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Honorable Kathleen Cardone
Chair, Ad Hoc Committee to Review Criminal Justice Program
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE
Washington, DC 20544

Dear Judge Cardone and Honorable Committee Members:

Thank you for the opportunity to appear and testify at your Portland hearing. By way of background relevant to your committee, I was the Federal Public Defender for the Western District of Washington for 32 years. While the Federal Defender I occupied a number of national leadership positions that allowed contact with both chambers of Congress, the United States Sentencing Commission and various sections of the Administrative Offices of the United States Courts (AO). I was a member of the 1993 Ad Hoc Committee to Review the Criminal Justice Act (Prado Committee) and I am currently on the CJA Panel for the Western District of Washington.

A. Introduction

My comments focus on the principle of public defense independence as relates to the operation of the CJA. Preservation of that principle has been a matter of concern since inception of the CJA. Placement of the direction of the CJA within the federal judiciary was done reluctantly for fear that CJA independence might be compromised. Notwithstanding those concerns, in its 50 years of operation, the CJA program has seen enormous growth, the overall quality of representation has improved and the CJA program has become a critical, indispensable component of the federal criminal justice system. But, as the program grew, judicial controls increased and the independence of defenders and CJA lawyers suffered. Sequestration all but ended the independence of federal public defense.

We are at critical point in the CJA's history and the work of this Committee could not be more timely. Strong, smart, forward looking recommendations based on information gathered from your effort and outreach offer the best chance for collaborative solutions to the problems panel lawyers and defenders suffer under the current CJA management structure. I think a quick look back offers helpful insight.

B. The Prado Committee and Its Aftermath

As this Committee is aware, in 1993 the Prado Committee identified a long list of issues and problems associated with the operation of the Criminal Justice Act (CJA) and recommended changes designed to improve both the quality of representation provided by appointed lawyers and the administrative operation of the CJA. The point of all the recommendations was to advance the principle of equal access to justice. Many of the specific recommendations of the Prado Committee were adopted by the Judicial Conference (Conference). For example, the Conference supported increases in compensation for panel lawyers, increased training for federal defenders and panel lawyers alike, enhanced expert, investigative and paralegal support for panel lawyers and, importantly, a *de facto* increase in the stature and responsibility of the Defender Services Committee (DSC). Rejected by the Judicial Conference was the Prado Committee's most controversial recommendation, establishment of an independent center for federal criminal defense services which would remain located within the judicial branch.

The Conference rejected the call for an independent center for a number of reasons, offering that perceived concerns with independence were supported by little more than anecdotal statements and the potential of occasional abuse. The Conference asserted that defenders and panel lawyers enjoy both "professional and administrative" autonomy from the courts and correctly observed that federal defenders were overwhelmingly opposed to creation of the proposed center. Lastly, the Conference questioned the cost of a new center and suggested defenders could not survive without the support of the courts because they "have no constituency, no powerbase, and no better champion than the judiciary".

In my view, the Conference backed up its implied commitment to champion the defense function in the years immediately following the Prado Committee's report. As noted above, it supported and implemented many of the changes suggested by the Prado Committee and, importantly, it largely deferred to the judgement of the DSC as to the funding, staffing and operation of Defender offices. I believe our former Chief Justice, William H. Rehnquist, set the tone for the changes. Chief Justice Rehnquist was a fierce advocate for judicial independence and recognized that the defense function, awkwardly placed within the judiciary, deserved and required similar independence.

In ensuing years and despite the demands and challenges presented by the Sentencing Guidelines, mandatory minimum penalties and enactment of ever-more federal crimes, defender offices grew and flourished. Panel lawyers received better pay and training, though they continued to suffer voucher cutting and judicial interference with attempts to obtain needed expert and investigative services. It seemed we were making progress though some, like former San Diego Federal Defender John Cleary, were skeptical and worried that "the judiciary, as the weakest branch of the Government, has a difficult time securing funding for its own programs,

and if its funds ever need to be restricted, the federal defender step-child will be the last to be considered and the first to be cut." John J. Cleary, *Federal Defender Services: Serving the System or the Client*, 58 Law and Contemporary Problems 65, 72 (1993).

C. The Impact of Sequestration

John Cleary was right. In the years immediately preceding sequestration, screws began to tighten. Voucher cutting worsened and judicial scrutiny of funds dedicated for CJA purposes increased. Defender offices endured costly and time consuming case weighting and work measurement studies. It is noteworthy that these studies, as observed by U.S. District Judge Kathleen M. Williams in her testimony before this committee, uniformly concluded that defender offices were operating competently and, in some instances, recommended increased support and funding.

With the arrival of sequestration, the Conference abandoned its post-Prado commitment to the "professional and administrative autonomy" of CJA lawyers and federal defenders. The DSC was stripped of its authority to develop a spending plan for the CJA appropriation, the Office of Defender Services was demoted from a distinct high level office and lumped together with service programs within the AO such as data analysis. Decisions related to managing the CJA appropriation were delegated to the Judicial Conference's Executive Committee (EC) which operates behind tightly closed doors. CJA management decisions made by the EC were damaging and evidenced a lack of understanding of the operation of defender offices and the work of CJA lawyers. Manydefender employees were fired due to insufficient funding and many more suffered loss of income through furloughs. Funding for CJA lawyers was delayed and/or reduced. Criticism of decisions made by the EC was loud and came from not just defenders, but the Department of Justice, Congress and a host of organizations concerned with criminal justice. Through their own efforts and without a judicial champion, "powerless" defenders won a rare supplemental appropriation in Congress, saving possible irreparable damage to the program.

But judicial interference with the defense function did not wane. Last year, in an astonishing opinion, the AO decided that federal defenders could not fully participate in the Clemency Project. NACDL's then president, Theodore Simon, offered his view that "any system that would foreclose a lawyer from representing pending or former clients who have a chance to secure their freedom is a system that must change". The subjects of the Clemency Project are people who were sentenced to terms of imprisonment that, under today's laws and sentencing policy, are seen as too harsh. It was a crushing emotional blow to defenders to be told they could not help former clients suffering over-punishment. But, the more damaging consequence of the AO's decision is that many eligible prisoners will not have petitions for commutation processed in time for consideration.

D. The Current Lay of the Land

Testimony presented to this Committee to date evidences continuing and growing concern with judicial control over defense requests for funding and for expert and investigative services necessary to effectively represent clients. CJA lawyers report that they feel discouraged and disrespected. FPD Michael Caruso of the Southern District of Florida wrote that he senses "that this appears to be a particular low-point in the Judiciary and Defender relationship." As a participant in the system for better than three decades, I agree. There needs to be change.

Given the current state of affairs, I believe positive progress starts with an attitude change in the judiciary. As correctly observed by the Prado Committee, "our system of justice is predicated upon the assumption that the product of vigorous adversarial competition between two independent and equal forces, the prosecution and defense, before a fair and impartial judiciary, will best assure the emergence of truth, the triumph of justice, and the resulting faith of society in its government and institutions." (Prado Committee Report, p. 9)

Demotion of ODS and DSC demonstrates that governing authorities of the federal judiciary have lost track of the assumptions underlying the principle of equal justice. Rather than championing a force equal to and as independent as federal prosecutors, federal defenders and CJA lawyers are deemed employees of the U.S. Court's Department of Programs and Services – like number crunchers in the data analysis group. We are viewed administratively as servants of the Courts. This lumping of CJA representations with general court services ignores the fact that CJA lawyers and federal defenders work for their clients, not judges. By standing toe to toe and on equal footing with prosecutors, we enable judges in fulfilling their function of fairly and impartially dispensing justice.

Despite my level of experience in the federal criminal justice system, I am at a loss to understand workings in the upper echelons of the federal judiciary. It is mysterious and cloistered territory. Thus, I do not underestimate the difficulty of this Committee's task in calling for judicial recognition that CJA lawyers and defenders are not employees, that we work for our clients, and that our work demands, deference and independence equal to deference afforded the government prosecutors. But the call must be made or achievements post-Prado will be lost.

Judicial oversight is largely well-intentioned. But, as witnesses have testified, judges often reduce vouchers and frequently question defense requests for expert and investigative services. Judges sometimes offer that work on behalf of our clients is outside the scope of a CJA representations and not compensable. In this vein, we hear judges characterize critical effort on behalf of our clients as "social work", questioning its worth. Judicial scrutiny is sometimes respectful but sometimes a bit overbearing. It might flow from budgetary concerns or simply not

fully understanding what must be done to effectively represent our clients. Whatever its form or motivation, it is exceedingly uncomfortable given its *ex parte* nature and our concern that our reaction might imperil our clients. Circuit Judge Stephanie Seymour described such oversight as "unseemly" given the imperative of defense independence. Prado Committee Report at page 44.

Below I offer some unoriginal suggestions for change. Should judges agree to systemic change, I believe the quality of lawyering and the sound administration of CJA panels, will improve. Where federal defenders have taken over administration of CJA panels, as in Oregon and Western Washington, the quality of the panel representation improved as did lawyer morale. Similarly, with the elimination of judicial involvement in the CJA vouchering system, the overall quality of lawering will improve because and consistent with the testimony of Puerto Rico attorney Rachel Brill, lawyers will not fear or face "burdensome court scrutiny", "resistance", and "bureaucratic excuses" when asking for experts, investigators and compensation for their work. Today, some lawyers in some districts are discouraged and intimidated by judicial scrutiny and simply do not ask for needed services. In these situations, the clients suffer.

E. Suggestions

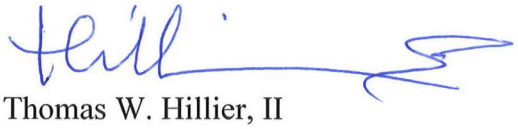
As to your ultimate recommendation on a model to suggest to the Conference, I believe an independent defense center within the judiciary would be the best vehicle for full and appropriate change. Past experience suggests this may be tough to accomplish and, in any event, would take significant time. Meanwhile, and urgently, I respectfully encourage the Committee to:

--ask that the authority of the DSC be immediately restored.
--restore the stature and place of ODS within the AO.
--assure that decisions and recommendations of both the DSC and ODS be afforded the highest order of deference.
--assure that the DSC and any other Judicial Conference committee involved with decisions related to the administration and/or funding of the CJA have defenders, CJA lawyers or judges who were formerly defenders as members or active participants.
--divest entirely and as soon as possible district and circuit judges of any decision making authority with respect to payment and expert and investigative service requests from panel lawyers.
--recommend that CJA panels in all districts be administered by defenders and not the courts.
--assure that defender offices are sufficiently funded and trained to take on CJA panel administration responsibility
--recommend that the selection and oversight of panel lawyers be handled by local committees of lawyers knowledgeable about and committed to indigent defense.

--assure that the selection of the FPD involves a process that is uniform throughout the country and is performed by lawyers with indigent criminal defense experience.
--promote appointment of a Federal Public Defender as an ex-office member of the United States Sentencing Commission
--support federal defender legislative detailees in both chambers of congress.

Thank you again for this opportunity. I look forward to testifying in Portland on February 3rd.

Respectfully submitted,



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