



NACDL Testimony

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 See also the attached [Legislative Alert](#) dated March 1997.

Fiscal Year 1998 Appropriation for Defender Services

Testimony of Judy Clarke, NACDL President '96-97, before the Senate Appropriations Subcommittee on Departments of Commerce, Justice and State, and the Judiciary

Mr. Chairman and Members of the Subcommittee:

The National Association of Criminal Defense Lawyers (NACDL),⁽¹⁾ appreciates this opportunity to offer our views concerning the Defender Services Appropriation for fiscal year 1998. This account has been badly underfunded for many years. During that same period, funding for law enforcement, prosecution and prison construction has grown dramatically. And, at the same time, criminal law and procedure have become more complex; death penalty litigation has expanded and accelerated, while funding for capital representation has been eviscerated; and the costs of legal practice have escalated.

We believe it is essential to recognize the defense function as an integral part of America's criminal justice system if it is to ensure the Constitution's guarantee of fairness and due process to persons accused. To preserve and protect the integrity of that system, we strongly urge Congress to appropriate \$400,000,000 for Defender Services -- an amount necessary to begin the recovery from too many years of inadequate funding.

Introduction

The Defender Services Appropriation funds the Federal government's Sixth Amendment obligation to provide counsel to represent defendants unable to hire their own attorney.⁽²⁾ In addition, the appropriation enables the government to fulfill its Fifth Amendment duty to provide such defendants with the "basic tools,"⁽³⁾ and the "raw materials"⁽⁴⁾ necessary to contest the prosecution's case within our country's adversary system of justice. These services are mandated by the United States Constitution; they are not "discretionary."

Four years ago, the Judicial Conference of the United States reported to Congress the results of its extensive review of the Criminal Justice Act (CJA):

There is no question that the single most important problem to confront the CJA program in recent years is that sufficient funding has not been appropriated to meet the increasing costs of providing the Constitutionally mandated services that the program was created to provide.⁽⁵⁾

Years of insufficient funding have resulted in federal criminal justice system with a number of shortcomings,⁽⁶⁾ including:

- Failure to fund federal defender organizations in all districts;
- Failure to fund cost-effective death penalty representation;
- Unreasonably low compensation for CJA "panel" attorneys; and
- Inadequate qualification standards for panel attorneys.

NACDL strongly agrees with those findings of the Judicial Conference Report. Without adequate -- and long overdue -- Defender Services funding, the constitutional mandates of Due

Process and Effective Assistance of Counsel cannot be fulfilled.

Public Defenders

NACDL agrees with the Judicial Conference that each judicial district should have an adequately funded federal defender organization (Federal Defender or non-profit Community Defender).⁽⁷⁾ Defender offices provide consistently high quality representation because they specialize in federal criminal law, receive regular training through the Administrative Office and the Federal Judicial Center, and maintain ongoing professional relationships with the court and the other agencies involved in the criminal justice system. In many districts, defenders also provide training, legal advice, and administrative support to CJA panel attorneys.

Congress should appropriate funds sufficient to open defender offices in the districts now without such offices; to enable existing offices to continue to keep up with the caseloads added by accelerating law enforcement and prosecution budgets; and to accommodate the increase in complexity driven by recent and expected substantive criminal legislation.

Post-Conviction Defender Organizations

The poor quality of much of America's death penalty representation is a well-documented national disgrace and international embarrassment.⁽⁸⁾ Exacerbating that crisis, Congress, in 1996, excluded funding for the Post-Conviction Defender Organizations (PCDOs) non-profit community defender organizations which served 20 of the 38 death penalty states (50 federal judicial districts). That precipitous act (repeated for fiscal year 1997) together with the accelerated scheduling mandated by the Antiterrorism and Effective Death Penalty Act of 1996, leaves hundreds of death row inmates without counsel, greatly increases the cost of representation for the rest, and has contributed to delay in the processing of capital cases.⁽⁹⁾ The Subcommittee should recommend omission of that funding prohibition for fiscal year 1998.

Established as a cost-effective means of providing counsel, PCDOs specialized in state and federal death penalty representation -- the law's most complex, burdensome and emotionally taxing specialty. In addition to direct representation in some cases, PCDOs performed a number of functions which help to ensure that fair and complete capital habeas corpus petitions were promptly filed and competently processed by trained counsel. Those organizations assisted the courts by recruiting counsel willing and able to provide representation in such complicated and demanding cases, thus relieving the courts of the need to perform this difficult and often time-

consuming task. In many states, PCDO assistance enabled private attorneys to provide representation *pro bono* -- without charge to the government. And where *pro bono* attorneys were not able to satisfy the need for counsel services, PCDO staff attorneys provided cost-effective representation in these most critical cases. Finally, where a PCDO did not have funds to hire enough staff to represent all of a state's death row population, the PCDO provided support services that greatly reduced the cost of assigning private attorneys.

In short, by providing competent, well-trained counsel, PCDOs reduced delay and, ultimately, the cost of processing capital cases in accordance with the constitutional requirements and procedures established by the Supreme Court. As the Judicial Conference Report put it:

The Death Penalty Resource Centers have provided invaluable services in an appropriate and cost effective manner. They have facilitated the appointment of competent attorneys in capital cases and have brought a higher quality of representation to these cases. They have, moreover, streamlined the capital litigation process by expediting cases and avoiding costly repetitive legal proceedings. The resource centers demonstrate how the current flexible structure of the CJA program has allowed for the development of innovative uses of limited resources that facilitate the attorneys working within the program in delivering the kind of representation required to ensure the continued vitality of the Sixth Amendment in even the most complex and demanding cases.⁽¹⁰⁾

Funding for PCDOs came from the Defender Services Appropriation and from non-CJA (state or private) resources sufficient to support the PCDO's work related to state court proceedings. The federal component of that funding should be restored in order to fill the growing capital caseload needs, consistent with legislative demands for more federal capital prosecutions and for faster processing of capital habeas cases.

CJA Panel Attorney Compensation

1986 amendments to the CJA authorized the Judicial Conference to adjust the 1984 panel attorney hourly rates, up to \$75 per hour:

Any attorney appointed . . . shall be compensated at a rate not exceeding \$60 per hour for time expended in court . . . and \$40 per hour for time expended out of court, unless the Judicial Conference determines that a higher rate of not in excess of \$75 per hour is justified for a circuit or for particular districts within a circuit. . . . The Judicial Conference shall develop guidelines for determining the maximum hourly rates for each circuit in accordance with the preceding

sentence, with variations by district, where appropriate, taking into account such factors as the minimum range of the prevailing hourly rates for qualified attorneys in the district in which the representation is provided and the recommendations of the judicial councils of the circuits.

That adjustment mechanism -- now 11 years old -- replaced a similar procedure adopted by Congress in 1970 authorizing hourly rate adjustments "not to exceed the minimum hourly scale established by a bar association for similar services rendered in the district."

This goal was subsequently frustrated by the abolishment of minimum bar fee schedules following the decision of the Supreme Court in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), which held that a minimum fee schedule promulgated and enforced by a bar association constitutes unlawful price-fixing in violation of the Sherman Act. The *Goldfarb* decision thus resulted in a collateral deactivation of the adjustment authority conferred by Congress in the Circuit Councils. . . . While the CJA Revision of 1984 removed the 1970 language authorizing judicial councils to set alternate hourly rates, it made no provision to replace this mechanism for affording flexibility to the CJA compensation scheme.⁽¹¹⁾

The 1970 mechanism Congress revised in 1986 was intended to ensure that panel payments are "neither a bonanza for some lawyers to get more than the going rate in that town, nor an empty shell which will not be used because the rates are below the going charge in those towns. . . . [A]nd it is hoped it will reflect what the private practitioner charges in those jurisdictions." *United States v. Mills*, 713 F.2d 1249, at 1259, 1261 (7th Cir. 1983) (Swygert, J., dissenting, quoting Representative Abner Mikva).⁽¹²⁾

Despite that legislative intention to adjust the rates to avoid impoverishing panel attorneys -- and despite the fact that overhead costs have risen to exceed the base rates established over a decade ago -- except for a token \$5 raise in January, 1996, the Judicial Conference has postponed implementing higher rates in all but the first 16 districts to be approved, in 1988.⁽¹³⁾

Seventy-five dollar rates (generally less than half the market rate, but more than the average cost of overhead) have been approved -- but postponed for lack of funding -- for the remaining judicial districts:

In 1990, the \$75 rate was approved for all the districts in the Seventh Circuit (Wisconsin, Illinois & Indiana) and extended to entire districts where previously limited to specific court locations.⁽¹⁴⁾ Due to inadequate funding, those approved rates have not been implemented.

In 1991, \$75 per hour was approved for the Southern District of Alabama, Arizona, Connecticut, Florida, the Northern District of Georgia, Guam, Idaho, Kentucky, Louisiana, Maryland,

Massachusetts, the Western District of Michigan, Mississippi, Missouri, Nevada, the Western District of North Carolina, Ohio, Oregon, the Middle & Western Districts of Pennsylvania, South Carolina, Tennessee, Texas, the Western District of Virginia and West Virginia.⁽¹⁵⁾ Due to inadequate funding, those approved rates have not been implemented.

The \$75 rate was approved in 1992 for the Northern & Middle Districts of Alabama, the Eastern District of Arkansas, Colorado, Delaware, the Middle & Southern Districts of Georgia, Iowa, Kansas, Minnesota, Montana, New Hampshire, the Western District of New York, the Eastern & Middle Districts of North Carolina, North Dakota, Northern Mariana Islands, Oklahoma, the Eastern District of Pennsylvania, Puerto Rico, Utah, Vermont, Virgin Islands, the Eastern District of Washington, Wyoming, and Hawaii.⁽¹⁶⁾ Due to inadequate funding, those approved rates have not been implemented.

And in 1995 the \$75 rate was approved for the Western District of Arkansas, Maine, Nebraska, South Dakota, and the Eastern District of Virginia.⁽¹⁷⁾ Due to inadequate funding, those approved rates have not been implemented.

Except for the token \$5 increase to \$45 per hour for work out-of-court (generally two-thirds of the average billing) and \$65 for work in court, the rates established after 1988 for those 77 districts have been repeatedly postponed. However, the cost of maintaining a law practice has not been postponed, but has steadily increased.

In the District of South Dakota, one of the least expensive locations, surveys conducted by the Defender Services Division show that the average overhead cost of a law office in 1994 was \$38 per hour.⁽¹⁸⁾ In most locations, the costs are notably higher. Average law office overhead in New Hampshire, for example, was \$53 per hour back in 1992.⁽¹⁹⁾ In Vermont, the overhead cost was \$47 per hour in 1993.⁽²⁰⁾ A 1994 survey by the Tennessee Bar Association showed the average cost of office overhead of \$46.81 per billable hour.⁽²¹⁾ In Texas, the average office overhead back in 1991 was \$64.25 per hour.⁽²²⁾ In Colorado, in 1992, \$46 per hour.⁽²³⁾ In Kentucky, in 1991, \$37 per hour.⁽²⁴⁾ In South Carolina, in 1991, \$50 per hour.⁽²⁵⁾ In Arkansas, \$47 per hour in 1992.⁽²⁶⁾ And in Maryland, in 1991, an average overhead cost of \$70 per hour.⁽²⁷⁾

Since those surveys were conducted, overhead costs have continued to rise. But the compensations rates have not, effectively turning panel attorney service, at \$45/65 per hour in most states, into a direct subsidy of the government's constitutional obligation to provide assistance of counsel to the indigent accused of crime.⁽²⁸⁾ The Judicial Conference has long recognized this problem:

The \$40 and \$60 hourly rates paid to CJA panel attorneys are seriously deficient. In many locations, they do not even cover the basic office overhead costs of law offices. Thus, many

lawyers accept assignments of cases from the federal courts at a financial sacrifice to their livelihood.⁽²⁹⁾

Of course, the problem is most acute in districts without a federal defender organization, where panel attorneys are often conscripted to fulfill the government's constitutional obligations, losing their livelihood, and risking bankruptcy in the process.⁽³⁰⁾

The crux of the panel attorney payment problem is this: The CJA, unlike the 1931 Davis-Bacon Act, does not require panel attorney payments reflecting, or even reasonably approximating, the prevailing private market wage. In fact, the \$75 maximum rate is substantially less than fifty percent of the value set by the private market in most locations. Continued payments at a fraction of that statutory rate -- and below the out-of-pocket cost of keeping an office open -- continually violates the basic constitutional property rights of those panel attorneys who, after all, have the same rights and responsibilities of any other small business owner.⁽³¹⁾

Qualification Standards for Panel Attorneys

As the costs of living generally -- and practicing law in particular -- have risen, and as federal criminal law has become more complex, time-consuming and specialized, the pool of qualified CJA panel attorneys has decreased because the rates in most areas have been virtually frozen for over a decade. Some of the resulting problems are explained by the Judicial Conference Report:

Federal criminal law, including its sentencing aspects, has become exceedingly complex. It is no longer feasible for a state criminal defense lawyer to appear occasionally in a federal court and be expected to perform competently. Lack of knowledge of federal law and procedure can create very serious adverse consequences for criminal defendants.

In order to be an effective advocate in a federal criminal case today, it is essential that an attorney be knowledgeable in the federal sentencing guidelines. Unfortunately, however, information elicited by the Review Committee indicates that it is not uncommon for attorneys with little or no criminal experience to be appointed in federal cases, and a lack of training for panel attorneys was a common complaint cited in hearings before and correspondence to the review committee.⁽³²⁾

Given the well-recognized, increasingly serious difficulty in recruiting qualified panel attorneys, the Judicial Conference proposed "only minimal qualification standards."⁽³³⁾ Even though quality control is essential, because most districts are stuck at barely above the \$40/\$60 rates established in 1984, the Conference was forced to recognize that "specific requirements might render it

difficult or impossible to find a sufficient number of attorneys to serve on the panel."⁽³⁴⁾

However, the 1995 *Long Range Plan for the Federal Courts* recommends against further delay in qualification standards: "The CJA does not establish qualification standards for attorneys serving on CJA panels. The practice of federal criminal law has become highly specialized. Defendants face increasingly lengthy prison terms. It is time for panel attorneys to be held to certain minimum qualifications."⁽³⁵⁾ But with compensation at or below the cost of merely maintaining a law office, the continuing education necessary to meet minimum standards is an expense many lawyers cannot afford.

The clear solution is simply the market system: panel attorneys paid at a fair rate (even though substantially less than the market rate) can purchase from the private market the training necessary to competently fulfill the government's constitutional mandates. The Judicial Conference should set high standards; Congress should appropriate funding sufficient to enable panel attorneys to purchase the training necessary to obtain (and maintain) the skills necessary to do the job. The whole criminal justice system will work efficiently then, to the benefit, including tax savings, of us all -- and it will be a justice system worthy of its name.

Conclusion -- the Future of the CJA

The Criminal Justice Act requires a "substantial proportion" of appointments to the private bar.⁽³⁶⁾ "'Substantial' shall usually be defined as approximately 25 percent of the appointments under the CJA annually throughout the district."⁽³⁷⁾ The American Bar Association also recommends "substantial participation by the private bar,"⁽³⁸⁾ in order to provide a broad-based constituency for improvement of the criminal justice system:

All lawyers, whether criminal practitioners or not, share in the responsibility of ensuring that the most visible legal institution in the Nation, the criminal justice system, is of the highest attainable quality. Increasingly, however, indigent defense in many cities is almost the exclusive responsibility of public defenders and a very small private bar. The remainder of the trial bar is not fulfilling its obligation to participate through the representation of indigent defendants, and as a result, the shunning of criminal defense practice deprives the criminal justice system of a powerful voice for criminal justice reform, because the influential lawyers are unfamiliar with the working of the criminal justice system.⁽³⁹⁾

The private bar's participation in the federal criminal justice system is also necessary to counter the inherent trend, in any closed bureaucracy,⁽⁴⁰⁾ of ignoring or rejecting alternative, even critical, points of view; in other words, to provide for a healthy and efficient system of checks

and balances.⁽⁴¹⁾

The combination contemplated by the CJA -- approximately 25 percent private panel attorneys; 75 percent public defenders -- is readily attainable. Defender offices can and should be opened in all federal districts, and should receive the lion's share of the appointments. The remaining cases should be assigned to panel attorneys who are willing (not conscripted), who are qualified (meeting high competency standards) and who are reasonably compensated (in order to maintain qualifications, pay necessary office overhead, and avoid destitution).

But still, the only way to obtain these goals -- and to fulfill the government's constitutional mandate -- is to fully fund the Criminal Justice Act. Because past appropriations have been grossly underfunded, and because the pending appropriation proposed by the Administration is demonstrably inadequate to redress the dire need, NACDL urges this Committee to recommend - - and the Congress to enact -- an adequate Defender Services Appropriation of \$400,000,000. This appropriation cannot be viewed in a vacuum. The Constitution of the United States mandates a fair and efficient criminal justice system for all Americans. Full and fair funding to accomplish that is a pittance to pay. On the other hand, the consequences of *not* doing so are dire.

On behalf of the National Association of Criminal Defense Lawyers, I want to thank the subcommittee again for affording us this opportunity to be heard on this very important subject, and for considering our concerns and requests for congressional action.

Judy Clarke, President
NACDL

Footnotes:

1. NACDL is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime. A professional bar association formed in 1958, NACDL's 9,000 direct members -- and 78 state and local affiliates with another 25,000 members -- include private criminal defense lawyers, public defenders and law professors committed to preserving fairness within America's criminal justice system.

2. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Johnson v. Zerbst*, 304 U.S. 458 (1938).

3. *Britt v. North Carolina*, 404 U.S. 226, 227 (1971).

4. *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985).
5. *Report on the Federal Defender Program* 11 (March 1993). The result of an extensive study of the effectiveness of the Criminal Justice Act, as required by Section 318 of the Judicial Improvements Act of 1990, the *Report* is reprinted at 53 CrL (BNA) 2003 (April 14, 1993).
6. *Report on the Federal Defender Program*, at 12.
7. *Report on the Federal Defender Program*, at 20-21.
8. *See, e.g.*, ABA, Resolution of the House of Delegates, Feb. 1997 (calling for a moratorium on imposition of the death penalty because of widespread defects, notably a failure to provide qualified and compensated defense counsel, investigators and experts); Int'l Comm'n of Jurists, Administration of the Death Penalty in the United States (June 1996).
9. *See, e.g.*, *Davis v. Thomas*, 266 Ga. 835, 471 S.E.2d 202 (1996) (describing the scramble to replace PCDO representation following de-funding, and ordering a continuance in the state habeas case).
10. *Report on the Federal Defender Program*, at 26. *See also*, U.S. General Accounting Office, Defender Services Program, 5 (July 1990) (finding that the PCDOs' average "cost per representation" was 46% of the cost of panel attorney death penalty representations).
11. House Report 99-417, 99th Cong., 1st Sess., (December 5, 1985) (Statement of Congressional Budget Office, appended to Report). *See Cong. Record* Vol. 131 (1985); 1986 USCCAN 61654; 1985 WL 25927 (Leg.Hist.).
12. *See* House Report 91-1546, 91st Cong., 2d Sess., (September 30, 1970); 116 Cong.Rec. 34,812, 34812 (1970); 1970 USCCAN 3982; 1970 WL 5700 (Leg.Hist.).
13. In 1988, the \$75 rate was established -- and implemented -- in the following districts and court locations: Alaska, California (Central, Eastern (Sacramento and Fresno), Northern & Southern), District of Columbia, Detroit, Michigan, New Jersey, Las Cruces, New Mexico, New York (Eastern and Southern), and Seattle, Washington; \$70 rates were approved for Phoenix and Tucson, Arizona and for Hawaii; and \$60 rates for Oregon and Las Vegas and Reno, Nevada. *Proceedings of the Judicial Conference (JCUS)* 16, 46, 75, 111 (1988).
14. *JCUS* 79, 108 (1990).
15. *JCUS* 18, 47, 56-57, 73 (1991).
16. *JCUS* 21-22, 39 (1992).
17. *JCUS* __ (1995).
18. Records of surveys conducted by the Administrative Office of the United States Courts.

19. *Id.*
20. *State of Vermont v. Bacon*, 163 Vt. 279, 315 (1995).
21. *State of Tennessee v. Mathews*, Criminal Court of Montgomery County, No. 33791, (March 18, 1995), at 1 (order setting a court-appointed hourly rate, in a capital case, at \$100 per hour).
22. Records of surveys conducted by the Administrative Office of the United States Courts.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. The Judicial Conference's *CJA Guidelines*, 2.28 A., excludes office overhead from those expenses reimbursed to panel attorneys: "The statutory fee is intended to include compensation for these general office expenses." *Compare, e.g., State of Louisiana v. Green*, 631 So.2d 11, 13 (La. App. 1993) (setting an overhead expense rate of \$30 per hour in addition to fees of \$45 per hour).
29. *Report on the Federal Defender Program*, at 30.
30. *See, e.g., Bey v. United States*, No. 93-8442, *cert. denied*, 114 S.Ct. 2714 (1994) (question presented: does conscription of panel attorneys to serve at a financial sacrifice violate the Constitution?).
31. In *FTC v. Superior Court Trial Lawyers Assn.*, 493 U.S. 411 (1990), for example, the Supreme Court held (unanimously) that panel attorneys are small businesses covered by the Anti-Trust laws.
32. *Report on the Federal Defender Program*, at 28. The *Report of the Committee to Review the Criminal Justice Act* is reprinted at 52 CrL (BNA) 2265 (March 10, 1993).
33. *Report on the Federal Defender Program*, at 28.
34. *Report on the Federal Defender Program*, at 27.
35. *Long Range Plan for the Federal Courts*, 120 (1995).
36. 18 U.S.C. 3006A(a)(3).

37. Administrative Office of the United States Courts, "Model Criminal Justice Act Plan," VI.C (1991).

38. ABA Standards for Criminal Justice, Providing Defense Services (ABA Standard) 5-1.2 (3d ed. 1992).

39. ABA Standard 5-2.2 (Commentary).

40. The Judicial branch, in its administrative role, is exempt from most laws covering open meetings, public records, or freedom of information.

41. The institutional benefit of private bar participation is illustrated by *In re Snyder*, 472 U.S. 634 (1985), where the unanimous Supreme Court held that a private CJA panel attorney was not contemptuous for criticizing the administration of the CJA. "Officers of the court may appropriately express criticism on such matters." Government employees, however, may not be so protected. *See Waters v. Churchill*, 114 S.Ct. 1878 (1994) (public employees can be summarily fired for criticism that could disrupt efficiency).

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