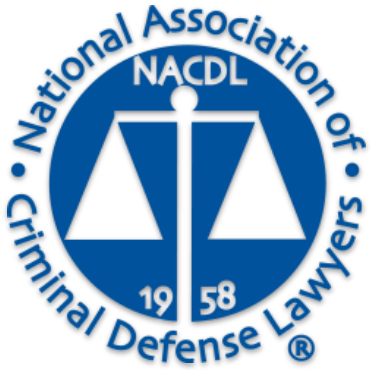
Judicial Conference of the United States

Committee to Review the Criminal Justice Act Program



Testimony Submitted By
National Association of Criminal Defense Lawyers

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Introduction

The National Association of Criminal Defense Lawyers (NACDL) welcomes this opportunity to submit testimony to the Committee to Review the Criminal Justice Act Program. NACDL is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's membership includes more than 9,000 direct members in all states and territories, as well as 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys, and is comprised of private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. Among these groups are thousands of lawyers who provide public defense representation in the federal system, either as federal defenders or as private counsel serving on Criminal Justice Act panels. NACDL's core mission is to elevate standards of practice throughout the criminal defense bar, preserve fairness, and promote a rational and humane criminal justice system.

For more than twenty-five years, one of NACDL's principal concerns has been promoting reform of the nation's public defense systems, or perhaps put more precisely, to address the sad fact that among the states there is no coherent system for providing counsel to indigent accused persons. Although *Gideon* was decided more than half a century ago, and subsequent Supreme Court jurisprudence has expanded the right to counsel to include most misdemeanors, it is well recognized that the state and local public defense infrastructure is woefully inadequate. Commentators, lawyers, many courts, and public officials, including the Attorney General of the United States, have characterized the public defense system as in crisis. With few exceptions, in most jurisdictions public defense providers are inadequately resourced and compensated, and attorneys carry unreasonably high

caseloads, with inadequate access to support services. Indeed, in many jurisdictions the indigent accused routinely appear in courts where either their liberty is at stake or an adjudication of guilt may be entered without any attorney.

In stark contrast, this has not been the case with federal public defense. Dating back to the Criminal Justice Act of 1964, and augmented by key amendments in 1970, which established the authority to create federal defender offices and federal community defender organizations, the federal system ultimately developed into one which had a reasonably dependable funding stream, and a healthy mix of institutional defenders and private assigned attorneys. For many years, those who grappled with the public defense crisis in the states looked with envy at the federal system. Some viewed this as the gold standard for public defense, and compared to the inadequately funded and chaotic approach to public defense throughout the states and counties, that was a fair characterization. But it is also somewhat misleading.

Many have long lamented that the federal system does not honor the first principle of the ABA Ten Principles of a Public Defense Delivery System: independence.[i] Many worried that subjugating the implementation of the constitutional right to counsel to control by the judiciary – the very judges before whom defense counsel must litigate in adversarial proceedings against the government – presented an inherent conflict. Despite the best of intentions of the many judges and judiciary staff who have had immediate responsibility for administering the federal public defense system, many worried about the implementation of the Sixth Amendment on the federal level in the face of such a profound lack of defense independence.[ii]

In 2013, those concerns materialized when sequestration hit. The Executive Committee of the United States Judicial Conference, eschewing the views of Judiciary entities with Defender Services program expertise, elected to implement budget cuts in ways that had extremely detrimental impacts on both defender offices and panel attorneys. Many defender offices were decimated. Many public and private defenders were personally hard hit. And, of course, the adverse impact on the most important constituency – the indigent accused – was incalculable. While the program was still reeling from the impact of severe across-the-board spending cuts, the Administrative Office of the Courts (AO) demoted the Office of Defender Services from a "district high-level office" within the AO to one of several units (such as probation and pretrial services) with its Department of Program Services.

NACDL Task Force on Federal Indigent Defense

The federal public defense community and its supporters, urgently sought support for efforts to restore funding and staunch the bleeding. Many individuals and groups responded – including NACDL. NACDL launched an intensive and focused effort to rally support for the federal public defense system.[iii] Among the most important and enduring initiatives was the establishment of a Task Force on Federal Indigent Defense in late 2013. The task force was directed to examine broadly the federal public defense system, not just the immediate concerns with the status of the defense function and the impact of sequestration, but the entire manner in which the federal system operates. The mission included an assessment of the level of independence afforded to the federal public defense system and consideration of whether reforms are necessary to ensure compliance with the ABA Ten Principles.

Over the course of 18 months, the task force interviewed more than 130 individuals, including judges, full-timer defenders, panel attorneys, AO personnel, and others whose work intersects with the federal public defense system. The survey garnered information from a diverse array of stakeholders with representatives from all federal judicial circuits and 49 of the 50 states. In addition, the task force reviewed countless reports and documents, and investigated the multitude of concerns expressed. To gain the broadest possible perspective, the task force relied upon personal interviews, surveys, and extensive outreach to judges, lawyers, and administrators who have worked within the system. Based upon the information obtained through this comprehensive review, and following months of additional research and deliberation, NACDL published *Federal Indigent Defense 2015: The Independence Imperative.*[iv] NACDL submits that report as the core of its testimony.

Key Findings and Recommendations

The NACDL report catalogues the unique strengths of the federal public defense infrastructure and recognizes that the federal system has attracted a strong cadre of federal defenders and panel attorneys. In most jurisdictions, it provides a robust hybrid system combining a full-time defender office and a panel of private bar members, which is essential to providing a stable, effective, and independent defense presence. At the same time, the report chronicles with great specificity fundamental flaws that imperil the system. The overarching finding is that from the national level to the individual district courts throughout the nation, it is judges, rather than defense attorneys or others appointed to represent and protect the interests of defendants, who manage the nation's federal public defense system. Further, the operation of many of the entities within the judicial branch is not transparent, and administrators often lack expertise or sensitivity with respect to

defense issues. As a consequence, many aspects of the federal public defense system – and the individual lawyers practicing within that system – are subjected to troubling judicial control that manifests itself in myriad ways, all of which imperil the independence of the defense function.

It is important for this Committee to keep in mind, as noted in the report, that the Criminal Justice Act was not designed to establish a comprehensive public defense system.[v] Rather it was a product of a very different era, with vastly fewer federal criminal prosecutions. And even with the 1970 amendments that authorized the creation of Federal Public Defender Organizations and Community Defender Offices, Congress foresaw "the desirability of eventual creation of a strong, independent office to administer the federal defender program," even considering the establishment of a "Defender General of the United States, or "a special directorate for defender programs with the Administrative Office."[vi] Congress did not take those steps at what a Senate Committee termed "this initial stage," but recommended further study over the course of several years.[vii] That same committee recommended against placing the direction of the federal public defense program in the Administrative Office, and noted that "[i]t 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."[viii]

Most of the problems documented in the NACDL report stem from the failure to heed those admonitions by proactively creating a suitable structure that would insulate the constitutionally mandated defense function. The report provides Seven Fundamentals of a Robust Federal Indigent Defense System:

- Control over federal indigent defense services must be insulated from judicial interference.

- The federal indigent defense system must be adequately funded.

- Indigent defense counsel must have the requisite expertise to provide representation consistent with the best practices in the legal profession.

- Training for indigent defense counsel must be comprehensive, ongoing, and readily available.

- Decisions regarding vouchers (i.e., payment to panel attorneys) must be made promptly by an entity outside of judicial control.

- The federal indigent defense system must include greater transparency.

- A comprehensive, independent review of the CJA program must address the serious concerns discussed in this report.

These Seven Fundamentals are not radical concepts and taking the steps necessary to bring the federal public defense program into compliance with them is not a radical proposal. The Fundamentals embody a broad consensus view of public defense system experts and contemporary national standards, and are designed to address clearly established systemic problems. Just as the ABA Ten Principles listed independence first, so too these Fundamentals and the title of the NACDL report underscore that independence is the cornerstone upon which a healthy public defense system must rest.

Further Reflections and Recommendations

The last of the Seven Fundamentals, the call for a comprehensive and independent review of the CJA program, may well be addressed by the creation of

this Committee. NACDL was heartened by the December 2014 announcement by AO Director Judge John D. Bates that an assessment of the CJA program would begin in 2015. As comprehensive as the NACDL project was, the report candidly acknowledged that a study of greater scope and depth was necessary, noting that "[a] truly independent, well-funded comprehensive review is long overdue."[ix] The publicly stated scope of this Committee's work is certainly broad enough to address the myriad concerns raised by the NACDL report, as well as many others.

Based upon the experience of the task force that produced *Federal Indigent Defense 2015: The Independence Imperative*, NACDL offers several observations that may inform the Committee as it goes about its work.

One of the most striking things that emerged as the task force conducted its review is a pervasive sense of fear within the federal public defense community. This fear was evident throughout the process, as lawyers from all practice settings, as well as court personnel and administrative staff, shared multi-faceted concerns and provided countless examples of arbitrary judicial practices that directly impact public defense representation, but would do so only under an assurance of anonymity. Many lawyers have resigned themselves to these arbitrary practices in ways that have a direct impact on clients, leading attorneys to either not take certain steps on behalf of their clients (such as seeking experts or visiting clients in detention facilities), or by doing work but not seeking compensation for it thereby leaving the private bar to subsidize the cost of public defense representation. Their fear emanates from the role the judiciary plays in carrying out the nation's Sixth Amendment obligations in the federal courts. That role encompasses three broad areas:

1. The selection, setting of staffing levels, and funding of federal defender organizations;

2. The appointment and payment of private panel attorneys; and

3. Policy development and program management at the national level, including the development, advocacy, and execution of the Defender Services appropriation.

NACDL urges the Committee to carefully consider how the judicial discharge of these responsibilities impacts the defense function. The Committee should gather information from as many sources as possible, and do so in a sensitive manner that recognizes the inherent challenges of obtaining accurate information when individuals fear for their livelihood.

In addition to considering programmatic shortcomings that arise from judicial oversight of the defense function, the Committee should also ask hard questions about how judges carry out their administrative responsibilities in a system that imbues individual judges with largely unreviewable discretion. For the most part, the federal judiciary lacks the criminal defense representation or public defense operational expertise to make the decisions they must routinely make in their current role overseeing federal public defense. Whether it is assessing the value of services provided by defense counsel in a particular case or evaluating the financial needs and operational effectiveness of a defender organization, can individuals effectively make those determinations if they have never represented an individual client in a criminal case or run a defender office? One would think that those responsible for making the ultimate determination of such matters should have the expertise that can only be garnered through experience, training, and study.

Of course, if there is a consensus that far greater independence is necessary, and NACDL does believe that such a consensus now exists within the defense community, the big question is how can that independence be achieved? The NACDL report contains myriad recommendations to provide greater independence at all phases of the system. The Seven Fundamentals of a Robust Federal Indigent Defense System establish clear principles that must inhere in any structure. But what is that structure? It is simply inadequate to merely tinker with modest reforms while retaining the current structure. There is a need for fundamental change to assure the level of institutional independence envisioned by the Senate committee 45 years ago and echoed in subsequent reports on the state of the system.

The section of the NACDL report that addressed Fundamental One (control over federal indigent defense services must be insulated from judicial interference) notes that greater independence is much more broadly and widely supported than it was two decades ago.[x] Many of those who were reluctant to support the recommendations of the Prado report held that view because of their belief that the defender program's status within the federal judiciary protected it both financially and politically. This view was belied by the events surrounding sequestration and its aftermath, including internal measures (changing the jurisdiction of the Committee on Defender Services and the status of the Office of Defender Services) that the judiciary took post-sequestration. Additionally, the sequestration experience demonstrated that the defender community and its allies could successfully advocate for the federal public defense program independent of the judiciary.

Given these developments and the problems identified in the NACDL report, the Committee may indeed find that the time is now right to pursue fundamental structural change. NACDL believes that once the Committee understands the

breadth and depth of the challenges to the federal public defense system, it can play a pivotal role in fostering a solution. Given the tension between judicial autonomy and authority on one hand, and the need for a robust, independent defense function on the other, fundamental change can only emerge through consensus.

As the review process unfolds, NACDL urges the Committee to invite the judiciary, the administrative component, and the defense community to articulate with specificity a new vision for federal public defense system – one that will scrupulously safeguard independence and ensure that that every accused person in the federal system has access to high quality representation. In pursuit of this quest, NACDL stands ready to assist the Committee and the federal public defense community however it can.

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[i] The ABA Ten Principles of a Public Delivery System, Principle 1: The public defense function, including the selection, funding, and payment of defense counsel, is independent.

[ii] In 1993, a Committee to Review the Criminal Justice Act (known as the Prado Committee, named for its chair, Judge Edward C. Prado, then a district judge in the Western District of Texas and a member of the AO's Defender Services Committee) called for numerous reforms, including the establishment of a new and independent Center for Federal Criminal Defense Services. REPORT OF THE COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT [hereinafter Prado Report], published in the CRIMINAL LAW REPORTER, Volume 52 (1993). This independence proposal was rejected by the Judicial Conference of the United States. The Judicial Conference did, however, accept a recommendation that comprehensive review of the CJA program should be undertaken every seven years by "an impartial entity." *See* Prado Report, at 15-16. No such review was undertaken until the recent establishment of this Committee.

[iii] NACDL's efforts to restore funding are described at www.nacdl.org/indigentdefense/federalcrisis/.

[iv] The report and many resources utilized by the task force are available at www.nacdl.org/federalindigentdefense2015.

[v] NACDL Report, page 13.

[vi] NACDL Report, page 14 citing Prado Report, quoting Senate Report No. 91st Cong., 2d Sess. 18 (1970).

[vii] *Id.*

[viii] *Id.*

[ix] NACDL Report, page 11.

[x] NACDL Report, pages 33-36.