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THE PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS

DECEMBER 16, 1994

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Executive Summary

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- Federal criminal charges should be filed only in those instances in which state court prosecution is not appropriate — consistent with the core value of limited federal jurisdiction.
- State courts should not have jurisdiction over federal crimes.
- Congress should forego future and repeal current offenses that are inappropriate for federal prosecution — consistent with the core value of limited federal jurisdiction.
- The district courts should decline jurisdiction of criminal cases where state jurisdiction is available and the federal interest is minimal.
- Mandatory minimum sentencing statutes should be repealed and disparity eliminated.
- Congress should fund the costs of federal legislation.
- Criminal Justice Act panel attorneys should be paid the rate increases, including annual cost-of-living increases, required by statute but deferred by the Judicial Conference.
- Training should be made available to panel attorneys, who should be subject to qualification standards.
- A federal defender office should be established in each district.
- Federal defender offices should not represent clients with adverse interests.
- Representation of clients with adverse interests violates the rules of ethics.
- It is essential to maintain substantial involvement of the private bar in the Criminal Justice Act system.

I. Introduction

The National Association of Criminal Defense Attorneys (NACDL)[(1)] appreciates this opportunity to comment on the Proposed Long Range Plan for the Federal Courts. We strongly support the concept of planning, to enable the federal courts to anticipate and act with respect to likely future opportunities and challenges, and to move toward a federal jurisprudence that is rational, predictable and coherent. We are strongly supportive of the methodology employed — public participation is the essence of democratic government.

We also strongly support the goal of conserving the "core values" of equal justice, judicial independence, limited federal jurisdiction, judicial excellence, and accountability, and the recommendations intended to achieve that goal. The recommendations specific to the federal criminal justice system, with some crucial exceptions, are also to be commended.[(2)]

II. Defining and Maintaining a Limited Federal Jurisdiction

Recommendations 1, 2, and 4 describe an optimum federal criminal jurisprudence, and list Implementation Strategies for the legislative and executive branches to follow.

We agree wholeheartedly with the principle that federal criminal charges should be filed "only in those instances in which state court prosecution is not appropriate," and that Congress should allocate criminal jurisdiction accordingly (Recommendation 1). While any definitions — including the "five types of offenses" discussed in the Proposed Long Range Plan — are subject to varied interpretation, proclaiming a goal of jurisdictional limitation is an important step in maintaining the judiciary's "core values." We also agree that Congress should revise the criminal code and remove offenses not appropriate for federal prosecution (Recommendation 2).

Recommendation 3, calling for Congress and the executive branch to work with the states to develop a policy to determine whether offenses should be prosecuted in the federal or state systems, includes Implementation Strategies in apparent conflict with Recommendations 1 and 2. Authorizing concurrent jurisdiction over federal crimes, to be prosecuted by cross-designated Special Assistant U. S. Attorneys, in state court, with convicted defendants sentenced to federal prisons, would certainly result in a geometric *increase* in federal jurisdiction, in contradiction to the goal of limitation. While the Article III district court bench might expect some relief from ridding itself of the plethora of minor drug cases clogging the dockets, there would certainly be an initial explosion in writ and motion practice; the circuit courts would have to be greatly expanded to cope with the resultant contentions. Moreover, the proposed increase in federal funding of state prosecutions (with or without a leap to concurrent jurisdiction) would represent a massive unfunded federal mandate — unless the right to counsel guarantee of the Sixth amendment, incorporated by the Fourteenth amendment,[(3)] receives a corollary appropriation. Recommendation 3 should be deleted, and replaced with a stronger Recommendation 4.

Recommendation 4 calls for cooperation between the executive and judicial branches "in developing standards on which the Justice Department will base the promulgation of prosecutorial guidelines." We assume this proposal would not be pursued *ex parte*, but in an open public forum. That assumption should be explicitly incorporated in the Proposed Plan.

Department of Justice standards designed to conserve and limit federal jurisdiction have been published for many years,[4] but have escaped judicial enforcement. While the cooperation recommended may be useful in furthering the goal of limited criminal jurisdiction, the federal judiciary should also re-examine the notion that prosecutorial discretion is virtually unreviewable.[5]

Professor Kenneth Culp Davis, in his exploration of prosecutorial discretion,[6] makes a strong case for reconsideration of the assumption that administrators of criminal justice, unlike all other administrators, are immune from basic, fundamental administrative due process.

Where law ends, discretion begins, and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either easonableness or arbitrariness.

* * *

The answer is, in broad terms, that we should eliminate much unnecessary discretionary power and that we should do much more than we have been doing to confine, to structure, and to check necessary discretionary power.[7]

In his article on discretion, Professor Vorenberg warns that reliance on discretion:

> hides malfunctions in the criminal justice system, and avoids difficult policy judgments by giving the appearance that they do not have to be made. It obscures the need for additional resources and makes misapplication of available resources more likely. And it promotes a pretense that we know more than we do, thereby leading to wrong decisions and preempting research and evaluation on which change should be made.[8]

Apart from misallocated resources, unbridled unreviewed discretion raises fear of malfeasance, as explained by the Director of the Ford Foundation's Study of Law and Justice, Charles E. Silberman:

> The absence of effective limits on prosecutorial discretion creates the potential for corruption, as well as for abuse of power for personal or partisan political ends. The latter potential is exacerbated by the fact that the post of prosecutor always has been a stepping stone to the judiciary or to higher elective office.[9]

Sidney I. Lezak, who served as United States Attorney for the District of Oregon under Presidents from Kennedy to Reagan, has also advocated

"new limitations on this overly expansive, largely unreviewed power" of prosecutorial discretion.[(10)] Mr. Lezak reviews the history of prosecutorial discretion,[(11)] its internal operation, and recent reforms seeking to "regulate its exercise to maximize benefits and minimize abuse."[(12)]

> The judiciary can review instances of challenged prosecutorial discretion and in case-by-case adjudications, set standards by which a prosecutor's actions may be judged.
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> Continued and expanded judicial review will channel the exercise of prosecutorial discretion to prohibit *ad hominem* discrimination and require consistent and evenhanded treatment of individuals.[(13)]

So long as the political engines that drive the unwarranted expansion of federal criminal jurisdiction go unchecked by the non-political branch, the "nightmare" future scenario described in Chapter 3 of the Proposed Long Range Plan will become reality. The Third Branch should not only define its "core value" jurisdiction, but should protect that jurisdiction by making it clear to the political branches that further disruption and dilution of the judicial function is not acceptable.[(14)] Accordingly, the "last resort" contingency plan on page 108 should be upgraded to a current Recommendation, and incorporated in Recommendation 4:

> Consistent with standards developed by the Judicial Conference, authorize district courts to decline jurisdiction in . . . criminal cases where state [jurisdiction could be invoked] and the federal interest is minimal.

III. Adjudication

The NACDL strongly supports Recommendations 29 and 30. Mandatory minimum sentencing statutes have radically skewed the work of the Sentencing Commission, resulting in penalties for regulatory offenses (drugs) much stiffer than for property crimes, or even crimes against persons. Moreover, the disparity between federal sentences for some drugs (*e.g.*, "crack" cocaine, marijuana plants) and other drugs indistinguishable in social harm (*e.g.*, powder cocaine, harvested marijuana), and the disparity between state and federal sentencing (possible probation versus decades without parole, and now prison versus execution) is often arbitrary, freakish and bizarre.

Congress should indeed be encouraged to forego mandatory minimum sentences — and should be urged to repeal those now on the books. Departures below guideline sentencing ranges should be encouraged, as well as alternatives to imprisonment. Moreover, the executive branch should be encouraged to rekindle its Pretrial Diversion Program, as an alternative to prosecution in appropriate cases.[(15)]

IV. Resources

The recommendations of Chapter 8 of the Proposed Long Range Plan are generally supported by the NACDL. We agree that Congress "should appropriate sufficient funds to accommodate the cost to the courts of the impact of new legislation" (Recommendation 54). When new federal crimes are created wholesale, and executive department and agency budgets are increased, there must be a corresponding increase in judicial budgets, including the allocation for Defender Services. When Defender Services funding is, instead, *decreased* (as for fiscal year 1995), and Criminal Justice Act (CJA) panel attorneys' statutory cost-of-living increases are perennially stalled, those essential service providers suffer "an actual diminution of compensation," far greater than the imposition on federal judges noted in Recommendation 55. Accordingly, Recommendations 56 and 89 should be amended to include full funding for the constitutionally-mandated services of the CJA, and immediate (if not retroactive) implementation of rate increases duly approved but indefinitely postponed.[(16)]

V. Representation of Criminal Defendants

Specific to indigent defense, the Proposed Plan recommends establishing federal defender offices in all districts, qualification standards and training for private panel attorneys, and fair compensation for the panel attorneys. (Recommendations 88, 89) "At a minimum, adequate funding should be *requested* so that the Judicial Conference can adjust compensation rates up to the maximum amount authorized by law." (Recommendation 89d; emphasis added.) The NACDL strongly endorses those Recommendations.

We take exception, however, to Implementation Strategy 88b, calling for "[g]uidelines . . . to enable federal defender organizations to represent

more than one defendant in a multi-defendant case," and the assumptions in the accompanying text:

> To control the heavy costs of the CJA system, protocols — including judicially approved guidelines — should be developed to enable federal defender organizations to represent more than one defendant in a multi-defendant case.

First, the costs of the CJA system are far from "heavy." In fact, the Defender Services appropriation has been systematically *under*funded for many years, as acknowledged by the Proposed Plan's recognition that "[i]n many locations, the $40 or $60 per hour paid to panel attorneys does not even cover basic overhead costs of a law office, and many lawyers incur financial sacrifice when they accept assignments of cases from the federal courts."[(17)]

Second, budget breaking multi-defendant mega-trials are generated by the executive branch which "should make a conscientious effort to determine where its case is strongest and focus upon that area, reducing the number of counts and of defendants to manageable proportions."[(18)] As noted above, the judiciary should require adherence to coherent prosecution policies intended to conserve scarce resources and preserve the federal courts' core jurisdiction.

Third, the notion that federal defender offices can switch to multi-defendant "protocols" fails to consider the collegial, team-work nature of those offices, where concentrated talent and experience provides the maximum return on the budgetary investment, resulting in consistently high quality representation and promoting judicial economy. If those offices represent clients whose interests are adverse, the important practice of case-conferencing (brainstorming; sharing and testing theories and strategies; basic and essential on-the-job training) would abruptly end. Keeping files, attorneys and support staff separate, while running a high-volume and high-stress office would be an administrative nightmare. Judicial efficiency would also likely suffer.[(19)]

Fourth, the assumption that conflict of interest jurisprudence can be readily overlooked is questionable. Finally, while establishing federal defender offices in all districts is laudable — and long overdue — taking the further step of appointing defender offices, rather than private panel attorneys, to represent co-defendants, risks thwarting the important goal of maintaining substantial participation by the private bar. These last two points bare close examination.

A. Conflict of Interest Jurisprudence

Apart from the many practical problems with the recommendation that defender offices represent co-defendants, a major obstacle will be ethical constraints imposed by state bar associations and supreme courts. Most state disciplinary codes contain some variant of Model Code of Professional Responsibility Disciplinary Rule 5-102,[(20)] and Model Rule of Professional Conduct 1.10,[(21)] requiring disclosure to and intelligent waiver by clients, as well as the court,[(22)] before one firm can ethically represent co-defendants.[(23)] The Model Rule defines "firm" and explains the purpose of the rule:

> For purposes of the Rules of Professional Conduct, the term "firm" includes lawyers in a private firm, and lawyers employed in the legal department of a corporation or other organization, or in a legal services organization.
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> The rule of imputed disqualification . . . gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated.

Federal courts have already declared that a "general trend of the law has been to limit the applicability of the vicarious disqualification rules to private organizations," exempting prosecutors and, arguably, federal defender offices.[(24)] Further limitation contemplated by the Proposed Plan will likely accelerate the increasing tension between the federal courts and the states' legal ethics systems,[(25)] while eroding federalism, comity and the policy goals of preserving and protecting the healthy participation of the private bar in the nation's indigent defense system. Unless some overriding policy goal is identified — and potentially saving a few dollars is not sufficient — the recommendation that defender offices represent co-defendants should be rejected.

B. The Need for Private Bar Participation

On November 5, 1994, the NACDL Board of Directors adopted general policies on Assigned Counsel Systems, explicitly endorsing standards

promulgated by the American Bar Association, the National Legal Aid & Defender Association, and other groups. One of the policies adopted provides:

> Assigned counsel systems must include *substantial participation by the private bar*, in order to assure the continued interest of the bar in the welfare of the criminal justice system.[(26)]

The goal of ensuring participation of the private bar is intended to provide a permanent broad-based political constituency for improvement of the criminal justice system. The Commentary to ABA Standard 5-2.2 explains:

> 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.

The ABA's 1979 2nd Edition, Standard. 5-1.2, page 510, also explains that "involvement of private attorneys in defense services assures the continued interest of the bar in the welfare of the criminal justice system. Without the knowledgeable and active support of the bar as a whole, continued improvements in the nation's justice system are rendered less likely."[(27)]

The Criminal Justice Act (CJA) requires a "substantial proportion" of appointments to the private bar.[(28)] "'Substantial' shall usually be defined as approximately 25 percent of the appointments under the CJA annually throughout the district."[(29)] Such a combination maximizes the advantages of public defender organizations and private bar involvement, assuming adequate funding,[(30)] and should be preserved.

VI. Conclusion

Over thirty years ago, the American Bar Association began its comprehensive study of the nation's chaotic criminal justice systems,

resulting in the ABA Criminal Justice Standards — now in its Third Edition. The 1963 genesis of that ambitious, and on-going, project was described by Justice Tom Clark:

> The Standards were born in a climate of deep concern over the burgeoning problems of crime and the correlative crises in our courts occasioned by overwhelming caseloads, recidivism and a seeming incapacity of the system to respond to the challenges of the Sixties.

Unfortunately, the most basic reforms advocated by the ABA Standards — in discovery, prosecution function, indigent defense, sentencing — have not gained acceptance in federal jurisprudence, despite their demonstrated utility, due to political opposition. Instead of a federal criminal jurisprudence centered on the core values of equal justice, judicial independence, limited jurisdiction, judicial excellence, and accountability, we have seen the "steady accretion of power in the executive, . . . the apparently irreversible alteration of American government toward executive hegemony."[(31)]

To counter that trend, and protect its core functions, the federal judiciary "must resist even well-intentioned legislation that would chill the capacity of the judge to render impartial justice."[(32)] The initial draft of the Proposed Long Range Plan for the Federal Courts is an admirable, ambitious beginning down the long road back from the brink of chaos. With the exceptions here noted, the NACDL supports the concept and the direction of the work of the Committee on Long Range Planning.

Gerald H. Goldstein, NACDL President

Footnotes:

1. The NACDL is a nonprofit, national organization which includes within its membership over 8,500 attorneys actively engaged in defending criminal prosecutions. In addition, we are affiliated with over 68 state and local criminal defense organizations with which we work cooperatively on issues of common concern. Altogether, we speak for more than 20,000 criminal defense lawyers nationwide. The mission of the NACDL, as defined in its by-laws, includes: preserving the adversary system of justice; maintaining and fostering independent and able criminal defense lawyers; and insuring justice and due process to persons accused of crime.

2. The NACDL joins in (and so avoids repeating) the Recommendations of the National Legal Aid and Defender Association, Statement of H.

Scott Wallace, December 9, 1994. In particular, we endorse NLADA's positions on elimination of racial disparity, appointed counsel independence, and the importance of continuing the Legal Services Corporation.

3. ***Gideon v. Wainwright***, 372 U.S. 335 (1963).

4. See, e.g., *Department of Justice Manual* (Prentice Hall), § 9-101.200 (consider "the district court's backlog of cases" in deciding whether to refer drug cases to local prosecutor); § 9-102.001 (addicts "should receive treatment rather than mere punishment," referencing the dormant Narcotic Rehabilitation Act); Ch. 23A, § 220 (decline prosecution where "[n]o substantial federal interest would be served").

5. See, e.g., ***Newman v. United States***, 382 F.2d 479, 480 (DC Cir. 1976): "Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge should be made, or whether to dismiss a proceeding once brought."

6. DISCRETIONARY JUSTICE A PRELIMINARY INQUIRY (1969).

7. Id., at 3-4. See also K. Davis, DISCRETIONARY JUSTICE IN EUROPE AND AMERICA (1976); L. Fuller, *Positivism and Fidelity to Law — a Reply to Professor Hart*, 71 HARV L REV 630, 636 (1958) (on the affinity of "coherence and goodness. . . . When men are compelled to explain and justify their decisions, the effect will generally be to pull those decisions toward goodness, by whatever standards of goodness there are"). The broader notion that legitimate discretion exists only within the context of standards and accountability is discussed in R. Dworkin, TAKING RIGHTS SERIOUSLY, 31 (1977).

8. Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 1976 Duke L J 651, 652 (1976).

9. Silberman, CRIMINAL VIOLENCE, CRIMINAL JUSTICE, 283 (1978).

10. Lezak and Leonard, *The Prosecutor's Discretion: Out of the Closet - Not Out of Control*, 63 OR L REV 247 (1984).

11. "The precise origin of our reliance on and acceptance of prosecutorial discretion is unknown. . . . Whatever its origin, discretion now pervades all facets of justice administration." 63 OR L REV, at 248.

12. Id., at 257.

13. Id., at 259, 164.

14. The methodology of the likely confrontation should also be planned, as a necessary contingency. If the judiciary were to give explicit docketing priority to its "core value" jurisdiction, resultant Speedy Trial Act violations would result in dismissal of extraneous cases, 18 U.S.C. § 3162, with ample opportunity for local prosecutors to accept jurisdiction.

15. See *DOJ Manual, supra*, Chapter 22. A major objective of the Pretrial Diversion Program is "[t]o save prosecutive and judicial resources for concentration on major, serious cases." Id., at § 9-22.000B. Congress has explicitly provided for investigation and supervision of divertees in the Pretrial Services Act of 1982. 18 U.S.C. § 3154(10). "Implied statutory authority for the [diversion] program appears as part of the Speedy Trial Act at 18 U.S.C. § 3161(h)(2)." ***United States v. Allen***, 683 F.Supp. 1136, 1137 n. 1 (E.D. Mich. 1988). State cases recognizing pretrial diversion to be a judicial function include ***Dearborne v. State***, 575 S.W.2d 259, 4 ALR4th 138 (Tenn. 1981).

16. Language on page 94 of the Proposed Plan assumes that the alternative rate (the equivalent of "locality pay") and the annual cost-of-living provisions of the CJA are optional suggestions which the Judicial Conference can indefinitely defer. See *Reports of the Proceedings of the Judicial Conference of the United States*, 79, 108 (November 12, 1990) (approving alternative rates and "automatic" annual cost-of-living increases "subject to whatever priorities the Conference might establish for the use of available resources"). ***Cf. National Treasury Employees Union v. Nixon***, 492 F.2d 587 (D.C. Cir. 1974) (President is not above the law; has constitutional duty to implement statutory pay adjustments).

17. Proposed Plan, 94.

18. ***United States v. Baker***, 10 F.3d 1374, 1390 (9th Cir. 1993) (citation omitted).

19. See, e.g., ***Burger v. Kemp***, 483 U.S. 776 (1987) ("actual" conflict of interest avoided when defendants, represented by one firm, were tried separately). Such a severance solution would mitigate any contemplated economy.

20. The Model Code, adopted by the ABA in 1969, was "subsequently adopted by the vast majority of state and federal jurisdictions." *Preface* to the Model Rules (1993). DR 5-105(D) provides that "[i]f a lawyer is required to decline or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment."

21. Adopted by the ABA in 1983, "more than two-thirds of the jurisdictions [have] adopted new professional standards based on these Model Rules." *Preface* to the Model Rules (1993). Rule 1.10(a) provides: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule[] 1.7. . . ." Rule 1.7 forbids clients with adverse interests; representing multiple clients in a single matter requires "explanation [to the clients] of the implications of the common representation and the advantages and risks involved." The commentary explains that "[t]he potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant."

22. See Rule 44(c), Fed. R. Crim. Pro.

23. See, e.g., ***Mannhalt v. Reed***, 847 F.2d 576 (9th Cir. 1988) (finding no waiver by client).

24. ***United States v. Lorenzo***, 995 F.2d 1448, 1453 n. 1 (9th Cir. 1993) (citing ***United States v. Judge***, 625 F.Supp. 901, 902 (D.Haw. 1986), *aff'd*, 855 F.2d 863 (9th Cir.), *cert. denied*, 488 U.S. 959 (1988)).

25. See, e.g., ***Baylson v. Disciplinary Bd. of Supreme Court of Pa.***, 975 F.2d 102 (3rd Cir. 1992) (federal court rules for federal prosecutors suing state disciplinary board over rule requiring prior judicial approval for grand jury subpoenas issued to defense attorneys). The federal courts are also embroiled in the government's claim that federal prosecutors are exempt from state ethical rules forbidding contact with represented persons. See, e.g., ***United States v. Ferrara***, 847 F.Supp. 964 (D.D.C. 1993) (dismissing government's suit against New Mexico's Disciplinary Counsel); *Matter of Doe*, 801 F.Supp. 478 (D.N.M. 1992) (remanding same disciplinary proceeding to Ferrara). The state courts, however, are beginning to object. *See*, Mark Curriden, "State Court Chiefs Flex New Muscle," The National Law Journal, October 17, 1994 (50 state chief justices unanimously condemn Justice Department position on represented party contact exemption; give Attorney General "an earful").

26. See ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES (ABA Standard) 5-1.2 (3rd Ed. 1992) (Systems for legal representation).

27. The institutional need for an occasional private voice 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 harshly criticizing the administration of the CJA — and then refusing to retract his criticism and apologize. "Officers of the court may appropriately express

criticism on such matters." Government employees, however, are not so protected. ***Waters v. Churchill***, 114 S.Ct. 1878 (1994) (public employees can be summarily fired for criticism that could disrupt efficiency).

28. 18 U.S.C. § 3006A(a)(3).

29. "Model Criminal Justice Act Plan" of the Administrative Office of the United States Courts, at VI.C.

30. ABA Standard 5-1.2 (Commentary).

31. Miller, *Separation of Powers, An Ancient Doctrine Under Modern Challenge*," 28 AD L J 299, 304 (1976).

32. Kaufman, *The Essence of Judicial Independence*, 80 COL L REV 671, 700 (1980).

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