of compensation for legal services provided under the CJA, including maximum amounts of compensation and parity of resources in relation to the prosecution.**
- 5. The adequacy and fairness of the billing, voucher review, and approval processes relating to compensation for legal and expert services provided under the CJA.**

For many years I have heard grouching about caps on compensation, court reduction of claims on vouchers, and delayed payments. U.S. Attorneys from other districts have reported the same information. I am not in a position to evaluate the adequacy of compensation under the CJA. Some other USAOs also reported suspicion that some appointed counsel “churn” cases, filing unnecessary motions to justify billing. I have never heard this complaint about any court appointed attorney in the Western District of Texas. I would offer the observation that almost everyone thinks they should be paid more for what they do.

On the issue of parity of resources, my impression is that any disparity is not so substantial that it cannot be remedied. I say this for several reasons. First, considering the number of criminal AUSAs and AFPDs in the District handling similar cases, the ratio is roughly two AUSAs to one AFPD. In the five divisions in which the FPD has a presence, there are about 102 criminal AUSAs (including appellate) and 48 AFPDs. Considering the type of work that AUSAs and AFPDs perform and the number of cases in which panel attorneys are appointed, the ratio is probably adequate. In most cases where counsel is appointed, the defense lawyer becomes involved only after charges have been filed. In contrast, AUSAs may put in a substantial amount of work long before many cases are filed. This may include consulting with investigative agents during investigations; pursuing various legal process to collect information, including court authorized electronic surveillance, search warrants, and preparing motions for stored electronic information, tax records, etc.; conducting extensive witness interviews; preparing for and presenting matters before a grand jury; collecting and reviewing discovery; and preparing a prosecution memorandum. While defense lawyers might review much of this information once a case is brought, the activity of collecting the information as an investigation develops undoubtedly requires much more time, especially in complex cases. Indeed, AUSAs may spend years on an investigation only to conclude that there is no prosecutable case. Obviously, this requires no work from a defense attorney. AUSAs also can spend many hours after conviction responding to pro se motions to vacate sentence, litigation in which the FPD is rarely involved.

Second, considering the average number of charged cases per attorney, the ratio between AUSAs and AFPDs is roughly 1:1. AUSAs in the El Paso Division who handle the more routine, reactive cases, averaged about 161 defendants each during FY 2015; in Pecos the average number of defendants was 157 per AUSA; and in Del Rio the average was about 174 per AUSA. According to the FPD numbers cited above, the average caseload for AFPDs was 172. (This number is lower if the Clerk's count is used.)

Third, it has been suggested that one should compare the total costs of prosecution with the cost of the defense. I suggest this is not only impossible and impractical, but also would be a misleading measure. First, if one could agree on what activities should be included, one would have to capture the cost of those activities. I do not believe either of these is possible. (Consider a multi-defendant prosecution: should investigative, attorney, and court expenses be apportioned among defendants on a per capita basis or on a marginal additional cost basis? And suppose the investigation targeted dozens of suspects, but only a handful are charged—how should the costs attributable to persons not charged be factored in?) Second, the cost of an investigative activity has no correlation to the cost of defending against the information. For example, court-authorized wire intercepts can be very expensive, involving many agents investing many hours to do preliminary investigation and then to monitor, capture, and document the interception, as well as to conduct surveillance and do follow-up reporting. The defense enjoys the fruits of much of this effort and expense and need not incur all over again the full cost of all of that work in order to prepare and present a defense.

I suspect that the real issue here is not the overall parity of resources as apportioned between prosecution and defense, but is actually a problem that arises in a relatively small number of cases that stems from making the courts the sole determiners of indigent defendants' use of experts and investigators in cases with appointed panel attorneys. In most of the cases brought in the Western District of Texas, there is limited need for investigative or expert services to mount a defense. For example, the factual issues in most cases charging illegal reentry after deportation, a sizeable percentage of the docket in the Western District of Texas, are not complex factually or legally. The cases rarely require extensive investigation or an expert. (These cases often require expertise in the sentencing rules, however, and the AFPDs have superior expertise in this area.) The same is true for most routine drug cases. While it does appear that judges generally disfavor appointing investigators and experts for the defense, a former defense lawyer gave me a most plausible explanation for this: for whatever reasons, the judges tend not to understand or appreciate the defendant's particular need for some expertise in specific, non-routine cases. In my view, this is not truly an issue of parity in the overall distribution of resources, but a systemic problem in the way in which indigent defendants must obtain investigative or expert assistance. Assuming there is adequate budgeting, this issue might

be addressed most effectively by raising awareness among the district courts of the genuine need for experts or investigators in specific cases.

## **6. The quality of representation under the CJA.**

The overall quality of defense representation under the CJA in the Western District of Texas is high. The FPD office has an outstanding reputation. They are considered by many to be among the best lawyers in the courtroom. My opinion is that if I were charged in federal court, my first choice would be to have representation by the FPD. They know the law, the procedure, the courts, and the prosecutors. They very effectively identify the issues and cases that should be vigorously challenged and resolve the other cases to their clients' best advantage.

Our experience with panel attorneys is mixed. The quality of panel attorneys varies within and between the branches. Overall, the representation afforded by panel attorneys is adequate or better, and I cannot say that there are any that are not competent. The panel attorneys in the El Paso Division generally are good, and some are excellent. Although there are relatively few panel attorneys in the Pecos Division, they generally range from good to excellent. That panel includes a very capable former AFPD and a seasoned criminal defense lawyer. The panel attorneys are generally strong in San Antonio, Midland, and Waco. And even though Austin does not have a formal CJA plan, the representation is generally very good. The widest range of quality is in the Del Rio Division. Some panel attorneys are very good to excellent; others are not as strong. Perhaps paradoxically, we find that appointed panel attorneys tend to be more competent than many privately retained attorneys. This probably reflects the fact that defendants and their families who hire private attorneys do not have the information needed to identify lawyers with competence and expertise in federal court, while the appointment process includes only attorneys with federal court criminal experience and who regularly appear in federal court.

I would offer the observation that the AFPDs and CJA panel attorneys probably establish the "norm" for representation. The greatest deviations, both above and below that norm, are among retained private attorneys. Retained attorneys range from being excellent or better to being out of their depth. At one end of the spectrum are those lawyers who have little or no meaningful federal experience, or who have minimal competence but advertise effectively. At the other end are lawyers with exceptional ability and national reputations. In my experience, the greatest disparity in quality of representation arises in the few cases where a defendant with extensive resources is able to wage all-out combat in litigation. In these cases, the entire process, not just the prosecution, can be overwhelmed by litigation of every conceivable issue. I can think of no remedy for this, except to offer that the representation in those cases should not be the standard by which representation is judged.

7. The adequacy of support provided by the Defender Services Office to federal defender organizations and panel attorneys.

I have no information to offer.

8. The adequacy of representation of panel attorneys on matters stemming from CJA representations, such as contempt, sanctions, ineffective assistance of counsel, and malpractice claims.

I have no information to offer.

**9. The availability of qualified counsel, including for large, multidefendant cases.**

This is a problem, especially in the Del Rio and Pecos divisions. In the last five years the USAO has brought a number of complex, multi-defendant prosecutions against organized criminal groups. These cases have targeted criminal organizations, such as the Mexican Mafia and Latin Kings, and have joined as many as 30 defendants in a single case. These cases have put a strain on the court in appointing qualified lawyers. Because many of these cases are based in part on the testimony of cooperating defendants, some of whom previously have been prosecuted, a number of otherwise qualified lawyers are not available for appointment. It is sometimes difficult to find enough qualified lawyers in the Del Rio Division to represent all of the charged defendants. The same problem can arise in the Pecos Division. In these cases, the courts have had to reach out to panel members in contiguous divisions, such as the San Antonio division for Del Rio, and the Midland-Odessa division for Pecos. Although it has not directly influenced any filings yet, this problem has prompted the U.S. Attorney's Office to keep in mind the availability of qualified counsel for appointment when deciding where to bring charges for which venue may be proper in more than one division.

10. The timeliness of appointment of counsel.

I am not aware of any issues relating to the timeliness of the appointment of counsel.

11. The provision of services or funds to financially eligible arrested but unconvicted persons for noncustodial transportation and subsistence expenses, (including food and lodging) prior to, during, and after a judicial proceeding.

To the extent this has been an issue in any case, the USAO has not been involved.

12. The availability of reliable data to evaluate the overall cost and effectiveness of the federal defender program.

I have no information to offer.

13. An examination of the national structure and administration of the defender services program under the CJA.

I have no information to offer.

**14. The availability and effectiveness of training services provided to federal defenders and panel attorneys.**

I am not in the best position to report on this. I am aware of some excellent training that the FPD has put on in San Antonio over the last few years. Some was for defense attorneys, and other sessions were open to the entire criminal bar, including AUSAs. I am also aware that the FPD sponsors training in El Paso. I am not aware of any obvious shortcomings or deficiencies in available training.

**Immigration and border issues.**

Cases involving immigration violations or drugs comprised almost 90% of the felony cases the USAO brought during FY 2015. Of the immigration cases, approximately 80% involved single defendant cases charging illegal reentry after deportation in violation of 8 U.S.C § 1326. (Approximately 3230 cases and defendants in FY 2015). For all intents and purposes, all of these defendants were represented by the FPD or other appointed counsel. The FPD undoubtedly handles the bulk of these cases and in my view, lawyers in that office are the subject matter experts in this area. They can recognize and understand the limited defenses to these cases, they understand the nuances and complexities of sentencing issues (especially issues relating to the definition of “crime of violence” that drive sentencing in these cases), they can spot the collateral consequences of conviction, they competently raise defensive and sentencing issues when they should, and they resolve the cases promptly in the best interest of their clients when there are no real issues to fight. The same can be said of their representation of defendants charged with alien smuggling, although those cases tend to be more involved, having multiple defendants and the need to contend with the time limitations for dealing with material witnesses in custody. Over all, the FPD’s handling of the large volume of immigration cases contributes substantially to the prompt and effective administration of an exceptionally heavy court docket.

The FPD demonstrates similar competence in handling a fairly large number of drug cases. El Paso has long produced a large number of drug cases at the ports of entry involving couriers caught transporting drugs concealed in compartments in vehicles. The main issue in most of those cases is the sufficiency of evidence showing the defendant’s knowledge of the

hidden drugs. As with immigration cases, the FPD deftly identifies and contests those cases in which knowledge is in serious dispute, while effectively resolving those to which there is little or no defense. In Pecos, the drug cases tend to involve backpackers on foot; again, the FPD effectively handles those cases. Del Rio has always had far fewer drug smuggling cases, although the FPD capably represents defendants in those cases. The performance of panel attorneys in these cases is consistent with the general comments about panel attorneys above—overall, they provide adequate representation, but not consistently of the same quality as the FPD’s representation.