

**COMPILATION OF
BACKGROUND HISTORY AND INFORMATION
U.S. FEDERAL DEFENDER PROGRAM
December 2005**

I. GUIDING PRINCIPLES

The right to the effective assistance of counsel is a constitutionally mandated, critical component of the criminal justice system and the foundation upon which the liberty of all Americans is protected. In exploring structural issues, the mission of the Defender Services program must be the central objective:

The mission of the Defender Services program is to ensure that the right to counsel guaranteed by the Sixth Amendment, the Criminal Justice Act (18 U.S.C. § 3006A), and other congressional mandates is enforced on behalf of those who cannot afford to retain counsel and other necessary defense services. By fulfilling its mission, the Defender Services program helps to (a) maintain public confidence in the nation's commitment to equal justice under law and (b) ensure the successful operation of the constitutionally-based adversary system of justice by which both federal criminal laws and federally guaranteed rights are enforced.

II. STRUCTURAL HISTORY

Historical Background

In passing the Criminal Justice Act of 1964, the Congress established within the judicial branch a program to provide compensation and expense reimbursement for attorneys appointed to represent individuals with limited financial means in federal criminal proceedings. Until then, there was no authority to compensate appointed counsel for their services, and federal judges depended on the professional obligation of lawyers to provide *pro bono publico* representation to defendants unable to retain counsel.

The goal of the Criminal Justice Act of 1964 was to ensure the Sixth Amendment right to effective assistance of counsel and equal access to justice in the federal courts. The Act adopted many of the recommendations included in the *Report of the U.S. Attorney General's Committee on Poverty and the Administration of Criminal Justice* ("*Allen Report*"), submitted to Congress in March 1963, with respect to financial eligibility for representation, compensation and reimbursement of appointed counsel for out-of-pocket expenses, provision of necessary defense services other than counsel, and the requirement that each federal district court and court of appeals devise its own plan for furnishing representation to eligible defendants, utilizing either representation by private attorneys, representation by attorneys furnished by a bar association or legal aid agency, or a combination of these alternatives. The Congress deferred adoption of other proposals, such as the *Allen Report's* recommendation for creation of federal defender organizations (FDOs).

In 1967, the Department of Justice and the Judicial Conference commissioned Professor Dallin H. Oaks of the University of Chicago Law School to evaluate the initiatives implemented by the Criminal Justice Act of 1964. The *Oaks Report (The Criminal Justice Act in the Federal Courts, December 31, 1967)*¹ recommended statutory amendments and changes in the administration of the Act, to include establishing federal public defender and community defender organizations as options for the district courts' plans. As a result, Congress amended the Act in 1970 to provide for two types of FDOs, public defender organizations and community defender organizations. The former are federal offices staffed by federal employees and funded through a federal budget process. The latter are, generally, private non-profit corporations that are staffed by private employees and funded through a grant process. In authorizing FDOs, Congress recognized the need for a strong, independent federal defender program and emphasized the need for ongoing congressional review of its structure.²

The committee recognizes the desirability of eventual creation of a strong, independent office to administer the federal defender program. It considered as a possibility the immediate establishment of a new, independent official - a "Defender General of the United States." It also considered establishing a special directorate for defender programs within the Administrative Office of the United States.

The committee, however, does not recommend founding an independent office at this initial stage. Such a step would be premature until Congress has had a[n] opportunity to review the operations of the defender program over the course of a few years. Nor does it recommend placing the overall direction of these programs in the Administrative Office. Clearly, 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. Consequently, the committee recommends that the need for a strong independent administrative leadership be the subject of continuing congressional review until the time is ripe to take this next step.

In 1991, as required by the Judicial Improvements Act of 1990 (Pub. L. No. 101-650), the Committee to Review the Criminal Justice Act was established to conduct a comprehensive analysis of the CJA program. This special Judicial Conference committee, chaired by Judge Edward C. Prado (then a district court judge in the Western District of Texas and a member of the Defender Services Committee), was appointed by Chief Justice William H. Rehnquist.

¹ Reprinted in Senate Committee on the Judiciary, 90th Cong., 2nd Sess. (1969).

² Senate Report No. 91-790, 91st Cong., 2nd Sess., April 23, 1970, at 18.

Almost all recommendations presented in the *Prado Report (Report of the Committee to Review the Criminal Justice Act, January 29, 1993)*³ were adopted by the Judicial Conference. However, the “centerpiece” of the Committee’s recommendations – to create within the judicial branch a new Center for Federal Criminal Defense Services – was not. In March 1993, the Judicial Conference rejected the idea in its *Report of the Judicial Conference of the United States on the Federal Defender Program (Judicial Conference Report, page 18)*, advising Congress that “National leadership and administration of the CJA program should remain with the Judicial Conference of the United States, assisted by its Committee on Defender Services and the Administrative Office of the United States.”⁴

The *Judicial Conference Report* (pp. 16-17) explained that the Prado Committee’s recommendations “were justified on the assumption that there is a ‘perceived’ need for complete independence of defenders from the federal judiciary” and that the Prado Committee “had presented no empirical data to support its recommendation.” It asserted that (a) creation of the Center “would subject unnecessarily the entire CJA program to politicization and heightened vulnerability,” (b) “criminal defense programs have no constituency, no power base, and no better champion than the judiciary,” (c) creation of a new Center would result in “elimination of involvement by the judiciary in CJA issues and a diminution in the degree of judicial support for CJA appropriations requests and programs,” and (d) the money required to establish the Center “would be better spent on funding more new federal defender offices.”

III. PROGRAM GOVERNANCE AND ADMINISTRATION

Various entities provide control, oversight, guidance, or assistance with respect to program management or the delivery of representational services under the CJA and related statutes. The oversight and operational structure of the program is outlined below.

Administration and Management of the Defender Services Program

- *The Judicial Conference*, as the policy making body for the federal judiciary, promulgates guidelines and policies for the administration of the CJA and related statutes.⁵
- *The Judicial Conference’s Committee on Defender Services* is the primary body charged with national policy formulation for and fiscal and administrative oversight of the

³ Reprinted in *The Criminal Law Reporter* (Bureau of National Affairs), Vol. 52, no. 22, March 10, 1993.

⁴ See also, *United States Courts: Selected Reports*, Reports of the Proceedings of the Judicial Conference of the United States (1993), Activities of the Administrative Office of the United States Courts, Judicial Business of the United States Courts, Section I, pp. 23-28.

⁵ The CJA provides that the Judicial Conference may issue rules and regulations governing the operation of plans formulated under the Act. 18 U.S.C. § 3006A(h).

program. It recommends policies and funding priorities and monitors the expenditure of CJA funds, advises the Judicial Conference of developments that require additional resources, and, when the budget is being prepared, proposes funding requests to support the program. The Committee makes legislative and policy recommendations to the Conference, including proposals to amend the CJA Guidelines. While the Conference has delegated to the Committee the authority to approve funding for individual FDOs, it retains the ultimate authority to approve guidelines, policies, or funding for the Defender Services program. (See Volume 7 of the *Guide to Judiciary Policies and Procedures*.)

- *The CJA Guidelines* are non-binding statements of Judicial Conference policy that are intended to guide judges and attorneys with respect to implementation of the Act.
- *The Administrative Office of the U.S. Courts* is the administrative component of the federal judiciary. Its Director is responsible for overseeing the expenditure of funds appropriated by Congress for the administration and operation of the federal appellate and district courts, and various programs and activities placed under the judiciary's supervision, including the Defender Services program.⁶
- *The Office of Defender Services*, Administrative Office of the U.S. Courts, functions as the primary administrator of the Defender Services program and provides policy, legal, management, and fiscal advice on related matters to the Director, the Committee on Defender Services, judicial officers and employees, private attorneys, and federal defenders and their staffs. The Office's responsibilities include continuing education and training for persons providing representational services under the Act.
- *The Courts of Appeals* are authorized by the CJA to appoint federal public defenders (for each district within their respective circuit that has a CJA plan establishing a federal defender organization) to four-year terms, after considering recommendations of judges from the relevant district courts; fix each federal public defender's salary at a level not to exceed that of the U.S. Attorney for the district served; and approve the number of full-time attorneys the federal public defender may hire. 18 U.S.C. § 3006A(g).
- *The Judicial Councils of the Circuits* make orders for the effective and expeditious administration of justice within their respective circuits. The CJA provides that district court CJA plans must be approved by the judicial council for the circuit, and that prior to doing so, the council shall supplement the district plan with provisions for representation on appeal. 18 U.S.C. § 3006A(a)(3).

⁶ The Administrative Office, circuit councils, and circuit conferences were created in 1939 by "An Act to Provide for the Administration of the United States Courts, and for Other Purposes," 53 Stat. 1223. The legislation shifted budgetary and personnel responsibility for the federal courts from the Department of Justice to the newly created Administrative Office and directed it to function under the supervision of the Judicial Conference.

- *District Courts* are responsible under the Act for establishing a plan for furnishing representation under the Act. Subject to the approval of the circuit judicial council, the district court determines whether to rely exclusively upon the appointment of private panel attorneys or to seek the creation of a federal public or community defender organization. The district court retains authority over the appointment of counsel and associated compensation and reimbursement of expenses of panel attorneys at that level, subject to the approval of the chief circuit judge (or circuit judge delegate) for payment of excess compensation claims. 18 U.S.C. § 3006A(a)(3), (d)(3), (g)(1).
- *Other Judicial Conference Committees.* Other Judicial Conference committees have authority over aspects of Defender Services funding, and/or with respect to substantive areas affecting Defender Services personnel and resources.

IV. FUNDING FOR THE DEFENDER SERVICES PROGRAM

Funding for the Defender Services program is provided by Congress through a separate “no-year” appropriation, within the judiciary’s annual appropriations bill. It includes monies for the operation of FDOs and for the compensation and reimbursement of panel attorneys and other persons who furnish services under the CJA.

