

JOINT STATEMENT OF STEVEN G. ASIN AND RICHARD A. WOLFF
to the
Ad Hoc Committee to Review the Criminal Justice Act
March 25, 2016

The two of us worked together for more than 20 years in the unit within the Administrative Office of the U.S. Courts (AOUSC) that was tasked by the AOUSC Director with carrying out certain of his responsibilities with respect to the Defender Services program. During our tenure, we had regular interactions with the Judicial Conference Committee on Defender Services, federal defenders, panel attorneys, judges, court personnel, and components of the AOUSC about all types of legal, policy, financial, and operational matters involving the CJA program. Because we share a common experience and common view, we are jointly submitting this statement. Briefly, our backgrounds include the following:

Steven G. Asin

From February 1988 to November 2013, I served as the deputy to the chief of the unit, with responsibilities that covered all aspects of its operation. Prior to joining the AOUSC I spent 12 years with The Legal Aid Society in New York City, which provided public defense services in all the city's state and federal courts. After two years as a trial attorney, I spent 10 in the Society's Special Litigation Units addressing pressing issues in New York City's criminal and juvenile justice systems through litigation and policy development.

Richard A. Wolff

Almost 25 years ago, I was hired to staff the Criminal Justice Act Review Committee, known as the "Prado Committee" after its esteemed chair, Judge Edward Prado. Following the issuance of the Prado Committee's report, I became a permanent member of the AOUSC's Defender Services Division (and its successor designations) until my retirement two years ago. I served as the chief of the Legal, Policy, and Training Division for most of my tenure. My prior legal experience included working as a legislative assistant for Congressman Abner Mikva (IL), then as his law clerk when he became a federal appeals court judge in the D.C. Circuit, followed by several years of antitrust investigations and litigation at the Federal Trade Commission.

Given the Philadelphia hearing's focus on the structure and organization of the CJA program and our status as former AOUSC staff, this statement focuses on the AOUSC's role in administering the program. We are both proud and grateful to have had careers in an agency of dedicated employees that provides outstanding service to the federal justice system and the American people overall. In working at the AOUSC, we were part of a team that extended beyond the individual office in which we worked, and any credit for the accomplishments of that office and its staff must be shared with others within the AOUSC who supported its work. At the same time, issues within the scope of this Committee's review of the Defender Services program include "judicial involvement." As the administrative arm of the federal judiciary, the mission of the AOUSC is to support the needs of judges in doing their work in adjudicating

cases. In our experience, commitment to this mission compromised the AOUSC's administration of the adversarial system's separate and distinct public defense function. We hope to assist the Committee by pointing out some ways in which we believe these compromises were manifest. In so doing, however, we do not mean to ignore the undeniable successes that the program has had under the judiciary's administration or the support it received from many individuals throughout the AOUSC during our tenure there. It is simply to observe that, just as historically housing the federal judiciary's administrative functions within the Department of Justice was an ill fit (leading to the establishment of the AOUSC in 1939), so too is having administration of the nation's public defense system under the direction of the federal judiciary.

We also are very aware that our memories of some details have faded. In formulating this statement within a short time frame and without access to AOUSC records, we have not attempted to conduct research to confirm every detail. We, of course, are open to working with staff on any follow up needed to flesh out any of the information we offer here.

Until 2004, our office was denominated the Defender Services Division (DSD). Between 1988 and 2004, the AOUSC underwent several reorganizations; under each of these, DSD was part of a grouping of other offices that reported to an assistant director. The DSD chief reported to that assistant director and he, in turn, reported to the Director's office. The offices in these groupings fluctuated, but at one point or another included those with responsibilities for the operation of clerks, probation, and pretrial services offices; court security; and public access/records management. In 2004, DSD was renamed the Office of Defender Services and "elevated" to a "directorate," which meant that it was no longer a part of a grouping of other offices and that its chief, now designated an "assistant director," reported to the Director's office. This status was revoked in 2013 when the AOUSC was reorganized into "departments," and our office was once again placed in a grouping with offices that provide court services and reported to an intermediary manager rather than to the Director's office. At this time, the office received its current designation, Defender Services Office, and we will refer to it by its current acronym, DSO, throughout the remainder of this statement.

The responsibilities assigned to DSO flow from statutory mandates given to the AOUSC Director for administering the judiciary generally (*see, e.g.*, 28 U.S.C. §604) and from the Criminal Justice Act, 18 U.S.C. §3006A [*see, e.g.*, 18 U.S.C. §3006A(g)(2)(A)], or from those assigned to him by the Judicial Conference of the United States (JCUS) [*see, e.g.*, 28 U.S.C. §604(b)(24)]. With respect to the latter, DSO provides staff support specifically to the JCUS's Committee on Defender Services, and more generally, if needed, to other JCUS committees.

The AOUSC is not akin to Executive Branch agencies, each of which has responsibility for carrying out an area of the federal government's executive function. The AOUSC is not the headquarters of the judiciary or a "headquarters" office. The judiciary's executive authorities are held by district courts and courts of appeal in accordance with a statutory scheme. The

JCUS develops and carries out policies within that scheme, and the Director acts on its behalf only to the extent he is requested or directed to do so by the JCUS. (Both the Director and a deputy director are appointed and subject to removal by the Chief Justice of the United States, after consulting with the Judicial Conference. 28 U.S.C. §601.) The AOUSC's primary mission is to assist the courts in carrying out their executive responsibilities pursuant to policies, guidance, and direction from the JCUS. The culture within the AOUSC is one of service and deference to the desires of judges individually and the JCUS institutionally. AOUSC personnel are urged to give advice and counsel based upon their expertise and experience, but it is a fundamental tenet of the AOUSC that courts and the JCUS are the decision makers.

The AOUSC's direct authority over the Defender Services program is similarly limited. As this Committee is well aware, the Criminal Justice Act (CJA), 18 U.S.C. § 3006A, directs that each district shall, with the approval of its governing circuit judicial council, adopt a plan for appointing counsel under the act that may, in addition to establishing panels of private attorneys from which appointments are to be made, also provide for representation by a defender organization. In addition, the act authorizes the JCUS "to issue rules and regulations governing the operation of plans formulated under this section." 18 U.S.C. § 3006A(h). (Consistent with the judiciary's culture of maximizing and deferring to the discretion of local federal courts, the JCUS has not literally exercised this authority and, instead, has elected to issue policy statements and other precatory guidance that are collected in Volume 7 of the Guide to Judiciary Policy, Part A: Guidelines for Administering the CJA and Related Statutes.) The CJA vests authority over the selection of attorneys to be members of local CJA panels in district and appellate courts, and the appointment of federal public defenders (FPDs) in the respective geographic courts of appeals. The CJA provides that courts of appeals set the number of assistant federal defenders an FPD can hire, the AOUSC Director sets the number of non-attorney staff, and the FPD is then responsible for appointing staff and determining their salary levels. The Director submits an annual budget request for each federal public defender organization (FPDO), and the JCUS provides an annual sustaining grant to each community defender organization (CDO). Other provisions in the act involving the Director's authority include responsibility for liability actions against FPDO employees, payments from the Defender Services appropriation, and FPDO reports of activities.

Despite the relatively spare statutory framework, the JCUS and the AOUSC exercise significant influence over the day-to-day operation of the Defender Services program. The CJA did not create a national program with a national governance structure. However, over time, the defenders, panel attorneys, the JCUS Committee on Defender Services, and DSO cooperatively developed processes, programs, and policies that governed the operation of the program in fundamental ways. Under the leadership of its longtime chief, Theodore J. Lidz, DSO focused on helping defenders and panel attorneys work with the Committee on Defender Services to enhance the operation of the program in ways that would maximize the quality of defense services provided while satisfying oversight and accountability requirements inherent in any government program. Among the results of these efforts were:

- An advisory process that provided a means for defenders and panel attorneys to play leadership roles in the development of program policies and practices. This process was greatly enriched by the development of a strategic planning process and plan.
- A budget process for federal defender organizations (FDOs) that worked with individual defender offices to take into account the particular demands of each office's caseload mix and the unique factors affecting the workload in its district.
- A national training agenda driven by the requirements identified by CJA service providers.
- Comprehensive programs for addressing the special demands posed by the death penalty.
- A national approach to meeting the opportunities and challenges of technology.
- A comprehensive personnel classification and payment system for FDOs.
- Initiatives that engaged the Department of Justice in addressing areas of mutual concern.

That the Defender Services program was not a court support program (i.e., it did not support the operation of clerks' offices, judges' chambers, courthouse operations, etc.) had both advantages and disadvantages. On the one hand, the fact that the program did not directly affect the general operation of the courts meant that there was often little interest among judges in many of the CJA initiatives undertaken. As long as the budget impact of an initiative was neutral or minimal, it often drew only limited reactions from officials in the AOUSC and JCUS. For example, because the Defender Organization Classification System (DOCS) was budget neutral, it attracted little attention when it was first adopted. Similarly, initiatives to create a national system of district panel attorney representatives also went forward with little controversy. Nor was any particular note taken when defenders first proposed, and the Committee on Defender Services developed, a national strategic plan outline for the program, including a mission and goals statement. For many years, the listing of training programs that constituted the annual training plan approved by the Committee on Defender Services also drew little attention.

On the other hand, the Defender Services program's distinct mission and separate constituency often made it difficult for DSO to carry out its responsibilities in this environment. The AOUSC maintains a singular focus on service to judges and courts – enhancing their ability to perform their adjudicatory function – through a highly structured management characterized by uniform procedures and a rigorous coordination process. Every initiative and issue presented to a JCUS committee has to be cleared through the AOUSC's Office of Judicial Conference Secretariat (OJCS) to ensure that it is consistent with JCUS policies. OJCS requires that every AOUSC office with a possible interest in the issue be given a chance to comment on it. This process helps ensure that the varied interests and views of judges and other components of the judiciary are brought to bear on any actions taken by the AOUSC. But because the public defense function is distinct from the judicial function, and one that Congress funds through a judiciary appropriation that is separate and independent of the funds it

provides for the operation of the courts, the insistence on bringing judicial and other perspectives into all aspects of the CJA program's administration is often problematic.

Outside of DSO, most elements and individuals within the AOUSC are not aware of the CJA's statutory framework and the limited authorities that the courts have over FDOs and panel attorneys compared, for example, to the direct supervisory role they have over units such as clerks' and probation offices. In general, AOUSC employees lack criminal defense expertise and are often unfamiliar with the issues that inhere in managing a public defense system.

Like their other AOUSC colleagues, DSO staff need a developed understanding of the federal judiciary's mission and operations. But, to be effective, DSO staff also need to understand the role and responsibilities of a criminal defense lawyer, including counsel's ethical obligations regarding zealous and conflict-free advocacy, client confidentiality, and the duty of loyalty an attorney owes to his or her client. They have to understand the factors that can affect the amount and nature of the resources that an effective defense requires. They have to know the procedures governing the appointment of counsel and the issues that come up in carrying them out. The need to preserve the independence of the defense function, while attending to the funding, administration, and oversight of a public defense system, creates issues typically not present in other areas of the AOUSC's work.

Because employees in the AOUSC generally lack public defense system expertise, issues that were straightforward for DSO staff were often viewed as unusual or unique, and sometimes difficult, by those in other offices within the AOUSC. As a result, moving issues through the AOUSC coordination processes was typically more time consuming and arduous than it would have been in an agency with a public defense mission. For example, DSO staff helped prepare judges and other AOUSC staff who were meeting with Department of Justice (DOJ) officials in an effort to obtain fast-track declinations in certain types of death-eligible cases in which DOJ could readily determine *not* to seek death without defense counsel input. Constant vigilance was required in this process to avoid having meeting participants pressure DOJ to make a decision to *seek* the death penalty before defense counsel had an opportunity to develop relevant mitigation evidence and DOJ had the time to fully consider the pros and cons of authorizing the death penalty in the individualized circumstances presented by a particular case.

At the same time, when other elements within the AOUSC, working on behalf of a JCUS committee they served or pursuing a directive, addressed policy and operational issues affecting the courts, they often included FDOs in the sweep of their proposals, sometimes inadvertently and at other times not realizing the inadvisability, if not inappropriateness, of doing so. Oftentimes, the coordination process would not bring such proposals to DSO's attention until very late in the process, which made effecting necessary changes to the policy more complex and time consuming. While this might be viewed as an issue that could be addressed by improvements in the coordination process, its persistence over time suggests it is

inherent in having the Defender Services program managed by an agency devoted to judicial administration.

As an example, a few years ago the Executive Committee had concerns about the number of volunteer attorneys from law firms who were being utilized as chambers staff and asked certain JCUS committees to examine the issue. The Codes of Conduct Committee expressed the view that it created the potential for conflicts of interest with the private firms' clients. It went on to preliminarily decide that the same would hold true for FPDOs, noting that U.S. attorneys' offices had also ceased the practice. No one from DSO, the defender community, or the Committee on Defender Services had been consulted in advance; rather, after the initial determination had been made and reported, there was an opportunity to respond, which entailed a higher burden to reverse the course. It was pointed out that defenders, who made extensive use of law firm volunteers, did not face the conflict-of-issue problems that the courts and law enforcement officials had. The matter could have been preempted if there had been early consultation or a better appreciation of the defenders' circumstances.

Another example can be found in the area of records management and retention, where the issue of whether defenders' client files were "public records" created confusion and complexity as the AOUSC staffed the JCUS effort to adopt uniform policies in this area.

It is understandable that general members of the public, members of Congress, or even a public defense oversight entity might require education about the need to balance preservation of defense counsel independence with appropriate oversight, or the impact on resource requirements of the evolving demands of criminal defense practice. But it is inefficient at best, and counterproductive to sound decision-making, for an appreciation and understanding of these issues to be foreign to those involved in the day-to-day administration of a public defense system.

Nowhere was this "one size fits all" mentality more problematic than in the budget area. Despite an annual budget crisis being the norm, throughout our shared AOUSC experience the Defender Services program was relatively well-funded by Congress compared to the judiciary and the federal government agencies in general. (The one significant exception to this statement was the constant struggle to have panel attorney hourly compensation rates increased to what is needed to ensure the availability of highly qualified private attorneys who are both willing to accept CJA appointments and are provided with the needed resources to furnish effective representation.) There are a number of reasons for this, which are beyond the scope of this statement. Without regard to the adequacy of the Defender Services appropriation, however, whenever there was a budget shortage requiring cuts to be made in the courts, there was always pressure placed on DSO staff to develop proposals for "sharing the pain" within the Defender Services program in general and among FDOs in particular. These pressures evolved over the years and eventually were expressed as formal decisions by the

JCUS Budget Committee adopted by the JCUS or through actions and decisions of the JCUS Executive Committee.

For example, in the early 1990s the AOUSC worked with the JCUS Budget Committee to develop an approach whereby the Defender Services appropriation, the distinct appropriation Congress mandated for funding Defender Services program requirements [see, 18 U.S.C. 3006A(i)], would be included with all other judiciary appropriations to calculate the overall “judiciary” increase reflected in the judiciary’s annual appropriation request. This was then incorporated into the Budget Committee’s processes for recommending annual appropriation requests to the JCUS. The Budget Committee’s annual summer “budget meeting,” in one form or another, includes a day spent with the chairs of JCUS committees responsible for developing any part of the judiciary’s appropriation requirements at which a collective effort is made to reduce the overall request to a target level. In some of the early years of this process, leadership of the Budget Committee would address the gathering of “spending committee” chairs, advise them of the percentage cut to their collective request that was required, and then leave the room with the expectation that the chairs would resolve how much of a cut each program would accept to achieve the desired result. While this process changed over the years, from the Defender Services program’s perspective it always had one essential common element: an effort to reduce the Defender Services appropriation request to assist in the effort to reduce the overall size of the judiciary’s request.

In simple terms, this budget process reflects the overarching way in which Defender Services funding needs have come to be viewed among those responsible for advocating for the funding before Congress: Defender Services and court operations requirements are considered to be in direct competition for a limited amount of funds that the judiciary’s congressional appropriation committees can make available for these requirements collectively. As the longstanding chair of the JCUS Budget Committee has expressly articulated this position, a dollar for the Defender Services program is one less dollar for the courts.

Whether or not there ever was, or is now, a direct, or even indirect, relationship between the amounts Congress provides for Defender Services and court operations can be questioned. Doing so is beyond the scope of our statement. We also do not address whether, since the CJA links the courts and the public defense function, there may be legitimacy to the view that the funding for the two should be related.

Our point, rather, is that the current administrative framework suffers from the view that the financial interests of the Defender Services program and the courts are at odds. Coming from JCUS leadership, the perception that funding for the Defender Services program drains potential court resources drives virtually every aspect of the AOUSC’s administration of the Defender Services program and impacts the way other judiciary components carry out their CJA responsibilities. It has led to initiatives to curb FDO spending and constrained the

willingness to seek panel attorney rate increases. It has caused judges to reduce panel attorney vouchers as a means to preserve the budget, even though JCUS policy dictates otherwise.

One consequence that is of particular significance was the JCUS Executive Committee's decision to transfer the Committee on Defender Services authority over FDO staffing determinations to the JCUS Committee on Judicial Resources in order to bring the management of FDO staffing allocations into line with that of clerks and probation offices. The Committee on Judicial Resources develops work measurement formulas for court employees. The subsequent work measurement process for FDOs is a matter about which other sources have addressed this Committee, and we will not pursue its merits substantively here. But the AOUSC's role as the Executive Committee was making this jurisdictional transfer decision is illustrative of points previously offered regarding AOUSC processes.

DSO first learned of the change when we were invited to a meeting in the OJCS and were provided with a copy of the signed Executive Committee memorandum announcing the change. Over the following weeks, we learned that others in the AOUSC whose committees were involved, specifically the staff of the Committee on Judicial Resources, were made aware of the change in advance and had an opportunity to comment on the new jurisdictional language. Even when information about CDOs was being sought, a component of the CJA program with which DSO had full expertise, the question went to staff of the Committee on Judicial Resources, which had none. When asked why DSO had not been consulted despite the AOUSC coordination processes for which OJCS had significant responsibility, OJCS staff indicated that the jurisdictional decision was the Executive Committee's call – so they said nothing to us, while others were brought into the loop. In short, JCUS/AOUSC decisions with major impacts on the Defender Services program were made without DSO participation, thus highlighting the structural problems in the program's current oversight.

The judiciary's response to sequestration reflected some of the tensions in its oversight of the CJA program. As noted above, Congress has a history of favorably responding to Defender Services program requests. While there have been good and bad years for the program's funding, the essential element of its success has been that the services it provides are constitutionally mandated. In general, Congress has accepted that FDOs are efficiently operated and well managed. Historically, it has endorsed the view presented by the judiciary that if FDOs are not funded to accept the maximum number of representations possible, the representations that remain will necessarily have to be provided by a less efficient system of appointing individual private panel attorneys. Consequently, during the several funding shortfalls that the program encountered during our tenure with the AOUSC, Congress accepted spending plans that provided funding for FDOs at whatever their then-current staff level was with the understanding that any shortfall in projected panel attorney payment requirements that resulted would be satisfied either by suspending them until a supplemental appropriation could be enacted or funds were made available in the following year's appropriation.

There is a great deal that can and has been said and debated about how the judiciary managed the Defender Services program during sequestration. Our point here is limited: The JCUS Executive Committee's actions, and the AOUSC staff work that supported those actions, were premised on the notions that FDOs needed to share the pain, and that FDO resources could be reduced without impacting their caseloads and creating a need to fund additional panel attorney representations. The effect of those decisions was to force FDOs to absorb immediate budget cuts that led to furloughs and terminations. The Executive Committee also broke with all precedent and imposed a temporary reduction to the hourly compensation rate for panel attorneys, a rate that has been chronically low and that had been raised to its then-existing level only after years of efforts. Unlike what occurs when panel payments are suspended, the money lost by panel attorneys on the rate reduction was not restored. Ultimately, the federal defenders and panel attorneys reached out to congressional representatives, and the plight of the program was addressed, but only after considerable damage had been done.

As mentioned earlier, the AO reorganization had much of the same flavor with respect to Defender Services: moving the office from directorate status to a component of a newly created Department of Program Services, in effect demoting the chief of the office, and dispersing Defender Services program IT and data functions to other offices. The homogenization of the CJA program as another court program is inconsistent with the differences in the mandates of those charged with providing administrative and policy support for the public defense function and those charged with supporting judges in carrying out their adjudicatory role.

Having said this, in addressing the significance of the demotion of DSO, it is worth noting that the Committee on Defender Services' loss of elements of its jurisdiction and the decision to move to a work-measurement based staffing formula for allocating FDO resources, as well as the decisions made regarding Defender Services program funding during sequestration, all occurred while DSO was still a directorate. The essential problematic aspect of the current administrative structure of the Defender Services program is that it is situated as one of many elements of the judiciary, and as such, its interests, at best, are addressed as part of the judiciary's other interests and, at worst, are balanced against those other interests.

This is not to say that the program would not be better served if it were a separate directorate even if no other changes to the Defender Services program were made. As referenced previously, the AOUSC has a tightly controlled management structure. Approvals are required for many of the day-to-day decisions that must be made to operate DSO and move forward with the administrative work needed to advance the program's work. Restoring DSO to the type of status it enjoyed prior to the last AOUSC reorganization would facilitate its daily operations while reducing the burden on those other AOUSC elements that now are involved in DSO processes and decisions that have little to do with the core concerns of the court program areas for which they are responsible.

In offering this critique, we do not want to take away from the many successes the judiciary as a whole, the judges who served on the Committee on Defender Services, defenders and panel attorneys, and especially our former colleagues at DSO have had in developing and operating the highly acclaimed federal public defense system. We have discussed the constraints in which we operated and not focused on the accomplishments achieved while acting within those constraints. And there were many. Both of us enjoyed wonderful careers with the AOUSC, and we appreciate the many ways in which it was a terrific place to work.

At the same time, however, we believe that much of what was accomplished by all of us who dedicated ourselves to the advance of the right to counsel at the federal level was, and continues to be, made more difficult by having the Defender Services program operate under judicial supervision rather than with oversight by an entity with federal criminal defense expertise. For example, it is wonderful that the federal system provides a mixed system of representation by both private attorneys and an FDO in almost every federal judicial district. But the JCUS policy favoring the presence of an FDO in districts was adopted in 1993. It took another 20 years to make nationwide FDO coverage close to being a reality in large part because of the limitations present in the authority the CJA gives to the judiciary as a whole and to its governance institutions regarding the Defender Services program. Other examples are evident in the problems that have been brought to this Committee's attention during the course of its study.