NACDL Testimony

October 24, 1995

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The Federal Courts Improvement Act, S.1101

Testimony by Loren Weiss before the Committee of the Judiciary, Subcommittee on Administrative Oversight and the Courts

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Introduction

The National Association of Criminal Defense Attorneys (NACDL)[(1)] appreciates this opportunity to comment on Senate Bill 1101, the Federal Courts Improvement Act. We support those sections which implement certain recommendations of the Judicial Conference of the United States [(2)] for amendments to the Criminal Justice Act (CJA).[(3)] We also point out that significant, comprehensive and long-term "Improvement" will require a reversal of the Congressional habit of grossly under funding the judicial function: particularly the constitutionally-mandated obligation to provide — and to fund — the right to effective assistance of counsel.

The CJA sets out the procedures by which the federal government meets its constitutional obligation to provide counsel for accused persons unable to hire their own attorney, [(4)] and its constitutional duty to provide such defendants with the "basic tools,"[(5)] and the "raw materials" [(6)] necessary to confront the prosecution's case within the adversary system of justice. The CJA provides for appointment of private counsel selected from a list (or "panel") or appointment of a federal defender organization (Federal Defender or non-profit Community Defender). [(7)] Panel attorneys can obtain "Investigative, expert, or other services necessary for adequate representation" [(8)] by ex parte application to the court; those necessary services are included in the budgets of the federal defender organizations.

Section 601 — More Defender Offices

Section 601 amends the CJA to require federal defender offices in districts where counsel is appointed in more than 200 cases annually, or where the Judicial Conference determines that defender offices would be cost-effective or are necessary to ensure effective representation.

NACDL agrees with the Judicial Conference that each judicial district should have an adequately funded federal defender organization. [(9)] Federal 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.

Moreover, in many districts with high caseloads, and with no defender organization, panel attorneys are virtually conscripted into service, and paid — eventually — at rates that are often below the amount necessary to cover office overhead. [(10)] Establishing defender offices in those districts to handle most of the cases[(11)] — and generally the most complex and protracted cases — will relieve the financial burden on the private bar.

Section 602 — Panel Attorney Support Offices

Section 602 will codify the recommendation of the Judicial Conference that "every effort should be made to encourage the courts to adopt a plan establishing a panel attorney support office" in districts where there is no defender office to "provide legal advice, support services, and training to panel attorneys." [(12)]

NACDL agrees that those panel attorney support services should be provided — especially given the likely demise of the Post-Conviction Defender Organizations [(13)] and the assignment of panel attorneys to represent death row inmates.

The support services contemplated by section 602 would benefit the court as well as the panel attorneys by emulating the administrative support now provided by defender offices in some districts. Removing much of the administration of the panel appointment and payment process from the shoulders of the judiciary will "save money by sparing the judiciary: the administrative costs of case-by-case appointment of panel attorneys; a judge's review of compensation and expense vouchers; and voucher processing and payment." [(14)]

Also important is the need to structure some level of insulation between the court and the appointed attorney. In 1993, the Judicial Conference, after considerable discussion, rejected recommendations for removing indigent defense administration from the judiciary. [(15)] The NACDL, along with the American Bar Association [(16)] and the National Legal Aid and Defender Association, [(17)] continues to respectfully disagree. [(18)] An imperfect, partial and temporary compromise can be achieved by delegating appointment and payment recommendations to defender offices or the support offices contemplated by this section.

Section 603 — Panel Attorney Rates

Section 603 will amend the CJA to delete the panel attorney rates established in 1984 — $40 per hour for out-of-court work; $60 per hour for work in-court; averaging $45 per hour [(19)] ($30 in 1984 dollars) [(20)] — and the procedures for adjusting those rates (up to $75 per hour, plus annual cost-of-living increases). [(21)] While NACDL agrees with the Judicial Conference [(22)] that rates should be increased to "sufficiently cover reasonable overhead costs and to provide a reasonable hourly wage," such rates already exist, but are not paid.

Anticipating inadequate Defender Services appropriations, the Judicial Conference, in 1988, decided that CJA panel attorney rate increases would be given its the lowest spending priority, in an attempt to stretch insufficient funds to cover a full fiscal year. [(23)] No rate increaseshave been implemented since then. In 1992 implementing CJA panel attorney rate increases was further discouraged by the Appropriations Committees: "While the conferees are not attempting to second guess the judgment of the members of the Judicial Conference concerning the need for increases in panel attorney rates, the constraints facing the conferees precluded the inclusion of such an increase in the conference agreement. [(24)]

Following that advice, budget requests for fiscal years 1994, 1995 and 1996, [(25)] omit the funds necessary to implement rate increases provided by the CJA, [(26)] and established by the Judicial Conference, [(27)] but never implemented. As a result, CJA panel attorneys in most judicial districts are still paid at 1984 rates.

The cost of practicing law, in the meantime, has increased tremendously. The most recent $75 rate, approved in January, 1995, applies (if and when funded) to the District of South Dakota, a low-cost area, where surveys conducted by the Defender Services Division show that the average overhead cost of a law office is $38 per hour, and the average private sector prevailing rates for criminal cases are $94 per hour in-court, $93 per hour out-of-court. In moderate-cost locations, the costs, and the prevailing sector rates, are notably higher. The cost of law office overhead in Vermont, for example, was $47 per hour in 1993. [(28)] A recent survey by the Tennessee Bar Association shows the average cost of office overhead of $46.81 per billable hour, and the average private sector prevailing rate for criminal cases of $115.84. [(29)] However, prevailing private sector rates and overhead costs in expensive metropolitan areas where the $75 CJA rates have been annually postponed for lack of federal appropriations (Miami, Dallas, Chicago, Philadelphia, Pittsburgh, St. Louis, Atlanta, Cleveland, Minneapolis, etc.) are much higher — effectively turning panel attorney service into a direct subsidy of the government's constitutional obligation to provide assistance of counsel to the indigent accused of crime. [(30)] 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. [(31)]

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. [(32)]

Several state courts have held that such a taking of private property for public use, without just compensation, violates the "takings clause" of the Fifth Amendment, or state constitutional counterparts. [(33)] It is well settled that an attorney's professional skills are property. Under the Federal Constitution, "the right to practice law has been held to be a property right within the meaning of the due process and equal protection provisions of the fourteenth amendment." [(34)] "From this it follows that an attorney from whom services are demanded and by whom they are given has a property right in his fee for those services which . . . should be based on their just and reasonable value." [(35)]

The crux of the CJA 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 less than fifty percent of the value set by the private market in many locations. Continued payments at less than half 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. [(36)]

While the Senate Committee on the Judiciary does not ordinarily initiate appropriations, the Subcommittee on Administrative Oversight and the Courts should be aware that amending the CJA without addressing the overarching crisis of inadequate funding is but a partial response to the larger problem.

Section 604 — Compensation for Services Other than Counsel

Section 604 will delete the CJA's 1986 presumptive amounts for paying experts, investigators, and other necessary services, and permit the Judicial Conference to establish, and periodically adjust, the base rates. The chief judge of the court of appeals will continue to review amounts in excess of the presumptive limit. [(37)]

NACDL supports this CJA improvement. The rates locked into statute nearly 10 years ago no longer reflect the cost of professional services — which have substantially increased — and do not acknowledge the constitutional necessity of providing the tools necessary to keep up with law enforcement technology. While indigent defendants are not likely to receive millions of dollars for expert assistance in, for example, DNA analysis, the constitution does require some basic leveling of the playing field. [(38)]

While this amendment will reduce the administrative burden on the judiciary now entailed in voluminous processing of orders approving excess compensation, the basic reform that is needed is appropriations sufficient to fulfill the constitutional mandate.

605 — Paralegals and Law Students

Section 605 pursues recommendations of the Judicial Conference that CJA panel attorneys "should be encouraged to use law students and paralegals to assist in all appropriate matters, and these legal assistants should be compensated at a reduced rate." [(39)] NACDL agrees that such flexibility should be recognized, because the current policy of paying only panel attorneys, at

panel attorney rates, for work that could well be done much cheaper by paralegals and law students "is significantly out of step with modern law office practices and can result in inefficiencies and additional costs to the CJA program." [(40)] If so reforming Judicial Conference policy requires an act of Congress, then Congress should so act.

Conclusion

In 1993, the Judicial Conference of the United States reported to Congress the results of its extensive review of the 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. [(41)]

That high priority continues in the 1995 Long Range Plan for the Federal Courts:

The single most important problem to confront the defender services program in recent years has been the judiciary's inability to secure appropriation of sufficient funding to meet the sharp cost increases attributable to rising criminal case loads, substantial expansion of prosecutorial and law enforcement resources, and the impact of guideline sentencing and mandatory minimum sentences. [(42)]

The CJA amendments proposed by S.1101 will not supply the missing appropriations, but will allow the judiciary to use very scarce resources more efficiently: by maximizing the proven economy — and quality — of federal defender offices; by improving the services available to panel attorneys while reducing the courts' administrative duties involved in the administration of CJA panel attorneys and other services necessary to representation; and by recognizing the utility and economy of paralegals and law students in modern law practice.

Accordingly, NACDL urges the Subcommittee to recommend passage of the CJA amendments noted above.

On behalf of the National Association of criminal Defense Lawyers, I want to thank the Subcommittee for its consideration of our concerns on this very important subject. We will gladly respond to any questions the Subcommittee may have.

Loren E. Weiss
National Association of Criminal Defense Attorneys

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Resolution of the Board of Directors

March 7, 1992

Whereas the Committee to Review the Criminal Justice Act has solicited the views of the National Association of Criminal Defense Lawyers on the important issues of the administration and operation of the Criminal Justice Act; and

Whereas the provision of criminal defense to persons accused of federal crime who cannot afford to hire counsel is of great importance to the members of NACDL, many of whom accept CJA appointments; and

Whereas NACDL recognizes the increased complexity of federal criminal practice in recent years, particularly due to the implementation of the federal sentencing guidelines and the increased complexity of federal prosecutions,

Therefore, now be it resolved by the officers and directors of NACDL as follows:

1. Every federal judicial district should be required by statute to have an institutional defender presence, whether that be a Federal Public Defender or a community defender organization, or in districts with low numbers of CJA appointments a panel lawyer support organization.

2. CJA panels should be composed of experienced criminal defense lawyers. The panels should be of small enough size so that panel members receive regular appointments. Panel lawyers should have access to periodic training, which should be mandatory for panel membership, and reasonable support and advice resources. Panel lawyers should be fairly and promptly compensated for CJA appointed work.

3. Federal Public Defenders and community defenders should be insulated from the local judiciary, including in appointment and reappointment of the defender, staffing, funding, and resources.

4. NACDL, as the only national organization devoted solely to a professional and high quality of representation of persons accused of crime, seeks participation in naming qualified criminal defense lawyers to serve on the national policy-making body for federal indigent criminal defense on an on-going basis. We believe that such a body should include representatives of the federal defenders, death penalty resource center directors, CJA panel attorneys, and the criminal defense bar. We express our willingness to be a continuing resource for the provision of members of such a body.

Footnotes:

[1] NACDL is a nonprofit, national organization which includes within its membership over 8,800 attorneys actively engaged in defending criminal prosecutions. In addition, we are affiliated with 72 state and local criminal defense organizations with which we work cooperatively on issues of common concern. Altogether, we speak for more than 28,000 criminal defense lawyers nationwide. The mission of the NACDL, as defined in its by-laws, is "to insure justice and due process for persons accused of crime, to foster the integrity, independence and expertise of the criminal defense profession, and to promote the fair administration of criminal justice."

[2] See *Report of the Judicial Conference of the United States on the Federal Defender Program* (March 1993) ("Report on the Federal Defender Program") and the Proposed Long Range Plan for the Federal Courts (March 1995) ("Long Range Plan"). The Report on the Federal Defender Program is the result of an extensive study of the Criminal Justice Act, as required by section 318 of Pub. L. No. 101-650, the Judicial Improvements Act of 1990. The Long Range Plan was substantially approved by the Judicial Conference at its meeting in March 1995. The final *Long Range Plan* will be printed in January, 1996. Except as noted herein, references are to the March 1995 printing.

[3] 18 U.S.C. § 3006A.

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

[5] *Britt v. North Carolina,* 404 U.S. 226, 227 (1971).

[6] *Ake v. Oklahoma,* 470 U.S. 68, 77 (1985).

[7] Post-Conviction Defender Organizations, a type of non-profit Community Defender Organization, are targeted for elimination — despite the well-documented fact that they provide cost-effective and efficient representation of death row inmates. See HR 2076 at 50. Those complex and emotionally taxing caseloads must now be reassigned to defender organizations and panel attorneys.

[8] 18 U.S.C. § 3006A(e)(1).

[9] Report on the Federal Defender Program, at 20-21; Long Range Plan at 110.

[10] Report on the Federal Defender Program, at 30; Long Range Plan, at 112.

[11] Defender offices typically project representation of 75 percent of the indigent caseload, pursuant to the policy of the CJA to maintain "substantial proportion" of the private bar. 18 U.S.C. § 3006A(a)(3); "Model Criminal Justice Act Plan" of the Administrative Office of the United States Courts, at § VI.C (defining "substantial" as approximately 25 percent of the annual appointments).

[12] Report on the Federal Defender Program, at 29; Long Range Plan, at 111.

[13] See note 7, infra.

[14] Long Range Plan, at 110.

[15] Report on the Federal Defender Program, at 16-20.

[16] ABA Standards for Criminal Justice, Providing Defense Services, 55-1.3 (3d ed. 1992) (Professional Independence).

[17] NLADA Standards for the Administration of Assigned Counsel Systems, 2.2 (Independence from Judiciary and Funding Source).

[18] Attached hereto, as an Appendix, is the March 7, 1992, Resolution of NACDL's Board of Directors, setting forth the Association's position on proposals then under consideration by the Judicial Conference.

[19] Report on the Federal Defender Program, at 4 ("The average compensation is about $45 per hour, since one in-court hour is reported for every three out-of-court hours").

[20] The general cost of living, as measured by the Bureau of Labor Statistics, shows that a dollar's worth of goods and services in 1984 costs about $1.50 in 1995. Accordingly, most panel attorneys are paid barely over $30 per hour (compared to $45) in 1984 dollars — a $15 per hour rate cut that has crept into the system over the years.

[21] 18 U.S.C. § 3006A(d)(1).

[22] Report on the Federal Defender Program, at 30-31; Long Range Plan, at 111.

[23] Reports of the Proceedings of the Judicial Conference 75 (1988) ("In recognition of the possibility that the 'Defender Services' appropriation might be insufficient to fund fully the anticipated level of CJA activities, the Conference established . . . priorities for that appropriations account").

[24] House Report No. 102-709, 102nd Cong., 2d Sess., at 75 (Sept. 28, 1992).

[25] "In response to Congressional concerns over the limited funding available to meet CJA requirements and in order to assist Congress in its efforts to reduce governmental spending overall, the Judiciary is not intending in fiscal years 1993 or 1994 to implement the $75 per hour rate in the 72 districts for which that rate has been approved but not yet implemented and, therefore, is not seeking any fiscal year 1994 funds for this purpose." Hearings, House Appropriations Subcommittee for FY 1993, Part 4, The Judiciary, 498-99 (emphasis in original); Hearings, House Appropriations Subcommittee for FY 1995, Part 4, The Judiciary, 384 (same); Hearings, House Appropriations Subcommittee for FY 1996, Part 3, Justification of Budget Estimates, 1021(same).

[26] 18 U.S.C. § 3006A(d)(1), amended in 1986, provides for increasing the 1984 $60/$40 rates when 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."

[27] Following the CJA procedures, the Judicial Conference has established "alternative rates" of up to $75 per hour in 89 of the 94 federal districts "subject to the availability of funds, and subject to whatever priorities the Conference might establish for the use of available resources."

- $75 rate established for Alaska, California (Central, Eastern (Sacramento and Fresno), Northern & Southern), Detroit, Michigan, New Jersey, Las Cruces, New Mexico, New York (Eastern and Southern), and Seattle, Washington; $70 rate in Hawaii; and $60 rate in Oregon and Las Vegas and Reno, Nevada. Proceedings of the Judicial Conference (JCUS) 16, 46, 75, 111 (1988).
- $75 rate for entire districts where previously limited to specific court locations, and to the Seventh Circuit (Wisconsin, Illinois & Indiana). JCUS 79, 108 (1990).
- $75 rate approved for Alabama (Southern), Arizona, Connecticut, Florida, Georgia (Northern), Guam, Idaho, Kentucky, Louisiana, Maryland, Massachusetts, Michigan (Western), Mississippi, Missouri, Nevada, North Carolina (Western), Ohio, Oregon, Pennsylvania (Middle & Western), South Carolina, Tennessee, Texas, Virginia (Western), and West Virginia. JCUS 18, 47, 56-57, 73 (1991).
- $75 rate for Alabama (Northern & Middle), Arkansas (Eastern), Colorado, Delaware, Georgia (Middle & Southern), Iowa, Kansas, Minnesota, Montana, New Hampshire, New York (Western), North Carolina (Eastern & Middle), North Dakota, Northern Mariana Islands, Oklahoma, Pennsylvania (Eastern), Puerto Rico, Utah, Vermont, Virgin Islands, Washington (Eastern), Wyoming, and Hawaii. JCUS 21-22, 39 (1992).
- $75 rate approved for South Dakota. JCUS __ (1995).

The rates established after 1988 (for 73 districts) have not been implemented.

[28] State of Vermont v. Bacon, —A.2d—, WL 74700, *24 (Vt. 1995) (Dooley, J., Dissenting).

[29] 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).

[30] 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." Cf. State of Louisiana v. Green, 631 So.2d 11, 13 (La. App. 1993) (setting an overhead rate of $30 per hour plus fees of $45 per hour, once annual pro bono donation exceeds 100 hours).

[31] Report on the Federal Defender Program, at 30.

[32] See, e.g., Bey v. United States, No. 93-8442, cert. denied, —U.S.— (June 23, 1994) (question presented: does conscription of panel attorneys to serve at a financial sacrifice violate the Constitution?).

[33] *See Pruett v. State*, 574 So.2d 1342, 1357 (Miss. 1990); *Jewell v. Maynard*, 383 S.E.2d 536, 543 (W.Va. 1989); *DeLisio v. Alaska Superior Court*, 740 P.2d 437, 441 (Ala. 1987); *Stephan v. Smith*, 747 P.2d 816, 842 (Kan. 1987); *State ex rel. Partain v. Oakley*, 227 S.E.2d 314 (W.Va. 1976).

[34] *Weiner v. Fulton County*, 148 S.E.2d 143, 145 (Ga.App.) *(citing Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957)), *cert. denied*, 385 U.S. 958 (1966). See *also Konigsberg v. State Bar of California*, 353 U.S. 252 (1957).

[35] *Bias v. State*, 568 P.2d 1269, 1270 (Okl. 1977). *See also Bedford v. Salt Lake County*, 447 P.2d 193, 195 (Ut. 1968); *Warner v. Commonwealth*, 400 S.W.2d 209, 211 (Ky. 1966), *cert. denied*, 385 U.S. 858 (1966); *State ex rel. Partain v. Oakley*, 227 S.E.2d 314 (W.Va. 1976); *Abodeely v. County of Worcester*, 227 N.E.2d 486 (Mass. 1967); *Knox County Council v. State*, 29 N.E.2d 405, 408 (Ind. 1940).

[36] 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. The House Republican's "Contract With America" calls for compensation under the Fifth Amendment when government regulations take 10 percent of property value. Where CJA payments reflect less than the cost of doing business, and less than a fourth of the private market rate, such a private property protection philosophy should apply.

[37] 18 U.S.C. § 3006A(e)(3).

[38] See, e.g., *Cade v. State*, 685 So.2d 550 (Fla. 5th DCA 1995) (convictions reversed for failure to fund DNA expert for defense); *Dubose v. State*, ___So.2d___, 1995 Ala. Lexis 151 (Ala. 1995) (same), applying the principles of *Ake v. Oklahoma*, supra note 6.

[39] *Report on the Federal Defender Program*, at 32.

[40] *Id.*

[41] *Report on the Federal Defender Program*, at 11.

[42] *Long Range Plan*, at 112.

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