March 25, 2016

The Hon. 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 and Committee Members:

Thank you for the opportunity to provide testimony to the CJA Study Committee, and thank you for devoting such incredible time and energy to the project.

I have been the Executive Director of the Federal Defenders of New York (FDNY), a Community Defender Office (CDO) covering the Eastern and Southern Districts of New York, since July 2011. I was a trial attorney in the office from 2002 to 2008. Between 2008 and 2011, I was a law professor, first at the University of Alabama where I taught Criminal Law and ran the Criminal Defense Clinic, and then at Stanford University where I directed a criminal defense clinic. I currently teach legal ethics as an adjunct professor at New York University School of Law.

My written submission will focus on my views about solutions to the problems that have already been well-identified by this committee. My conclusion is this: the CJA program should be an independent organization fully outside of the Judiciary. The problems identified by the Prado Committee almost 25 years ago have not resolved. The problems are a natural consequence of the program’s structure, and without significant change, will remain. Indeed, the problems were foreseen at the time of the passage of the Act. The Senate Report accompanying the 1970 amendments that created federal defender offices explained that independence would ultimately be necessary because “the defense function must always be adversary in nature as well as high in quality. It would be just as inappropriate to place direction of the defender system in the judicial arm of the U.S. Government as it would be in the prosecutorial arm.”

Although I advocate for structural change, I do not mean to suggest that all is broken with the CJA program. Nationally, over the many years of its existence, the CJA program has fared far better than most state public defender programs. And in my own districts, the bench has been

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1 S. REP. NO. 91-790, at 18.
incredibly supportive of the work of my office and the CJA Panels. Indeed, the chief judges of my districts, the Honorable Loretta Preska (SDNY) and the Honorable Carol Bagley Amon (EDNY), were leaders in the effort to better fund federal defender offices during sequestration. Many other judges, especially those who have served on the Defender Services Committee, have spent a considerable portion of their professional lives dedicated to improving the program.

But the structural flaws and the problems that flow from them are real and intractable. Just as it would be inconceivable to have judges decide who is hired in a prosecutor’s office, how and whether prosecutors should investigate individual cases, and how much money the Department of Justice should request from Congress, so too it is inappropriate for judges to be involved in those decisions with respect to the defense function.

My thoughts about an independent model are more fully contained in a forthcoming law review article, The Structure of Federal Public Defense: A Call for Independence, 102 CORNELL L. REV. __ (2016). I would be pleased to share a draft of the article with the Committee. Portions of my written testimony below are excerpted from it.

I. A SUMMARY OF THE PROBLEMS

I briefly recap the problems with the current structure in order to place my views about a solution in context.

Judicial Review of CJA Vouchers. Although CJA attorneys from some districts report few problems, others report significant problems. The problems range from unexplained cuts to the attorneys’ hours to denial of outside services such as investigators and experts. Throughout the hearings, Professor Gould has pointed out the low rate of outside services in many districts—sometimes less than five percent. And even when cuts are not made, the fact that lawyers must disclose to the judge sitting on the case the time they spend on particular activities or the reasons why they need an investigator or expert, raises troubling ethical issues regarding confidentiality.

Judicial Selection of CJA Panel Members. The methods for selecting CJA Panel members vary widely around the country. In some places the judges play a small to non-existent role; in others, they play a large role. Even in places where there are no overt examples of judges removing attorneys from the Panel for reasons unrelated to quality of representation, there is a problematic perception by many CJA Panel attorneys that if they raise certain arguments or request too much in the way of resources, they may jeopardize their place on the Panel.

Circuit Approval of Attorney Staffing. In some circuits, the requirement that the circuit approve attorney staffing is not an issue; in others, there have been notorious problems. Part of the reason for resource disparities among offices is directly attributable to this requirement.

Judicial Selection of Federal Defenders. The selection of Federal Defenders by the Circuit was meant to provide some buffer between defenders and the District Courts before
whom they more routinely appear. But Defenders know, or at least perceive, that the Circuit Judges rely heavily on the comments from their colleagues on the District Court bench. Even the Executive Directors of CDOs who are not selected by the judges have observed that the District Court may choose to dissolve the CDO if they are not pleased with the Executive Director. The Committee heard testimony regarding recent events in the Western District of North Carolina where that scenario is playing out.

**Judicial Management of the national budget.** Although the federal defender budget has fared far better than many state public defender offices’ budgets over the years, there have been notable problems. The most glaring issues arose during sequestration. The Executive and Budget Committees were initially slow to respond to the crisis and ultimately disregarded the views of Defenders and Panel Attorneys. Nationwide, Federal Defender offices lost approximately 400 people, roughly 10% of the total staff, and imposed unpaid furloughs equivalent to 20,000 workdays. No corresponding staffing actions were required in any other Judiciary unit. In addition, CJA Panel attorneys saw their hourly rates cut by $15 per hour for a six-month period of time. The staffing and rate cuts were imposed over the objection of the DSC and the defender advisory groups, all of which advocated for delaying CJA Panel payments rather than imposing cuts.

**AO Management of Defender Services.** Defender Services’ placement among other “program services” disregards the fundamentally different role of defenders as compared to other Judiciary units. Unlike clerks or probation officers, the mission of defense lawyers is not to support and serve the judges. Perhaps the most glaring example of the problems that can arise from this arrangement is the way in which information technology has been handled. The testimony from the Federal Defender in the Northern District of California, Steven Kalar, details the serious problems.

**Constitutional Questions.** To the list of concrete problems above, I would add the serious constitutional problems raised by the current arrangement. I will not go into great detail here, but it is not at all clear that Article III permits the Judiciary to play the role it currently does. Supreme Court decisions in *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding the now-repealed Independent Counsel statute), *Mistretta v. United States*, 488 U.S. 361 (1989) (upholding the structure of the Sentencing Commission while noting that it is “unquestionably a peculiar institution within the framework of our Government”), and the cases upholding the federal courts’ authority to enact rules of procedure,\(^2\) teach that when called upon to determine the limits of Judiciary authority to engage in non-adjudicative functions, the courts have given themselves permission to do so only when: (1) the Constitution specifically allows for the activity (such as under the Appointments Clause); (2) the activity inheres in traditional judicial activity (such as procedural rule-making); or (3) other rule-making authority provided by

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Congress is sufficiently limited and confined to traditional areas of judicial competence (such as participation on the Sentencing Commission).

In managing the defense function, judges determine (1) how much money to seek from Congress for the defense program overall (perhaps at the expense of the federal courts’ budget), (2) how to apportion those public dollars among CJA Panel attorneys and public defenders, (3) how to apportion those dollars among defender offices nationwide, (4) what policies covering employment, information technology, and administration to apply to public defender offices, (5) whether individual CJA Panel attorneys are permitted to use those dollars to investigate particular cases or engage in other out-of-court preparations, and (6) who among the bar are permitted to act as CJA Counsel or the head of a Federal Public Defender Office. None of those decisions involves the resolution of disputes between parties to cases or controversies. And little to nothing about these activities is inherently “judicial” in nature.

It is not at all apparent where within Article III this power is found. And the Article III limits are especially significant in light of competing and well-recognized concerns about the importance of an independent defense function. For instance, the Supreme Court has found that a prisoner suing his public defender under 42 U.S.C. § 1983 cannot prevail because his public defender is not, and should not be, a state actor. In that case, the Court discussed the importance of Gideon’s requirement of counsel’s “guiding hand” and elaborated that “implicit in the concept of a ‘guiding hand’ is the assumption that counsel will be free of state control.” The Court concluded, “[t]here can be no fair trial unless the accused receives the services of an effective and independent advocate.”

II. A PROPOSED SOLUTION

There seem to be three plausible ways to try to address the problems identified above. First, the basic structure of the CJA Program, as a unit within the AO, could be maintained and the Judiciary could create policies to ameliorate the problems. Second, Congress could create something similar to the structure recommended by the Prado Report, i.e., an independent agency within the Judiciary. And third, Congress could create an entirely separate independent agency. I propose the third option.

The first option, maintaining the same basic structure, seems unlikely to result in real or lasting change. The problems identified above were identified 23 years ago in the Prado Report, and many of the issues have been repeatedly raised within the Judiciary since then. The Judiciary as a governing body has not addressed them, and there is little indication that it will do so anytime soon. Moreover, some fixes are beyond the ability of the Judiciary to make because of the statutory requirements of the CJA. The second option, adopting the Prado Report’s

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4 Id. at 322 (emphasis added).
5 Id. (emphasis added).
recommendations, would be a dramatic improvement over the current structure, and it has the potential to solve most of the identified problems. But the Prado Report recommendations would require major legislative action, and if such action is taken, I think it worthwhile to consider full independence for both symbolic and practical reasons as discussed below.

The proposal I offer builds on the outline created by the Prado Report and calls for a national center and regional boards. But rather than house the defender program within the Judiciary, an organization would be established by Congress as a stand-alone non-profit corporation. The enabling legislation would establish the process for selecting a board of directors which would then oversee the operations of the federal defense function in the role that the Judicial Conference currently plays.

There are many possible variations on the proposed structure. The legislation could roughly mirror Prado’s recommended national center and local boards, or it could create something else entirely with either greater national or local control. My own proposal calls for the creation of a “Center for Federal Defense” (CFD) governed by a national board of directors consisting of seventeen members. Twelve of the members would be chosen by the chief judges of each circuit, one member from each circuit. The selections would be restricted to a nominating slate of names provided by the federal defenders and CJA Panel attorney representatives from the districts within the circuit. The remaining five at-large members would be chosen directly by the current Defender Services Advisory Group (DSAG). Upon creation of the CFD, a new advisory board of federal defender and CJA Panel representatives would be created to replace DSAG.

Like the Prado recommendation, there would also be specific criteria for board members. No member of the Board could be a judicial officer or a current employee of a federal public defender office or member of a CJA Panel. No member could be an employee of a law enforcement or prosecution office, nor could members have been an employee of such for a period of five years preceding their membership. At least three of the at-large members would be former federal public defender attorneys or former CJA Panel attorneys with a minimum of five years’ experience as such. Board members would serve staggered four-year terms with a maximum of one renewal.

The Board of Directors’ duties, among others, would include selecting the Director of the CFD, approving standards for the provision of defense services, hiring an independent auditor, submitting an annual appropriations request to Congress, and providing an annual report to Congress, the Chief Justice, and the President explaining the financial condition of the organization and the services performed during the prior year.

At the regional level, I recommend circuit-based boards. The number of board members could range in size depending on the size of the circuit. The members would be chosen in a similar fashion and with similar criteria as the national board. The Federal Defender and CJA Panel representatives for the districts within each circuit would nominate no fewer than twice the
number of board members, and the Chief Judge of the circuit would select the members from that slate of candidates. Each regional board would be authorized to hire an administrator who in turn would hire a small number of administrative staff whose primary responsibility would be to manage CJA Panel attorney vouchers and authorize outside services such as investigators and experts. The regional boards would also be charged with hiring the heads of the federal defender offices and developing CJA Plans, which would include a system for the selection of CJA Panel members.

Under this system of national and regional boards, the CJA Panel budgets would be circuit-based. Initial circuit budgets could be based on historical figures, but the national governing board and the CFD Director would be authorized to set those amounts and to adjust funding throughout the year depending on need. Circuit-based funding would accomplish two goals. First, it would provide some measure of accountability and oversight for expenditures. Currently, the CJA Panel budget is a national budget, meaning there is no restriction on the amount spent by any individual district. This means that some districts and circuits may spend large sums and others may spend very little, but there is no incentive or disincentive to be on either end of that spectrum. Although the system works well for those jurisdictions that allow for adequate spending, it obscures those places that deny needed funding. Circuit-based funding combined with removing the judges from the approval process would provide greater rationality along with a conflict-free and independent mechanism for paying counsel.

Second, circuit-based funding, as opposed to district-based funding, is flexible enough to address spikes in resource needs occasioned by large, unexpected cases. While any individual district may see heavy increases, it is less likely that all of the districts in a circuit would experience a sharp increase all at once. And the national budget could be organized in such a way (as it currently is) to leave some room for the CFD to shift funds or hold some amounts in reserve to disburse as needed throughout the fiscal year.

The enabling legislation could also potentially expand the services provided by defenders and allow for the possibility of private grants and fundraising for services not strictly viewed as criminal defense-related. The expansion could help federal defenders more closely mirror the better practices of some state public defender offices that engage in holistic representation that addresses the myriad challenges facing criminal defendants (e.g., mental health and substance abuse, housing issues, family law issues, immigration consequences, and a host of other social services aimed at reducing recidivism and improving clients' lives). Lastly, the organization could provide policy guidance to Congress and the public by providing data and expertise available to defenders but not to other organizations.

There are examples of independent agencies that exist outside of the formal branches of government. As Professor Anne O'Connell writes in Bureaucracy at the Boundary, 162 U. PA.

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L. Rev. 841 (2014), there is a sizable world of what she terms “boundary” organizations—those that do not meet the traditional criteria for federal agencies and commissions, and yet serve important functions within the administrative state.

Although not a perfect analogy because it is not technically a federal agency, the Public Defender Service of Washington, D.C. (PDS), which acts as the local public defender office in the District of Columbia, offers an instructive model. Although the organization is a creature of local D.C. law, PDS receives its funding from the federal government, and it seeks its appropriation from Congress upon submitting an annual appropriations request to the Office of Management and Budget. Its employees look virtually identical to federal employees in that they participate in the federal pension, life insurance, and health care systems, are subject to federal laws relating to workers’ compensation, and are paid salaries not to exceed “the compensation which may be paid to persons of similar qualifications and experience in the office of the United States Attorney for the District of Columbia.”

PDS is governed by an eleven-member Board of Trustees chosen by a panel consisting of the Chief Judge of the United States District Court for the District of Columbia, the Chief Judge of the District of Columbia Court of Appeals, the Chief Judge of the Superior Court of the District of Columbia, and the Mayor of the District of Columbia. The board members must consist of at least four non-lawyers who are residents of the District of Columbia. Judges from either the D.C. or federal courts are not permitted to serve as members. PDS is required to arrange for an independent annual audit and must submit an annual report to Congress, the chief judges of the federal and D.C. courts, and to the Office of Management and Budget. PDS may also accept “public grants and private contributions made to assist it in carrying out” its duties.

Most significantly, PDS is widely regarded as a model public defender office with an outstanding reputation for quality and a successful history of obtaining adequate funding.
III. SHOULD DEFENDERS WANT AN INDEPENDENT AGENCY?

Any large-scale programmatic change comes with risk, and that is especially so for a program that is not thoroughly broken. Assigned counsel in the federal system, whether public defenders or CJA Panel attorneys, are widely regarded as competent, zealous advocates. And the funding of federal public defense, while far from perfect, is also far from the state of constant crisis that exists in many state public defense systems. Those who are wary of, or opposed to, significant structural change have cited three primary reasons: (1) the current system works pretty well; (2) the defender program is better off under the umbrella of the Judiciary than out in the open with Congress; and (3) an independent agency is not a realistic option.

A. Does the Current System Work Well?

With respect to the first concern, I agree that the system of federal public defense on the whole, and as compared to many horribly overburdened state systems, seems to provide quality service. That said, the quality of lawyering, and of public defender systems, is notoriously hard to measure. Indeed, the history of federal criminal defense before the enactment of the CJA offers a cautionary tale about complacency and satisfaction with a system that is later understood to have been badly dysfunctional.

In 1962, two Harvard Law Review editors researched the state of indigent defense in federal courts by compiling surveys and data covering 90% of federal districts, and engaging in field observations and interviews with federal judges and lawyers in nineteen major cities. In describing the typical representation, they noted that “counsel’s role is generally limited to appearances at arraignments and sentencing, discussions with his client and the prosecutor, and occasionally a brief investigation of the case in order to uncover mitigating circumstances.” Most respondents to the survey estimated that assigned counsel typically spent “less than three hours in out-of-court preparation, and in at least three-fifths of the cases he makes only one or two brief appearances in court.” If a client pleaded guilty, “a hurried ten-minute conference in a corner of the courtroom [was] often the sole prelude” to the plea.

Sadly, despite those findings, the vast majority of the lawyers and judges in the system found the quality of representation to be perfectly sufficient. Ninety-three percent of respondents to the survey considered the thoroughness of assigned counsel’s preparation “adequate” or “very adequate.” The vast majority of judges reported that they had little difficulty finding counsel to

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18 Id. at 588.
19 Id.
20 Id. at 589.
21 Id. at 588.
appoint, citing the "considerable prestige of the federal courts" and the desire of younger lawyers "to become known to the district judge and other federal officials." They also noted that "attorneys would be reluctant to refuse a judge's request when they might later have to appear before him on an important matter."

Judges and attorneys in the pre-CJA world overwhelmingly considered that system to be satisfactory despite the system's obvious and significant failings. Although the current system may be similarly well thought of, the problems detailed in the Prado and NACDL Reports are real and persistent over time, and no objective measure of attorney performance exists that suggests the current system is the best among available options.

Without any such objective measurement, we should be concerned about the incentives the current structure creates. Even when actual conflicts between judges and defenders are avoided, the tensions created by the very structure of judicial supervision of the defense function are pervasive. Good relationships with judges often go hand in hand with good advocacy (the old saying, "good lawyers know the law; great lawyers know the judge" comes to mind), but there are times when tensions exist. Lawyers must sometimes make a record when a judge has clearly heard enough. Good advocacy may require asking questions of witnesses or making arguments at trial with which the judge will strongly disagree. As prominent legal ethicists and law professors Monroe Freedman and Abbe Smith have written:

Along with a great deal of mutual respect between judges and the lawyers who appear before them, there is also a considerable amount of tension. One reason for that tension is the fact that the judge and the advocates have different functions. The lawyers are committed to seek justice as defined by the interests of their clients, while the judge is dedicated to doing justice between the parties. From the perspective of the judge, therefore, at least one lawyer in each case is attempting to achieve something to which her client is not entitled. From the perspective of the lawyer, however, the judge is always poised to deprive her client of something to which the client is entitled. In the words of Professor Louis Raveson, "some level of emotional reaction, some degree of temporary animosity, and a measure of turmoil, are part of the natural process of trial advocacy."

The tensions they describe often require attorneys to make judgment calls about the costs and benefits of pursuing a course that may upset the judge. But in the normal arm's length relationship between attorney and judge, those calls are made entirely with the best interest of the client guiding the decision. A lawyer may decide to pick her battles and not file a long-shot motion because an angry judge may deny other better motions. That sort of strategizing and weighing of risk is part of being an ethical and effective lawyer. Not so when the lawyer is

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22 Id. at 591.
23 Id. (emphasis added).
24 MONROE FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS ETHICS 82 (4th ed. 2010).
forced to choose between his own job security and pay and the best interests of the client. That is a fundamentally more troubling conflict and one with significant ethical implications — especially when it is built into the very nature of the practice on a regular basis.

B. Should Defenders Be Concerned About Dealing Directly with Congress?

The second concern, dealing directly with Congress, raises the problem of how best to administer and fund a politically vulnerable but vital government service. Nobody can say for sure how Congress might treat an independent federal defense agency, but there are good reasons to think that it would fare at least as well as it does now. First, an independent agency would not be a brand new federal agency in any practical sense. As the Prado Report noted, and as is still true today, the Defender Services line in the Judiciary Budget is already highly visible. It is the second largest account in the Judiciary budget at an annual appropriation of approximately $1 billion. To the extent that there is risk that the agency would be vulnerable to political interference or backlash, that risk already exists. An independent agency would bring the advantage to defenders of dealing directly with Congress and avoiding the cuts that come from the Judiciary before the Defender Services budget even makes it to appropriators.

Second, federal public defense is not an optional government service. It is constitutionally mandated, and its mission has significant bi-partisan support. The leading sponsors of the CJA included the highly conservative Senators Roman Hruska and Barry Goldwater. During sequestration, one of the leading voices to better fund federal public defense was the conservative Senator Jeff Sessions from Alabama. Liberals, conservatives, and libertarians have all expressed support for a robust federal public defense as a check on overreaching federal law enforcement.

Lastly, a statute could be drafted to include a safeguard for funding by linking a minimum amount of defender funding to a percentage of federal law enforcement and prosecution funding. Similar mechanisms have been used for other agencies and would make sense for the CFD because of its politically vulnerable mission. The defense function is largely reactive—responding to the number of cases and the resources brought to bear on those cases by the prosecution and law enforcement. It only makes sense that funding decisions about new or

26 S. REP. NO. 91-790, at 18.
28 Id.
different law enforcement initiatives be considered in conjunction with the corresponding and necessary defense expenditures. A formula could be developed to tie minimum defender funding to a ratio of DOJ and federal law enforcement funding (to be determined by whatever metrics are most easily tracked). The initial ratio could be determined using the previous year’s ratio, which could be used as a starting point and a floor. For instance, if this year’s defender budget represents 5% of total federal prosecution and law enforcement, that percentage would become the floor for future budgets.

C. Is an Independent Agency Realistic?

The third objection, that the creation of an independent agency is not realistic, may well be true. But nearly all significant pieces of legislation are unrealistic—until they’re not. The CJA itself took many years to accomplish. For twenty-six years, from 1938 to 1964, federal defendants had a constitutional right to counsel that came with no meaningful backing. During those years, several pieces of legislation were proposed and died. Finally, the CJA was passed after a series of reports and studies – but without federal public defender offices, which waited another six years and followed another major report. The Prado Report’s recommendation for independence was issued twenty-three years ago. It was rejected, but every few years another group of commentators is reminded of its call. Perhaps the time has come.

CONCLUSION

A question this Committee will surely have to answer is whether the report it issues should recommend reforms it considers politically feasible or whether the report should reflect the Committee’s views about the best possible system. I would encourage the latter -- in part because I believe such a report would help to shape what we think of as politically feasible. That said, I appreciate the many valid considerations that will surely weigh in that decision, and I am sincerely grateful for the Committee’s work on these difficult and important issues.

Respectfully submitted,

[Signature]

Executive Director
Federal Defenders of New York