March 25, 2016

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

Dear Judge Cardone,

Thank you for the opportunity to testify before the Ad Hoc Committee to Review the Criminal Justice Act. Having reviewed some of the hearings the committee has held, and some of the materials that have been submitted to the committee, I am not sure that there is much that I can add to the submissions of those far wiser than I am.

Just for background, I began my career as an Assistant Federal Public Defender in the San Francisco office in 1980, after completing a clerkship with Judge Procter Hug, Jr., of the Ninth Circuit. In 1987, I left to become the Chief Assistant Federal Public Defender in Sacramento (I can offer no reason for leaving San Francisco, other than stupidity). Then in 1990, I left to become the Federal Public Defender for D.C., where I have been ever since (again, I can offer no reason for leaving California).

The District of Columbia

Since our office opened in 1991, we have administered the CJA panel for the district court and the CJA list for the court of appeals. Our office obtains the CJA lawyer for cases where our office cannot represent the defendant. Our office also reviews all vouchers -- for lawyers and experts -- submitted in district court cases (we do not process vouchers for the court of appeals). The vouchers are reviewed, a recommendation is made, and they are sent to the judge for final approval. Because our office processes all the vouchers for every district court case, I am familiar with the practices of each judge.

Ordinarily, there is a perception that D.C. is out of touch with the rest of the country, and does not function well. Fortunately, with respect to the CJA, that is not true. There is essentially no voucher cutting in D.C. in the district court. On the rare occasions that it has occurred -- and, that is only after careful consideration by the judge -- the CJA lawyer has been given a chance to explain, either in person or by letter, before a final decision is made. I am unaware of any voucher that has been approved by a district judge that has been reduced at the circuit level. We do not
process vouchers for the appeals cases - - I have heard of some reductions on those vouchers, but believe it is infrequent.

Currently, the Guide to Judiciary Policies and Procedures recommends, but does make it mandatory, for a judge contemplating reducing a voucher, to give notice to the lawyer and an opportunity to respond. This procedure should clearly be mandatory.

I am also unaware of any case where a request for expert services has been denied. On some occasions, an amount requested in advance has been reduced, with an opportunity to come ask for more when the original amount has been exhausted. That has only occurred when the initial request is for a very large amount of money.

Each court has a CJA committee that reviews applicants and makes selections. Each court has made efforts to increase the diversity of the CJA lawyers. The district court committee is composed of three district judges, a magistrate judge, seven lawyers (some members of the CJA panel and some not), and myself. The court of appeals committee is composed of two circuit judges, two lawyers (one on the CJA list and one not), and myself.

There has been no problem maintaining lists of well-qualified CJA lawyers for both courts. There are more applicants than needed for both courts. The two committees are concerned primarily with one main attribute - - selecting lawyers who will provide high-quality representation. The committees also look for lawyers who speak other languages, and those who may have certain experience, such as immigration cases or other specialized matters. I believe that the CJA lawyers for both courts are of extremely high quality.

In short, the emphasis of both courts in D.C. in CJA cases is that defendants should receive quality representation. There is also a view that the CJA process should assist in that regard, rather than be an impediment. Thus, I believe that D.C. represents a prime example of the current system functioning as it should, to provide quality representation to CJA defendants.

Structure and Organization of The CJA Program

At this stage of your process, you have heard both about strengths and problems of the system. I doubt there is much that I can add that you have not heard before, nor do I have any great insight.

Having been in the system for over 35 years, the first observation I would make is that the system has always been adequately funded, with the exception of sequestration, as discussed below. I do not recall ever seeing a case handled improperly because of a lack of resources. There has always been a sharp contrast in this regard with many state and local public defender systems, some of which are woefully underfunded.
I know that there is a large sentiment for independence, although I think that there are some different views of what exactly that means. This sentiment seems to have arisen anew after the effects of sequester, which caused chaos for both defender offices and CJA lawyers. I observed the effects of that severe budget crisis with dismay, as it brought out the worst in some people. I am not clear, however, that independence in various forms would have been the solution to that crisis.

In fact, I have heard comments from people, who are experienced and knowledgeable, and who have the best interests of the federal defender system at heart, about some kind of independent agency, which range from “committing suicide” to “plain stupid.” There is great skepticism that Congress has shown any zeal to create a new multi-billion dollar agency devoted to federal criminal defense. I have seen no detailed draft of the structure or cost of such an agency. Nor have I seen any notion of how Congress would deal with such a proposal.

I have also seen mention of the military criminal justice system as a model of some kind. Having spoken at a number of JAG trainings and meetings, I can tell the committee that all I have ever heard from JAG lawyers is how they wish their system was more like the federal defender system.

I think talk of independence is meaningless without a solid draft of the legislation needed to accomplish that. Without such a draft, it is very difficult to offer concrete suggestions. Talking in generalities does not really accomplish much. There are so many questions left unanswered, starting with the most basic one - - in an independent system would there still be community defenders and federal public defenders, or would there have to be only one type of organization. There also has to be factored in the likelihood of Congress changing any such legislation.

Other Issue

Having addressed the issues about which I will testify, I feel compelled to address another major issue. The study conducted by the Rand Corporation of relative cases weights is defective in several major respects. The study takes no account of cases in district court: 1.) where all the events took place overseas, and the defendant has before never been in the United States; and 2.) involving classified information. Either of those situations alone vastly complicates cases - - combined, they are an incredible burden in providing adequate representation. In cases in the court of appeals, the study takes no account of: 1.) whether the case went to trial; and, 2.) whether the defender office represented the defendant in district court.

Cases where the events took place overseas present formidable barriers to proper investigation, both of the offense itself and of the defendant’s background. Complicating factors may also include the fact that access to the country where the events took place may be restricted or prohibited, or unsafe. Over the years our office has handled cases where the events took place in Rwanda, Indonesia, Colombia, Iraq, Iran, Afghanistan, Pakistan, as well as numerous other countries. At any given time, we
ordinarily have a number of such cases pending, involving a range of charges, including terrorism, drugs, kidnapping, export controls, and computer crimes. We have also had, in the last several years, a number of cases from American Samoa. The difficulties of travel there, as well as the expense, are daunting.

Cases with classified material also present unique problems. Such material can only be reviewed in a SCIF, under very restrictive conditions. Any pleadings or letters in such cases are subject to review. The extra time required in such cases is exponentially more than a regular case.

As discussed above, our office over the years has handled a number of such cases of each type of case, as well as a number of cases combining both factors. At present, we have several such “combination” cases pending. Likewise, CJA lawyers in the district court are appointed to such cases.

As for appeals, the single most important factor that determines the time necessary is whether the case went to trial in the district court. A second factor is whether our office represented the defendant in the district court.

During the Rand Corporation case weight study, I had a long discussion with one of the leaders of the study. The bottom line is that I was told that there was no way to capture or account for any of the above factors - - whether the offense occurred in a foreign country; whether the case involves classified material; whether an appeals case went to trial; and, whether in an appeal, the defender office represented the defendant in district court. Thus, I believe the Rand study is worthless for the purposes for which it is used.

Thanks again for the opportunity to submit these comments, and to appear before the committee in Philadelphia.

Sincerely,

A. J. Kramer
Federal Public Defender