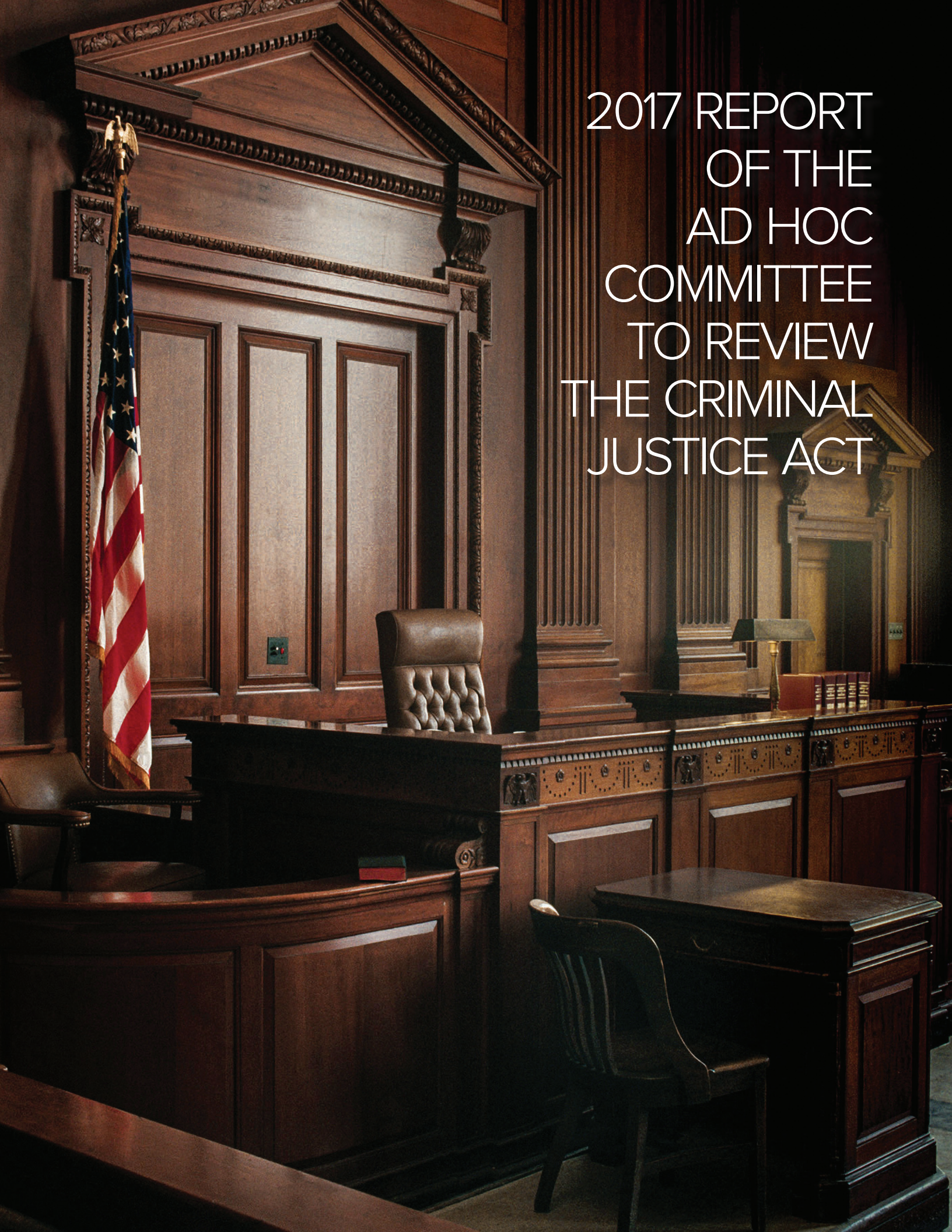


2017 REPORT OF THE AD HOC COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT

2017 REPORT OF THE AD HOC COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT

NOTICE

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Acknowledgments

A study of this scope is only possible with the assistance of many willing hands along the way. From planning and holding the public hearings, to collecting data, to writing the report, the Committee benefited from knowledgeable and dedicated judges, federal defenders, CJA panel attorneys, clerks—and many others. Here we take the opportunity to acknowledge a few who were of particular assistance, but there are hundreds of others who also contributed to this study.

The Committee benefited from the counsel and writing skills of staff attorney, Arin Melissa Brenner, as well as the support of project manager Autumn Dickman, paralegal specialist Amy Cushman, meeting planner Mark Gable, and, Judge Cardone's career law clerk, Richard Wallach. Dr. Robert Boucher of the Defender Services Office provided statistical assistance, and Professor Jon B. Gould of American University served as the Committee's reporter. We thank Jennifer Trone for her expert assistance with editing, and AURAS Design for design and production of this report.

Six of the seven public hearings were held in federal courthouses. For these hearings we were warmly hosted by Chief Judge Kevin Moore and former Chief Judge Federico Moreno in the Southern District of Florida for the Miami hearing; former Chief Judge Ann Aiken and Chief Judge Michael Mosman in Oregon for the Portland hearing; Chief Judge Karon O. Bowdre in the Northern District of Alabama for the Birmingham hearing; Chief Judge Phyllis J. Hamilton in the Northern District of California for the San Francisco hearing; former Chief Judge Petrese Tucker in the Eastern District of Pennsylvania for the Philadelphia hearing; and Chief Judge John R. Tunheim in the District of Minnesota for the Minneapolis hearing. Over the two years of the study the Committee met 12 times in addition to the public hearings. Many of these meetings took place in courthouses around the country. We are appreciative of the chief judges and their clerks who offered us meeting space and resources to assist us in our efforts in Seattle, El Paso, and Chicago.

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CJA panel attorneys are an integral component of the hybrid system and their voices were an essential part of the data gathering process. We thank the following panel attorney district representatives who were tasked with assisting in identifying and recruiting panel attorneys to testify at each of the hearings: John Convery (Santa Fe); Gilbert Schaffnit (Miami); Lisa Costner (Birmingham); Peter Schweda (Portland); Victoria Bonilla-Argudo (San Francisco); Patrick Nash (Philadelphia); and Stephen Swift (Minneapolis).

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Following the completion of the public hearings, and the review of the voluminous written and oral testimony received, the Committee was faced with the daunting task of condensing all of the information into a format from which we could draw conclusions and make recommendations. Sean Broderick from the National Litigation Support Center provided invaluable assistance with setting up our electronic documentation system and was of great help in advancing the Committee's understanding of technology and the issues that ESI discovery present. Kamila Tolentino, paralegal from the Federal Defenders of San Diego, Inc. was instrumental in coding thousands of pages of transcripts and written submissions from the seven hearings.

We would like to thank Director James Duff for his support and guidance throughout the process; the Defender Services Committee for their oversight of the CJA program and for requesting this long overdue study; and Cait Clarke and the staff of the Defender Services Office for their support and valuable contributions over the past two years.

Finally, the Committee would like to thank the community of public defenders—both institutional and panel attorneys—for the work they do in upholding the promises of the Sixth Amendment. ●

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Ad Hoc Committee to Review the Criminal Justice Act

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Preface

The Sixth Amendment to the Constitution guarantees individuals accused of crimes the assistance of counsel—a skilled and devoted lawyer by their side advocating for their interests. The right to counsel is the foundation of an adversarial system of justice that is truly fair to all, as opposed to one that is stacked against those without money and influence. For the past two years we, along with 10 others, have had the honor of serving on a committee appointed by Chief Justice John G. Roberts, Jr. to study and report on the program that is responsible for delivering that fundamental right to roughly 250,000 people every year in federal courts throughout the country.

That program, with an annual budget of over a billion dollars, has been overseen by judges since its inception more than half a century ago. When Congress mandated the creation of a federal system of public defense by passing the Criminal Justice Act in 1964, the judiciary was considered to be a temporary home for the fledgling program. Over the years, with support from the judiciary, that program has grown and matured tremendously, but is still under the judiciary's control and, as a result, unable to fully accomplish its specific mission.

The needed course of action is clear: Congress should create an autonomous entity, not subject to judicial oversight and approval. Our recommendation echoes the conclusion reached nearly 25 years ago by the only other committee to comprehensively review the Criminal Justice Act, which our Chair Emeritus the Honorable Edward C. Prado led. The call for independence in 1993 was highly controversial and ultimately rejected. While it is not without controversy today, much has changed in the intervening decades.

Today, a preponderance of defense attorneys, federal judges, and outside experts believe the time has come to create an independent entity with the same mission as frontline defenders. The judiciary as a whole and individual federal judges were never well suited to the role Congress gave them. There were problems from the start, and those problems—the result of a cumbersome administrative structure that fails to

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elevate the expertise of defense attorneys, meet their needs, or preserve their independence—have only worsened over the years while the number of defendants in federal court who cannot afford to hire their own attorney has increased significantly.

Talk of administrative flaws might sound like a merely bureaucratic or even trivial matter. It is not. Genuine independence is crucial to providing a high-quality defense—not just in some cases but in all cases. It must be the standard of practice in federal courts nationwide. Under the current administrative structure too many attorneys are compromised—if not hamstrung—by the lack of financial resources, training and guidance, and latitude to mount a skilled and vigorous defense of their clients in federal court. When the defense is undermined in these ways, the innocent are more likely to face wrongful conviction and the guilty are more likely to face harsher punishment, including execution. The failures that play out tragically in individual lives are systemic.

We can do better. Over the course of the past two years at hearings around the country we met scores of judges, attorneys, and others with a deep commitment to justice in the federal courts. Many of them referred to our system as "the gold standard," and called on us to make it shine in practice; not just on paper. A fully independent entity governing the provision of public defense in the federal courts is the goal, one that we must move steadily toward by educating members of Congress and the public about why independence matters. It is our sincere hope that this Committee's report sparks and guides a process that achieves this goal.

While it will take action by Congress to realize the original and full intent of the 1964 Criminal Justice Act, the transition to independence can begin now. This Committee has outlined interim steps the judiciary can take on its own to confer greater authority and autonomy to members of the defense community, changes that raise the quality of defense in individual cases.

On behalf of the entire Committee, we wish to thank Chief Justice Roberts for the honor of being selected to serve and for entrusting us with a challenging assignment. It was difficult because of its scope and also because we had to collect our own data since much of the data we sought to evaluate this billion-dollar-plus government program was lacking. That too is something to remedy beginning now. Reviews such as ours are infrequent, but we need much better data to effectively manage a system that the public funds and that so many Americans rely on for justice.

Kathleen Cardone

Honorable Kathleen Cardone
Chair

Edward C. Prado

Honorable Edward C. Prado
Chair Emeritus

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Executive Summary



Introduction

This Committee was tasked to study one of the most fundamental of rights in America, the right of an accused person to legal counsel. Enshrined in the Constitution under the Sixth Amendment, the right to assistance of counsel is a pillar of our adversarial system of justice and our government. "If we are to keep our democracy," Judge Learned Hand cautioned in 1951, "there must be one commandment: Thou shalt not ration justice." He was speaking on the occasion of the New York Legal Aid Society's 75th Anniversary, yet it would be more than a decade before the Supreme Court's 1963 landmark ruling in *Gideon v. Wainwright*, compelling states to provide counsel at government's expense to criminal defendants who cannot afford to hire an attorney.[1]

The effort to make such a fundamental right real in practice—not to some, but to all—has been waged in the halls of justice by jurists committed to the letter of the law and the principles that underlie it. Their compelling legal arguments are captured in a chain of court decisions before and after *Gideon*. These rulings emphasize that representation *per se* is not enough. Writing in *MacKenna v. Ellis* in 1960, for example, the Fifth Circuit Court of Appeals stated that an accused person is entitled to "effective, wholehearted assistance of counsel and to the undivided loyalty" of his representative."[2] The Court deemed such skill, dedication, and independence to be "essential to due process."[3]

Chief Justice of the United States John G. Roberts, Jr. tasked this Committee with studying the current quality of public defense in federal courts nationwide provided under the auspices of the Criminal Justice Act—groundbreaking legislation passed in 1963 and expanded in 1970. That the United States has a fully developed system of public defense at the federal level is evidence of considerable progress in making the Sixth Amendment right to counsel real in practice. But this Committee

The effort to make such a **fundamental right** real in practice—not to some, but to all—has been waged in the halls of justice by jurists committed to the letter of the law and the principles that underlie it.

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

2 *MacKenna v. Ellis*, 280 F.2d 592, 595 (5th Cir. 1960), *modified*, 289 F.2d 928 (5th Cir. 1961).

3 *Id.*

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The Committee's Review Process

To assess the quality of representation for indigent defendants in federal courts nationwide, this Committee held seven hearings around the country that drew 229 witnesses, nearly all of whom also submitted in-depth written testimony that totaled more than 2,300 pages. Federal defenders, panel attorneys, prosecutors, and judges from 78 of the 94 federal court districts—83 percent of all districts—testified before the Committee. Witnesses also included former public defense clients, circuit court judges, magistrate judges, nationally recognized advocates, representatives of the American Bar Association and other key professional groups, noted academics, and subject matter experts. The Committee conducted its own survey of panel attorneys to begin filling the glaring gap in data about their work, and reviewed hundreds of pages of reports and studies produced by others. Committee Members met 12 times in addition to the hearings and, in meeting time alone, spent more than 200 hours working together to plan the review, organize and assess the overwhelming amount of information collected, discuss findings and recommendations, and produce this report.

was not formed to rest on the laurels of history, and by the standard articulated in *MacKenna v. Ellis*, justice continues to be rationed in federal courts around the country. While it has been decades since people charged with crimes—in many cases facing life-altering punishments—faced prosecutor, judge and jury alone, representation by a skilled and devoted advocate with sufficient resources to mount a vigorous defense is far from guaranteed. Indeed, the quality of defense appears to be highly uneven across the country and from case to case within districts.

Fully 90 percent of defendants in federal court cannot afford to hire their own attorney. Justice in their cases, and indeed the future course of their lives, depends on the quality of the system that provides lawyers to represent them. The subject of the Committee's Report is the examination of that system's successes and failures, as well as a course of action for improving it—findings and recommendations presented in brief in this Executive Summary.

Before committing the significant time and effort required to undertake this study, most Committee members were unaware of the depth and scope of the problems hindering administration of the Criminal Justice Act across the country and believed that small changes or gradual shifts in policy and practice would suffice.

Precisely because the current structure emphasizes local control, most people are only aware of what happens in the courtrooms where they practice. Such limited perspective is hardly new. Two years before Congress passed the Criminal Justice Act, editors from the *Harvard Law Review* researched the existing ad hoc approach to public defense.[4] Looking across the country in 1962–1963 they saw glaring problems, yet the individual lawyers and judges interviewed for that study—fully 93 percent of

[4] Bruce J. Havighurst & Peter MacDougall, Note, *The Representations of Indigent Criminal Defendants in the Federal District Courts*, 76 Harv. L. Rev. 579 (1963).

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them—believed the system provided "adequate" or "very adequate" representation to indigent defendants in federal court.[5] Because those lawyers and judges were enmeshed in the system they failed to see its weaknesses.

Thanks to decades of leadership by the judiciary, Congress, defenders themselves, and others, the system of public defense at the federal level is a vast improvement on the ad hoc services that predated the Criminal Justice Act. But it is no less important today than it was in 1962 to take stock of what is happening in courts around the country.

It was only in studying the federal defender system as a whole and hearing from witnesses across the country that the members of this Committee have come to the unanimous conclusion that despite the best efforts of all parties involved in delivering effective representation under the Sixth Amendment, the current structure for providing public defense results in disparities in the quality of representation that have serious consequences for some defendants. The Committee hopes its report illuminates the scope and nature of these problems and underlying structural flaws from which they arise—and makes a persuasive case for meaningful change. ●

5 *Id.* at 588

Establishing a System of Public Defense in the Federal Courts

Although defendants in federal court have been guaranteed representation, regardless of ability to pay, since the 1938 Supreme Court ruling in *Johnson v. Zerbst*,[6] for almost three decades there was no national system for appointing lawyers or pool of money to pay them. Few legal aid societies existed at the time, so federal judges had to find attorneys in private practice willing to work on a pro bono basis. Because seasoned trial attorneys were rarely interested in these cases, young lawyers, often with no criminal law or trial experience, represented the vast majority of indigent defendants.[7] Attorneys were obliged to use their own resources to pay for all defense expenses, including expert witnesses, investigators, and other services. In 1963 an Alabama district court, ruling in *United States v. Germany*, found that burden ultimately denied the accused a full-throated defense as required under the Sixth Amendment.[8]

Even before *Johnson v. Zerbst,* the Federal judiciary had been calling for a formal system of indigent defense. As early as 1937, the Judicial Conference of the United States recommended establishing defender offices where caseloads justified them,[9] and repeated that recommendation for years to come.[10] Once again judges were

6 *Johnson v. Zerbst*, 304 U.S. 458 (1938).

7 Bruce J. Havighurst & Peter MacDougall, Note, *The Representations of Indigent Criminal Defendants in the Federal District Courts*, 76 Harv. L. Rev. 582-583 (1963).

8 *United States v. Germany*, 32 F.R.D. 343, 344 (M.D. Ala. 1963).

9 Rep. of the Judicial Conf. of the U.S. 8-9 (Sept. Sess. 1937), *available at* http://www.uscourts.gov/sites/default/files/1937-09_0.pdf.

10 Robert J. Kutak, *The Criminal Justice Act of 1964*, 44 Neb. L. Rev. 703, 711 (1965).

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out in front, working to make the Sixth Amendment right a reality in practice. And they were not alone. Several U.S. Attorneys General, some members of Congress, and the American Bar Association repeatedly called for a legislative solution to the Sixth Amendment crisis. In the end, it took a federal commission—the Committee on Poverty and the Administration of Justice—appointed by Attorney General Robert F. Kennedy to persuade Congress to act.

The Allen Committee, named for its chair Professor Francis A. Allen, concluded that the ad hoc system of providing counsel to indigent federal defendants failed both defendants and the criminal justice system as a whole.[11] When the Committee's report was delivered to Congress on March 6, 1963, lawmakers were already primed to receive the findings. In his final State of the Union address on January 14, 1963, President John F. Kennedy had called on Congress to protect the right to counsel regardless of a defendant's financial circumstances.

Congress passed the Criminal Justice Act on August 7, 1964, outlining a system to provide defendants without resources legal representation at every stage of the court proceeding. Even though the Act applied only to federal courts, its national scope made it a watershed for public defense, especially coming on the heels of the Supreme Court's 1963 decision in *Gideon v. Wainwright*.

Because Congress was divided at the time about whether or not to create federal defender offices, the Act initially outlined a system in which federal judges would appoint counsel drawing from a local "panel" of private attorneys who would be paid at set rates for work in and out of court up to a fixed maximum. The statute also provided compensation for experts, investigators, and others services up to a fixed amount. The Judicial Conference of the United States and its allied agency, the Administrative Office of the United States Courts, were tasked with the responsibility of building and overseeing this new national system of public defense.

A few years later at the request of Congress, the Department of Justice and the Judicial Conference commissioned Professor Dallin H. Oaks to revisit the idea of creating institutional defenders. Submitted to Congress in 1969, the Oaks Report found "a demonstrated need for some type of full-time salaried federal defender lawyers."[12] Congress amended the Criminal Justice Act in 1970 to create the current hybrid system of institutional defenders and private attorneys. Today, 91 of the 94 judicial districts have a Federal Defender Office whose staff are federal employees or a nonprofit Community Defender Office that works under contract with the federal government.

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[11] The Allen Committee, *Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice*, submitted to the Attorney General on February 25, 1963 [hereinafter Allen Committee]. (See e.g. page 10, discussing the vital role that a strong defense plays in the health of our adversarial system, and stating the Committee's finding that the "system was imperiled" by the large number of defendants unable to afford or adequately fund "a full and proper defense.")

[12] Dallin H. Oaks, THE CRIMINAL JUSTICE ACT IN THE FEDERAL DISTRICT COURTS, Subcomm. on Constitutional Rights of the S. Comm. on the judiciary, 90th Cong., 2d Sess. 11 (Comm. Print 1969) [hereinafter Oaks Report].

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Under-Resourced and Unduly Constrained

It was beyond the scope of this Committee's inquiry to review actual cases and their outcomes, which would have been the best measure of quality of defense. In fact, given the paucity of government data such a review was simply impossible. But there are compelling proxy measures of quality that this Committee considered. If attorneys lack the resources and training to provide a zealous defense; if their caseloads are overwhelming; if they lack the genuine independence needed to make the best decisions on their clients' behalf; then the quality of representation they provide is bound to suffer—not in every case but in far too many cases. This Committee found troubling signs that many panel attorneys in particular are indeed ill-equipped and insufficiently compensated; often without the resources or knowledge to hire experienced investigators, expert witnesses, and interpreters when a case requires such services; and lacking access to the level of training and guidance that both institutional public defenders and prosecutors have readily available.

If attorneys... lack the **genuine independence** needed to make the best decisions on their clients' behalf, then the quality of representation they provide is bound to suffer—not in every case but in far too many cases.

In addition, both panel attorneys as well as institutional defenders are unduly constrained by the nature and degree of judicial oversight built into the Criminal Justice Act—and recent changes in Judicial Conference policy have neither clarified nor simplified the oversight burden on judges, constraining them as well.

On the whole, the judiciary has had the best intentions in administering the Criminal Justice Act, and individual judges and administrative leaders have been careful stewards of a system created to protect a crucial right. But they are operating within a fundamentally flawed administrative structure. Tasking—and indeed burdening—federal judges with the responsibility for managing the provision of public defense creates conflicts of interest and other serious impediments to genuine justice.

Those structural problems include giving the judiciary control over the defense budget; giving individual judges sole authority to appoint counsel and determine staffing levels at federal defender offices; and letting judges decide what, if any,

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resources attorneys may or may not use in defending their clients and what constitutes fair compensation for their legal services. The following sections explore these administrative obstacles to a full and effective defense in greater detail.

Inadequate Compensation and Guidance for Panel Attorneys

Nationwide, an estimated 10,000 to 11,000 attorneys in private practice—many of them solo practitioners—stand ready to represent indigent defendants in federal court. Yet these frontline defenders are not adequately compensated. In fiscal year 2017, the pay rate for panel attorneys in non-capital felony cases was $132 per hour. This is far less than the prevailing rate for criminal defense work and even less than the $144 per hour that Congress has authorized to pay under the statute.

When the high cost of living in some cities is considered, along with high overhead expenses, the effective rate of compensation for panel attorneys is arguably lower than the original rates authorized by Congress in 1964. Although a sizable increase in compensation has been needed for years—and the judiciary's official policy is to seek the full rate authorized by Congress—the judiciary has typically requested only minor increases that are less than the authorized amount as a way to limit its overall budget request to Congress.

Inadequate Compensation

Fiscal Year	Paid Rate	Maximum Authorized Rate*	Judiciary's Request to Congress	Rate Approved By Congress
2002	$75/$55 (in-court/out-of-court)	$113	$113	$90
2005	$90	$125	$92	$90
2008	$94	$133	$113	$100
2011	$125	$141	$141	$125
2014	$125	$141	$126	$126
2017	$129	$146	$137	$132

*The assumed rate at the time the judiciary submitted its budget request to Congress.

Not only are hourly rates unrealistically low, panel attorneys aren't even guaranteed payment-in-full for the services they provide. Many witnesses told the Committee that so-called "voucher cutting" by district court judges who have the responsibility for approving requests for payment is a common occurrence—apparently more so in some districts and among some judges. In addition to ad hoc cuts, judges in some districts compare vouchers for similar types of cases or between co-defendants in the same case and average the amounts, paying everyone the same as if the work involved in defending different individuals was exactly the same. These views are supported by quantitative data collected in surveys of panel attorneys that this Committee conducted as part of its review process, data that indicates

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unwarranted voucher cutting is prevalent throughout the country.

Judges are not required to provide a reason for cutting a voucher, and often don't. Panel attorneys typically lack an effective, or sometimes any, recourse for appealing the judge's decision. Some panel attorneys testified to the Committee that they are reluctant to challenge voucher cuts, fearing reprisal by the judge within the context of the ongoing case or when submitting vouchers in the future.

The phenomenon of cost-cutting also encompasses refusal by judges to approve expenditures for non-legal services. These can be essential to mounting an effective defense, especially when counsel is a solo practitioner, as are many panel attorneys. These services include the assistance of a skilled investigator, expert witnesses, and interpreter. Among panel attorneys surveyed by the Committee, 60 percent reported using expert services in just 1 out of 10 cases or less; and only 12 percent reported using these services in more than half their cases. In some districts, as little as two percent of cases handled by panel attorneys involved the use of experts. Judicial oversight is not the only source of this problem; it is also true that some panel attorneys do not appreciate the value of expert services, know where to find needed experts, or simply want to log more billable hours themselves.

Discouraged by the prospect of voucher cutting and the related phenomena described above, many panel attorneys have resorted to "self-cutting," in which they deliberately do not bill for reimbursable hours or request services they suspect judges will not approve. When these self-cuts are combined with cuts by judges, the effect is systemic undermining of the defense.

The judiciary as a whole is not unsympathetic to the needs of the defense. Most judges are committed to protecting the integrity of our adversarial criminal justice system. At the same time, some judges also feel the need to cut costs, especially in the wake of the 2013 Congressional budget sequestration. More significantly, when judges do not fully appreciate the time, resources, and tactical decisions involved in mounting a vigorous defense they are more likely to conclude that vouchers are excessive in amount or that services are unnecessary. Fundamentally, judges should not be in a position where they have to be experts in defense in order to fairly compensate and reimburse attorneys.

Even when panel attorneys are paid in full, the requirement for judicial review and approval of vouchers often results in payment delays. There are efficient remedies to this particular problem. Delays in payment are less common in districts where judges can rely on an initial review and recommendation by a supervising panel attorney or the local federal defender office. This should be common practice. Similarly, case budgeting attorneys have been helpful in preventing both voucher cutting and delays in payment, but they too are not available everywhere.

In addition to being insufficiently compensated, most panel attorneys lack access to training and guidance. As a result, they are behind the curve, especially in complex and quickly changing areas of practice such as electronic discovery. The

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Department of Justice's expenditures on training and training facilities for prosecutors exceeds the entire budget of the Defender Services Office (DSO). Lack of resources limits the amount of training DSO can provide. Moreover, panel attorneys from rural areas testified that the cost and difficulty of traveling to attend a national or regional training is a real barrier. While learning occurs organically in the context of a defender office—and these offices have considerable expertise to share—staff shortages and other fiscal constraints limit the amount of training institutional defenders can provide to panel attorneys in their district.

Destabilizing Defender Offices

The fact that there are Federal Defender Offices or Community Defender Offices serving 91 of the 94 judicial districts, is one of the **great achievements** of the Criminal Justice Act.

Panel attorneys are not the only defense practitioners unfairly hampered in their work as a result of judicial oversight. The extraordinary authority and latitude given to individual circuit court judges to appoint and remove federal defenders, set staffing levels at federal public defender offices, and even to create or dissolve both federal and community defender offices, leads to vast discrepancies in organizational capacity and, arguably, in the quality of defense. A 2013 work-measurement study by the Judicial Resources Committee was instrumental in revealing that many defender offices are severely understaffed.

Several federal public defenders testified to the Committee that the nature of the appointment cycle—a four-year term with no presumption of reappointment—creates a destabilizing environment in which they feel hamstrung as managers of their offices and, in some instances, beholden to the judiciary. Some federal defenders told the Committee they were reluctant to ask for staff increases, even when desperately needed, fearing such requests would negatively affect their prospects for reappointment. Several defenders even said they felt pressure to base hiring and budgeting decisions on the preferences of individual judges, rather than the best interests of their indigent clients, to bolster their chances of reappointment.

The fact that there are Federal Defender Offices or Community Defender Offices serving 91 of the 94 judicial districts, is one of the great achievements of the Criminal Justice Act—growth that would not have happened without judicial leadership. These institutional defenders raise the quality of defense in their districts through their own practice, by the example they set, and in some instances, through guidance they provide to less experienced panel attorneys. Still, in one of the three districts without a defender office, the Committee heard testimony that inexperienced panel attorneys are routinely assigned to defend clients outside their areas of expertise. Individual judges should not determine whether to establish institutional defenders offices in these three districts, or whether the defender offices that currently exist continue to operate.

The judiciary exerts control over defender offices in other ways as well. The Administrative Office of the U.S. Courts (AO) controls the information systems these offices rely on to manage cases, which not only reduces efficiency but also puts

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confidential client information at risk of disclosure. Even ad hoc policy decisions can have a profound effect. The AO recently prohibited public defenders from representing clients in non-capital clemency petitions, despite the fact that these attorneys have knowledge and experience that would be of tremendous benefit to individuals facing an important determination that relates directly to their criminal conviction.

Troubling Deficiencies in Capital Habeas Cases

This Committee explored several specific areas of defense practice—all of which are addressed in the full report—but one area stands out as especially troubling: the current state of public defense in capital habeas cases. The underlying problems in these cases, which concern possible constitutional violations or wrongful convictions, are not dissimilar to those already discussed, but the potential consequence of inadequate representation is plainly dire.

The rate of compensation for panel attorneys in habeas cases, $185 an hour, is higher than the rate for non-capital felony cases but in no way sufficient. Moreover, the presumptive cap on expert services has not risen since 1996, when it was instituted. Because capital habeas cases often require thorough re-examination of the original trial—what counsel did and failed to do—the current cap is unrealistically low.

The underlying problems in these cases, which concern potential constitutional violations or wrongful convictions, are not dissimilar to those already discussed, but the potential **consequence of inadequate representation is plainly dire**.

Separately, many of the federal judges presiding over these cases are not familiar with the nature of capital habeas representation, which can inadvertently hamper the quality of defense. For example, if a judge doesn't recognize the need for in-depth investigation to mount an effective challenge, that judge may not approve necessary expert expenses. Similarly, voucher cutting in these cases is a widespread concern because many judges don't grasp the extent of work required to submit an effective and complete habeas petition. Such variation among individual judges, coupled with differences in policies among the circuit courts, leads to serious discrepancies in the quality of defense available to capital habeas defendants across the country. In addition, few defense attorneys are qualified to handle these cases, and the combination of below-market rates and prospect of dramatic voucher cutting creates a financial disincentive to accept cases.

The short statute of limitations for capital habeas petitions, 12 months, creates other problems. Frequent delays in appointing counsel limit the time attorneys have to prepare a petition, and some judges have responded negatively to attempts to expedite appointments. The limited time frame combined with heavy caseloads means that habeas attorneys miss deadlines, sealing their clients' fates. Recently, nine defendants in Texas were scheduled for execution because their attorneys failed to file habeas petitions on time.[13] Since the passage of the Antiterrorism and

[13] Richard Burr, Texas Regional Habeas and Assistance Project, Public Hearing – Birmingham, Ala., Panel 3, Writ. Test., at 2. (*See* Lise Olsen, [Texas Death Row] *Lawyers' Late Filings can be Deadly for Inmates: Tardy Paperwork Takes Away Final Appeals for 9 Men, 6 of Whom Have Been Executed,* Hous. Chron., Mar. 21, 2009.)

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Effective Death Penalty Act of 1996, states have had the ability to apply for "fast-track" measures that would shorten the statute of limitations for capital habeas cases to six months and aggravate existing problems.

To address these widespread problems, some Federal Defender Offices created Capital Habeas Units (CHUs) that serve their entire district and/or state. These specialized units are effective in ensuring timely, high quality representation and in controlling costs because of their economies of scale.[14] Despite their demonstrated effectiveness, CHUs were prohibited in some circuits until recently, and even today some circuit courts restrict the creation of a CHU and its staffing.

Persistent Data Deficit

The lack of data hamstrung this Committee, just as it did its predecessor a quarter-century ago.

Twenty-four years ago, the last time an independent committee was tasked with reviewing the quality of public defense in the federal courts, that body was criticized for the lack of data supporting its findings and recommendations, despite the fact that at the time such data did not exist. It still doesn't exist. The kind of comprehensive approach to data collection needed to effectively manage and evaluate a billion-dollar-plus government program is not taking place.

The lack of data hamstrung this Committee, just as it did its predecessor a quarter-century ago. Much of the data that the Committee sought out to complete its review was unavailable, nonexistent, or inaccessible. The Administrative Office of the U.S. Courts doesn't even maintain a list of all practicing panel attorneys.

With limited government data to rely on, the Committee embarked on its own effort to gather data. Through significant effort on the ground, the Committee created a master list of panel attorneys in each and every district—and then surveyed them. As a result, the most extensive effort ever to collect data on the administration of the Criminal Justice Act was undertaken by this Committee. Moving forward, it is imperative that government assume this responsibility, use all available tools—including full implementation of the electronic vouchering system (eVoucher)—and develop data collection protocols when none exist. ●

[14] Stephen Bright, President, Southern Center for Human Rights, Public Hearing – Miami, Fla., Panel 4, Writ. Test., at 8.

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Stifled Under Layers of Bureaucracy

The federal program charged with ensuring representation for indigent defendants in federal courts nationwide is deeply enmeshed in the Judicial Branch of government. The Judicial Conference of the United States (JCUS), the governing and rule-making body of the judiciary, has ultimate authority. JCUS is composed of judges from both appellate and district courts and is chaired by the Chief Justice of the United States.

Within JCUS, the Defender Services Committee is nominally tasked with developing relevant policy, but the Executive Committee can withdraw any portion of that policy-making power at any time. Most notably, in 2013 an effort to "enhance coordination and oversight" of the judiciary's own resources resulted in the Executive Committee stripping the Defender Services Committee of the power to determine staffing and compensation in federal defender organizations. Additionally, the JCUS Budget Committee controls funding priorities through its central role in the budgeting process.

The responsibility for implementing policy falls on the Administrative Office of the U.S. Courts (AO). Up until 2013, the AO included the directorate-level Office of Defender Services, which directly administered the federal system of public defense. A casualty of the 2013 reorganization mentioned above, this office was demoted and renamed Defender Services Office (DSO), and now has much less autonomy and flexibility. In addition to a greater level of micromanagement and bureaucratic supervision that has resulted, the shift was demoralizing for many defenders, a sign in their view that defense work is a service to the courts.

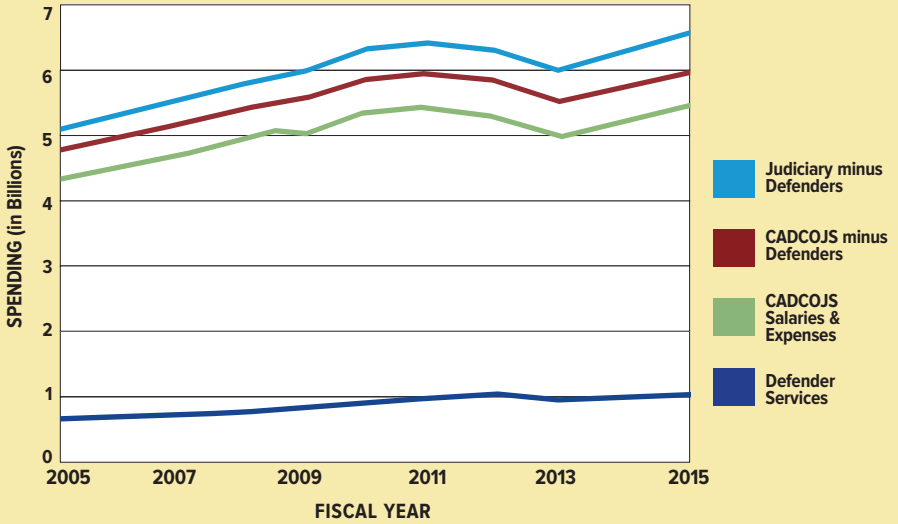
Individual defenders have limited direct access to these entities that exert considerable influence over their day-to-day work. For example, both the Defender Services Office and the Defender Services Advisory Group, composed of defender office and panel attorney representatives, must receive approval from the AO to raise crucial issues for discussion at Defender Services Committee meetings.

Although defender services is a separate line-item constituting approximately 16 percent of the judiciary's annual budget, defenders cannot advocate for funding before Congress. The Defender Services Committee has little influence over the Chair of the Budget Committee and the Director of the AO who represent the judiciary in Congressional budget hearings.

It has been stated to Congress that defender services represent an increasing share of the budget. In fact, most of the increase is related to the growing cost of operating the courts, as set out in the chart on page 14. Although the need for defenders is greater than ever—the result of a large and growing number of federal defendants who can't afford counsel—the rate of increase of the overall budget since 2005 has outpaced the budget for defender services.

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Cost of Defender Services Grew at a Slower Rate than the Judiciary's Overall Budget



Note: The judiciary's budget includes the Supreme Court Salaries and Expenses, Supreme Court Care of Building and Grounds, Court of Appeals for the Federal Circuit and Court of International Trade. "CADCOJS" is the total combined costs for the Courts of Appeals, District Courts and Other Judicial Services. CADCOJS Salaries and Expenses are just those specific expenses of the Courts of Appeals, District Courts, and Other Judicial Services. Source: Administrative Office of U.S. Courts THE JUDICIARY FY07–FY17 CONGRESSIONAL BUDGET SUMMARY.

Sequestration and the Fallout

The 2013 Congressional budget sequestration devastated many public defender offices, cutting funding by 10 percent resulting in staff reductions of 30 to 50 percent.[15] It has taken years for these offices to return to prior staffing levels. For a full year, panel attorneys were paid at a reduced rate; a pay-cut for which they have never been compensated. Additionally, there is a widespread belief among panel attorneys who testified before the Committee that the cost-cutting mentality evident during sequestration sparked a rise in voucher cutting by judges that continues today. Lack of government data on voucher review and approval makes it impossible to evaluate the accuracy of this perception.

Sequestration engendered a widespread sentiment among the defender community that the judiciary was unable to fully protect the public defense function. Frustrated and concerned, defenders by-passed the judiciary and appealed directly to Congress for emergency funding which they then received. Many experts view their success in the midst of this fiscal crisis as evidence that the federal defense community is now mature enough to advocate for itself, independent from the judiciary.

[15] Ron Nixon, *Public Defenders Are Tightening Belts Because of Steep Federal Budget Cuts* N.Y. TIMES (Aug. 23, 2013).

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The Case for Independence

The Criminal Justice Act was the product of considerable debate and compromise between the U.S. House of Representatives and U.S. Senate. But one contentious issue was not debated on the floor of Congress — where to situate this new public defense program. The Attorney General was the nation's top prosecutor, so the Department of Justice was out of the question. And no other Executive Branch agency seemed well suited to nurture a fledgling criminal defense program. As the *Wall Street Journal* reported in August of 1964, "the Judicial Conference privately urged the [Johnson] Administration and Congress to find someone else to run the program."[16] Even from the beginning it was understood that the mission and practice of the public defense function was a poor match with the goals and expertise of the judiciary. But with nowhere else to put the program, "the judges got the job."[17]

As early as 1969, Chief Justice Warren E. Burger lamented that Congress had not created a separate entity to administer the program. He believed judges should maintain a "real and an active interest," but felt "the governance of a public defender or a legal aid system should be insulated from the courts."[18] By 1970, when Congress was considering amendments to the Criminal Justice Act that would give judicial districts the option of creating defender offices, many lawmakers shared Chief Justice Burger's view. A Senate Committee report cast the judiciary as a temporary home for the program, acknowledging "the need for a strong independent administrative leadership," and called upon Congress to review such

A Senate Committee report cast the judiciary as a **temporary home** for the program, acknowledging "**the need for a strong independent administrative leadership**," and called upon Congress to review such prospects "until the time is right to take the next step."

16 John J. Haugh, *The Federal Criminal Justice Act of 1964: Catalyst in the Continuing Formulation of the Rights of the Criminal Defendant*, 41 Notre Dame L. Rev. 996, 1005, n.68 (1966).

17 *Id.*

18 *Proceedings at the1969 Judicial Conf., U.S. Court of Appeals, Tenth Circuit: Minimum Standards for Criminal Justice*, 49 F.R.D. 347, 374 (1969).

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prospects "until the time is right to take the next step."[19]

Even while the judiciary continued to oversee implementation of the Criminal Justice Act, Supreme Court rulings made clear that independence of counsel is more than an aspirational ideal—it is a "constitutionally protected" principle.[20] In *Polk County v. Dodson* (1981), the Supreme Court again underscored that the State has a "constitutional obligation to respect the professional independence of the public defenders whom it engages.... It is the independence from governmental control as to how the assigned task is to be performed that is crucial."[21]

This same line of legal reasoning even predates passage of the Criminal Justice Act. In 1958, Judge E. Barrett Prettyman observed that:

> The constitutional right of an accused to the assistance of counsel might well be destroyed if counsel's selections upon tactical problems were supervised by a judge. The accused is entitled to the trial judgment of his counsel, not the tactical opinions of the judge. Surely a judge should not share the confidences shared by client and counsel. An accused bound to tactical decisions approved by a judge would not get the due process of law we have heretofore known.[22]

These constitutionally protected principles—that an advocate must act with professional independence seeking solely the best interests of the client—do not compel that a system providing counsel be designed in a particular way, but that these principals should inform the design. And when aspects of a public defense system compromise an advocate's independent professional judgment, they are particularly troubling and must be carefully examined.

After two years of study, this Committee unanimously believes that the federal defense program should be governed by an independent entity with the same mission as frontline defenders. Current governance of the program by the Judicial Conference of the United States and management by the Administrative Office of the U. S. Courts, with their different missions and competing budgetary needs, has led to fundamental fissures and inequities in a system that nearly 250,000[23] people each year depend upon for effective representation in federal court.

The Criminal Justice Act had flourished under the judiciary in its infancy, and the Committee recognizes that without judicial assistance the program may not have been primed to govern itself. At this time, however, independence is not

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19 S. Rep. No. 91-790, at 18 (1970).

20 *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

21 *Polk Cty. v. Dodson*, 454 U.S. 312, 321-22, 327 (1981) (J. Burger concurring).

22 *Mitchell v. United States*, 259 F.2d 787, 793 (D.C. Cir. 1958).

23 U.S. Federal Courts, Federal Judicial Caseload Statistics, Criminal Justice Act – Judicial Business 2016 http://www.uscourts.gov/statistics-reports/criminal-justice-act-judicial-business-2016, (last visited July 26, 2017) (This is the number of CJA representations for 2016).

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only possible, it is necessary to continue progress toward a day when every criminal defendant in federal court has a skilled, independent, and properly resourced advocate.

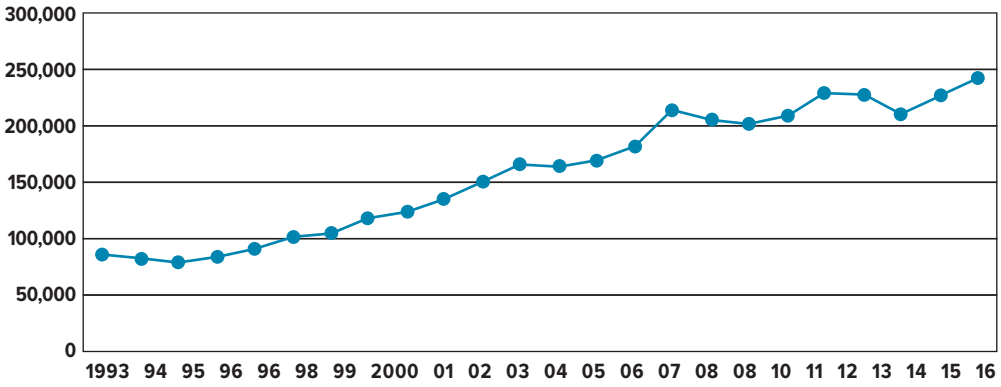
This Committee's recommendations have important historical precedent. The first and only other comprehensive review of the Criminal Justice Act concluded in 1993 that the federal defense program required greater administrative independence. Under the leadership of Judge Edward C. Prado, who also serves on this Committee, the "Prado Report" recommended that the Criminal Justice Act be amended to create a "Center for Federal Criminal Defense Services" responsible for the administration of the Criminal Justice Act program.[24] As the Prado Report stated:

> A public defender system, whether staffed by institutional defenders, part-time panel attorneys, or a combination of both, is not effective simply because no one goes unrepresented. Such a system is effective when it ensures that each defendant has an independent, competent, and vigorous advocate, dedicated solely to the interest of the individual client and free from any improper personal or institutional conflicts of interest.[25]

The first and only other **comprehensive review** of the Criminal Justice Act concluded in 1993 that the federal defense program required **greater administrative independence.**

The Judicial Conference did not act on this core recommendation in the Prado Report. Given widespread voucher cutting, arbitrary staffing caps on defender offices, court influence over some defender offices, budgeting decisions by the Judicial Conference in 2013 during sequestration, and other problems—coupled with dramatic growth in the number of indigent defendants prosecuted in federal court—the need for independence is even greater today than it was in 1993.

Growing Number of Indigent Defendants Prosecuted in Federal Court



24 Comm. to Review the Criminal Justice Act, Rep. of the Comm. to Review the Criminal Justice Act, 75 (1993) [hereinafter Prado Report]. (A committee established by Chief Justice William H. Rehnquist pursuant to the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089. Judge Edward C. Prado was selected as Chair. The Prado Committee's report, issued in 1993, included several recommendations, including recommendations to enhance the independence of defense services in the federal criminal system.)

25 *Id.* at 46.

Views have changed considerably since the Prado Report. Many federal judges now support the creation of an independent entity to oversee public defense in the federal courts. As Judge John Gleeson, a former chair of the Committee on Defender Services and author of the 2005 Gleeson Report told the Committee, "I think there should be fundamental structural change. I think wresting the obligation, the responsibility to deliver indigent defense away from the judiciary is a good idea. We've just gotten used to the fact that it's in the judiciary. It doesn't make a whole lot of sense. I'm not sure if we had a blank slate and we were divvying up responsibilities now and that was on the table we would take it. I would take it out of the judiciary and find a really good defender general."[26] Likewise, a consensus of federal and community defenders supports such a change. The Defender Services Committee, panel attorneys, relevant professional associations, and academics who study public defense have all voiced support for the creation of such an entity.

The Judicial Conference Committee on Defender Services (DSC) met with this Committee during the course of our review and concluded that not only would DSC support a recommendation for independence, but that the only recommendation it would not support would be to maintain the status quo. Realizing that it will take Congressional action to create such an independent entity, DSC later submitted a letter outlining important steps the judiciary can take in the interim.[27] This guidance significantly informed the slate of interim recommendations this Committee developed, which are discussed in brief below.

A March 25, 2016, letter from federal and community defenders to Judge Cardone as Chair of this Committee reported on the results of an on-line poll of defenders, with a 94 percent response rate.[28] Of those who responded, 84 percent believed that defense attorneys themselves must have significant authority to govern and manage the program at both the national level and within districts. Their specific minimum requirements outlined in the letter are reflected in this Committee's interim recommendations.

In a letter dated July 6, 2016, from Defender Services Advisory Group's Panel Attorney District Representatives conveyed the consensus view that judges should have very little control and oversight of the program.[29] In particular, judges should have no role in the voucher review process, in establishing compensation rates for panel attorneys, or even in appointing counsel. Their views are also incorporated into the Committee's interim recommendations.

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26 Judge John Gleeson, E.D.N.Y., Public Hearing – Miami, Fla., Panel 3, Tr., at 40.

27 Letter from the Judicial Conf. of the U.S. Comm. on Defender Serv. to the Honorable Kathleen Cardone, Chair, Ad Hoc Comm. to Review the Criminal Justice Act Program (July 22, 2016).

28 Letter from the Federal and Community Defender Offices to the Honorable Kathleen Cardone, Chair, Ad Hoc Comm. to Review the CJA Program (Mar. 25, 2016).

29 Letter from the CJA Panel Attorney District Representatives (PADRs) to the Honorable Kathleen Cardone, Chair, Ad Hoc Comm. to Review the CJA Program (July 6, 2016).

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In the ABA's Ten Principles of a Public Defense Delivery System,[30] independence is the first principle. Professor Norman Leftstein,[31] Dean Emeritus of the Indiana University Robert H. McKinney School of Law and someone who has studied public defense systems for decades, reminded the Committee that "[I]t is the first principle for a reason: unless you have independence, the other principles vital for genuinely successful public defense programs are usually difficult to achieve."[32] Professor Lefstein also highlighted a 2009 report from the National Right to Counsel Committee that urged states to "establish a statewide independent non-partisan agency headed by a board or commission responsible for all components of indigent defense services."[33] While the recommendation was addressed to states, its reasoning applies to the federal system as well. As Professor Lefstein said,

> It is exceedingly difficult for defense counsel always to be vigorous advocates on behalf of their indigent clients when their appointment, compensation, resources, and continued employment depend primarily upon satisfying judges or other elected officials. At a minimum, judicial oversight of the defense function creates serious problems of perception and opportunities for abuse.
>
> What is needed are defense systems in which the integrity of the attorney-client relationship is safeguarded and defense lawyers for the indigent are just as independent as retained counsel, judges, and prosecutors.[34]

In its own study of the Criminal Justice Act program in the fall of 2015, the National Association of Criminal Defense Lawyers (NACDL) listed "seven fundamentals of a robust federal indigent delivery system." The first fundamental called for independence, since "control over federal indigent defense services must be insulated from judicial interference."[35] A new structure under independent administration could incorporate the sixth fundamental on NACDL's list: "greater transparency."[36]

In written testimony to the Committee, William Leahy, Director of the New York State Office of Indigent Legal Services and former Chief Counsel of the Massachusetts Committee for Public Counsel Services, described judicial control and management of the defense function as "relics of a bygone age; perhaps

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30 ABA Ten Principles Of A Public Defense Delivery System (Feb. 2002), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf (last visited April 26, 2017).

31 Norm Lefstein, Prof. of Law & Dean Emeritus, Robert H. McKinney Sch. of Law, Ind. Univ., Public Hearing — Minneapolis, Minn., Panel 3, Writ. Test., at 2–3.

32 *Id.*

33 *Id.* at 4 (quoting Justice Denied at 186).

34 *Id.*

35 Nat'l Ass'n of Criminal Def. Lawyers (NACDL), *Federal Indigent Defense 2015: The Independence Imperative* 9 (2015) *available at* www.nacdl.org/federalindigentdefense2015 [hereinafter NACDL Report].

36 William Leahy, Director, N.Y. State Office of Indigent Serv., Public Hearing – Minneapolis, Minn., Panel 1, Writ. Test., at 4.

understandable when public defense was in its infancy and was thought to require judicial oversight; but for a long time now neither appropriate nor tolerable."[37]

Clearly, the Prado Report's call for independence nearly 25 years ago has garnered widespread and vocal support today. ●

[37] William Leahy, Director, N.Y. State Office of Indigent Serv., Public Hearing — Minneapolis, Minn., Panel 1, Writ. Test., at 4.

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Recommended Course of Action: Create an Independent Defender Commission

National Structure and Administration

This Committee unanimously recommends that Congress create an independent Defender Commission within the judicial branch of government, but outside the oversight of the Judicial Conference. The Commission would have sole authority to set policy and practices related to the provisions of federal defense. Specifically, the Commission would have the power to:

1. **Establish general policies and rules as necessary to carry out the purposes of the CJA**
2. **Appoint and fix the salaries and duties of a director and senior staff**
3. **Select and appoint federal defenders and determine the length of term**
4. **Issue instruction to, monitor the performance of, and ensure payment of defense counsel**
5. **Determine, submit, and support annual appropriations requests to Congress**

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6. **Enter into and perform contracts**
7. **Create and oversee a system for litigation funding for CJA counsel, including the review of attorney, expert, and investigator fees**
8. **Procure as necessary temporary and intermittent services**
9. **Compile, collect and analyze data to measure and ensure high quality defense representation throughout the nation**
10. **Rely upon other federal agencies to make their services, equipment, personnel, facilities and information available to the greatest practicable extent to the commission in execution of its functions**[38]
11. **Perform such other functions as required to carry out the purposes of and meet responsibilities under the CJA**

Decisions about the provision of defense services should be made and implemented by those with direct experience and responsibility for the defense function — promoting best practices — and there should be no internal conflict of interest created when requesting funding from Congress.

Modeled after the United States Sentencing Commission, this entity would have seven voting members appointed by the President and confirmed by the Senate. While voting members could include federal judges, they must not constitute a majority.[39] Additionally, no more than four board members shall serve from any political party. For the initial board, the Committee recommends that the Chief Justice of the United States, as well as the Defender Services Advisory Group, which currently represents defenders and advises the Defender Services Committee, prepare a slate of candidates from which the President may select. For subsequent boards, a slate of candidates would be prepared by the Chief Justice and the equivalent of the Defender Services Advisory Group to the new commission.

Voting members should have a minimum five years of experience in, as well as a demonstrated interest in and a commitment to, high quality indigent criminal defense. To prevent conflicts of interest, no voting member should be employed by

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[38] The Committee bases this recommendation upon the enabling statute for the U.S. Sentencing Commission, which is housed within the same building as the AO and uses services provided by the AO but is not within AO governance. The statute for the Sentencing Commission reads, "28 U.S.C. § 995(c) Upon the request of the Commission, each Federal agency is authorized and directed to make its services, equipment, personnel, facilities, and information available to the greatest practicable extent to the Commission in the execution of its functions." Any statute creating a defender commission should contain the same assistance for the new commission to execute its duties.

[39] One Committee member, Professor Orin Kerr, believes the committee should be comprised of all judges selected by other district court judges. Please see statement in Appendix M.

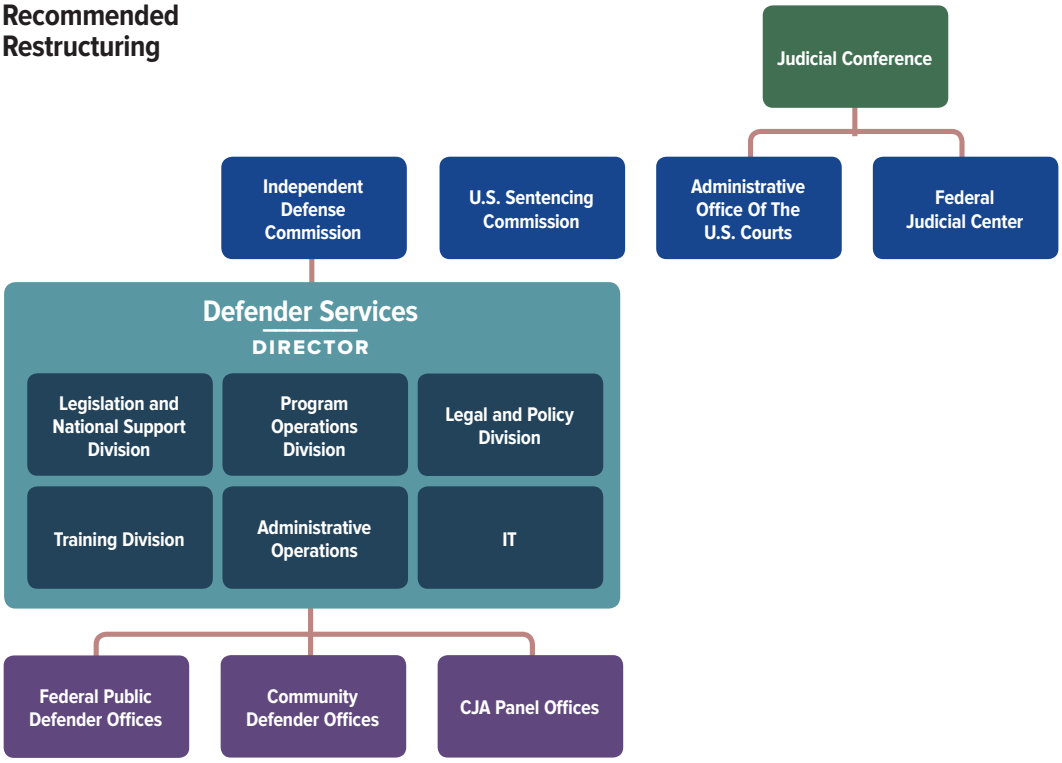
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the Department of Justice, work as a state or federal prosecutor, or serve as a chief or assistant federal defender or as an active member of a CJA panel.

To ensure full representation of the federal defense function before the commission, three non-voting members should be appointed, respectively, from a Federal Defender Office, a Community Defender Office, and a CJA panel.

The Committee recommends that members of the commission be appointed for staggered three-year terms and remain in office until their vacancy is filled to provide continuity of leadership. Members should be limited to two full terms to ensure fresh perspectives. Compensation for voting members of the commission should not exceed the daily rate at which judges of the U.S. Courts of Appeal are compensated.

Recommended Restructuring



Local Structure and Administration

The Committee recognizes that federal and community defender offices are integral to raising the quality of representation by establishing best practices and providing training and other resources for panel attorneys, while striving for cost-effective administration. For this reason, every judicial district should require the appointment of a CJA Panel Attorney Administrator and any necessary staff to manage the panel and review vouchers. This administrator may reside within a local defender office, with appropriate firewalls to prevent conflicts, or in a separate office, but must not be employed or supervised by the courts. These broad recommendations leave considerable room for local control and decision-making to meet a jurisdiction's specific circumstances and needs.

Each district is encouraged to create boards that are **representative** of and **responsive** to local needs.

Defender offices and panel administration should be overseen by a local board consisting of an uneven number of members (three minimum, seven maximum), each with a demonstrated knowledge of and commitment to indigent defense. Initial boards shall be appointed through a collaborative process involving the local district courts, Community and/or Federal Defender Office, and CJA panel attorney district representative, in consultation with the national structure outlined above. Local bar organizations or other interested stakeholders may also participate in the appointment process. Each district is encouraged to create boards that are representative of and responsive to local needs. While judges will be involved in the initial appointments, boards should be self-perpetuating, and judges may not serve as board members. Board members, who should serve without compensation, may be asked to serve for five-year staggered terms and remain on the board until their vacancy is filled. As is currently the case with some defender offices, multiple districts may be governed by a single board, or a district may choose to have a board in each division, depending on caseload and/or geography.

Local boards should collaborate with leadership of the defender office to develop a defense delivery plan and appoint a panel administrator to be approved by the independent national defense commission. Like the current CJA plans, these plans would address the recruitment, selection, retention, and removal of panel attorneys, and would incorporate best practices as outlined in the CJA Model Plan. Local boards, defenders, and panel administrators also would collectively develop a system for voucher review as well as an appeal process for those attorneys whose vouchers are cut for reasons other than clerical error.

Additionally, no district shall be without access to a case budgeting attorney to help panel attorneys plan expenses and seek reimbursement in all cases, not just extended or complex ones. Case-budgeting attorneys will no longer be employed by the courts but by local boards within the panel administration office or by the independent national commission. In districts with high caseloads or a history of large, complex cases to support such a position, the local CJA plan should provide sufficient resources to employ a case budgeting attorney for the district. Otherwise, multiple districts may work with a single case budgeting attorney. Local boards should work in consultation with the national defense commission to implement a solution that meets local needs.

Benefits of the Recommended Restructuring

Creating a new, independent entity within the judiciary that can continue to make use of resources available through the Administrative Office of the U.S. Courts would control costs and be least likely to disrupt the ongoing provision of representation for defendants in federal courts.

As discussed above, the benefits of independence are myriad. Defenders

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themselves would be in a position to persuasively advocate before Congress for the funding needed to adequately compensate panel attorneys and staff defender offices. Panel attorneys would no longer refrain from requesting expert services for fear of undermining their client's defense, violating attorney-client privilege, or simply annoying judges.

This structure is ideally suited to spreading best practices and delivering training, both of which are required to provide a consistently high quality of defense. Furthermore, the problems created by the judiciary's oversight of one side in our adversarial system of justice would no longer exist. Once created, this new Federal Defense Commission should review its own structure and functioning every seven years to determine whether additional changes or increased independence is required.

To those who argue that independence would imperil federal funding for public defense, subjecting this crucial public service to political whims, the Committee points out that the program is already a separate account in the judiciary's appropriation and Congress has always had the authority to underfund or defund the program as it chooses. Equally important, as seen during sequestration in 2013, defenders have proved themselves to be able advocates, and Congress has demonstrated an understanding of the importance of funding an effective system of public defense.

Finally, the Committee believes that judges' support for the defender program derives primarily from principles, not self-interest or obligation. As a result, the Committee fully expects that the judiciary as a whole and many individual federal judges—including those who will serve on the proposed commission—will act as allies in support of vibrant defense under this new administrative structure.

That two very different committees nearly twenty-five years apart have come to the identical conclusion reinforces the need for an independent entity to oversee public defense in the federal courts. While the Prado Report led to significant reforms, the core issue of independence was left unaddressed. As a result, the majority of the problems identified by the Prado Committee remain problems today and in some cases have worsened, as they stem from the lack of independence. Congress viewed judicial implementation of the Criminal Justice Act as the initial phase. The independence recommended by this Committee is a long overdue next step. ●

That two very different committees nearly twenty-five years apart have come to the **identical conclusion** reinforces the need for an independent entity to oversee public defense in the federal courts.

Interim Recommendations of the CJA Review Committee

OCTOBER 2017

The CJA Review Committee unanimously recommends that Congress create an independent Federal Defender Commission within the judicial branch of government, but outside the oversight of the Judicial Conference. The Commission would have sole authority to set policy and practices related to the provisions of federal defense.

The Committee realizes that the creation of an independent Federal Defender Commission cannot be implemented immediately. While Congress weighs the merits of this recommendation and determines how best to proceed, the judiciary can and should take important steps to give defenders more authority and autonomy. While most of the actions outlined below constitute interim recommendations—and will be moot once a Federal Defender Commission is created—some are useful guidance even to a fully independent entity.

Structural Changes

1. **The Defender Services Committee (DSC) should have:**
   - **Exclusive control over defender office staffing and compensation.**
   - **The ability to request assistance of Judicial Resources Committee (JRC) staff on work measurement formulas.**
   - **Control over development and governance of eVoucher in order to collect data and better manage the CJA program.**
   - **Management of the eVoucher program and the interface with the payment system.**
   - **Exclusive control over the spending plan for the defender services program.**
2. **For any period during which AO and JCUS continue to have authority over the budget for the CJA program, when either the Budget or Executive Committee disagree with the budget request by the DSC, the matter should be placed on the discussion calendar of the full Judicial Conference.**
3. **The composition of the DSC should include the co-chairs of the Defender Services Advisory Group, both as voting members.**
4. **Defender Services Office (DSO) must be restored to a level of independence and authority at least equal to what it possessed prior to the reorganization of the AO. In particular, DSO should be empowered to:**

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- Exclusively control hiring and staffing within DSO.
- Operate independently from the AO Department of Program Services or any other department that serves the courts.
- Retain exclusive control with NITOAD over defender IT programs.
- Retain ultimate discretion with DSC in setting the agenda for DSC meetings—no requirement of approval from other AO offices.

5. DSO should be made a member of the AO Legislative Council to consult on federal legislation.

6. Representatives from DSO should be involved in the Congressional appropriations process.

Compensation and Staffing for Defenders and CJA Panel Attorneys

7. The annual budget request must reflect the highest statutorily available rate for CJA panel attorneys.

8. To provide consistency and discourage inappropriate voucher cutting, the Judicial Conference should:

   - Adopt the following standard for voucher review –

     Vouchers should be considered presumptively reasonable, and voucher cuts should be limited to mathematical errors, instances in which work billed was not compensable, was not undertaken or completed, and instances in which the hours billed are clearly in excess of what was reasonably required to complete the task.

   - Provide, in consultation with DSC, comprehensive guidance concerning what constitutes a compensable service under the CJA.

9. Every circuit should have available at least one case budgeting attorney and reviewing judges should defer to their recommendations in reviewing vouchers and requests for expert services.

10. To promote the stability of defender offices until an independent Federal Defender Commission is created: Circuit judges should establish a policy that federal defenders shall be reappointed absent cause for non-reappointment.

11. A federal public or community defender should be established in every district which has 200 or more appointments each year. If a district does not have a sufficient number of cases, then a defender office adjacent to the district should be considered for co-designation to provide representation in that district.

12. The Judicial Conference should develop a policy in which judges defer to DSO recommendations and accepted staffing formulas when setting staffing levels.

13. Circuit court judges should implement DSO staffing formulas when approving the number of assistant federal defenders in a district.

14. Modify the work measurement formulas to:

    - Reflect the staff needed for defender offices to provide more training for defenders and panel attorneys.
    - Support defender offices in hiring attorneys directly out of law school or in their first years of practice, so that the offices may draw from a more diverse pool of candidates.

15. Every district should form a committee, or designate a CJA supervisory or administrative attorney or a defender office, to manage the selection, appointment, retention, and removal of panel attorneys. The process must incorporate judicial input into panel administration.

16. Every district should have an appeal process for panel attorneys who wish to challenge any non-mathematical voucher reductions.

    - Every district should designate a CJA Committee that will determine how to process appeals.
    - Any proposed reasonableness reduction shall be subject to review by the designated CJA review committee that will issue a recommendation to the judge.

Standards of Practice and Training

17. DSO should regularly update and disseminate best practices.

18. DSO should compile and share best practices for recruiting, interviewing, and hiring staff, as well as the selection of panel members, to assist in creating a diversified workforce.

19. All districts must develop, regularly review and update, and adhere to a CJA plan as per JCUS policy. Reference should be made to the most recent model plan and best practices. The plan should include:

    - Provision for appointing CJA panel attorneys to a sufficient number of cases per year so that these attorneys remain proficient in criminal defense work.
    - A training requirement to be appointed to and then remain on the panel.
    - A mentoring program to increase the pool of qualified candidates

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20. FJC and DSO should provide training for judges and CJA panel attorneys concerning the need for experts, investigators and other service providers.

21. FJC and DSO should provide increased and more hands-on training for CJA attorneys, defenders, and judges on e-discovery. The training should be mandatory for private attorneys who wish to be appointed to and then remain on a CJA panel.

22. While judges retain the authority to approve all vouchers, FJC should provide training to them and their administrative staff on defense best practices, electronic discovery needs, and other relevant issues.

23. Criminal e-Discovery: A Pocket Guide for Judges, which explains how judges can assist in managing e-discovery, should be provided to every federal judge.

Capital Representation

24. Remove any local or circuit restrictions prohibiting Capital Habeas Units (CHUs) from engaging in cross-district representation. Every district should have access to a CHU.

25. Circuit courts should encourage the establishment of CHUs where they do not already exist and make Federal Death Penalty Resource Counsel and other resources as well as training opportunities more widely available to attorneys who take these cases.

26. Eliminate any formal or informal non-statutory budgetary caps on capital cases, whether in a death, direct appeal, or collateral appeal matter. All capital cases should be budgeted with the assistance of Case Budgeting Attorneys (CBAs) and/or resource counsel where appropriate.

27. In appointing counsel in capital cases, judges should defer to recommendations by federal defenders and resource counsel absent compelling reasons to do otherwise.

28. Modify work measurement formulas to:

    - Dedicate funding—that does not diminish funding otherwise available for capital representation—to create mentorship programs to increase the number of counsel qualified to provide representation in direct capital and habeas cases.
    - Reflect the considerable resources capital or habeas cases require for federal defender offices without CHUs.
    - Fund CHUs to handle a greater percentage of their jurisdictions' capital habeas cases.

29. FJC should provide additional judicial training on:
    - The requirements of § 2254 and § 2255 appeals, the need to generate extra-record information, and the role of experts, investigators, and mitigation specialists.
    - Best practices on the funding of mitigation, investigation, and expert services in death–eligible cases at the earliest possible moment, allowing for the presentation of mitigating information to the Attorney General.

Defender Information Technology

30. Adequately fund and staff NITOAD in order to control and protect defender IT client information, operations, contracts, and management.

Resources: Litigation Support and Interpreters

31. Increase staff and funding for the National Litigation Support Team, as well as increased funding for contracts for Coordinating Discovery Attorneys to be made available throughout the United States.

32. Create new litigation support position(s) in *each district* or at the circuit level, as needed, to assist panel attorneys with discovery, evaluation of forensic evidence and other aspects of litigation.

33. Develop a national policy requiring the use of qualified interpreters whenever necessary to ensure defendants' understanding of the process.

Legislative Changes

34. Amend 18 U.S.C. § 4285 to permit courts to order payment of costs in the limited circumstances where the defendant is unable to bear the costs and the court finds that the interests of justice would be served by paying necessary expenses.

35. Congress must amend the Criminal Justice Act to eliminate circuit court review of attorney and expert fees exceeding current statutory caps.

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Background



Section 1: The Committee's Task and Review Process

1.1 The Committee and its Task

In 2015, Chief Justice John G. Roberts, Jr. appointed an ad hoc committee to evaluate the implementation of the Criminal Justice Act of 1964 (hereinafter "CJA")[1] and public defense in the federal courts generally. Chaired by U.S. District Judge Kathleen Cardone from the Western District of Texas, the Committee is comprised of federal judges, an assistant circuit executive, federal defenders, a CJA panel attorney, a law professor, and a corporate lawyer who previously served as United States Attorney. Committee member biographies are included in Appendix A to this report.

In an April 2015 memorandum announcing the Committee's creation, James Duff, Director of the Administrative Office of the U.S. Courts, explained that "Judicial Conference policy supports a periodic, comprehensive, and impartial review of the CJA program" and listed the following 14 issues for the Committee to address:

1. The impact of judicial involvement in the selection and compensation of federal public defenders and the independence of federal defender organizations (federal public defenders and community defenders);
2. Equal employment and diversity efforts in federal defender organizations;
3. Judicial involvement in the appointment, compensation, and management of panel attorneys and investigators, experts, and other service providers;
4. The adequacy of compensation for legal services provided under the CJA, including maximum amounts of compensation and parity of resources relative to the prosecution;

[1] 18 U.S.C. § 3006A.

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5. The adequacy and fairness of the billing, voucher review, and approval processes relating to compensation for legal and expert services provided under the CJA;
6. The quality of representation under the CJA;
7. The adequacy of support provided by the Defender Services Office to federal defender organizations and panel attorneys;
8. The adequacy of representation of panel attorneys on matters stemming from CJA representations, such as contempt, sanctions, ineffective assistance of counsel, and malpractice claims;
9. The availability of qualified counsel, including for large, multi-defendant cases;
10. The timeliness of appointment of counsel;
11. The provision of services or funds to financially eligible arrested but unconvicted persons for noncustodial transportation and subsistence expenses (including food and lodging) prior to, during, and after a judicial proceeding;
12. The availability of reliable data to evaluate the overall cost and effectiveness of the federal defender program;
13. An examination of the national structure and administration of the defender services program under the CJA; and
14. The availability and effectiveness of training services provided to federal defenders and panel attorneys.

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1.2 The Committee's Review Process

The Committee held seven public hearings across the country. It ensured that every district was covered over the course of the study by dividing the 94 federal districts according to their geographical proximity to the hearing locations.[2] Locating hearings around the country was also a way to elicit a diversity of perspectives and, where necessary, examine issues relating to particular geographical areas. The hearings took place in:

Santa Fe, New Mexico	*November 16–17, 2015*
Miami, Florida	*January 11–12, 2016*
Portland, Oregon	*February 3–4, 2016*
Birmingham, Alabama	*February 18–19, 2016*
San Francisco, California	*March 2–3, 2016*
Philadelphia, Pennsylvania	*April 11–13, 2016*
Minneapolis, Minnesota	*May 16–17, 2016*

The Committee invited 467 witnesses to testify. They included:

- Circuit, district, and magistrate judges;
- Circuit Case Budgeting Attorneys;
- CJA Supervisory Attorneys;
- Circuit Executives;
- A Circuit Appellate Commissioner;
- Officials and staff from the Administrative Office of the U.S. Courts;
- Federal and community defenders;
- CJA Panel Attorney District Representatives;
- Additional CJA attorneys in the region who were recommended by defenders or other panel representatives;
- Judge Advocates from each of the military branches; and
- Representatives from interested organizations and academic institutions.

Ultimately, the Committee heard nearly 100 hours of testimony from 229 witnesses. Representatives from 78 federal districts—83 percent of all districts—appeared before the Committee. The Committee also received 224 written submissions from these witnesses, totaling more than 2,300 pages of testimony.

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2 *See* Appendix B for Map of Hearing Invitations.

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In addition to its public hearings, the Committee held closed-door hearings with individuals who requested anonymity or had sensitive information to relay. The Committee also met privately with leaders of the Administrative Office, members of Judicial Conference Committees, and other relevant agencies, offices, and courts in Washington, D.C. Outside the scope of hearings, the Committee invited and received written comments from district, circuit, and magistrate judges, the American Bar Association, the Federal Bar Association, the Association of American Law Schools, the National Legal Aid and Defender Association, and the National Conference of Women's Bar Associations, among others. Finally, the Committee and staff reviewed hundreds of pages of relevant reports and studies.

The Committee attempted to secure quantitative data from the Administrative Office on panel attorneys' vouchers, voucher review, and voucher reductions as part of its research. Much of the information requested by the Committee did not exist, and what was provided did not fully meet the Committee's needs.

The Committee understands that the Administrative Office's efforts to systemically collect data have met with some obstacles. For example, although the judiciary has an electronic system for receiving and processing bills from panel attorneys nationwide, many of the system's features that would allow for more comprehensive data collection and analysis have not been activated or installed.

The Committee did have access to useful data from prior surveys of federal defenders and panel representatives, as well as information on the use of service providers by panel attorneys. To complement that data the Committee fielded its own nationwide surveys of panel attorneys, and questioned half of them about their experience with voucher cutting and the other half about their use of service providers.[3]

In order to study, review, and organize the information received, discuss recommendations, and complete this report, the Committee worked together for over 200 hours in addition to time spent conducting hearings. Before participating in the study, Committee members were unaware of the depth and scope of the problems hindering implementation of the Criminal Justice Act. Because the current structure emphasizes local control, most actors within the criminal justice system know only what happens in their own courtrooms and/or districts; and each has its own distinct culture and practices. At the outset, many on the Committee believed that the system of federal public defense worked fairly well, upheld the right to equal justice, and could be improved with small changes or gradual shifts in policy and practice. Studying the system as a whole and hearing from hundreds of witnesses from around the country led Committee members to the unanimous conclusion that the current administrative structure of the CJA is flawed, defeating

[3] As evidence of the current lack of data, the Committee was unable to obtain a complete national list of active panel attorneys from the Administrative Office. Thanks to the assistance of CJA Panel District Representatives across the country and others, the Committee was able to construct its own list of all CJA Panel Attorneys for use in these surveys. See Appendix C: Survey Data Considered.

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the best efforts of everyone dedicated to consistently deliver independent and effective representation. The Committee hopes this report will provide the same broad perspective to those individuals who lack a bird's-eye view of the system of public defense in the federal courts. ●

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Section 2: Legal Underpinnings and Passage of the Criminal Justice Act

2.1 Establishing the Right to Counsel: Sixth Amendment Jurisprudence

The Chief Justice tasked this Committee to study one of the most fundamental rights in America. This right—the right of the accused to competent counsel— "must be assured to every man accused of crime in Federal court, regardless of his means."[4] Enshrined in the Constitution under the Sixth Amendment, the right to "assistance of counsel" is a pillar on which the American justice system rests. As Judge Learned Hand stated succinctly, "If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice."[5]

However for nearly 200 years from the Sixth Amendment's[6] adoption until the Supreme Court's decision in *Gideon v. Wainwright*[7] justice was rationed, with a greater portion allotted to those who had money. Prior to the 20th century, even though defendants possessed a right to retain counsel, those who could not afford an attorney were still required to defend themselves, but alone against a prosecutor and in front of a judge, both possessing specialized legal knowledge. A few cities

4 John F. Kennedy, Annual Message to the Congress on the State of the Union, (Jan. 14, 1963).

5 C.J. Learned Hand, 75th Anniversary Address to the Legal Aid Society of N.Y. (Feb. 16, 1951) (quoting Sophocles).

6 See U.S. Const. amend. VI, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and *to have the Assistance of Counsel for his defence.*" (emphasis added).

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

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and jurisdictions created legal aid societies to assist the indigent in their criminal defense, but the vast majority of defendants too poor to afford a lawyer were prosecuted and convicted without a lawyer by their side.

In 1932, the Supreme Court recognized that defendants required more than the occasional, ad hoc provision of counsel if their Sixth Amendment rights were to be protected. In *Powell v. Alabama*,[8] nine African-American teenagers—often referred to as the "Scottsboro boys"—having been denied effective counsel, an impartial jury, or a fair trial and sentencing were wrongly convicted of raping two white women.[9] All were convicted in trials that lasted no more than a few hours. Eight of the nine, including a 13-year-old boy, were sentenced to death. None had been given access to an attorney until a few minutes before their trial began. Of the two attorneys who had agreed to represent all nine, one had retired decades prior and the other was a Tennessee real estate lawyer.

Recognizing there had been a grave miscarriage of justice, the Supreme Court formally held that indigent defendants charged with capital crimes had a right to court-assigned counsel. Challenging principles of English common law that looked to judges as the defendant's protector and advocate, and forecasting many of the principles that inform this report, the Court intoned:

> [H]ow can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that, in the proceedings before the court, the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.[10]

By rejecting English common law as contrary to principles of due process, the Supreme Court held that defense counsel had an essential and unique role to play in our adversarial system. Denial of counsel was a denial of justice.[11]

Six years later, in *Johnson v. Zerbst*,[12] the Supreme Court held that all defendants, not just those facing the death penalty, had a right to court-appointed counsel when charged with a felony in federal courts. The Court stated, "Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional

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8 *Powell v. Alabama*, 287 U.S. 45 (1932).

9 *Powell* at 71–73.

10 *Powell* at 61.

11 *Powell* at 68 (citing *Galpin v. Page*, 85 U.S. 350, 369 (1873)) ("Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.").

12 *Johnson v. Zerbst*, 304 U.S. 458 (1938).

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prerequisite to a federal court's authority to deprive an accused of his life or liberty."[13]

Despite establishment of this substantive right, no legislation was immediately forthcoming to ensure it in practice. Federal judges were responsible for implementing the Sixth Amendment, but they lacked access to any institutional assistance in the form of a federal scheme or structure for providing defense counsel. Judges had the power to appoint attorneys. But without the authority and resources to pay them, the costs of defending indigent clients fell wholly on the shoulders of the private bar. Courts had to rely on attorneys' professional obligation to perform pro bono service. Assignment methods varied depending on the court and were mixed in their success of equally distributing the work among the bar and "in picking a suitable attorney for a particular case."[14] With the exception of the few legal aid organizations in large cities that employed skilled defense attorneys, the vast majority of poor defendants were appointed counsel who were young, generally inexperienced, and typically had no trial experience at all, let alone experience with criminal defense.[15]

Although lacking resources, the lower courts did not allow the Sixth Amendment to wither; they continued to define the contours of the right to an attorney for those unable to afford one. The accused was entitled not to just a pro forma attorney but to "effective, wholehearted assistance of counsel and to the undivided loyalty" of his representative.[16] Such dedication was "essential to due process"[17] and encompassed a lack of conflicts not only with other defendants or parties but also with other players in the criminal justice system. The appointed attorney should not act "as a passive friend of the court, but as a diligent, conscientious advocate," said the D.C. Circuit.[18] Decisions about the defense were to be left solely to the defense attorney.[19] Judge E. Barrett Prettyman observed that:

> The constitutional right of an accused to the assistance of counsel might well be destroyed if counsel's selections upon tactical problems were supervised by a judge. The accused is entitled to the trial judgment of his counsel, not the tactical opinions of the judge. Surely a judge should not share the confidences shared by client and counsel. An accused bound to tactical decisions approved by a judge would not get the due process of law we have heretofore known. And how absurd it would be for a trial judge to opine that such-and-such a course was ineffective

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13 *Johnson v. Zerbst*, 304 U.S. 458, 467, (1938).

14 Bruce J. Havighurst & Peter MacDougall, Note, *The Representation of Indigent Criminal Defendants in the Federal District Courts*, 76 Harv. L. Rev. 579, 581 (1963).

15 76 Harv L Rev 579 at 582–583.

16 *MacKenna v. Ellis*, 280 F.2d 592, 595 (5th Cir. 1960), *modified*, 289 F.2d 928 (5th Cir. 1961).

17 *Id.* at 599.

18 *Tate v. United States*, 359 F.2d 245, 253 (D.C. Cir.1966) (citing *Ellis v. United States*, 356 U.S. 674, (1958)).

19 See *O'Malley v. United States*, 285 F.2d 733, 734 (6th Cir. 1961) ("Many questions may arise in the course of a trial, which must be left to the decision of the defense attorney.").

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> or incompetent because it persuaded him (the judge) to decide thus-and-so adversely to the accused.[20]

Up until the early 1960s, assigned counsel were obliged to use their own resources to pay for all expenses, experts, and other assistance. Then in 1963, a district court in Alabama found such a burden ultimately denied defendants a full-throated defense. The court ruled that the Sixth Amendment right to *effectiv*e representation necessitated that appointed counsel be reimbursed for their expenses.[21] This ruling would later be cited by Attorney General Robert F. Kennedy in his request to Congress to address through legislation the federal government's Sixth Amendment responsibilities.[22]

Also in 1963 the Supreme Court decided *Gideon v. Wainwright,*[23] establishing the right to counsel for all persons charged with a felony-level offense. Clarence Earl Gideon was charged with larceny for breaking into a Florida pool hall. Though Mr. Gideon insisted he had the right to an attorney, he was denied one because Florida law at that time provided counsel only in capital cases. Despite his best efforts to mount a defense at trial, Mr. Gideon was convicted on a single piece of circumstantial testimony. Though he had only an eighth grade education, Mr. Gideon personally hand wrote his petition to the Supreme Court requesting they hear his case. In this landmark ruling, the Court held that the right to an attorney in all state criminal proceedings was an essential liberty under the Constitution's Fourteenth Amendment[24] that guarantees equal protection and due process under the law.

Even after *Gideon*, the Supreme Court continued to make clear that the Sixth Amendment granted not only a procedural right to counsel but also a substantive right to an independent and devoted advocate. Indeed, the "independence" of appointed counsel to act as an adversary is an "indispensable element" of "effective representation."[25] The state that appoints counsel has a "constitutional obligation to respect the professional independence of the public defenders whom it engages," as "a defense lawyer best serves the public not by acting on the State's behalf or in concert with it, but rather by advancing the undivided interests of the client."[26] In *Polk County v. Dodson*, the Court ruled that once counsel is appointed,

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20 *Mitchell v. United States*, 259 F.2d 787, 793 (D.C. Cir. 1958).

21 *United States v. Germany*, 32 F.R.D. 343, 344 (M.D. Ala. 1963).

22 *Criminal Justice Act: Hearings Before the Subcomm. No. 5 of the House Comm. On the Judiciary,* 88th Cong., 29, 44–45 (1963).

23 372 U.S. 335 (1963).

24 U.S. Const. amend. XIV, Section 1, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protections of the laws." The Sixth Amendment right is considered so fundamental that it is "incorporated" under the Fourteenth Amendment, and thus protects both federal and state defendants.

25 *Ferri v. Ackerman*, 44 U.S. 193 (1979).

26 *Polk County v. Dodson*, 454 U.S. 312 (1981).

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the attorney "is not amenable to administrative direction" from those who made the appointment.[27] In *Polk County*, Chief Justice Burger emphasized genuine independence as a requirement:

> [I]n providing counsel for an accused, the governmental participation is very limited. Under *Gideon v. Wainwright*, 372 U. S. 335 (1963), and *Argersinger v. Hamlin*, 407 U. S. 25 (1972), the government undertakes only to provide a professionally qualified advocate wholly independent of the government. It is the independence from governmental control as to how the assigned task is to be performed that is crucial.[28]

Three years later the Court ruled in *Strickland v. Washington* that independence of appointed counsel is not merely aspirational, it is a "constitutionally protected" principle.[29] Thus, the Supreme Court has made clear that the right to effective assistance under the Sixth Amendment requires counsel's freedom "to make independent decisions about how to conduct the defense."[30]

2.2 Moving Towards a Federal Defender Program

Long before the Supreme Court decided *Gideon*, the federal judiciary had called for a formal system of indigent defense in the federal courts. As early as 1937, the Judicial Conference of the United States recommended the establishment of defender offices where caseloads justified it.[31] This suggestion was raised again and again by the Judicial Conference for years.[32] In 1947, the Director of the Administrative Office of the United States Courts sent a letter to the U.S. Senate Judiciary Committee calling the lack of compensation for appointed counsel a "defect in the federal judicial system" that needed to be fixed.[33] Warren Olney, III, Director of the Administrative Office in 1959, testified before Congress that the pro bono expectation was not only a burden on private attorneys but was unfair to defendants as well. The Judiciary was not alone—the Attorneys General of the United States, the Department of Justice, and the American Bar Association all advocated alongside judges for a legislative solution to this Sixth Amendment crisis.

In 1961, Attorney General Robert F. Kennedy appointed the Committee on

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27 *Id.*

28 *Id* at 327.

29 Strickland v. Washington, 466 U.S. 668, 689 (1984).

30 *Id* at 686.

31 The Report of the Judicial Conference of the United States, 8–9 (Sept. Sess. 1937).

32 Robert J. Kutak, *The Criminal Justice Act of 1964*, 44 Neb L Rev 703, 711 (1965).

33 S. Rep. No. 81–197, at 2–3 (1949).

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Poverty and the Administration of Justice, instructing its members to study the system of federal criminal justice for those defendants unable to afford an attorney. The Allen Committee[34], named after its chair, Professor Francis A. Allen, was asked to present to the Department of Justice a series of recommendations to address weaknesses in the administration of criminal defense, especially the problems faced by defendants without resources to afford counsel. In 1962, as the Allen Committee went about its work, two editors of the Harvard Law Review conducted their own research into the state of federal public defense.[35] They found that without institutional support or payment, assigned counsel's role was limited, and most of the attorneys spent less than three hours, not including time in court, preparing each case.[36] Guilty pleas were prefaced only by "a hurried ten-minute conference in a corner of the courtroom."[37] Those who were assigned counsel received young, inexperienced lawyers, "little versed in the technicalities of the criminal law or the questioning of accused persons," with "little if any courtroom experience."[38] Attorneys were reluctant to refuse a judge's assignment because "they might later have to appear before [the judge] on an important matter."[39]

While the glaring problems were obvious to the article's authors, the majority of lawyers and judges interviewed for the study felt the ad hoc system provided "adequate" or "very adequate" representation.[40] Even though the system's inadequacies were clear to those who studied the system, those within that system failed to see them. Perhaps because operating within the system limited perspective and exposure, or perhaps because their expectations were low, 93 percent of lawyers and judges believed that appointed counsel performed sufficiently.[41]

The Allen Committee's findings, captured in its 1963 report, echoed those of the Harvard Law Review study. It refuted the belief that defendants without means were receiving effective representation. The Allen Committee concluded that the ad hoc system of providing counsel to indigent defendants failed both those defendants and the criminal justice system as a whole.[42] The report underscored the

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34 The Allen Committee's *Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice* was submitted to the Attorney General on February 25, 1963 and to the Congress in March of the same year.

35 Bruce J. Havighurst & Peter MacDougall, Note, *The Representation of Indigent Criminal Defendants in the Federal District Courts*, 76 Harv. L. Rev. 579, 581 (1963).

36 76 Harv. L. Rev. 579, 588.

37 76 Harv. L. Rev. 579, 589.

38 76 Harv. L. Rev. 579, 596.

39 76 Harv. L. Rev. 579, 591.

40 76 Harv. L. Rev. 579, 588.

41 76 Harv. L. Rev. 579, 588.

42 *See e.g.,* Attorney General's Comm. on Poverty and the Admin. of Fed. Criminal Justice, Rep. to the H. Comm. on the Judiciary, 86th Cong. 10 (U.S. Gov't Printing Office 1963) (discussing the vital role that a strong defense plays in the health of our adversarial system, and stating the Committee's finding that the "system [was] imperiled" by the large number of defendants unable to afford or adequately fund "a full and proper defense") [hereinafter Allen Report].

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serious consequences for defendants in the ad hoc system: Lacking resources to challenge the government's charges, the vast majority of defendants were advised to plead guilty. For those who ignored this advice, going to trial without an attorney skilled and equipped to provide a vigorous defense proved "devastating."[43] The committee called upon the Department of Justice to support legislation that would allow each federal district court to craft a plan for providing adequate representation and addressing local needs and circumstances. The Allen Report extolled the newly created independent legal aid office in the District of Columbia as a model and advocated for the end of pro bono representation:

> The notion that the defense of accused persons can fairly or safely be left to uncompensated attorneys reveals the fundamental misconception that the representation of financially deprived defendants is essentially a charitable concern. On the contrary, it is a public concern of high importance. A system of adequate representation, therefore, should be structured and financed in a manner reflecting its public importance.[44]

Attorney General Kennedy delivered the report to Congress on March 6, 1963. The Report urged the prompt enactment of legislation to ensure that people accused of crimes in federal court receive the kind of defense guaranteed under the Sixth Amendment. As part of future legislation, the report urged changing the definition of eligible defendants from "indigent" to persons "financially unable to obtain adequate representation," and recommended that compensation be provided to attorneys and for any ancillary services essential to the defense, including investigatory services, use of experts, preparation of transcripts, etc.

2.3 The Criminal Justice Act

President John F. Kennedy gave his final State of the Union address before a joint session of Congress on January 14, 1963. In it, he called for the protection of the right to counsel regardless of a defendant's financial position.[45] That same year, U.S. Attorney General Robert Kennedy warned the U.S. House of Representative's Committee on the Judiciary about the consequences of refusing to act to ensure the right to counsel. Citing *U.S. v. Germany*,[46] where the court found that the government's refusal to pay expenses for assigned counsel to interview witnesses or view the alleged crime scene violated the Sixth Amendment, he warned, "There

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43 Allen Report at 26.

44 Allen Report at 42.

45 "The right to competent counsel must be assured to every man accused of crime in Federal court, regardless of his means." Annual Message to the Congress on the State of the Union, January 14, 1963.

46 *United States v. Germany,* 32 F.R.D. 343, 344 (M.D. Ala. 1963).

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are going to be cases thrown out all over the country" if Congress refused to act.[47] At that time, Congress had considered legislation creating a public federal defense system but had failed to enact such a law. But on August 7, 1964, following pleas from the President, the Attorney General, and the Allen Committee, Congress passed the Criminal Justice Act.[48]

Because Congress continued to debate whether to create institutional defenders, the CJA focused on compensating and providing resources to private attorneys appointed to represent indigent defendants. The initial version of the Act provided for appointed counsel to be selected from a panel of designated attorneys and paid at the rate of $10 per hour for out-of-court work and $15 per hour for time spent in court, in addition to reimbursement for reasonable expenses incurred.[49] The maximum attorneys could recover for time and expenses was $500 for a felony case and $300 for a misdemeanor. The statute also provided compensation for service providers such as experts or investigators up to a maximum $300 per case. Importantly, the Act provided that a defendant without resources "shall be represented at every stage of the proceeding from his initial appearance . . . through appeal," granting defendants a right to representation at an earlier stage than previously established by federal courts.[50]

Recognizing that it needed to resolve whether defender offices should be established, the 88th Congress requested further study of the issue. In 1967, the Department of Justice and the Judicial Conference of the United States commissioned Professor Dallin H. Oaks to undertake the study. Submitted in 1969, the Oaks Report found "a demonstrated need for some type of full-time salaried Federal defender lawyers."[51] In 1970, Congress amended the Act to create the current hybrid system of institutional defenders and private attorneys.

While the CJA was the result of extended debate and compromise between the Senate and House, one question was not debated publicly: Who should have the responsibility for running the program? The judicial branch ultimately was decided

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47 *Criminal Justice Act Hearings Before the Subcomm. No. 5 of the House of Comm. On the Judiciary,* 88th Cong. 29 (1963).

48 Pub L. 88–455 (signed August 20, 1964) The original CJA only created compensation for private attorneys; as discussed in the *Criminal Justice Act of 1964*, Pub. L. No. 88–455, 78 Stat. 552 (codified as amended at 18 U.S.C. § 3006A (2012)) (Please note that the original CJA only created compensation for private attorneys; as discussed below, the statute was amended in 1970 to include federal and community defender offices.).

49 It should be noted this was considerably lower than prevailing legal fees at the time, even in comparison to the payment schemes that had been established by states. For example, the minimum hourly rate under the state of Michigan's suggested state-wide fee schedule was $25.00. See John J. Haugh, *The Federal Criminal Justice Act of 1964: Catalyst in the Continuing Formulation of the Rights of the Criminal Defendant*, 41 Notre Dame L.Rev. 996, 1004 fn 60 (1966) (citing 43 MICH. S.B.J. 9, 28 (Aug. 1964)).

50 See e.g. *Anderson v. United States*, 352 F.2d 945, 947 n.3 (D.C. Cir. 1965).

51 Dallin H. Oaks, The Criminal Justice Act in the Federal District Courts, Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary, 90th Cong., 2d Sess. 11 (Comm. Print 1969) [hereinafter Oaks Report].

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to be what might be described as the "least bad" option. Even from the beginning, Congress understood that the defense function was a mismatch with the mission and expertise of the Judiciary. As the *Wall Street Journal* reported in August of 1964:

> Not surprisingly, this new administrative chore isn't welcomed by the judges, already overburdened by crowded trial dockets. The Judicial Conference privately urged the Administration and Congress to find someone else to run the program. But the Justice Department couldn't qualify because it is the prosecutor who will do battle with the appointed lawyers. The Department of Health, Education, and Welfare was eliminated for fear the program would pick up a "welfarism" label and falter on Capitol Hill. So the judges got the job.[52]

Judges at the time voiced their concerns about controlling a function that they believed should be independent. In 1969 Chief Justice Warren E. Burger lamented that the CJA had not created a separate entity to run the program. Having studied the program from its implementation, he agreed that "some independent supervisory agency" was appropriate, as he had concluded that the defender program had to be "insulated . . . from the judges."[53] He went on to state:

> Now, I did not think that at the outset of the study. I became persuaded after I saw systems where either the judges were inattentive or where the machinery that grew up resulted in certain favorite lawyers getting the appointments, or some other such inadequacy. The judges, as I said before, must maintain a real and an active interest in all these things. But the governance of a public defender or a legal aid system should be insulated from the courts, insulated from the prosecutor; it should be an independent body of lawyers.[54]

Judges were not the only ones concerned about placing the federal defender program under the judiciary's control. While considering the 1970 amendments to the Act, which gave districts the option of creating federal defender offices, a Senate report characterized placement in the judiciary as an "initial phase" from which the program should grow and evolve. The legislative history makes clear that Congress saw the judiciary as a temporary home for any defense program:

> Clearly, the defense function must always be adversary in nature as well as high in quality. It would be just as inappropriate to place the direction of the defender system in the judicial arm of the government as it would be in the

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52 *The Wall Street Journal*, Aug. 18, 1964, p. 10, col. 3–4.

53 *Proceedings at the1969 Judicial Conf., U.S. Court of Appeals, Tenth Circuit: Min. Standards for Criminal Justice*, 49 F.R.D. 347, 374 (1969).

54 *Id.*

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prosecutorial arm. Consequently, the committee recommends that the need for a strong independent administrative leadership be the subject of continuing congressional review until the time is right to take the next step.[55]

2.4 Prado Report: First Independent Review of the Criminal Justice Act

That "congressional review" would not come for another 20 years. Not until the Judicial Improvement Act of 1990 did Congress ask the Judicial Conference to conduct further study of the federal appointed counsel program. Led by Judge Edward C. Prado, then a federal district court judge for the Western District of Texas, the "Prado Committee" included federal judges, defenders, professors, and a former United States Attorney. The Committee faced obstacles in its comprehensive review, including the unavailability of reliable, empirical data about the program, time and budget constraints, incomplete and inaccurate panel attorney rolls, and the absence of any formal analyses of the quality of representation provided by federal and community defenders and panel attorneys.

Despite these challenges, the Prado Committee submitted its report to the Judicial Conference on January 29, 1993.[56] Finding significant problems in the administration of the CJA, the Committee made several recommendations for reform, some of which the Judicial Conference ultimately adopted. These included eligibility standards for membership on a CJA panel, additional training programs for panel attorneys, increased compensation for panel attorneys, and reimbursement for necessary and reasonable travel time. The report also recommended the establishment of more federal defender offices in districts with the caseloads to support it, and the creation of evaluation procedures to review staff and attorney performance in defender offices, which the Judicial Conference agreed to as well.

However, the centerpiece recommendation of the report was to create an independent defense agency under the judiciary. Citing the growing size and complexity of federal defense services, the Prado Committee concluded that a dedicated agency was necessary to manage the program effectively. The Committee also found that judicial involvement in the program impaired the quality of CJA representation while overburdening the courts, whose responsibilities under the CJA had grown as caseloads had increased.

Analyzing the letters, comments, testimony, and surveys it received, the Prado

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55 S. Rep. No. 91–790, 91st Cong., 2d Sess. at 18 (1970).

56 Comm. to Review the Criminal Justice Act, Rep. of the Comm. to Review the Criminal Justice Act, at 2, *reprinted in* 52 Crim. L. Rep. (BNA) 2265 (1993) [hereinafter Prado Report] (quoting S. Rep. No. 91–790, 91st Cong., 2d Sess. at 18 (1970)).

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Committee ultimately recommended what the Senate Judiciary Committee and Chief Justice Burger had believed would be necessary to fulfill the CJA's mission "of a strong, independent office to administer the federal defender program."[57] While the Judicial Conference took up many of the Prado Committee's recommendations, the Conference rejected the call for independence.[58]

2.5 How Things Have Changed Since the Passage of the Criminal Justice Act

In 1964, when Congress first passed the CJA, the landscape of criminal justice at the federal level looked considerably different. Criminal jurisdiction was extremely limited.[59] Because there were a "comparatively small number of criminal cases" in federal courts—only a third of which would be eligible for services under the CJA—Congress initially thought the program would be "both manageable and relatively inexpensive."[60] During debate over the bill, a congressman stated his assumptions about the expected cost:

> Now, if we assume that each attorney would spend one hour in his office and one hour on each of these cases, the $25 fee would amount to $250,000 a year. Of course, in a complicated felony case, the time expended and the cost involved might be substantially greater than the average, especially if appeals are involved. However, it is equally true that in many cases, if not most cases, less than an hour of courtroom practice and less than $15 in fees may be involved.[61]

Initially, the program proved less costly than expected. However, the program and its cost began to grow rapidly. The number of appointments increased. And by the time of the Oaks Report in 1969, the cost per case had risen to $125.[62] These same trends continued in the years to come. Along with growth in federal criminal jurisdiction, there was an increase in the complexity of individual cases, and a significant rise in the percentage of defendants who required appointed counsel. By

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57 Prado Report at 9–10, quoting Senate Report No. 91–790, 91st Cong. 2d Sess. April 23, 1970, at 18.

58 Rep. of the Judicial Conf. of the United States on the Federal Defender Program 3, submitted by the Federal Judiciary to Cong. pursuant to Sec. 318 of the Judicial Improvements Act of 1990, Pub. L. No. 101–650 (1993) [hereinafter JCUS Report 1993].

59 The Wall Street Journal, August 18, 1964, p. 10, col 3–4; John J. Haugh, *The Federal Criminal Justice Act of 1964: Catalyst in the Continuing Formulation of the Rights of the Criminal Defendant*, N.D. Law Rev (1965) Vol. 41 Issue 6 Art. 11, at 1005, n.68.

60 John J. Haugh, *The Federal Criminal Justice Act of 1964: Catalyst in the Continuing Formulation of the Rights of the Criminal Defendant*, N.D. Law Rev (1965) Vol. 41 Issue 6 Art. 11 at 1004.

61 44 Neb L Rev 703, fn 55 pg 720; Statement of Congressman Poff, 110 Cong. Rec. 447 (1964).

62 Oaks Report, Roman L. Hruska, *Preface* to Oaks Report, at III (1968).

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the time of the Prado Report in 1993, the number of CJA appointments had more than quintupled, from 16,000 in 1964 to approximately 80,000 thirty years later. Total program expenditures in fiscal year 1993 surpassed $295 million. The Prado Report identified various underlying causes, including massive growth in the number of federal prosecutions overall, a significant increase in drug cases, a drastic increase in the length and complexity of federal criminal cases, and the introduction of sentencing guidelines and mandatory minimums.[63]

The CJA program itself expanded and matured to satisfy the demand for appointed counsel. By 1993, approximately 40 federal public defender offices (FPDOs) had been established to serve over half of the 94 judicial districts. Additionally, there were nine community defender offices (CDOs)—non-profit organizations incorporated to provide criminal defense services on par with their federal defender counterparts—representing indigent defendants in 10 districts.[64]

Still, the Prado Report recognized that the capacity of the defender program had not kept pace with the enormous rise in need. The Report stated that after three decades, "The management needs of this large and complex program have outgrown what can properly be expected through even the highly conscientious efforts of the Judicial Conference and the Defender Services Committee."[65]

Continued expansion of federal criminal jurisdiction,[66] even greater case complexity and challenges in sentencing, voluminous electronic discovery, and an exponential increase in immigration cases have led to even further growth of the defender program under the CJA. Today, there are 81 federal and community defender offices serving 91 judicial districts. The number of appointments to those offices has more than quadrupled, from 37,685 in 1993 to 161,540 in fiscal year 2016, while the number of cases appointed to panel attorneys has more than doubled since the Prado report to 80,535. Even since 2000, total appointments to panel attorneys and defender offices have nearly doubled, from 118,494 to 226,710 in 2015.[67] Today, roughly 93 percent of criminal defendants in federal court require appointed counsel.

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63 Prado Report at 1.

64 JCUS Report 1993 at 3.

65 Prado Report at 1.

66 While the expansion of federal criminal jurisdiction has been the subject of many other reports, for comparison, in 1990 just before the Prado Committee began its study, the total requested for just salaries and expenses for United States attorneys employed by the Department of Justice was $454,279,000. For FY2015, at the start of this Committee's study, for salaries and expenses, the DOJ requested $1,995,300,000. These numbers do not include the significant amount of money expended towards investigation, forensic analysis, or requested by other agencies like the FBI or DEA for assistance with federal prosecutions. *See* Office of Mgmt. & Budget, Exec. Office of the President, Budget of the United States Gov't, Fiscal Year 1990, 485 (Jan. 9, 1989); U.S. DOJ, FY2015 Summary Information by Appropriation: U.S. Attorneys, available at https://www.justice.gov/sites/default/files/jmd/legacy/2014/05/04/usa.pdf, (last visited July 26, 2017).

67 U.S. Federal Courts, Judicial Business 2000 28 http://www.uscourts.gov/sites/default/files/2000judicialbusiness.pdf. (last visited July 26, 2017); U.S. Federal Courts, Federal Judicial Caseload Statistics, Criminal Justice Act—Judicial Business 2015 http://www.uscourts.gov/statistics-reports/criminal-justice-act-judicial-business-2015, (last visited July 26, 2017).

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A CJA program that was created on the understanding that its budget would be small and its appointments few has been required to grow well beyond its original design into a billion dollar program. An evaluation of the program's needs and an investigation into how it could adapt and evolve to meet the sheer volume and complexity of modern criminal defense work was well overdue.

2.6 Administration of the Criminal Justice Act by the Judiciary

2.6.1 Hybrid System of Defense

Since the CJA's amendment in 1970, the federal defender program has functioned as a hybrid system comprised of public defender offices and appointed private attorneys. This system allows for flexibility, since panel attorneys can step in to handle a sharp increase in prosecutions. It also addresses conflicts that may arise in multi-defendant cases, with the defender office often taking the lead defendant while panel attorneys act as counsel for the other defendants. Lastly, the current system offers the consistency of having an institutional defender office, which not only sets the bar for defense best practices locally but, with ready access to resources, can often provide training opportunities and assistance to panel attorneys in that district.

There are two kinds of defender offices within the CJA system:[68]

Federal Public Defender Offices (FPDOs)

FPDOs are headed by a federal public defender appointed by the Circuit Court and subject to various reappointment processes every four years. All staff in an FPDO are government employees. The Circuit Court determines the number of Assistant Federal Defenders an office may hire and so exercises additional control over FPDOs.

Community Defender Organizations (CDOs)

CDOs are non-profit corporations funded by the Defender Services Program. CDOs are managed by a board of directors and employ an Executive Director who functions as the district's Federal Defender.

From the perspective of a defendant, FPDOs and CDOs operate identically (in this report, they are referred to collectively as "federal defender offices" or FDOs)

Private attorneys, depending on the district, either apply to be included on the local "CJA panel" or are placed on the panel through some other process. Panel attorneys are often solo practitioners or from small firms and also take paying clients in addition to their appointed cases. Each district has a CJA panel attorney

[68] 18 U.S.C. Section 3006A(g)(1) and (2).

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district representative to communicate with the national program and disseminate information among panel attorneys. This program was instituted after the Prado report, to improve communications with panel attorneys.

2.6.2 National Administration

The Criminal Justice Act places the national administration of the defender program under the authority of the Judicial Conference of the United States (JCUS or Judicial Conference) and the Administrative Office of the United States Courts (AO or Administrative Office). JCUS is authorized to create rules and regulations for the program,[69] while the director of the AO is tasked with supervising the expenditures of funds appropriated for indigent defense.[70] The statute also charges JCUS with determining the hourly rate for panel attorneys[71] as well as the maximum amount to be paid to a panel attorney on any one case without additional justification and oversight.[72]

The Judicial Conference is the judiciary's governing body. It consists of the Chief Justice of the Supreme Court, who presides; the chief judges of each circuit; and one district judge from each circuit. The Conference administers judiciary funds and makes policy for the administration of the courts. JCUS has committees to advise the larger Conference on a variety of matters, such as the Committee on Criminal Law, the Committee on Court Administration and Case Management, and the Committee on Information Technology. The Executive Committee is the chief decision-making body within the Conference, determining the jurisdiction of the other committees and setting the calendar and agenda for JCUS.

The Defender Services Committee (DSC), comprised entirely of judges, is the JCUS Committee charged with overseeing the CJA program. DSC provides policy guidance, reviews budget and staffing requests for defender offices, monitors legislation affecting the appointment and compensation of counsel, assists to ensure adequate and appropriate training for defense attorneys, and helps determine long range goals for the program. As part of the DSC's process, it receives feedback from the defender community through established working and advisory groups. Although DSC is directly responsible for overseeing the defender program, under the current JCUS structure, this Committee does not have final decision-making authority on any aspect of the CJA program and cannot advocate directly to Congress for appropriations for the defender program. Furthermore, under the current structure of JCUS, even DSC's limited authority is subject to diminution. As an example, in 2012, the Executive Committee altered DSC's jurisdiction, removing its

69 18 U.S.C. § 3006A(h).

70 18 U.S.C. § 3006A(i).

71 18 U.S.C. § 3006A(d)(1).

72 18 U.S.C. § 3006A(d)(2).

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authority to determine individual defender office staffing and compensation levels and placing that power with the Judicial Resources Committee, which performs these functions for court entities.

The AO performs administrative functions for the federal judiciary and oversees the expenditure of appropriated funds. Its mission is to serve and support the federal judiciary pursuant to the policies, guidance, and direction of the Judicial Conference. The AO provides the working staff for all JCUS committees and so plays an important role in JCUS policymaking. It assists in creating the judiciary's budget, maintains a legislative office that has contacts with Congressional staffers to track and offer comment on legislation affecting the judiciary, and provides auditing services and financial accountability for court entities, among other tasks.

Within the AO, the office responsible for staffing DSC and assisting in the national administration of the CJA is the Defender Services Office (DSO). DSO's mission is divided between supporting defenders and panel attorneys and, as part of the AO, supporting judiciary interests. DSO provides training to CJA practitioners, advises on legal and policy issues affecting the provision of counsel and other services under the CJA, assists individual defender offices in formulating budgets, serves as staff to AO working and advisory groups, and collects limited data on the defender program.

Until 2013, DSO was a "directorate," reporting directly to the head of the AO. This status recognized DSO's unique non-judicial role. During a reorganization of the Administrative Office, DSO was demoted to become an office within the AO's Department of Program Services, grouped with other court services like pretrial services and probation.

2.6.3 Local Administration

The CJA gives local district and circuit courts significant authority in administering the program. The statute requires each district to develop and, with the approval of the circuit judicial council, implement its own plan for providing representation to defendants financially unable to hire their own lawyer.[73] This local control creates considerable variation across districts in the provision of defense services.

CJA panel attorneys are subject to much greater judicial control of their daily activities than attorneys who work in federal and community defender offices. While defender offices receive an annual budget, have salaried employees, and have the freedom to hire experts, use investigators and paralegals, or purchase computers and software as needed without judicial approval,[74] district courts do have the ability to determine whether to have a defender office at all, and whether the institutional defender office will be an FPDO or a CDO. District courts also have the authority to close a defender office or alter its organizational structure (i.e. from a

[73] 18 U.S.C. § 3006A(a).

[74] 18 U.S.C. § 3006A(g)(2).

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FPDO to a CDO or vice versa).[75] But individual judges do not direct or influence the way lawyers in defender offices represent their clients.

The same is not true for a private panel attorney appointed to a CJA representation whose daily activities are subject to judicial scrutiny. In most districts, judges decide which attorneys may be on the panel, how cases are assigned, and whether attorneys should be removed from the panel. The presiding judge in a case where a panel attorney has been appointed to a CJA client determines whether and how much a panel attorney will be paid for work on a case.[76] And while in some districts panel attorneys submit fee requests (commonly referred to as "vouchers") for payment through a CJA supervisory attorney or the federal defender for an initial review, in almost every district it is the presiding district judge who must approve a voucher before it can be paid. Additionally, there are case compensation maximums on panel attorney fees and expert and investigator costs. If a panel attorney's voucher exceeds $10,300 for a non-capital felony case or an expert or investigator voucher exceeds $2,400, payment must be approved by the chief judge of the circuit court or a designee.[77]

75 18 U.S.C. § 3006A(g)(1).

76 18 U.S.C. § 3006A(d)(1)-(2).

77 18 U.S.C. § 3006A(d)(2); 18 U.S.C. § 3006A(e)(3). For a history of panel rate and case maximum increases see chart on page 54.

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Findings



Section 3: National Administration of the CJA

3.1 Background and Introduction

Since the Prado Report, the federal public defense function has grown considerably. While in 1993, the program's budget was $295 million, in fiscal year 2017, program expenditures are expected to exceed $1.1 billion. And while there were 80,000 appointments under the program in 1994, there are now over 242,000.[78] At the time of the Prado Report, there were approximately 49 FDOs and CDOs representing over half of the 94 federal judicial districts, while today there are 81 such organizations serving 91 of the 94 judicial districts. Considering these numbers, it would seem that the program has grown and developed—even flourished—under the auspices of the federal judiciary. Indeed, the judiciary has fostered the development of federal defender offices in almost every district, instilling a strong defense culture in federal courtrooms across the country.

Though these successes inform this Report, they do not resolve the questions that the Committee was charged with answering. While the judiciary has served as a committed steward, the current structure has hindered the progress of the CJA Program. As a former member of DSO succinctly explained the issue:

> The question facing this Committee is not how well the judiciary has done in managing the defender services program within the existing constraints that limit its ability to do so. It is whether there is sufficient or indeed any rationale for continuing to operate within those constraints and limitations, rather than making the changes needed to give the

78 These include panel attorney and defender appointments. U.S. Federal Courts, *Federal Judicial Caseload Statistics, Criminal Justice Act—Judicial Business 2016*, U.S. Courts, www.uscourts.gov/statistics-reports/criminal-justice-act-judicial-business-2016.

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> defender services program the elements that any modern governmental or business programmatic model would have. A governance structure that has an unconflicted mandate to carry out a clearly defined mission and that can be held accountable for its successes and failures.[79]

This section addresses the suitability of the judiciary's governing structures to the task of administering the CJA. The Committee wishes to make it clear that this review is focused on the current structure and function of this governance; not on the individual judges who operate within that structure. Indeed, witnesses who appeared before the Committee made the important distinction between individual judges and the structure under which those judges must operate. As one defender testified:

> I feel tremendous support locally from my judges.…Our chief judges in both districts really went to bat for us during sequestration, but they were going to bat for us within the judiciary. They were having to do battle within the judiciary about what was going on, as did the chief judges all around the country who very much appreciated the work that we were doing.[80]

But since federal public defense practice has grown, this structure has created fundamental conflicts between the public defense attorneys and their administrator, the judiciary. A closer examination of the current structure amplifies these conflicts.[81]

3.2 Current Structure and Governance

The Criminal Justice Act provides the JCUS authority to issue rules governing local plans for the provision of public defense. The current structure also provides the Director of the Administrative Office with authority to create rules and procedures for, and otherwise administer, the Defender Services Program. Thus, the same entities that determine rules, regulations, and policy for public defense also provide administrative support for and advocate on behalf of federal judges.[82]

3.2.1 Judicial Conference Committees Relevant to the Governance of Defender Services

The JCUS carries out its work primarily through a number of standing committees, several of which interact with, and have authority and influence over, the

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79 Steven G. Asin, Former Deputy Assistant Director, DSO, Administrative Office of the U.S. Courts, Public Hearing — Philadelphia, Pa., Panel 7, Tr., at 7.

80 David Patton, Exec. Dir., CDO, S.D.N.Y & E.D.N.Y, Public Hearing — Philadelphia, Pa., Panel 3, Tr., at 13.

81 For an overview of the basic structure, see Section 3.2, Current Structure and Governance, *supra*.

82 18 U.S.C. § 3006A(h) (2012).

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CJA program.[83] Most central to the program's mission is the Defender Services Committee, which oversees "the provision of legal representation to defendants in criminal cases who cannot afford an adequate defense."[84] The Executive Committee is the most powerful committee of JCUS, acting as "the senior executive arm of the Judicial Conference."[85] Because it "[p]repare[s] the discussion and consent calendars for meetings of the Judicial Conference;" the Executive Committee decides what topics and issues the entire Judicial Conference will address at each semi-annual meeting.[86] The Committee on the Budget's mission is "to assemble and present to Congress the budget for the judicial branch."[87] It determines what resources will be requested for indigent defense. Lastly, the Judicial Resources Committee determines the staffing formulas governing federal defender offices. As discussed below, the fact that the majority of decision-making authority over the CJA program largely rests with Committees other than the Defender Services Committee leads to less informed and less effective administration of the program.

3.2.2 The Administrative Office and its Role in the Governance of Defender Services

JCUS also supervises the Director of the Administrative Office, and through the AO Director, the entirety of the judiciary's administrative apparatus.[88] The AO's mission statement makes clear that the Office is dedicated to one entity: "The Administrative Office of the United States Courts supports, through excellence and innovation, the constitutional and statutory mission of the federal judiciary…"[89] Among the AO offices that significantly affect the budget, policy, and governance of the defender program are the Defender Services Office, the Budget, Accounting, and Procurement Office (BAPO), the Office of General Counsel (OGC), and the Office of Legislative Affairs (OLA).[90]

The Defender Services Office's mission is "to ensure that the right to counsel guaranteed by the Sixth Amendment, the Criminal Justice Act, and other statutory

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83 *See generally About the Judicial Conference*, U.S. Courts, http://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference (last visited Oct. 5, 2017).

84 *Id.*

85 *Id.*

86 *Id.*

87 *Id.*

88 28 U.S.C. § 604 (2012).

89 The rest of the mission reads, "…to provide equal justice under the law as an independent and equal branch of government." Given that defenders are positioned under our system of criminal justice to act in an adversarial role in relation to the prosecution of an individual by the government, the additional emphasis on the judiciary as a fundamental part of that government is another conflict of mission with the defense program. It should also be noted that the AO still has limited authority, as one witness pointed out during Committee hearings. "The AOUSC has little direct authority. If a judge does not want to follow the CJA's dictates, let alone Judicial Conference policies, the AO cannot direct the judge to do so." Steven G. Asin, Former Deputy Assistant Director, DSO, Administrative Office of the U.S. Courts, Public Hearing — Philadelphia, Pa., Panel 7, Tr., at 6.

90 See Appendix D for full list of acronyms.

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authorities is enforced on behalf of those who cannot afford to retain counsel and other necessary defense services."[91] DSO is charged with providing leadership, management, oversight, and support to "(1) Maintain public confidence in the nation's commitment to equal justice under law; and, (2) Ensure the successful operation of the constitutionally-based adversary system of justice by which both federal criminal laws and federally guaranteed rights are enforced."[92]

In contrast to DSO, other offices within the AO that have substantial influence over the defender program focus their efforts on support of the judiciary as a whole. For example, "The Office of Legislative Affairs (OLA) carries out the judiciary's legislative liaison activities with Congress, other government entities, and private sector organizations with an interest in legislation and other activity affecting the judicial branch."[93] Specifically, OLA develops, presents, and promotes legislative initiatives endorsed by the Judicial Conference.[94]

BAPO is responsible for preparing the judiciary's appropriations requests and managing its budget: "The Budget, Accounting and Procurement Office (BAPO) is responsible for the management, oversight, and support of the judiciary's finance, budget, and procurement activities."[95] The office is responsible for the congressional appropriations requests of the entire judiciary. (The budget process will be discussed in more detail below.) Within BAPO the Financial Liaison and Analysis Staff's mission is to "coordinate the judiciary's liaison activities with the congressional appropriations and budget committees and assist in the coordination of such activities with the executive branch regarding budget matters."[96] Its functions include:

1. Provide staff support to the Judicial Conference Committee on the Budget's Congressional Outreach Subcommittee and other Conference committees as needed on financial matters.
2. Serve as the judiciary's point-of-contact with congressional appropriations and budget committees on budget matters.
   A. Prepare testimony on the judiciary's budget.
   B. Coordinate responses to congressional inquiries and reports.
   C. Represent the judiciary's financial interests to Congress.
   D. Track congressional budget resolutions and the judiciary's appropriations bill.[97]

These tasks are entrusted to BAPO alone; the other offices within the AO cannot independently speak directly with congressional appropriators. This is true

91 Administrative Office of U.S. Courts, 1 AO Manual § 330.40.
92 *Id.* § 330.40(a).
93 *Id.* § 320.60.
94 *Id.* § 320.60(b)(3).
95 *Id.* § 340.30.
96 *Id.* § 340.30.20.
97 *Id.* § 340.30.20(b).

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even when the Defender Services appropriation is being discussed with congressional staff. BAPO staff does occasionally invite the program staff or a JCUS committee member to accompany them to the Hill to discuss a particular topic, though in the case of Defender Services this is extremely rare.[98] And while defenders can meet with anyone in their capacity as an individual defender, they cannot speak for the program as a whole. Thus, BAPO generally serves as the sole point of contact from the AO to appropriations staff regarding the Defender Services budget requests.[99]

In short, the distinct missions of DSO, which primarily supports the provision of defense counsel and expert services, and of the AO, which primarily provides administrative support to the courts, are not aligned.[100] With these vastly different missions, DSO fits poorly within a larger structure dedicated to serving the interests of the judiciary as a whole. And, as this program has grown along with the number of federal prosecutions, this conflict has become more pronounced.

3.3 Fundamental Weaknesses in the Current Structure and Governance

The Committee has identified the following issues with placing the CJA administration within the current structure of the Judicial Conference and the Administrative Office. The Committee's findings in these areas are supported by testimony from the public hearing and other public and non-public documentation. These are:

1. the Defender Services Committee's lack of authority to make meaningful decisions about the oversight of the CJA program;
2. the Defender Services Office's lack of status and authority to effectively manage and support the administration of the CJA program; and
3. the federal defender and panel attorney's inability to meaningfully participate in the governance of and advocacy for the CJA program.

The Prado report identified many of these same issues more than twenty years ago, and in some cases the resulting conflicts have increased in severity over time. A former federal defender who worked within the federal defense system for decades observed that there has been "a sea change within the administrative office and the judicial conference over the last, not just the sequester 3 year period, but I would say probably going back 5 to 7 years. That sea change has significantly

98 This last occurred in 2014 for Defender Services when then-chair of the Defender Services Committee and one DSO staff member went with BAPO staff to meet with staff from the House appropriations subcommittee on the issue of the CJA panel attorney hourly rate request.

99 There is a subcommittee of the Budget Committee dedicated to congressional outreach as well.

100 The Defender Services Office staff who work for the Director of the Administrative Office also support the Defender Services Committee. This creates a structural conundrum. The primary focus of the Defender Services Office should be the provision of defense counsel and expert and investigative services.

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reduced the independence of the defense function, within the administrative office, within the judicial conference."[101]

Other witnesses echoed this sentiment. A former member of the Prado Committee testified about a 2004 change in the AO's structure when the director of the AO at the time, Leonidas Mecham, created the Office of Defender Services as an independent directorate within the AO. "He recognized [defenders'] unique importance and recognized the importance not only of the function, but the nature of the work, and elevated the Office of Defender Services to a distinct high level status within the judiciary, in order to provide judicial input that was deferential to the needs of the defender community."[102] He told the Committee this recognition and respect for the importance of the defender function has been lost. Under the 2013 reorganization of the AO, "ODS [the precursor to DSO] was basically demoted."[103]

Given that the "federal judiciary did assume a fiduciary duty to look after the independence of the defense function,"[104] the gradual erosions of institutional protections are troubling, witnesses told the Committee. A former employee with DSO explained that "with the budget armageddon that we have all experienced in the last few years, I think there's been a scarcity mentality that has set in the judiciary and I think a lot of those protections have been eroded."[105] Defenders told the Committee they no longer believed that the administrative structure afforded the program the respect and resources it needed:

> I could honestly believe that the defender program was the gold standard for indigent defense in the country if not in the entire world. Then came the demotion [of DSO]. Then came the sequester. Then came the work measurement study. We had known all along that we could not survive without the judiciary in our corner. In this dark time, we were reminded that the judiciary could exert as much influence and control as it desired over the administration of the indigent defense program.[106]

3.3.1 DSC's Lack of Decision-Making Authority Over the CJA Program

Emblematic of the structural tensions between the CJA program and its parent the judiciary is the role of the Defender Services Committee within the JCUS. While it is the mission of the DSC to represent the interests of the CJA program within the JCUS, the Committee heard testimony that the DSC has too little authority to truly advance those interests.

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101 Steve Wax, Legal Director, Oregon Innocence Project, Public Hearing—Portland, Or., Panel 1, Tr., at 5.
102 Thomas Hillier, Former FPD, W.D. Wash., Public Hearing—Portland, Or., Panel 1, Tr., at 1.
103 *Id.* The AO's reorganization is discussed later in this section.
104 Stephen McCue, FPD, D.N.M, Public Hearing—Santa, Fe, N.M., Panel 2, Tr., at 10.
105 *Id.* at 10.
106 Louis Allen, FPD, M.D.N.C., Public Hearing—Miami, Fla., Panel 1, Tr., at 8.

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DSC's Ability to Advocate for the CJA Program

One reason often given for the concentration of decision making authority within the Judicial Conference structure is the importance of the judiciary speaking with "one voice" in its representations to other branches of government, the press, or any other entity.[107] However, as the CJA Program has grown in size and sophistication, its requirements and responsibilities have increasingly diverged from those of the judiciary. The former chair of the DSC told the Committee,

> while I fully understand the need for the judiciary to speak with a consistent voice, and I appreciate the difficult and generally successful work that has been done by [another JCUS] committee and its staff, I believe that there are issues specific to the defender and panel attorney programs on which we could assist and should have the opportunity to be heard.[108]

The budget formulation process is an example of where the DSC does not always prevail in being able to advocate for the best interests of the CJA program. The budget process is something that came up repeatedly throughout the hearings. Though the DSC is the committee with the most knowledge about and experience with the defender program, it lacks the authority to effectively advocate for the CJA budget within the judiciary and with Congress. Once the DSC meets and makes its recommendations on funding requests, those recommendations are then filtered through the Budget Committee and, ultimately, the Judicial Conference. As noted earlier, it is the Executive Committee's role to determine whether issues raised will be discussed during one of the JCUS's biannual meetings. Particularly problematic are impediments to the DSC's ability to directly formulate and transmit to the JCUS its budget request. If DSC's view of CJA program needs is never conveyed to or approved by the JCUS, it cannot be considered by Congress. A more in-depth discussion of the budget process is set forth below.

The same is true of DSC's perspective on proposed legislation affecting the program. The DSC often has little or no say in the formulation of Conference policy on legislation.[109] Because OLA is bound to advance only positions approved by the Conference, even where potential legislation may have a profound effect on the CJA

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107 During a meeting with the AO administration and senior executives, the Committee was told that the judiciary must speak with one voice in its representation to other branches of government, the press, or any other entity.

108 Chief Judge Catherine Blake, D. Md., Public Hearing—Philadelphia, Pa., Panel 1, Tr., at 4–5.

109 The DSC's jurisdiction is extremely limited in terms of its input on legislation: "Monitor, analyze, and propose for Judicial Conference consideration legislation affecting the appointment and compensation of counsel and, where appropriate, make recommendations to other Judicial Conference committees and to the Judicial Conference regarding issues which impact upon the defender services program." See The Judicial Conference of the United States and its Committees August 2013, Appendix Jurisdiction of Committees of the Judicial Conference of the United States (As approved by the Executive Committee, effective March 13, 2017).

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program, the DSC's perspective may never be heard by Congress.

One defender pointed out to the Committee that the fight the DSC had to wage on behalf of the CJA program, however, was indicative of the problems the DSC faces in advocating for the program within the current system:

> [W]hen I'm watching [former DSC Chair] Chief Judge Blake fighting tooth and nail for something…it impressed upon me, "What is the view of the judiciary as far as independence of the defense function when the respected chair of DSC has to fight this hard to execute something that everyone had assumed was a given?"[110]

In spite of the difficulties presented in the current structure, the DSC's efforts were recognized by defenders who testified that judges appointed to the DSC had often become unfailing allies in the competition for resources and policy changes within the Judicial Conference. Former employees at DSO also lauded the work it has done, one of them telling the Committee, "The Defender Services Committee I think has done an outstanding job. People did come to it with varying degrees of experience and have been great advocates for the program."[111] A defender told the Committee that even if the judges appointed to the DSC have no experience with criminal defense and have never cared much about the defense function, "when judges come out of Defender Services Committee, they usually leave having a really better understanding of what we do, and a newfound respect for it."[112] Another defender agreed, testifying that the DSC, "spent enough time with defenders over a period of years that they seemed, even if they may have come in hesitant at first or skeptical at first, they developed an appreciation of exactly what it is we do and how difficult it is and how much of it goes on out of sight of the court and the judges."[113]

What the Committee heard was that the DSC did not have as much authority over the program's decision-making as it should. As one panel attorney testified, "right now they're governed by the Budget Committee [and] by the Executive Committee."[114]

Loss of Jurisdiction over Defender Staffing and Compensation

On February 25, 2013, the Executive Committee transferred authority over staffing and compensation in defender offices from the DSC to the Judicial Resources Committee. Announcing these changes, the Executive Committee stated that, "In advising you of this decision, I would emphasize again the Executive Committee's overarching purpose in making these changes, which is to enhance coordination

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110 Steve Kalar, FPD, N.D. Cal., Public Hearing — San Francisco, Cal., Panel 7, Tr., at 20.

111 Richard Wolff, Former Chief, Legal, Policy, and Training Division, DSO, Public Hearing — Philadelphia, Pa., Panel 7, Tr., at 12.

112 Marianne Mariano, FPD, W.D.N.Y, Public Hearing — Philadelphia, Pa., Panel 3, Tr., at 11.

113 Louis Allen, FPD, M.D.N.C., Public Hearing — Miami, Fla., Panel 1, Tr., at 21.

114 Peter Schweda, CJA Dist. Rep., E.D. Wash., Public Hearing — Portland, Or., Panel 5, Tr., at 5.

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and oversight of the judiciary's resources."[115] Where the DSC had previously worked with budget analysts and defenders to determine staffing and budgets for individual offices, the change in jurisdiction removed this collaboration and effectively eliminated the DSC's role in the staffing of offices.[116]

A member of the Judicial Resources Committee (JRC) testified before this Committee in Philadelphia, stating that in regard to defender staffing, "The Judicial Conference and Executive Committee asked the Judicial Resources Committee to take over that function so that we could have a national work measurement study and a national staffing formula."[117] This was reportedly a strategic decision to streamline the budget process. The Judicial Resources Committee could create a staffing formula for the defender offices similar to those used in other court units in the judiciary. That formula could then be used in creating and presenting to Congress a national budget. Indeed, a JRC member, when asked about returning jurisdiction to the DSC, told the Committee, "I don't know that there's a benefit for returning it to the Defender Services Committee or to the defender community once this [work measurement] study is done. I think likely the reason is that we have a history of doing staffing formulas and then revising those on a rotating 5-year basis."[118]

However, the loss of DSC jurisdiction over staffing has consequences for defender offices and their ability to represent their clients. The then-chair of the Defender Services Committee's budget subcommittee explained why the loss of jurisdiction could undermine the defense program: although the JRC may have the ability to modify and reevaluate the staffing formulas and surveys on work measurement every five years, that schedule and reliance on staffing formulas fails to accommodate for the specific needs of defender offices:

> The work measurement study and the accompanying transfer of jurisdiction over staffing to the Committee on Judicial Resources will in my view adversely impact the ability [of DSC] to respond to individual FDO office staffing needs that inevitably but predictably arise . . . As you know, the defense function is unique in that it only acts in response to prosecutorial initiatives, initiatives that are totally out of its control. While it is perfectly appropriate to use a staffing formula as the starting point for an FDO budget process, restricting the flexibility of a defender organization to adjust staffing needs in response to an unforeseen change in

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115 JCUS Memorandum from Judge William B. Traxler to various JCUS Committees, "Subject: Follow Up on Changes in Committee Jurisdiction, February 25, 2013.

116 The 2013 jurisdictional change removed DSC's authority over defender office staffing and compensation and placed it under the Judicial Resources Committee. Because personnel costs amount to approximately 80 percent of federal defender office budgets, many heads of offices describe the change as removing budget authority.

117 Chief Judge Lawrence Stengel, E.D. Pa., Public Hearing—Philadelphia, Pa., Panel 8, Tr., at 6.

118 *Id.* at 17.

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> caseload whether by virtue of the number of cases or the complexity of the cases, or sudden changes in the law, places the quality of the representation at risk in my view.[119]

An example of a sudden change in constitutional law which gave rise to a need for staffing flexibility was the 2015 Supreme Court ruling in *Johnson v. US*, which held a portion of the Armed Career Criminal Act unconstitutional.[120] Because a habeas petition seeking relief based on a new rule of constitutional law must be filed within one year of the Supreme Court's ruling, defenders had only twelve months to review the cases of every individual sentenced under the Act, as well as those sentenced under similarly-worded acts, determine which individuals had valid claims for relief, and file habeas petitions in district court. Sentences under these acts are lengthy and thousands of individuals sentenced might still be imprisoned. Accordingly, defenders were required to review cases from as long as thirty years ago, and the volume of individuals potentially eligible for relief was staggering. In the end, the decision in *Johnson* resulted in a review of approximately 35,000 files and more than 10,000 petitions being filed as a result of that review. One federal defender told the Committee that after *Johnson*, "We have 1700 cases to review and probably about ten percent of those we want to file a [habeas petition], but we're looking at this five year average that I can't go out and hire people and Defender Services can't give me people to deal with those cases."[121] Additionally, the workload increase was not uniform — some offices were barely affected while others reported to be still struggling to work through past cases to assist their clients. The inability of DSC to respond quickly to the staffing needs of defender offices in such situations inhibits the effective representation by those offices.[122]

3.3.2 AO Re-organization and the Loss of Directorate Status of DSO

As described earlier, the Defender Services Office is the entity within the AO that provides leadership, direction, administration, management, oversight and support for the federal appointed counsel system.[123] Similar to the structural tensions discussed between the DSC and the larger JCUS, DSO operates within a structure that is predominantly focused on judges and court staff.

The Committee heard testimony from many witnesses that the re-organization

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119 Mag. Judge Jonathan Feldman, W.D.N.Y., Public Hearing — Philadelphia, Pa., Panel 1, Tr., at 6.

120 135 S. Ct. 2551.

121 Elizabeth Ford, Exec. Dir., CDO, E.D. Tenn., Public Hearing — Birmingham, Ala., Panel 6, Tr., at 32.

122 From Miriam Conrad: "We have some districts where prosecutors have agreed to waive the statute of limitations. We have other districts where they haven't. Each defender is trying to negotiate that and fight it out on its own." Miriam Conrad, FPD, D. Mass. & D.N.H. & D.R.I., Public Hearing — Philadelphia, Pa., Panel 3, Tr., at 18.

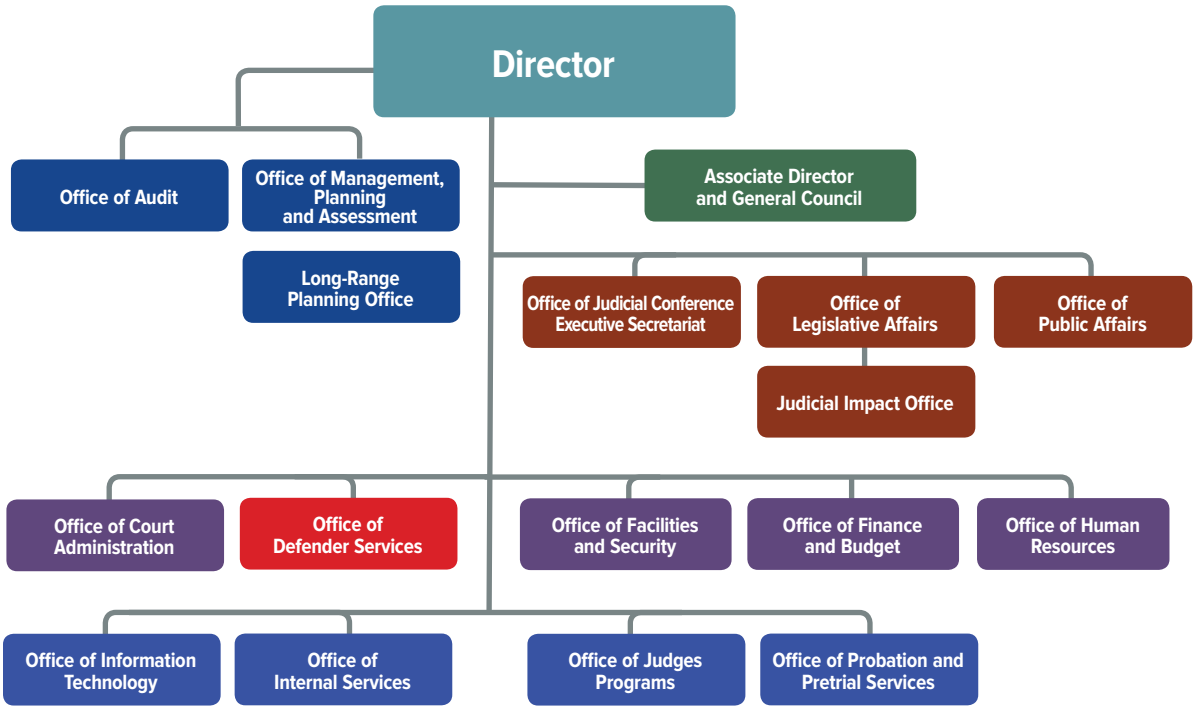
123 Administrative Office of U.S. Courts, 1 AO Manual § 330.40.

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(discussed below) has made the DSO less flexible, has weakened the authority of the chief of the office, and has created difficulties in supporting federal defense. Defenders also testified that they saw the change in DSO's status as indicative of the judiciary's failure to appreciate their distinct mission and needs.

Within the AO, before 2013, DSO (then named the Office of Defender Services) was an independent "directorate," reporting to the Director of the AO. As illustrated in the chart below, there was a direct line of communication between Office of Defender Services and the AO Director.

Administrative Office of the United States Courts (pre-restructuring)



In 2013, the AO reorganized its structure in an effort "to reduce operating costs and duplication of effort, simplify the agency's administrative structure, and provide enhanced service to the courts and the Judicial Conference."[124] This reorganization ("re-org") was meant to: "Simplify organizational structures;" "Empower managers and streamline governance;" and "Create flexibility to respond to changing circumstances."[125] One core goal was "[t]o enhance service to the courts and the Judicial Conference."[126] To achieve this, the re-organization would: 1) "Refocus on the AO's core mission," in order to "sustain, and where possible improve, our support of the courts and the Judicial Conference;" 2) "Enhance the partnership between the AO

[124] Memorandum of Association Director Minor to Federal Public / Community Defenders and Memorandum of Understand, at Exh. B (April 24, 2014).

[125] Administrative Office of U.S. Courts, AO Document: Restructuring the Administrative Office: Maintaining Excellence in an Era of Fiscal Austerity 5–6.

[126] *Id.* at 4.

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and the courts;" and 3) "Accomplish the AO's mission with fewer resources."[127]

Under the re-organization, the Office of Defender Services ("ODS") became the Defender Services Office ("DSO") and is no longer an independent directorate. It is instead considered a "program" under the newly formed Department of Program Services. DSO is grouped together and supervised with programs such as the Court Services Office, the Probation and Pretrial Services Office, and the Judiciary Data and Analysis Office, all programs that exist to serve the courts. DSO's requirements are evaluated not independently but in the context of these other offices' needs. The chart below shows the current AO structure after re-org.

Defenders expressed concern that their program was now more vulnerable. In their view, the re-organization demonstrated a lack of understanding of the unique role defenders play as independent advocates within the criminal justice system. Several told the Committee they wanted to see DSO restored to its previous position within the AO structure to show the judiciary's commitment to the defense function. A federal defender told the Committee that with the placement of DSO in the Department of Program Services,

> as things have turned out, we feel that we are being perceived as a service to the judges rather than a separate constitutional mission. We believe that there's a tension between the Defenders doing what they have to do in defense of their clients and the administrative office serving and servicing judges and the judicial mission. The Director in the administrative office looks to judges, we look to the client. We are more akin to the opposite side of the US Attorneys rather than probation and pretrial.[128]

Defenders also told the Committee that they were concerned that the demotion of DSO spoke generally to the decreasing ability of anyone within the current governance structure to advocate for the CJA program. Reinstating DSO to an entity that answers directly to the Director of the AO, and is separate from other AO offices that serve the courts,

> gives the CJA [panel] and our offices a voice within AO. As I understand it right now, if there are issues impacting indigent defense, because we are a program service, there is a bureaucracy that has to be followed before those concerns make their way to the decision-makers. If we are a directorate…I mean [previously] there were still processes in place, but there was a more direct method of advocating for and on behalf of the CJA panel and defender offices under the prior system.[129]

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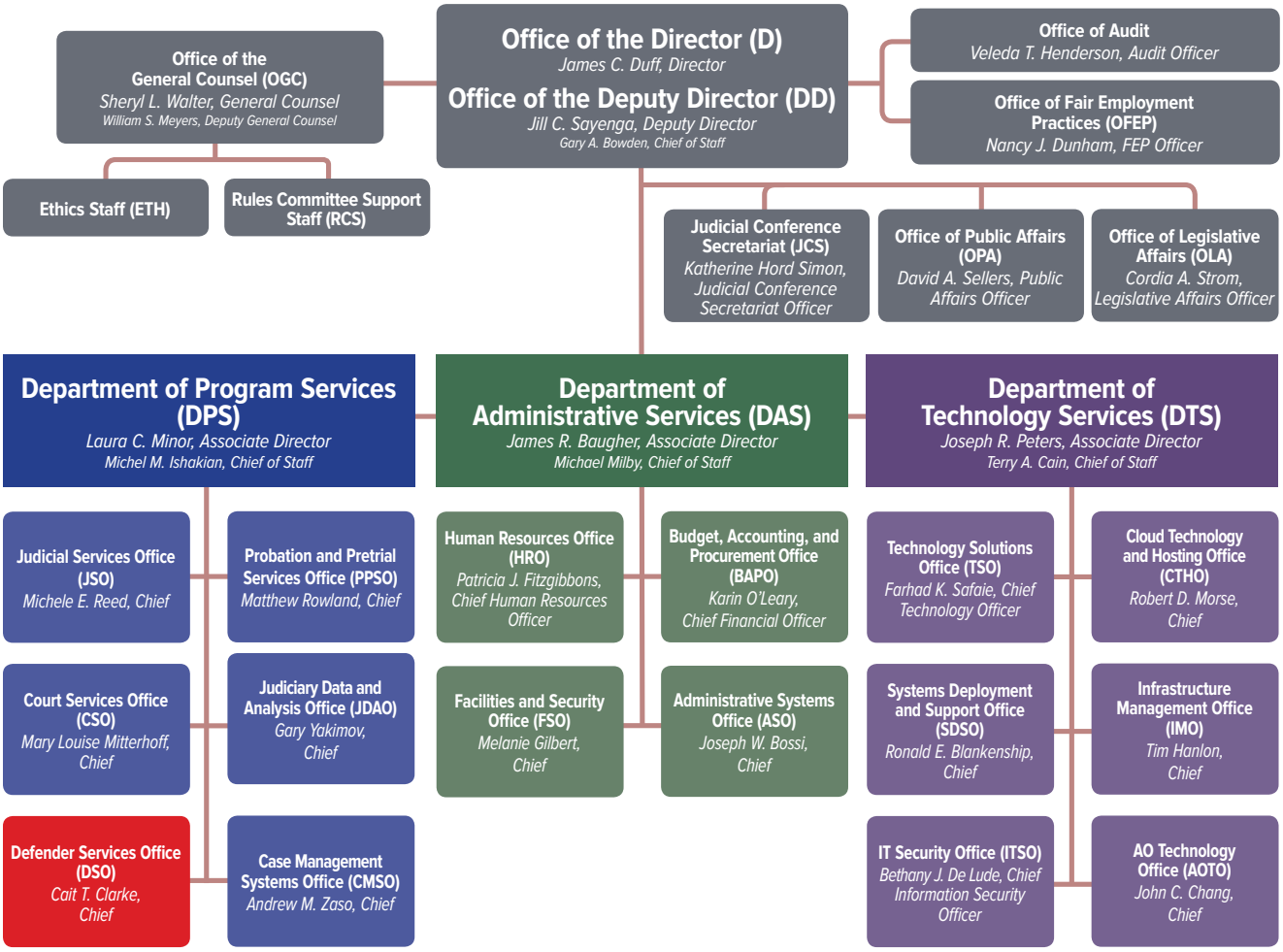
127 *Id.* at 4–5.

128 Jon Sands, FPD, D. Ariz., Public Hearing—Minneapolis, Minn., Panel 5, Tr., at 23.

129 Kevin Butler, FPD, N.D. Ala., Public Hearing—Birmingham, Ala., Panel 2, Tr., at 20.

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Administrative Office of the United States Courts



While reinstating DSO as an independent directorate could be a temporary solution that would allow for more flexibility and a stronger office to better support the defense function, it is not a panacea. Other problems, described below, exist and cannot be remedied solely by restoring DSO to its former status.

3.3.3 Inability of Defenders to Meaningfully Participate in JCUS

The attenuation of the defender and panel attorneys' input creates a void of information which not only disenfranchises the defenders but also puts decision-makers in a position of deciding on policies or funding without the best and most complete information. Simply stated, "[T]he information flow is defective when you carve people out and you cut people out of the process."[130] As the CJA program has grown, the link between those doing the work of public defense and those making the decisions that impact the program's governance and administration

130 Judge John Gleeson (ret.), E.D.N.Y., Public Hearing—Miami, Fla., Panel 3, Tr., at 6.

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has become more important, not less.

During the Committee's public hearings, many of the judges involved in this process voiced their frustration. A member of the DSC told the Committee, "The current structure requires the voice of defenders to be filtered through the judges. That filter in many respects is unnecessary and, more importantly, [it] deprives the defense community of their best advocates on policy and funding issues of national importance."[131] A former chair of the DSC[132] told the Committee about a conference call convened to discuss how to handle the CJA program during sequestration:

> On this conference call there was us in New York and then on the other end of the call was the chair of the Executive Committee and then a staffer from the Budget Committee. When you do this stuff long enough…you recognize talking points when you hear them. The talking points that we heard were the talking points that we had been getting from the Budget Committee for a decade. The most remarkable thing about the call to me was there was no one on that call from the staff from the Office of Defender Services, no one there from Defender Services Committee. A decision that went right to the heart of the function of defender services was being made with no input whatsoever from anybody who knew what was going on.[133]

A magistrate judge told the Committee the question facing the Committee regarding the current structure asked, "[I]s there a better system? Is there a better way for the defenders and the CJA lawyers to have a seat at the table, to have a voice into what's going on?…I do think it's important for the CJA lawyers and the federal defenders to have a true seat at the table and a true voice in what is going on with the defender program."[134]

The former general counsel for the District of Columbia's public defender program, which advocates to Congress for its own budget and legislative interests, spoke forcefully for the need for defender voices and input to be incorporated into all decisions regarding a defense program. She testified that subsuming defender needs into the judiciary's mission: "isn't a good fit. It isn't part of the judiciary's job to be zealous advocates for indigent clients."[135] She pointed out that as defenders have a very specific mission, "When it comes to getting into the trenches and fighting for what we do and how we should do it and how we should be evaluated about how we do it, we're the ones that are obligated to our clients. We're the ones that are obligated under our

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131 Mag. Judge Jonathan Feldman, W.D.N.Y., Public Hearing—Philadelphia, Pa., Panel 1, Tr., at 8.

132 From 1999 to 2008, Judge John Gleeson was a member of the Defenders Services Committee and served as Chair from 2005 to 2008. The sequestration at issue occurred in FY 2013.

133 Judge John Gleeson (ret.), E.D.N.Y., Public Hearing—Miami, Fla., Panel 3, Tr., at 6.

134 Mag. Judge William Matthewman, S.D. Fla., Public Hearing—Miami, Fla., Panel 3, Writ. Test., at 23–24.

135 Julia Leighton, General Counsel, Public Defender Service for D.C., Public Hearing—Minneapolis, Minn., Panel 1, Tr., at 25.

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rules of professional conduct to keep that goal center all the time."[136]

The Committee is concerned about the pervasive inability of those most impacted by the oversight of the federal defense program to have any say in its governance. As a former member of DSO told the Committee, "Even with that help and assist from [DSC], there are limits to what is able to be done. Not only are there limits, but at times, the Defender Services Committee just isn't listened to.... There is an internal judiciary power structure, if you will, and defenders aren't a part of it."[137]

The most important information about the functioning of the program comes from those doing the work at ground level—federal defense attorneys. There is an advisory structure that is intended to keep DSC informed about the CJA program, with such working groups as the Death Penalty Working Group, the Community Defender Organization Working Group, and the Performance Measurement Working Group, among others. These groups are made up of federal defenders and panel attorneys, they are assisted by staff at DSO, and their work informs the Defender Services Advisory Group (DSAG). DSAG's membership also includes both federal and community defenders and panel attorneys, and it works with DSO and ultimately the Defender Services Committee to assist in the oversight, governance, and support of the CJA program. However, no defense attorney—either defender or panel attorney—has a voting membership on any Judicial Conference committee.

So while structures theoretically exist to capture and transmit their knowledge and insight to decision-makers with authority over the program's management, that theory often does not lead to practice, and defender voices are then only heard in an advisory capacity, still subordinate to the needs of the judiciary.

As with the lack of federal defender and panel attorney input within the Judicial Conference structure, when it comes to legislation and policy proposals defenders are placed in the difficult position of acting as dedicated advocates for their clients while trying to work within a governing structure whose mission is to serve the courts. This placement harms both the defenders and the judiciary—the former by silencing them when they have a duty to speak for their clients; the latter by placing the judiciary in a conflicted position of having to speak for both the defenders and their own interests.[138]

Defenders testified about their frustration with not having a seat at the legislative and policy tables both inside and outside the Judicial Conference. A defender testified that because defenders "have that constitutional responsibility, we should

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136 Julia Leighton, General Counsel, Public Defender Service for D.C., Public Hearing—Minneapolis, Minn., Panel 1, Tr., at 25.

137 Richard Wolff, Former Chief, Legal, Policy, and Training Division, DSO, Public Hearing—Philadelphia, Pa., Panel 7, Tr., at 12.

138 As mentioned above, the DSC's jurisdiction regarding legislative input is extremely limited. Often, even regarding legislation that will directly affect the CJA program or defenders, the DSC is not asked for any comment, nor is it necessarily notified of legislation proposed either in Congress or by the judiciary. This will be discussed below with the recent example of legislation proposed by the judiciary to expand the policing powers of probation officers.

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have a voice in whatever agency or committee oversees us, we should have an ability to advocate for ourselves in front of Congress and the legislating bodies."[139] The Director of the 2255 Project (discussed further in Section 9) admitted to the Committee that while taking on the responsibility of advocating for the program could seem daunting, "One of the reasons is we know this stuff. This is what we do day in and day out and we can talk about it."[140]

3.4 Oversight of National Budget for the CJA

> A black letter principle of an effective public defense system is that the quality and effectiveness of that system, the ability of the lawyers to meet their Sixth Amendment obligations, is directly dependent on the resources the government is willing to devote to that system of public defense.[141]

During the public hearing in Philadelphia, as the Brigadier General overseeing the defense for the Guantanamo Bay Military Commissions told the Committee, "The problem isn't who you report to; it's who owns the purse."[142]

Yet the CJA program, placed under the governance structures of the JCUS and AO, cannot seek the resources it needs directly from funders. And because the JCUS and AO are by statute and policy charged with pursuing the best interests of the judiciary, Defender Services' needs for resources must be subsumed within the pursuit of the interests of the judiciary as a whole. This is a structural conflict. And so, despite the best efforts of all the individuals and offices involved in the process, the problems surrounding the budgeting of a national defense delivery system continue to plague the program.

Described below are the conflicts over funding, the inability of those charged with management of the CJA to determine or advocate for its budget within JCUS and with Congress, and the recent difficulties in obtaining adequate funding and resources for the program to ensure those Sixth Amendment obligations.

3.4.1 Formulation of the CJA Program Budget

Given that the needs of defenders are reactive to forces beyond their control, the development of a budget for the administration of the CJA is necessarily a complex process. Placement of the CJA's management within the judiciary's governing

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139 Jon Sands, FPD, D. Ariz., Public Hearing — Minneapolis, Minn., Panel 5, Tr., at 6.

140 Ruth Friedman, Director, Federal Capital Habeas Project, Public Hearing — Birmingham, Ala., Panel 3, Tr., at 26.

141 Mag. Judge Jonathan Feldman, W.D.N.Y., Public Hearing — Philadelphia, Pa., Panel 1, Tr., at 7.

142 Brigadier General John Baker, U.S. Marines, Public Hearing — Philadelphia, Pa., Panel 5, Tr., at 18.

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structure further complicates this task by creating obstacles to obtaining funding and limiting flexibility necessary for the program to be properly administered.

The process of creating a budget for the Criminal Justice Act program begins with budget analysts within the Defender Services Office.[143] These analysts consider past year's costs, projected caseload, staffing formulas, and any new initiatives in projecting the program's actual needs. However, this estimate of the program's needs is not what is transmitted to Congress, or even necessarily to the DSC. Because DSO is a part of the AO's structure, its estimates are reviewed and sometimes altered by many other offices within the AO, including BAPO, the staff for the Budget Committee. Thus DSO's budget formulations are subject to judiciary needs before those formulations are even transmitted to the DSC.

A principle policy mechanism is also used to limit the Defender Services (the account name for the entire CJA program within the judiciary's budget) requests. Each year, before the beginning of a new appropriations cycle, the chair of the Budget Committee transmits to the Committees with authority over various judiciary "programs" a "guidance letter." The guidance letter informs the Committee (in the case of the CJA, the Defender Services Committee) chair of the maximum percentage increase the Committee should request in a given year—a budget cap. The Budget Committee's guidance instructs the Defender Services Committee (like other JCUS "program" committees) to limit its request to the JCUS regardless of programmatic needs identified such as new prosecutorial initiatives, developments in the law, or changes in caseload. These caps can operate differently depending upon how the baseline is set. For example, for the FY 2018 request, the cap was set at four percent with the FY 2017 current services as the base. However, for the FY 2019 request, the cap was set at four percent above the FY 2018 baseline which assumed the FY 2017 funding levels.[144] In other words, while the four percent was the same, the starting point chosen from which to build each year's request was very different. If strictly adhered to, this level of funding would have required significant reductions to FY 2019 current services.

These caps are not hard ceilings; the Budget Committee has approved requests exceeding the limitations. But the limitations send a message to Committee chairs, who must present their program's budget request to the Budget Committee, about what will or will not be approved and presented to JCUS. Ultimately, this process leads to situations where JCUS is not informed of and Congress is not requested to fund what DSO or DSC has determined to be the true needs of the program.

This process plays out in an environment where the DSC lacks any real power

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143 This description of the formulation of the budget is based upon information and discussions with DSO, budget staff, and other employees at the AO as well as direct knowledge of members of this Committee involved in the process.

144 That FY 2017 funding level was based on the appropriated level plus the projected carryforward which was listed in the FY 2018 congressional request.

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to influence Budget Committee and JCUS decisions. This is not a recent development; the former deputy assistant director of DSO told the Committee that for years before any jurisdictional changes in JCUS committees, "recommendations regarding Defender Services appropriations requests would come in and [BAPO] would look at our request that was put forth by the Committee of Defender Services. They'd look at the justification for it and they would say that's simply too much. We're going to cut that appropriation request by 'X' percentage."[145]

After this extensive review process has taken place and the Judicial Conference has approved a Defender Services budget request, defenders, DSO and the DSC are excluded from the advocacy for the funding in Congress. The Chair of the Budget Committee and the Director of the AO represent the judiciary branch in Congressional budget hearings and answer questions regarding appropriations from legislators for the entire branch. BAPO staff represents the branch in day-to-day communications with Congressional appropriations staff.

Under this structure, none of the people with the subject matter expertise—not the chair of the DSC, not the chief of DSO, not the defenders—may appear before the appropriations committees in the House and Senate, or have any contact with appropriations staffers on behalf of the national program. Any questions about the CJA program and advocacy for its budget to Congress are handled by the Budget Committee Chair, the Director of the AO, or the BAPO staff.[146] Therefore, those who ultimately must approve funding for the defender services program are unable to make fully-informed decisions about the needs of that program.

Fundamental conflict over funding

As stated, each year, the Judicial Conference approves the requests that will be presented to Congress. The judiciary's appropriations strategy, the Committee was told, is to limit requests for increases in funding to demonstrate to the appropriators that the judiciary is a prudent manager of resources. The belief underlying this approach is that it increases the likelihood that Congress will fully fund these limited requests.[147]

While the Executive Branch agencies request appropriations to meet their programmatic needs, the Committee was told that there is a pervasive belief within the judicial branch that a request to fully fund the judiciary "would undermine their

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145 Steven G. Asin, Former Deputy Assistant Director, DSO, Administrative Office of the U.S. Courts, Public Hearing—Philadelphia, Pa., Panel 7, Tr., at 18.

146 The Committee was told that the BAPO staff has a good working relationship with appropriations staffers on Capitol Hill, and so many of these exchanges happen informally and cannot be relayed here. BAPO's Financial Liaison and Analysis Office is tasked with preparing testimony on the judiciary's budget and coordinating responses to congressional inquiries and reports. See Administrative Office of U.S. Courts, 1 AO Manual § 340.30.20 (2).

147 ("[T]he judiciary's cost containment program has helped tremendously to provide credibility with Congress in our budget requests and has helped the judiciary secure adequate appropriations.").

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advocacy for the entire judiciary's appropriation before the Congress."[148] Because the judiciary's primary mission is to support the courts as a branch of the government, the defender program, which is not a core function of the judiciary, particularly in an adversarial system, is at a disadvantage in obtaining the funding it requires.

In looking at the manner in which the JCUS has managed the Defender Services account and requests for increases to it, the Committee considered the question of whether the needs of the judiciary as a whole take priority over those of the CJA program. The Committee heard testimony that the needs of the CJA program were, by design of the current structure, necessarily subordinated to those of the judiciary.

Defenders' view is that the request for resources for their program is limited in order to fully fund core judiciary functions. This was not merely the opinion of the defenders. A widely circulated memo on cost containment within the judiciary states:

> Defender Services. Third, we have all experienced the difficulties of budget shortfalls in the Defender Services program. Achieving significant, tangible cost containment in the Defender Services program has proved to be particularly challenging. Many of the ideas suggested by the Defender Services Committee require changes in legislation or changes in practice or policy by the Department of Justice. Congress has repeatedly expressed its concern about the level of growth in this account and the judiciary's cost-containment efforts in this program. In spite of the mission of the Defender Services program, the judiciary cannot expect Congress to continue to provide significant appropriations increases annually. If such increases are provided, it will be at the expense of the Salaries and Expenses account and by extension, the courts. Thus, the judiciary must re-focus its efforts to achieve real, tangible cost savings in this program.[149]

This view that a dollar spent on the Defender Services appropriation is a dollar away from the courts distills the conflict inherent in judiciary control of the CJA program budget. When DSC has pushed for greater CJA program funding in the past, "the Budget Committee said we're not going to debate your numbers. We're not doubting what you're saying that that is the calculation of what is needed. We're just telling you you're not going to get it and you're going to have to operate with less. . . . We're not going to go forward and ask for all the money that we think that we actually need to manage the program."[150]

The former deputy assistant director of the Defender Services Office confirmed that many within the current JCUS structure view the budget as a zero-sum game

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148 Steven G. Asin, Former Deputy Assistant Director, DSO, Administrative Office of the U.S. Courts, Public Hearing — Philadelphia, Pa., Panel 7, Tr., at 18.

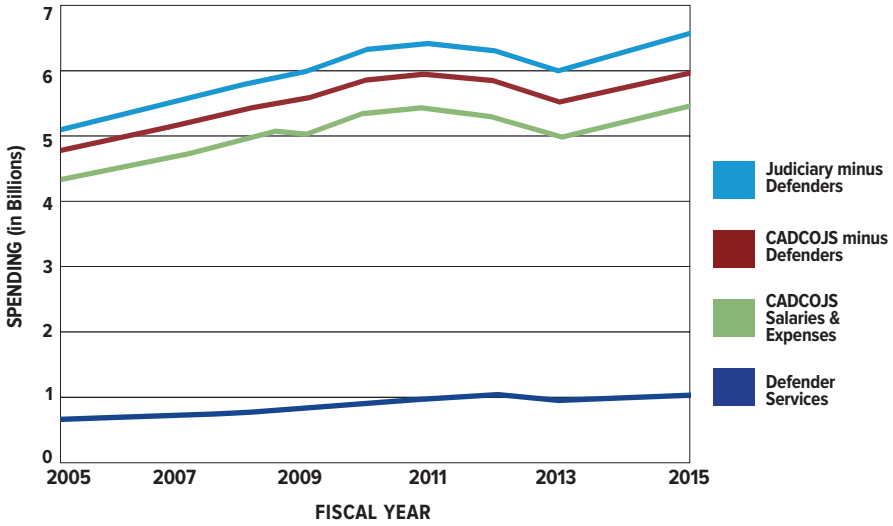
149 JCUS Budget Committee memo (provided to the Committee).

150 Steven G. Asin, Former Deputy Assistant Director, DSO, Administrative Office of the U.S. Courts, Public Hearing — Philadelphia, Pa., Panel 7, Tr., at 19.

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between defenders and courts, telling the Committee that as the judiciary's budget increased, "[I]t began to see a tactical need to limit the growth of the defender services appropriation as a way to limit the overall growth in the judiciary's appropriation. This was pretty much the situation that existed when I started with the program in the late 1980s. Since then, the judiciary's focus and control over the federal defense function based upon its need to protect its own institutional interest has steadily increased."[151]

Cost of Defender Services Grew at a Slower Rate than the Judiciary's Overall Budget[152]



Indeed, analysis of the judiciary's budget over ten years, from FY 2005 to 2015, shows that the courts' budget has grown more rapidly than that of defenders. As shown in the graph above, while court costs rose quickly, the defender program was targeted to contain costs, even though its costs were growing at small, predictable rates each year.[153]

Recently, the Budget Committee's Recommendations/Actions of July 2016 regarding the FY2018 budget present further examples of this conflict. The Budget Committee recommended that the judiciary seek no more than a four percent increase over prior year's requirements. But two categories were exempted from this limitation because the Budget Committee "felt it was important to include

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151 *Id.* at 5.

152 The Judiciary account includes the Supreme Court Salaries and Expenses, Supreme Court Care of Building and Grounds, Court of Appeals for the Federal Circuit and Court of International Trade. "CADCOJS" is the total combined costs for the Courts of Appeals, District Courts and Other Judicial Services. CADCOJS Salaries and Expenses are just those specific expenses of the Courts of Appeals, District Courts, and Other Judicial Services. See Administrative Office of U.S. Courts, The Judiciary FY17 Congressional Budget Summary.

153 Administrative Office of U.S. Courts, The Judiciary Fy07-Fy17 Congressional Budget Summary. The Committee was told that the defender account "has grown vastly more than all other accounts in recent years" and that the Budget Committee had been criticized by other sub-committees in reports about the rapid growth of the defender budget.

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resources in the FY2018 request for enhanced cybersecurity requirements and for the necessary infrastructure related to new courthouse construction."[154]

At the same time, the Budget Committee did not recommend funding defender staff positions that the Judicial Resources Committee's work measurement study and resulting staffing formula found to be necessary and appropriate. Fully funding defender offices is not recommended because "the Budget Committee does not believe that the additional $8.l million for 44 additional staff can be adequately justified to Congress at this time."[155] Such an increase cannot be adequately justified in part because, "Adjustments to the request were necessary to address Defender Services and judiciary-wide cybersecurity and information technology enhancements while moderating the increase in appropriated funds in this account for FY 2018."[156]

This funding conflict was explored by the JCUS more than 10 years ago. In 2004, it tasked the DSC to determine whether, from a financial standpoint, the judiciary would be better served by removing the CJA program from its management: "In April 2004, as part of a comprehensive cost-containment effort for the entire judiciary, the Executive Committee of the Judicial Conference of the United States suggested that the Committee on Defender Services consider whether Defender Services should be a separate program outside the judiciary."[157] After studying these concerns, the DSC issued their report: "Should the Structure of the Defender Services Program be Changed? Report to the Committee on Defender Services of the Judicial Conference of the United States" (hereafter the "2005 Subcommittee Report").[158] The Executive Committee had expressed concerns over the budget conflict described above, between the adequate funding of a national federal defense program and the effect that it could have on the appropriations to the courts. Then Executive Committee Chair Chief Judge Carolyn Dineen King stated that the growth in the defender program in response to increased prosecution and defense costs "could result in Congress having to appropriate funds for the Defender Services account at the expense of other judiciary accounts, particularly the Salaries and Expenses account…."[159] The Executive Committee admitted that defenders and judges were pitted against each other in the budget, and had concerns about the "perceived potential adverse impact of the [defense] program's

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154 Administrative Office of U.S. Courts, July 2016 Budget Committee Recommendations/Action 1.

155 *Id.* at 3.

156 *Id.* Another reason given was that the Budget Committee did not think that defenders could hire fast enough to fill all the FTE received in FY 17, especially since the full-year appropriation came late thus delaying the start of the hiring.

157 Letter, JCUS Committee on Defender Services to Judge Thomas F. Hogan, "Re: Exploration of Whether the Defender Services Program Should be Placed Outside the Judiciary," January 5, 2006.

158 *See generally* Subcommittee on Long Range Planning and Budgeting, Should the Structure of the Defender Services Program be Changed? (2005) (prepared for the Committee on Defender Services).

159 *Id.* at 1.

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continuing growth on 'other' judiciary accounts."[160]

The Subcommittee Report recognized that there were budgetary conflicts in the placement of the CJA Program within JCUS. Under "Program-Wide Concerns" the report stated, **"There are inherent tensions in the appropriations process."**[161] The report listed the same concerns voiced by many witnesses to the Committee:

> Independence concerns are raised by the judiciary's responsibility to request appropriations for the operation of both the courts and the Defender Services program. Questions could arise about whether enough time is spent discussing Defender programs and issues with Appropriations Committee staff and whether there is an inherent conflict in having to advocate for funding for both court operations and defender services.

The Report posed several questions about the placement of the CJA program, and concluded that the Defender Services program should not advocate independently for its own budget, as "the Defender Services program needs a buffer with Congress," and "if Defender Services presented its own budget request it would be perceived as self-serving."[162] Additionally, answering why the CJA budget should be subject to revision by the Budget Committee, the report suggested, "These revisions are necessary control measures to ensure the overall judiciary budget request is credible."[163]

Despite the conflict-of-interest concerns and recognition that the needs of the judiciary might be funded at the expense of the CJA program, the 2005 Subcommittee Report ultimately found that in regard to cost containment, removing the defense system from the JCUS structure "would not provide any advantage to the judiciary in terms of securing more funding for its other accounts. Nor would it provide any funding advantage to the Defender Services program."[164]

In January 2016, Judge John Gleeson testified before the Committee at its Miami hearing. On the subject of the 2005 Subcommittee Report, he told the Committee:

> We were asked as part of cost containment to look into this and address a number of suggestions . . . one fulcrum of that decision was a representation from the Budget Committee that we accepted. And that is that having the defender program as part of the judiciary had no impact on the defender program budget. That is to say it was not the case that a dollar into the defender budget was perceived as a dollar out of the other spending programs. I don't think that's true.[165]

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160 *Id.* at 9–10.
161 *Id.* at 15 (emphasis in original).
162 *Id.* at 25.
163 *Id.*
164 *Id.* at 28.
165 Judge John Gleeson (ret.), E.D.N.Y., Public Hearing — Miami, Fla., Panel 3, Tr., at 40–41.

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When a Committee member asked Judge Gleeson whether he believed this was a departure from the time when the report was written, Judge Gleeson stated, "I don't think it was true then, but we accepted it as true." [166] He told the Committee, "I think there should be fundamental structural change. I think wresting the obligation, the responsibility to deliver indigent defense away from the judiciary is a good idea."[167]

Congressional Advocacy for Funding the CJA

It is this Committee's understanding that the Prado Report recommendations for an independent defense entity faltered in part due to concerns that Congress would not adequately fund such an agency. That concern was given careful consideration by our Committee which examined the following funding issues:

- What actual budget/funding advantages and protections are provided by continuing to house the CJA within the judiciary;
- Whether the CJA budget suffers under a structure whereby CJA funding requests are contained within, and are in competition with, the overall funding for the entire judiciary; and
- How Congress would receive budget advocacy by defenders.

The evidence examined by the Committee suggests that while the judiciary continues to be committed to obtaining adequate funding, judicial advocacy for public defense can be undermined by a focus on other judiciary priorities. While the institutional prestige of the third branch certainly benefits the CJA program, this advantage is insufficient to outweigh deficits that result from the divergent missions and funding needs of the judiciary and the CJA.

The Current Practice of Advocacy for CJA Budgets

Funding for the judiciary is included each year in the Financial Services and General Government (FSGG) Appropriations bill. In any given year, either the House or Senate Appropriations FSGG Subcommittee may hold hearings concerning the judiciary budget. As described above, the Chair of the Judicial Conference's Budget Committee and the Director of the AO represent the judiciary before congressional appropriations committees. BAPO's Financial Liaison and Analysis Staff ("Financial Liaison Staff" or "FLS") also work with congressional staff advocating for the judiciary's appropriations request. Conversely, the Defender Services Committee, DSO, and defenders have no Judicial Conference-approved role in separately advocating for the Defender Services account, which is one of four separate accounts that make up the main part of the judiciary's appropriation request.[168] The

166 *Id.* at 41.

167 *Id.* at 40.

168 The Salary and Expenses (S&E), Jurors Fee, Court Security, and Defender Services accounts are the four most often discussed when speaking about judiciary funding. There are also accounts for the AO, the Federal Judicial Center, the United States Sentencing Commission, and the Supreme Court. While these are sent with the other four requests, the Judicial Conference is not involved in those four accounts.

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Chair of the Budget Committee may ask other representatives to accompany her to appropriations hearings. In recent years, no member of the DSC, representative of DSO, or defender has been asked to appear at these hearings.[169] Indeed, DSO and defender staff can interact with Congressional appropriations staff only by arrangement of the FLS. This has rarely happened.

Judiciary as Advocates for Defense Funding

The Committee received testimony from judges, and some defenders, that the CJA program is best served by continuing the judiciary's advocacy for its budget. This position is primarily premised upon the belief that by being under JCUS supervision, the defender budget will be protected from political influence, and that without this protection, the federal defense program's funding could be jeopardized.[170]

For instance, one federal judge told the Committee that her "fear is that Congress, which is even further removed from observing the critical work that these fabulous attorneys do, will be even less understanding of the need for funding without our support."[171] Another judge expressed concern that if defenders approach the legislative branch, "for a certain amount of money to defend somebody who's committed what appears to be a very heinous crime, I don't know that you have that level of sympathy for the defense function in all areas of the political realm."[172]

These witnesses supported judicial budget advocacy for several reasons, including: 1) the current quality of advocacy for the CJA is quite high; 2) the defender budget is protected from unusually steep cuts by being part of the larger judiciary budget; 3) the defender budget receives more favorable treatment because it benefits from the judiciary's institutional prestige; 4) defenders would be poor advocates for their budget, and Congress does not understand or support the defender mission, thus necessitating judicial protection.[173]

These justifications are examined below.

HIGH QUALITY OF CURRENT ADVOCACY

While the Committee recognizes that the Budget Committee may be strongly committed to the highest quality public defense, the current structure does not promote advocacy for the CJA in the budgeting process. Generally, DSO staff reviews a draft of the testimony prepared by BAPO staff, but is not actively involved in the preparation

169 Michael Nachmanoff, former Federal Public Defender for the Eastern District of Virginia, did testify with the chair of the Budget Committee and others, at a Senate Panel on the impact of sequestration in July 2013. This was not a formal appropriations hearing.

170 The Committee disagrees with the premise advanced by some that some judges or the judicial branch would cease to support the CJA program if it was no longer located within the JCUS structure. To the contrary, the Committee firmly believes that judges would continue to support strong Sixth Amendment protections and the integrity of the criminal justice system in their courts.

171 Mag. Judge Cheryl Pollak, E.D.N.Y., Public Hearing — Philadelphia, Pa., Panel 2b, Tr., at 3.

172 Chief Judge Lawrence Stengel, E.D. Pa., Public Hearing — Philadelphia, Pa., Panel 8, Tr., at 26.

173 Judge Federico Moreno, S.D. Fla., Public Hearing — Miami, Fla., Panel 6, Tr., 21–25.

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which can lead to a loss of understanding of some of the nuances of public defense.

This lack of a comprehensive knowledge of the issues can result in incomplete information being provided during the hearings or a loss of opportunity to advocate. While additional information can be provided after a hearing, the in-person testimony has a different impact. Some examples have included:

- On more than one occasion Congress was advised that CJA budget growth was disproportionate to that of the judiciary. But as the budget growth chart shown on page 42 demonstrates, since 2005 the costs required to maintain the CJA have risen at a much slower rate than that of the judiciary as a whole;[174]
- Suggestions that CJA panel attorneys' perform unnecessary legal work to safeguard themselves against lawsuits and as a result inflate CJA costs. Yet the committee heard no evidence that this existed, and heard very little testimony from judges about inflated voucher submissions;[175]
- Statements to Congress that the eVoucher system was set up to more carefully scrutinize CJA vouchers and contain costs, creating the unfavorable impression that CJA counsel bills are generally excessive;[176]
- Submission to Congress of information that defender staffing for immigration cases would be affected only in the border courts, when in fact defender offices nationwide are currently dealing with increased staffing needs for immigration cases;[177]
- When given the opportunity to advocate for public defense, the Budget Committee has focused instead on the needs of the judiciary as a whole.

It is worth repeating that it is the Committee's view that the examples cited above stem from the structural defect of tasking the Budget Committee representatives with also having to advocate for CJA funding. Charged with advocacy primarily for core functions and supported by staff with that same charge, the judiciary must balance the needs of the courts against the needs of public defense. If defender budget requests create a concern that funds for other core functions may be depleted, defense needs can suffer.

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174 *Judiciary FY2014 Budget: Hearing Before the Subcomm. on Financial Services and General Government of the H. Comm. on Appropriations*, 112th Cong. (2013) (statement of Judge Julia Gibbons, Budget Committee Chair).

175 *Judiciary FY2013 Budget: Hearing Before the Subcomm. on Financial Services and General Government of the H. Comm. on Appropriations*, 111th Cong. (2012) (statement of Judge Julia Gibbons, Budget Committee Chair).

176 Judiciary *FY2018 Budget: Hearing Before the Subcomm*. on Financial Services and General Government of the H. Comm. on Appropriations, 115th Cong. (2017) (statement of Judge Julia Gibbons, Budget Committee Chair).

177 *Id.*

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INSTITUTIONAL SHIELDING OF DEFENDER BUDGETS

A number of supporters of the current CJA budgeting practice expressed a belief that because CJA budgeting requests are part of the larger judiciary appropriation, the CJA's budget cannot be easily targeted for cuts. However, the CJA budget is a separate account, one of four contained within the judiciary appropriation, and entirely visible to Congress. Over the years, Congress has frequently treated the Defender Services account differently from other judiciary accounts—granting sometimes greater, sometimes lesser percentages of the Defender Services request than of the other accounts. And on at least one occasion described below, despite strong judicial opposition, Congress chose to target a particular defender program; not simply overall Defender Services spending levels.

INSTITUTIONAL PRESTIGE OF THE JUDICIARY

Even if the Defender Services account is fully visible to Congress, a number of witnesses suggested that the judiciary's institutional prestige serves to protect defender funding. The Budget Committee chair has noted that the judiciary's budgeting process "instills confidence within the Appropriations Committees in Congress that the funding needs for Defender Services, and for other Judiciary accounts that fall under the jurisdiction of the Judicial Conference, have received appropriate scrutiny."[178]

It seems likely to the Committee that the Defender Services account receives favorable treatment by Congress both because judges are well respected and the judiciary carries substantial institutional prestige. It is also clear that the judiciary's budget process ensures that Defender Services requests are well justified and documented. But it does not necessarily follow that the public defense community could not obtain the same positive results acting on its own as an independent entity.

As to the more particular benefit posited by the Budget Committee Chair that Congress knows the Defender Services request has received appropriate scrutiny before its submission, it seems very likely that this benefit can be replicated. DSO staff has experience working with BAPO staff in creating formal budget submissions.

However, the benefit the account may receive as a result of respect for the judiciary as an institution is a different issue. Individual judges who appear before Congress are often known to and respected by members of Congress. But this does not mean that separation of the CJA function from the judiciary, either partly or entirely, will result in a complete loss of this benefit. Judges as individuals, and the judiciary as an institution, have supported the Defender Services program because it is constitutionally mandated. Neither the individuals' nor the institution's commitment to provision of high quality public defense is likely to diminish because of any change in where the CJA program is housed. The evidence on this is quite clear.

One striking example is that of 87 chief judges who, individually witnessing

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178 3.26.2014_Judge Gibbons. House Approps Hearing QFRs, Questions for the Record Submitted by Congressman Mike Quigley.

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the devastation visited on defenders by sequestration, signed a letter in support of defenders while forgoing advocacy for other core court functions that faced serious cuts.[179] A shared commitment to the Sixth Amendment means that judges and defenders should always find common cause on the need to adequately fund indigent defense. The current relationship is simply not a prerequisite to judicial support.

Moreover, if Congress is not convinced of the value of the public defense program, judicial influence may be insufficient to save it. This premise is illustrated by Congress' defunding of Post-Conviction Defender Organizations (PCDOs). In 1988, Congress had authorized the federal judiciary to support the creation of the PCDOs to address a looming crisis in state and federal post-conviction death penalty cases. In January of 1993, the Prado Committee submitted its report praising their work and recommending continued support and funding of PCDOs. But by July of that year, the Senate Appropriations Committee expressed concerns over the escalating cost of the organizations. The judiciary's appropriations request that was approved by the Conference sought continued funding of the PCDOs.

However, judicial support was not enough to protect the organizations in Congress. PCDOs had received a harsh reaction from death penalty proponents, which prompted criticism of the program from the National Association of Attorneys General and Congressman from states with the death penalty. In turn, Congress acted to defund PCDOs. In an appropriations bill passed in January of 1996, Congress funded the Defender Services account but added a special directive that no funds were to be expended for PCDOs after April. Without federal funding, many of the PCDOs dramatically scaled back operations; seven of the 20 offices closed their doors entirely.

The Committee cites this example to illustrate that judicial support for public defense does not always result in Congressional approval. While the prestige of the judiciary is likely an asset in securing necessary funding, after careful consideration and considerable debate, the Committee believes that defenders are their own best advocates, and will receive continued judicial support.

DEFENDER ADVOCACY AND CONGRESSIONAL RECEPTION

Numerous witnesses proposed greater defender program involvement in congressional advocacy, arguing that it would be favorably received. Considerable evidence demonstrates that defenders would be more effective and better informed advocates for their program. The former chair of the DSC told the Committee, "I also support a greater role for the committee, DSO staff, defenders and panel attorneys themselves in advocating to Congress as part of the appropriations process. While I fully understand the need for the judiciary to speak with a consistent voice. . . . I believe that there are issues specific to the defender and panel attorney

179 Letter, Chief Judge Loretta A. Preska, S.D.N.Y. to Senator Joseph Biden, August 13, 2013.

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programs" on which defenders should be heard.[180]

One federal defender told the Committee he believed that defenders needed legislative access through official channels that wasn't informal or "by virtue of personal relationships."[181] He explained, "We have a constitutionally and congressionally mandated budget, and yet we have no voice in legislative or budget decisions. . . . If we are committed to structural independence within the judiciary, as the lowest common denominator at minimum, there must be a defender voice, and a DSO voice, on legislative decisions such as budgetary decisions."[182] Recognizing the importance of ongoing relationships with budget appropriations staffers in Congress, the Chief of Defender Services pointed out that it would be defenders that could best represent their own program. Not only do defenders have "survey data, but we also could answer questions and tell stories. That ongoing relationship is very critical when Congress is deciding on our budget, and defender involvement would add more substance and information to those discussions."[183]

The DC Public Defender Service, which requests its own budget from Congress directly as an independent agency, is an example of how advocacy for public defense, independent of judicial oversight, can be effective. The former General Counsel of that organization told the Committee,

> The directors at PDS have good relationships with the Hill. They know the program inside and out. They've lived the program. They can explain it to Congress. It is no different than any other audience, and they come in as subject-matter experts. They come in passionate about what they do. They know their performance, and they know the outcomes they're achieving, and they can describe it to Congress.[184]

The Committee agrees that, as "subject-matter experts," defenders have an important role to play in advocating for their needs before Congress.

A representative from The Constitution Project, a non-profit which focuses on constitutional rights and criminal justice issues, echoed those sentiments, telling the Committee that federal defenders and panel attorneys are "really fantastic advocates with Congress. They can speak with meaning about what budget cuts will do to clients and people on the ground . . . [I]t is really important to have that independence, to allow for an independent entity to advocate for federal public defenders with Congress because those budget cuts are impacting their offices."[185] She went on:

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180 Chief Judge Catherine Blake, D. Md., Public Hearing — Philadelphia, Pa., Panel 1, Tr., at 4.

181 Steve Kalar, FPD, N.D. Cal., Public Hearing — San Francisco, Cal., Panel 7, Tr., at 2.

182 *Id.* at 7.

183 Cait Clarke, Chief, DSO, Public Hearing — Philadelphia, Pa., Panel 1, Tr., at 20.

184 Julia Leighton, General Counsel, Public Defender Service for D.C., Public Hearing — Minneapolis, Minn., Panel 1, Tr., at 17.

185 Madhuri Grewal, Senior Counsel, The Constitution Project, Public Hearing — Philadelphia, Pa., Panel 8, Tr., at 13.

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> Speaking as a policy counsel who does a lot of advocacy on criminal justice issues before Congress, I think what really resonates with staffers and members of Congress is people who can go in and speak with experience and lean on their own experience. Having federal defenders who can go in and speak to the importance of funding is so important.[186]

The experience of sequestration lends credibility to the testimony of many witnesses endorsing the ability of defenders to secure necessary funding. Facing significant consequences for the program, some federal defenders made the decision to reach out to Congress directly to request emergency funding to preserve the program. Ultimately, Congress was responsive. Defenders told the Committee that the experience, though it created tension with the AO and the JCUS, was instructive. "I think Congress, when they understood the problems the defenders were facing during the sequestration, we came out pretty well with Congress and support from both sides, from the Republicans and the Democrats."[187]

Defenders told the Committee that their successful appeals to Congress showed they could be effective advocates for their program with Congress and congressional appropriations staff.[188]

As one witness who has worked in criminal and civil rights for decades stated, the lesson to take away from sequestration is that the federal defender program "is a great brand. It didn't matter whether you had a D, or an R, or an I label, who you went to talk to. The federal defender program has an excellent reputation across Congress. The second thing is, unlike other expenditures, this is a necessity…this is a fundamental need of government, to keep the courts open and to see that indigent people have representation."[189]

The evidence is convincing that defenders are capable of advocating for the CJA and that Congress would continue to provide adequate funding for their needs. Maintaining the status quo leaves in place a structure whereby the defense budget competes with the budget for the judiciary.

3.5 Panel Attorney Hourly Rates

In 1964 when Congress passed the Criminal Justice Act, the hourly rate was set at $10 per hour for out-of-court work and $15 per hour for time spent in court.[190] In 1986, the rates were revised and Congress authorized annual, recurring

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186 *Id.* at 19.

187 Michael Filipovic, Former FPD, D. Or, Public Hearing-Portland, Or. Tr. at 36.

188 See also section "Federal Defenders Become Effective Advocates with Congress" Supra at p.62.

189 George Kendall, Director, Public Service Initiative, Squire Patton Boggs, Public Hearing—Minneapolis, Minn., Panel 3, Tr., at 26.

190 Criminal Justice Act of 1964 (Pub. L. 88–455).

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cost-of-living adjustments (COLAs).[191] If the statutorily authorized COLAs provided to federal employees had been provided to the panel attorney rate on a recurring, annual basis since 1986, the authorized non-capital hourly rate for fiscal year 2017 would be $145,[192] and for 2018 would be $148.[193]

Although the current maximum panel attorney hourly rate in non-capital felony cases is $148,[194] panel attorneys are only being paid $132 per hour to represent CJA clients. For the past four years, the Defender Services Committee has requested the panel attorney rate to be raised to the full statutorily authorized amount for non-capital cases; however, as explained below, the Budget Committee has requested only lesser increases.

3.5.1 Budget Process to Determine Panel Attorney Rates

When formulating a budget request for the Defender Services program, the Defender Services Committee makes recommendations regarding possible increases to the CJA panel attorney hourly rates. The Budget Committee, subject to Judicial Conference approval, then determines what panel attorney rate to request from Congress. The Chair of the Budget Committee explained that whether to seek panel attorney rate increases is a political determination, based on whether she believes a rate increase is likely to be approved. The Budget Committee and its staff weigh a number of factors in determining whether an increase request is appropriate, including considering the budget needs of all other judiciary programs and offices. In recent years, the Defender Services Committee has requested that the Judicial Conference seek funding for the full statutorily authorized rate in FY 2016, FY 2017, FY 2018, and FY 2019.[195] The Budget Committee has advanced alternate requests for less than the statutorily authorized maximum, and the Executive Committee has rarely placed a panel rate increase proposal on the JCUS discussion calendar. When asked why panel rate increases had not been requested or at least discussed more often by JCUS, the Chair of the Budget Committee explained: "Just because a committee requests something doesn't mean that a member of the Judicial Conference deems it relevant to talk about."[196]

Some panel attorneys who testified felt that the judiciary was prioritizing court budgets over appointed CJA counsel. Regarding the judges' decision not to ask

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191 18 USC 3006A(d)(1); 7A Guide to Judicial Policy § 230.20.

192 This rate is approximate and changes depending on economic variables.

193 FY18 House Appropriations testimony Judge Gibbons written statement pg. 8–9.

194 The discussion in this section will refer only to the non-capital panel attorney hourly rate. In 2005, Congress increased the capital hourly rate to $160. See Omnibus Appropriations Act, 2005 (Pub. L. No. 108-447). Since that time, the capital rate has received all applicable COLAs; therefore, the CJA panel attorney capital rate, currently at $185 per hour, has reached the statutorily authorized rate.

195 See chart in Executive Summary at xviii.

196 From notes taken contemporaneously in a meeting between the Committee, Judge Gibbons, and members of BAPO on September 29, 2015.

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Congress to increase the CJA hourly rate, one panel attorney expressed his frustration to the Committee:

> For 11,000 CJA panel reps [sic], the judges decided not to even approach Co ngress and ask for what the rate should be right now. Think about that. Who does that benefit? Now, they did it "for our own good." Well, thank you. I really appreciate that, but I don't feel very good about it, as you can tell.[197]

3.5.2 Effects of the National CJA Panel Rate

Insufficient hourly-rate funding for CJA panel attorneys has consistently been identified as a threat to effective representation. The hourly rate paid to CJA panel attorneys has fallen well behind prevailing rates for legal work. As the gap between rates paid for CJA representation and those earned elsewhere in the law grows, highly qualified lawyers become increasingly unwilling to accept CJA appointments. Some of the best lawyers doing this work leave the panel altogether.[198] This problem is not a new one.

In 1993, the Prado Committee found that "[a] primary reason for the growing dissatisfaction with the functioning of [the] private bar component of the CJA program stems from the historically and increasingly inadequate compensation paid to panel attorneys."[199] Over two decades later in 2005, a subcommittee of the Defender Services Committee, evaluating the placement of the CJA program within JCUS, reached the same conclusion,[200] finding that the primary reason that attorneys declined CJA appointments was the "low level of CJA panel attorney compensation and concerns about voucher reductions."[201] Surveys commissioned by the subcommittee supported this finding. The subcommittee concluded that "the failure to fund the panel attorney program adequately, including fair and reasonable compensation rates, has adversely impacted . . . the availability of qualified attorneys to accept CJA appointments."[202]

This Committee's conclusions are no different. Both the $132-per-hour non-capital rate which Congress has funded, and the unfunded $148 statutorily authorized non-capital rate, are too low and need to be significantly increased. These rates cause the loss of qualified counsel from CJA panels and make it difficult to attract young, capable federal criminal practitioners to an aging panel. As explained

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197 John Convery, CJA Dist. Rep., W.D. Tex., Public Hearing—Santa Fe, N.M., Panel 6, Tr., at 33.

198 *See e.g.* in section C below: "What I understand is that some of the best and the brightest have left the list, so there's a relationship between who you get and how you treat people." Retired Judge Nancy Gertner, Senior Lecturer, Harvard Law School, Public Hearing—Philadelphia, Pa., Panel 2b, Tr. at 9; "I've had lawyers tell me 'I can no longer work for free.'" Deborah Williams, FPD, S.D. Ohio, Public Hearing—Philadelphia, Pa., Panel 10, Tr. at 29.

199 Rep. of the Judicial Conference Comm. CJA Rev. Comm., March 1993, at 37. Emphasis added.

200 Gleeson Report pg.16.

201 *Id.* at 14.

202 *Id.*

more thoroughly in other parts of this report, for those qualified attorneys who do remain on the panel, the low hourly rate creates significant financial hardships.

3.5.3 Rate increases Over Time

The chart below shows the non-capital hourly rates paid panel attorneys between 2002 and today:[203]

History of Criminal Justice Act (CJA) Rates
Non-Capital Hourly Rates for CJA Panel Attorneys

If services were performed between...	The hourly rate maximum is...
5/5/2017 to present	$132
1/1/2016 through 5/4/2017	$129
1/1/2015 through 12/31/2015	$127
3/1/2014 through 12/31/2014	$126
9/1/2013 through 2/28/2014	$110
1/1/2010 through 8/31/2013	$125
3/11/2009 through 12/31/2009	$110
1/1/2008 through 3/10/2009	$100
5/20/2007 through 12/31/2007	$94
1/1/2006 through 5/19/2007	$92
5/1/2002 through 12/31/2005	$90

Historically, Congress has funded a panel attorney rate well below the maximum rate authorized by statute. For instance, in 2002, the statutorily authorized maximum hourly rate was $115, yet Congress funded a rate of only $90 per hour. In 2008, the statutory maximum rate was set at $133, but Congress funded only $100 per hour. And in 2014, the statutory maximum rate was $141, but Congress funded an hourly rate of $126.[204] This low rate and the historically slow growth of that rate have damaged the ability of panels to recruit and keep qualified defense attorneys. This report takes up the issue of the rate's impact on effective representation in greater depth in Section 7, but it became clear in the course of this study that the slow incremental increase in the hourly rate damages the CJA's ability to secure high quality representation for those unable to afford counsel.

By any measurable market comparator, the hourly rate for CJA panel attorneys is extremely low. The 2005 Subcommittee report, discussed above, ultimately recommended a considerable rate increase. The report concluded:

CJA panel attorney representations and pay rates have been thoroughly

203 *See Guide to Judiciary Policy,* 7A , Ch.2, § 230.16(A).

204 *See also* chart in Executive Summary at xviii.

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> examined by this Committee. As a result, the Committee believes in order to maintain a high quality of panel representations, both the hourly rates and case compensation maximums must be addressed. Within the amounts provided herein, and effective January 1, 2005, this Committee recommends the hourly rates payable to capital case attorneys be increased to $160 per hour.

3.5.4 Locality

When CJA counsel live and work in areas with high overhead costs, the effect of these low rates is exacerbated. For example, the financial burden of defending a client will vary greatly between an attorney who lives and works in San Francisco, California, with a monthly cost of living calculated to be $11,273,[205] and one who lives and works in Mobile, Alabama, with a monthly cost of living of $5,828.[206]

Locality increases are consistently implemented for federal judiciary employees,[207] but the CJA non-capital hourly rate does not change by locality. A panel attorney practicing in San Francisco succinctly explained this problem:

> I'll just say two things about San Francisco. We all know it, it is an extraordinarily expensive place to live. For the past nine months, it has been the highest rent paying area in the country, eclipsing New York by a very large degree . . . and at $129 an hour, that's just not a sustainable hourly rate.[208]

Additionally, the federal defender from the Southern District of Indiana supports locality increases:

> If you are being paid, say, $100 an hour in San Francisco, that is certainly not the same as $100 an hour in some rural county in South Carolina. So, I do think that there's some merit to locality increases, particularly for large cities where rates of overhead are so much higher than in some of the more rural areas in this country.[209]

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205 *Cost of Living Index*, The Council for Community and Economic Research, https://store.coli.org/compare.asp (last visited Jan. 19, 2017) (estimating the monthly cost of living for a husband and wife with children ages 6-17 in San Francisco, CA).

206 *Cost of Living Index*, The Council for Community and Economic Research, https://store.coli.org/compare.asp (last visited Jan. 19, 2017) (estimating the monthly cost of living for a husband and wife with children ages 6-17 in Mobile, AL).

207 5 U.S.C. § 5304 (2012); *Compensation*, U.S. Courts, http://www.uscourts.gov/careers/compensation (last visited Jan. 19, 2017) ("Judiciary pay consists of base pay plus a locality pay component and a cost-of-living allowance component.").

208 Mary McNamara, CJA Dist. Rep., N.D. Cal., Public Hearing—San Francisco, Cal., Panel 6, Tr., at 4.

209 Monica Foster, Exec. Dir., CDO, S.D. Ind., Public Hearing—Minneapolis, Minn., Panel 5, Tr., at 35.

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3.5.5 Overhead

Even if an attorney does not live and work in a high-cost area, increasing overhead costs diminish the effective rate paid by the CJA. Neither the Judicial Conference nor Congress has ever evaluated how these increasing costs affect the value of the CJA rate. Overhead costs create a financial hardship for CJA counsel and discourage the acceptance of cases by capable private defense attorneys.[210] Solo practitioners must pay costs for maintaining their practices, including malpractice insurance, staff, computer equipment, IT services, electronic legal research services, telephones, rent, and other miscellaneous overhead items.[211]

Testimony reflected that overhead costs amounted to as much as $70–100 of the $132 hourly rate. Recent survey data confirms that increasing overhead costs have substantially eroded the net income of CJA attorneys. The 2015 Survey of Criminal Justice Act Panel Attorney District Representatives and Individual Panel Attorneys, commissioned by the Administrative Office of the U.S. Courts, revealed that the average overhead per billable hour in non-capital cases was $85.[212] Thus, in 2015 CJA attorneys would have earned an effective hourly rate of $42 ($127 minus $85) at then current rates.

The same survey illustrates the significant gap between panel attorneys and privately retained counsel. While panel attorneys netted a mere $42 per hour, retained attorneys netted more than $150 more per hour.[213] With overhead consuming so much of the CJA rate, the rate is inadequate. As the CJA representative from the Central District of California explained:

> We're only three lawyers, I asked my office manager, "What's our overhead per hour attorney work?" Afterwards, I almost regretted that I asked because it was so depressing when I got the answer. It was almost $100 an hour.…I would say in Los Angeles, our overhead is probably about $70 an hour. In my law firm it's higher, but I'd say for a sole practitioner, which most of the panel is, it's probably about $70 an hour. Once you subtract out what people pay on their taxes, they're probably left with about $30 an hour.[214]

3.5.6 How Rate Affects Representation

Other lawyers who work in the federal criminal justice system are effectively paid a much higher rate. Federal defenders and U.S. Attorneys do not bear the cost of

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210 In the 2005 Gleeson report, nearly 40 percent of CJA panel attorneys reported declining cases based on the low level of compensation. pg. 15-16.

211 Ken Gomany, CJA Panel Atty., N.D. Ala., Public Hearing—Birmingham, Ala., Panel 4, Tr., at 19.

212 Westat Survey. See Appendix C: Survey Data Considered.

213 Michele A. Harmon et al., 2015 Survey of Criminal Justice Act Panel Attorney District Representatives and Individual Panel Attorneys 45 (Westat 2015).

214 Marilyn Bednarski, CJA Dist. Rep., C.D. Cal., Public Hearing—San Francisco, Cal., Panel 6, Tr., at 9–10.

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overhead, have access to staff provided by the office, and receive benefit packages.

The Committee appreciates the fact that federal defenders and U.S. Attorneys cannot engage in the private practice of law. However, this is becoming a reality for some CJA panel attorneys as well. There are two factors associated with federal practice which may also make it difficult to maintain a private practice. The first is that the complex nature of federal criminal defense requires panel attorneys to take a sufficient number of cases to remain proficient in complicated areas of law.[215] Taking the number of cases at this hourly rate to maintain that proficiency may become a financial burden. Second, as panel attorneys become more skilled in federal defense, they take on increasingly complex and difficult cases, which may inhibit their ability to accept private cases to support their practices.[216] If CJA panels are to retain qualified counsel, the need for adequate rates must be addressed.

The low hourly rate is demoralizing and discourages continued participation in federal public defense representation. One panel attorney said that in Pittsburgh, "I think there are paralegals who make more money than that or who bill at higher rates."[217] Another panel attorney told the Committee the rate is "demoralizing. Many times the ancillary services people get the same as what the [CJA] lawyer gets."[218] Finally, a panel attorney testified in Philadelphia:

> Because I need to save money…I made the decision…to share an office, not office space, but literally share an office with another very experienced attorney.…We love the work, we're committed to the work and we do it. But, really, I shouldn't be sharing an office at this point of my career. I shouldn't be forced into that position.[219]

To continue to attract qualified panel attorneys to take cases under the CJA, the hourly panel rate must be higher.

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215 The Vera Report recommended 4-5 cases a year, though witnesses who testified to the Committee recommended a higher number. Please see section B; Jon Wool *et al.*, *Improving Public Defense Systems: Good Practices for Federal Panel Attorneys Programs,* Vera Inst. Of Just. 7 (June 2003), *available at* https://www/vera.org/publications/good-practices-for-federal-panel-attorney-programs-a-preliminary-study-of-plans-and-practices (last viewed 9/25/2017).

216 *See* Mark Windsor, CJA Panel Atty., C.D. Cal., Public Hearing—San Francisco, Cal., Panel 3, Writ. Test., at 1–2; *See also* Jessica Hedges, CJA Board Chair, D. Mass., Public Hearing—Philadelphia, Pa., Panel 9, Tr., at 11 ("I [have had] to turn away good civil cases recently…to focus on [my urgent CJA cases]. I am losing a lot of money on making that choice.").

217 Patrick Livingston, CJA Dist. Rep., W.D. Pa., Public Hearing—Philadelphia, Pa., Panel 9, Tr., at 11.

218 Bobbi Sternheim, CJA Dist. Rep., S.D.N.Y., Public Hearing—Philadelphia, Pa., Panel 9, Tr., at 29.

219 Jessica Hedges, CJA Board Chair, D. Mass., Public Hearing—Philadelphia, Pa., Panel 9, Tr., at 30.

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3.6 Examples of How Structural Conflicts Influence the Administration of the CJA

3.6.1 The Lessons of Sequestration

In FY 2013, a budget crisis known as "sequestration" that occurred during the same time period as other budget cuts, had a debilitating effect on federal defender organizations and CJA panel attorneys across the country. The impact of this crisis was well-publicized in the national media and recognized by the judiciary and Congress.

Sequestration refers to the across-the-board spending cuts required by the Budget Control Act of 2011 (Pub.L. 112–25, S. 365, 125 Stat. 240, enacted August 2, 2011) which were amended by the American Taxpayer Relief Act of 2012 (Pub.L. 112–240, H.R. 8, 126 Stat. 2313, enacted January 2, 2013). When these severe cuts to the federal budget were conceived, and ultimately passed, Congress believed the consequences would be "so dangerous, and so reckless" that it would provide an incentive to pass a responsible budget to confront the nation's spiraling deficits. Instead, Congress failed to act, and the severe cuts went into effect on March 1, 2013.[220]

Sequestration's Impact on the Defender Services Program

Due to the effects of sequestration and other budget cuts, from the end of September 2012 through September 2013, federal public defender organization staff levels dropped from 2,778 to 2,497 full time equivalent (FTE) employees, a reduction of 281, or approximately 10 percent of the total FPDO workforce. In addition, in FY 2013, over 149,000 hours (approximately 18,625 days) of furloughs and 21,000 hours of leave without pay were taken by federal defender organization staff. The initial FY 2014 on-board staffing levels for all federal defender organizations were 9.5 percent below the Defender Services Committee-approved staffing levels. These widespread furloughs and layoffs in FY 2013 caused an unprecedented loss of experienced federal defender staff and, in some offices, created an untenable conflict between choosing to hire a needed expert for a case or furloughing more defender staff.

Sequestration also negatively affected CJA panel attorneys. A temporary emergency rate cut of $15 per hour for both capital and non-capital cases went into effect to already below market rates. On September 17, 2013, this hourly-rate reduction was followed by several weeks of delays in panel attorney payments due to insufficient funds in the Defender Services account and the partial government shutdown. Additionally, a reduction in the national training budget for substantive legal training for both defenders and panel attorneys drastically decreased training on the substantive legal knowledge and skills necessary for criminal defense practice.

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220 See Senate Judiciary Committee's Subcommittee on Bankruptcy and the Courts held a hearing entitled, "Sequestering Justice: How the Budget Crisis is Undermining Our Courts." July 2013, pg. 1-2.

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Unique Posture of Federal Defender Offices Amplified the Effect of Sequestration

Late in fiscal year 2012, Congress authorized defenders to increase staffing in response to rapidly-rising caseloads. When Congress authorizes new positions, especially when it does so late in a fiscal year, it is the practice to fund only part of a year's cost for the position to account for the time it takes to hire new staff. The following year a higher level of funding is needed to maintain the same positions for a full year. As a result, Congress's action in FY 2013 in funding the government through a Continuing Resolution at the prior year's appropriations levels resulted in an immediate and severe shortfall in the Defender Services Account: all the new positions Congress approved in the prior year were only partially funded in FY 2013. As a consequence, in February of 2013, before sequestration went into effect, DSO announced to federal defender offices that their budgets for the year would be cut by roughly five percent, a cut that would have to be absorbed in the remaining eight months of the year. Two months later, sequestration would impose a further five percent cut on defender budgets to be absorbed in the remaining six months of the year. The effect of the cuts was doubled by this timing. Defenders had only half a year to manage a ten percent cut to full year funding.

Federal defender organizations had little ability to manage this shortfall. More than 90 percent of federal defender budgets are dedicated to personnel and space. The remaining funds go to necessary expenses like case-related travel and necessary expert services, categories not amenable to reduction without affecting the quality of representation.[221] Prior to the 2015 Work Measurement Study conducted by the AO, DSO funded federal defender offices at amounts needed for authorized staff, and the number of authorized staff was set based on actual need. In contrast to other judiciary "programs" subject to staffing formulas and funded at certain levels not necessarily related to actual staff on board, defender offices did not maintain funded but vacant positions that could provide a "cushion" during a fiscal emergency.

JCUS Committee Actions During Sequestration

Witnesses told the Committee that the manner by which the judiciary handled the budget during sequestration was not only devastating to the CJA program but also changed the way they regarded placement of the CJA Program within the judicial branch. Indeed, the opening of the National Association of Criminal Defense Lawyers ("NACDL") 2015 report on federal public defense explains that it was in light of the sequester that their task force to study the federal defense system was commissioned: "If a shining light in the country's indigent defense system was itself so vulnerable to shifting political winds, was there something fundamentally

221 Testimony from DSO received by the Committee, meeting at the AO June 2016.

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flawed with that model?"[222] The President of the NACDL told the Committee, "Those problems became very manifest in 2013 with the sequester crisis… During that crisis, there was a feeling among the defender community that when money got tight, that the Judiciary looked after itself more than the defenders and that the defenders, who had long relied upon the Judiciary to be their advocates for Congress, for funding, were let down."[223]

Some witnesses explained to the Committee that the defenders were not singled out during sequestration; all offices and programs in the judiciary were affected. A federal district judge who was chief judge at the time told the Committee that the judiciary took "significant hits" during the budget shortfall.[224] "For instance in my district, our funding for staffing was cut by one-third and we had to reduce our staffing costs…. There was in no way an attempt that I'm aware of by the judiciary to meet the budget restrictions by decimating the federal defenders or defender services."[225]

This assertion is, on its face, accurate.[226] Defenders operated under the same Continuing Resolution and were subject to the same sequestration related percentage cuts as the rest of the judiciary. But for reasons particular to the program, defenders were affected far more severely than the judiciary's various programs. More important for purposes of this discussion, judiciary decisions about how these shortfalls would be managed prioritized judiciary needs over those of the CJA and in doing so damaged the program.

The Defender Services Committee, aware of these facts and of the harm these cuts would cause federal defender offices, recommended to the Executive Committee — which has exclusive jurisdiction to create the judiciary's yearly spending plans[227] — that the shortfall in available funds be addressed by planning to delay payments to CJA panel attorneys at the end of the fiscal year. The judiciary could then either seek supplemental funding in the current fiscal year to timely make these payments or seek sufficient funding in the following fiscal year to make

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222 National Association of Criminal Defense Lawyers Report, *Federal Indigent Defense: The Independence Imperative*, 2015, *available at* www.nacdl.org/federalindigentdefense2015 (last visited Oct. 6, 2017) at 5 [hereinafter "NACDL Report"]. The report goes on to state that in light of sequestration, "[f]or NACDL, which has increasingly devoted resources to promoting indigent defense reform among the states, the federal indigent defense crisis was a grave concern. This concern was heightened as many within the federal indigent defense structure urgently sought support for efforts to restore funding. It was in this context" that the report was commissioned. NACDL Report at 5.

223 Gerry Morris, President, National Assoc. of Criminal Defense Lawyers, Public Hearing — Santa Fe, N.M., Panel 4, Tr., at 7.

224 Judge Rosanna Peterson, E.D. Wash., Public Hearing — Portland, Or., Panel 3, Tr., at 2.

225 *Id.*

226 The following information is based on interviews held with those involved at the time and direct Committee member knowledge.

227 The Judicial Conference of the United States and its Committees August 2013, Appendix Jurisdiction of Committees of the Judicial Conference of the United States (As approved by the Executive Committee, effective March 13, 2017). The Jurisdictional Statement of the Executive Committee of the Judicial Conference which gives this Committee explicit authority to, "…fashion spending plans for the federal judiciary's congressionally approved appropriations."

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payment at that time. This strategy had been used successfully in past funding crises to prevent long-lasting damage to institutional defenders. But DSC did not have the authority to authorize this course of action. The Executive Committee alone could approve a spending plan. It declined to authorize delaying year-end payments to CJA panel attorneys, requiring instead that cuts of nearly ten percent be imposed on defender offices. These cuts had to be absorbed in roughly half of the fiscal year. The results were both predictable and catastrophic.

As noted above, on a large scale, defenders laid off and furloughed workers. Many valued employees, demoralized, left the program. And when funding was restored the following year, it went unused as defenders, having just faced near devastation from the way their budgets had been managed, were wary of hiring new employees. Federal defenders who did attempt to hire found out that high-quality prospective employees, aware that defenders had laid off employees only the prior year, were reluctant to apply for those positions defenders sought to fill. As a result, defender staffing has lagged behind needs for years.

Though the Executive Committee's fiscal year 2013 spending plan largely spared CJA panel attorneys the effects of sequestration cuts, the following year's plan did not. The Budget Control Act called for further sequestration cuts in successive years. DSO estimated that, were institutional defenders to be forced again to absorb the entirety of the account's shortfalls, federal defender offices would be subject to budget cuts of up to 23 percent with staffing cuts at an even higher level.

In FY 2014 the Defender Services Committee again recommended to the Executive Committee that a spending plan address the shortfall by deferring year-end panel payments (those that would become due a year later in August and September of 2014) and seek from Congress supplemental funding to avoid any actual delays. The Executive Committee chose instead to impose a ten percent cut on defenders, a $15/hour reduction to the panel attorneys' rate, and a brief deferral of year-end panel attorney payments as a way of addressing the possible shortfall. The $15 reduction to the panel attorney hourly rate went into effect in September 1, 2013, and lasted until February 28, 2014.[228]

In October of 2013, after a government shutdown, Congress reached a budgetary agreement increasing discretionary spending. A subsequent appropriation funded the Defender Services account at a level that could no longer (after layoffs had taken place) be used. A drop in the panel attorney appointments further diminished demands on the account. The following year, the Defender Services account showed an over $75 million surplus.

Despite this $75 million-plus surplus, CJA panel attorneys have never been made whole following the rate reduction. The Defender Services Committee urged JCUS to seek full funding of the panel's statutorily-authorized rate ($144/hour at

228 *Guide to Judiciary Policy*, 7A, Ch. 2 § 230.16(A).

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the time) as a way of reducing the surplus and retaining qualified panel members demoralized by the year's rate cut. The Budget Committee pursued an alternative course. Private attorneys who had accepted CJA appointments prior to sequestration and other budget cuts were forced to accept a reduced rate of payment for work done, and the higher hourly rate was never paid after sequestration ended.

Federal Defenders Become Effective Advocates with Congress

During sequestration the judiciary's position that the branch must "speak with one voice" and that all contacts with Congress take place through specified staff at the AO limited the federal defenders' ability to contact Congress on behalf of the Defender Services program and seek additional funding. Thus, the Defender Services program was deprived of its best advocates during a crisis. Additionally, because of the structural conflicts already mentioned above, and the inability to speak directly to Congress on behalf of the Defender Services program, many defenders believed their concerns would not be conveyed.

Facing dire consequences for the federal indigent defense, some federal defenders made the decision to reach out to Congress directly to request emergency funding to preserve their ability to continue to provide representation to CJA clients. Ultimately, Congress was responsive. Another defender told the Committee that rather than needing judges to protect the program from legislators, the defenders' experience with reaching out for assistance illustrated:

> Part of what we learned from that I think is that Congress was actually fairly responsive, understood those needs. In fact, defenders got one of the two, I think it was, anomalies or special additional amounts of money to help out during that crisis.[229]

Rather than looking at the defense program with skepticism, a defender testified to the Committee that, "When congressmen asked me for information during the sequestration and we provided it to them and to their staffers, we were greeted with an understanding of what our role is and what we have to do. The skepticism that we thought we would meet was not there."[230]

Views on CJA Structure Change Following Sequestration

The effects of the judiciary's management of appropriation shortfalls under sequestration have had a profound effect on defenders' views of the judiciary's management of the program. Whether all judiciary accounts bore the brunt of steep budget cuts equally or not, federal defenders and panel attorneys repeatedly asserted to the Committee their belief that they were targeted for greater cuts under sequestration in order to spare the courts' funding. A former defender testified that historically the

229 Chief Judge Catherine Blake, D. Md., Public Hearing—Philadelphia, Pa., Panel 1, Tr., at 18.

230 Jon Sands, FPD, D. Ariz., Public Hearing—Minneapolis, Minn., Panel 5, Tr., at 26.

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program had received "a lot of protection [from DSC and JCUS]. . . . [M]ost of us felt that, in terms of funding, that we needed the judges to go to the Hill. . . . we didn't get that protection. In fact, we were actually competing with the judges, and the judges were going to win. That's what's changed my opinion about pulling all of it out from underneath the judiciary."[231] As of the writing of this report, many federal defender offices are still trying to recover from sequestration cuts in 2013. One defender testified it was not just her office, but "all of us are invested in trying to staff up our office to recoup the losses from sequestration because we lost a lot of people."[232]

Because of the unique circumstances of the CJA program, the defense community could not prepare for sequestration in the way that some other offices or programs in the judiciary could. The program's mission requires it to be responsive to decisions made in a different branch of government. Simply put, unless the Department of Justice had stopped prosecuting or lessened its caseload in the lead up to sequestration, the CJA program could not take preventive budgetary measures without endangering the quality of representation. The former assistant director of DSO acknowledged that some within the AO blamed the CJA program for some of its steep cuts; he testified, "Yes, their complaint was that we weren't taking radical cuts in anticipation that sequestration might happen."[233] However, he told the Committee:

> We took the view that, as Congress had taken, that this is a constitutional mandate and you can have all the sequestration that you want, but when you're going to arrest somebody and charge them with a crime, they're entitled to a lawyer, not a sequestered lawyer. They're entitled to services. . . . We were asking for the amount of money that was needed to provide the basic elements of a defense, not a Cadillac defense, not a Ford defense, a Sixth Amendment defense.[234]

Sequestration highlighted the conflict created by placing the defense program within the judiciary. The judiciary made decisions on CJA spending considering the best interests of the judiciary—not those of the program. The CJA program could not, as an independent entity, make budgetary decisions that would preserve defenders' ability to fulfill their duties and obligations to the defendants they represented. Surely, the Committee was told, there was "a really good rationale why this made a lot of sense for the federal judiciary as a whole to take this approach. That may have made sense for them as a whole, but within that context, this program [CJA] gets hurt."[235]

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231 Franny Forsman, Former FPD, D. Nev., Public Hearing—San Francisco, Cal., Panel 4, Tr., at 11.

232 Maureen Franco, FPD, W.D. Tex., Public Hearing—Santa Fe, N.M., Panel 2, Writ. Test., at 15.

233 Steven G. Asin, Former Deputy Assistant Director, DSO, Administrative Office of the United States Courts, Public Hearing—Philadelphia, Pa., Panel 7, Tr., at 17.

234 *Id.* at 17–18.

235 *Id.* at 21.

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And while individual judges across the country continue to support a strong defense program, the erosion of the Defender Service Committee's authority has caused defenders to rethink their position within that structure. The concern of defenders is not the product of any lack of commitment to the Sixth Amendment on the part of individual judges. Rather, it is a product of the very real conflicts created by housing the CJA program under the JCUS. There are times when the interests of the CJA program and the judiciary diverge. And these divergences become more obvious, and more severe, in times of constrained resources.[236] Inevitably then, the views of the Defender Services Committee and the interests of the CJA program are subordinated to the pressing needs of the judiciary.

3.6.2 Work Measurement

The 2015 Work Measurement Study of Federal Defender Organizations is another example of how the structural conflicts caused by placing the CJA program within the judiciary affects CJA program administration. The September 2013 Report of the Judicial Conference announced that the Judicial Resources Committee, in consultation with the Defender Services Committee, would develop new national staffing formulas for FPDOs and CDOs.[237] Until that time, defender organization staffing had been based on formulas created by the Defender Services Office, taking into account weighted cases[238] and historical needs of the district. In December of 2013, the federal defender offices began participation in an extensive work measurement study program to determine their staffing needs.

Recognition of Defenders' Distinct Function

Work measurement studies had previously been used in other court programs, and the thought was that such staffing formulas should be equally applied to defender offices. The study ended in June of 2015. While all defender organizations participated,[239] some told the Committee that it harmed morale because defenders felt the Work Measurement study did not recognize the distinct mission of the defender services program, instead treating them as another program meant to serve the courts.

One defender testified that such a study misunderstood the nature of the work that defenders do. "We were told that everyone else had to do work measurement, probation officers, court people and so we were just like everybody else and we're not. When they tried to do work measurement on the U.S. Attorneys they couldn't

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236 See discussion above on sequestration; NACDL Report at 5.

237 Judicial Conference Report Sept 2013; see also discussion DSC jurisdiction change above.

238 Evaluated under a study prepared by the RAND corporation.

239 All FPDO employees were required to participate in the data collection, and defenders told the Committee the process was onerous. One defender testified, "It was laborious to do it. It was added on, we already had too much work to do." Henry Martin, FPD, M.D. Tenn., Public Hearing—Birmingham, Ala., Panel 6, Tr., at 12.

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do it, and to be compared to court reporters and probation officers, and to assume that our tasks can fit into widgets, was devastating to morale."[240] Despite defender misgivings about the study, the defender community was lauded as a "model of cooperation" for their participation in it.[241]

While the study itself may have created tension between defenders and the judiciary structure, it also unequivocally supported what defenders had been repeatedly asserting: rather than being an account out of control, their program was understaffed. The chair of the JRC told the Committee that, "despite early concerns that a rigorous, statistically-driven work measurement study would lead to a recommendation…for a reduction of the staffing formula, actually the opposite happened. We ended up with a recommendation that was approved by the Judicial Resources Committee and approved then by the Conference for an increase in 8.6 percent across the board for the defender community."[242]

Lack of Flexibility

While there were positive results to the study, defenders highlighted for the Committee that there are two main problems with the staffing formulas and work measurement data: the staffing formulas, while designed for stability, are not flexible enough for a program that is reactive to the decisions of another branch of government, and the staffing and weight measures don't take into account the many forms of representations that defenders engage in for their clients.

Defenders told the Committee that the inflexibility of the staffing formulas makes it difficult to respond to new laws, prosecutorial initiatives, or Supreme Court rulings (see, e.g., *Johnson v. United States* above and California – Proposition 66 below in Chapter 9). The rigid application of the current formula, which averages work measurement findings over five years, "removes needed flexibility from the DSC that has the institutional experience and responsibility to support the defenders unique mission. Defenders need to be able to respond to changes in prosecution policies or court initiatives in different areas of the country."[243] As one district judge pointed out, the "real problem, I think, is that everything about CJA, everything about defender services, is by its nature reactive. It depends on how many cases are filed by the U.S. Attorney's Office."[244] Although the work measurement process may have been "well intentioned and successfully performed thanks to both AO staff and the defenders themselves," it does not adequately address this quality of defenders' work.[245]

For example, in 2014, the United States Sentencing Commission voted to

240 Marjorie Meyers, FPD, S.D. Tex., Public Hearing — Birmingham, Ala., Panel 6, Tr., at 32–33.
241 Chief Judge Lawrence Stengel, E.D. Pa., Public Hearing — Philadelphia, Pa., Panel 8, Tr., at 8.
242 Chief Judge Lawrence Stengel, E.D. Pa., Public Hearing — Philadelphia, Pa., Panel 8, Tr., at 7.
243 Chief Judge Catherine Blake, D. Md., Public Hearing — Philadelphia, Pa., Panel 1, Tr., at 4.
244 Judge Rosanna Peterson, E.D. Wash., Public Hearing — Portland, Or., Panel 3, Tr., at 36.
245 Chief Judge Catherine Blake, D. Md., Public Hearing — Philadelphia, Pa., Panel 1, Tr., at 4.

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amend the drug sentencing guidelines. Often referred to as "drugs minus two," this amendment was also retroactive, requiring that closed cases be reviewed and motions filed to give defendants the benefit of the new sentencing guidelines.[246] A defender told the Committee the work formula "is so inflexible. It does not recognize that we have to react to what other people do in the system. [Because of] drugs minus two, we have 1400 cases in our office to review and most of those will get motions filed."[247] Despite the need, the federal defender office was unable to hire additional staff to assist with that case review. One long-time defender told the Committee, "I really didn't see it ultimately as being a long-term benefit to us. It may have temporarily saved us because it showed that we do work more than they thought we were but all it did was measure what we've been doing, not what we should be doing."[248] The defender lamented that the staffing formula didn't include any flexibility to "anticipate the changes and new challenges that would come to us that in the past we've been able to adjust to."[249]

Inability to Accurately Quantify Representational Tasks

Additionally, some offices fared poorly in work measurement and will lose staff and positions not because they are overstaffed, but because the formula does not take into account all the work the defenders do in the course of serving their clients. This work includes drug courts, re-entry courts, and veterans' courts. "That kind of work doesn't really count into our staffing formula, and it raises some very difficult ethical issues sometimes . . . I think as we start to think out of the box in terms of how the criminal justice system operates, I think we also have to think outside of the box in terms of how we staff and fund it."[250] One federal defender who, as a result of work measurement, was directed to lay off nine of her staff members[251] told the Committee:

> These programs are in our hearts, this [is] what our clients need, this is what we should be doing, this is making our communities better, but the reality of it is that if every lawyer that I assign to go work on mental health court, or to go work with the veterans, or to go work with our tribal communities is getting less than a misdemeanor's case worth of credit. We cannot continue to sustain our involvement in these programs, and to me that would be a tragic loss and a complete inability to evolve what it is we do and why we do it. The science says we should be

246 For more information, please see http://www.ussc.gov/sites/default/files/pdf/amendment-process/materials-on-2014-drug-guidelines-amendment/20140724_FAQ.pdf.

247 Elizabeth Ford, Exec. Dir., CDO, E.D. Tenn., Public Hearing — Birmingham, Ala., Panel 6, Tr., at 33.

248 Henry Martin, FPD, M.D. Tenn., Public Hearing — Birmingham, Ala., Panel 6, Tr., at 12.

249 *Id.*

250 Miriam Conrad, FPD, D. Mass. & D.N.H. & D.R.I., Public Hearing — Philadelphia, Pa., Panel 3, Tr., at 34.

251 Kathy Nester, FPD, D. Utah, Public Hearing — Portland, Or., Panel 6, Tr., at 36.

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> doing this. Every other agency in the federal family has acknowledged this is important and is investing resources in it. I think the defender services need the flexibility, and frankly, to bring in the CJA panel.[252]

Federal defender offices do not get credit under staffing formulas for helping to manage the CJA panel.[253] While some FPDOs manage to do so, others would like to but simply can't. A defender told the Committee, "I would take that on . . . [but] I'm fully staffed, and we don't have any room for panel management. So we would have to figure out a way where the work measurement studies . . . take into account that non-case related work we would do managing a panel, but I would be happy to help.[254]

Returning Jurisdiction to the Defender Services Committee

Finally, one defender pointed out to the Committee that because the study and its resulting formulas provide an empirical basis for CJA budgeting, concerns about overspending should be assuaged. That being so, justification for depriving the DSC of authority over defender staffing and budgets is, if it ever existed, now lacking.

> Because of work measurement, the program now has an empirical and analytical tool to address its staffing, resources and requirement, and the need for judicial oversight over the defender program is substantially reduced. As a consequence, at a minimum, DSO should be re-elevated to the directorate within the AO and judicial oversight of our staffing and budget limited. This will allow DSO the ability to more effectively advocate not just for necessary resources but also advocate for policy and programs initiatives that will be beneficial to the accused.[255]

The Committee recognizes the need for metrics to appropriately staff offices and promote accountability. But those metrics must take into account the need for flexibility in a fundamentally reactive program.

3.6.3 Clemency

On April 23, 2014, the then-acting Deputy Attorney General announced a Department of Justice initiative "to encourage qualified federal inmates to petition to have their sentences commuted, or reduced, by the President of the United

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252 *Id.* at 34–35.

253 A recent adjustment to the formulas provides minimal credit to those offices that, because they are losing staff, would otherwise abandon this work.

254 Laine Cardarella, FPD, W.D. Mo., Public Hearing—Birmingham, Ala., Panel 2, Tr., at 25.

255 Kevin Butler, FPD, N.D. Ala., Public Hearing—Birmingham, Ala., Panel 2, Tr., at 2.

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States."[256] Given the volume of applications, DOJ requested volunteers and assistance in screening applications, and the Deputy Attorney General wrote a letter requesting the three FPDOs in the Washington, D.C. area to consider detailing one or two staff members from each office to assist in the initiative.[257] Additionally, some U.S. district courts issued orders authorizing their district's FPDO to represent applicants applying for clemency.[258]

In response to these initiatives and efforts, then AO Director Judge John Bates requested an opinion from the AO's general counsel about the appropriateness of appointing CJA counsel or federal defenders. In a memo dated July 30, 2014, the General Counsel determined that district judges had no authority to appoint federal defenders or panel attorneys to represent non-capital clemency applicants. [259]

Among other reasoning, the General Counsel's memo addressed the language of the CJA which states, "A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate judge or the court through appeal, including ancillary matters appropriate to the proceedings."[260] The AO's General Counsel asserted that "the plain language of subsection (c) of section 3006A makes clear that courts' authority to appoint counsel in ancillary matters extends only to those ancillary matters that are germane to judicial proceedings."[261]

The memo notes that, "While courts have discretionary authority to appoint FPDOs to assist in various administrative tasks for the general benefit of their office, the courts, or the judiciary, there is no authority to appoint federal defenders or panel attorneys to represent individual non-capital clemency applicants." [262]

The Committee heard from defenders and defender organizations about the impact the General Counsel memo had on the clemency process. The NACDL reported that, "Because defenders had the files, historical knowledge, and expertise to determine if their clients qualified for clemency, their non-participation has had a substantial negative impact on the ability to identify those who might qualify for clemency."[263] A defender stated, "These limitations on our representation deprive

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256 https://www.justice.gov/pardon/clemency-initiative Qualifications included that current inmates had been convicted of low-level, non-violent crimes, had served at least ten years in prison, and had demonstrated good conduct in prison.

257 Legal memo from Robert Loesche, AO General Counsel to Judge John Bates, AO Director, *Authority to Appoint Criminal Justice Act Counsel in Non-Capital Clemency Matters and to Detail Federal Public Defender Office Staff to the Office of the Pardon Attorney*, July 30, 2014 pg 2. Available on JNET, access restricted to judiciary employees, at http://jnet.ao.dcn/court-services/cja-panel-attorneys.

258 *Id.*

259 *Id.*

260 18 U.S.C. 3006(a)(c).

261 Loesche Memo at 6.

262 *Id.* at 7. *See also* Memorandum from Judge John D. Bates, Director, Administrative Office of U.S. Courts, and Judge Catherine C. Blake, Chair. Judicial Conference Committee on Defender Services, July 31, 2014 pg. 2.

263 NACDL Report at 31.

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defendants of much needed assistance in trying to obtain post-conviction relief."[264] A former defender who is now a panel attorney disagreed with the General Counsel memo. He told the Committee that, for defenders, "[W]e don't feel that we're part of the judiciary, we work for our clients and these were the people who were impacted by that opinion that limited involvement."[265] He wrote to the Committee that the memo was "a crushing emotional blow to defenders to be told they could not help former clients suffering over-punishment. But, the more damaging consequence of the AO's decision is that many eligible prisoners will not have petitions for commutation processed in time for consideration."[266] Another defender agreed that because of this decision, it was "questionable whether all those cases that are ripe for review will be timely entertained during this administration."[267]

As the clemency issue described above illustrates, where policy initiatives and client interests are concerned, the AO and the judiciary's views can conflict with the defenders at a very basic level—who should be represented under the CJA.

3.6.4 Probation Officer Protection Act

This conflict of missions is also illustrated in a recent bill passed in the U.S. House of Representatives. Nearly a decade ago in its March 2008 meeting, the JCUS adopted a recommendation to "seek legislation that would permit probation officers, whether in a search context or otherwise, to arrest, based on probable cause, persons who assault, resist, or impede the officer in the performance of official duties."[268] A bill to do so, H.R. 1039, the "Probation Officer Protection Act of 2017," was introduced and passed in the House of Representatives. Before it passed, two federal defenders wrote a letter to the representatives on the House Judiciary Committee on behalf of Federal Public and Community Defenders outlining their position against the bill. They wrote, "We oppose the bill because it would violate the Separation of Powers, would invite Fourth Amendment violations, is unnecessary for purposes of supervision or safety, and would instead escalate the risk of harm to all concerned and undermine effective supervision."[269]

Unfortunately, there is no evidence the Committee can find that the Defender Services Committee had any chance to meaningfully consider and respond to this proposal before it was approved by the Judicial Conference. No one from the Defender Services Office or the defender community was included in meetings with congressional staff on this bill. Also, since the AO's Office of Legislative Affairs only promotes

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264 Marjorie Meyers, FPD, S.D. Tex., Public Hearing—Birmingham, Ala., Panel 6, Writ. Test., at 4.

265 Thomas Hillier, Former FPD, W.D. Wash., Public Hearing—Portland, Or., Panel 1, Tr., at 14.

266 Thomas Hillier, Former FPD, W.D. Wash., Public Hearing—Portland, Or., Panel 1, Writ. Test., at 3.

267 Leigh Skipper, Exec. Dir., CDO, E.D. Pa., Public Hearing—Philadelphia, Pa., Panel 3, Tr., at 6.

268 Available on JNET, access restricted to judiciary employees, at http://jnet.ao.dcn/legislation/legislative-summary/crime/safe-searches-us-probation-officers-2017.

269 Patton-Sands letter, March 30, 2017 pg 1. See Appendix E.

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JCUS legislative policies, even if the Defender Services Committee, the AO's Defender Services Office, or the defenders had voiced opposition, it would not have been communicated or included in any submissions if it was contrary to that policy.

During the markup of the bill, Rep. Conyers advanced many of the arguments put forth in the Federal Public and Community Defenders' letter in opposition to the bill, illustrating the importance of defender input to legislators. It appears that the defenders felt forced to circumvent the JCUS governing structure to give input on the bill. The current structure had failed to allow for the defense view to be heard. Under the current structure, there does not appear to be a mechanism for the defender program to have an official position that is contrary to that of the judiciary. Finally, this structure does not allow federal defenders to act as advocates for the CJA program or their clients on legislative matters that affect federal criminal defense.

Once again, the CJA program is simply not suited to be subsumed within a judiciary structure whose goal is to serve the courts. As a judge on the Defender Services Committee said,

> The defenders today are uniformly individuals at the very top of their profession, experts in the field of federal criminal defense who for the most part have devoted their careers to defense of the indigent. . . the fact remains that the direction of the defense function is controlled by a committee made up entirely of judges, leaving the nationally-recognized experts in the criminal defense profession and the lawyers charged with implementing policies and providing the representations with no vote and little authority over the direction of the defense function.[270] ●

[270] Mag. Judge Jonathan Feldman, W.D.N.Y., Public Hearing—Philadelphia, Pa., Panel 1, Tr., at 8.

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Section 4: Local CJA Panel Administration

The Criminal Justice Act requires each United States district court, with the approval of the relevant circuit court, to formulate and implement a district-wide plan for providing representation to any criminal defendant who cannot afford to hire an attorney.[271] The CJA also grants authority to the Judicial Conference of the United States (JCUS) "to issue rules and regulations governing the operation of district plans" for providing legal representation for indigent defendants.[272]

While plans can and should vary to reflect local conditions, the fundamental goals of any plan are the same: to ensure there is a pool of qualified lawyers (both panel attorneys and institutional defenders), that counsel is promptly appointed, that these defense attorneys have the resources necessary to properly represent their clients, and that they are fairly compensated. Even though up-to-date plans that conform to JCUS policies are a requirement around the country, there are currently districts without CJA plans, districts that have not updated their plans in decades, and districts that do not follow their own plans.

4.1 Importance of CJA Plans for Representation

Local plans are critically important to the administration of the CJA. These plans are meant to spell out the process for selection and retention of panel attorneys along with many other essential aspects of representation in ways that meet the particular needs of the district. Doing so helps ensure that qualifying defendants are provided

271 18 U.S.C. § 3006A(a) (2012).

272 18 U.S.C. § 3006A(h).

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with timely appointed counsel, as well as ensure those counsel will represent defendants consistent with the best practices of the legal profession, so that the rights of individuals are safeguarded.

A federal defender told the Committee that plans were essential to creating a knowledgeable, experienced panel of private attorneys to take CJA appointments, as they provide "a structure for admitting members to the CJA panel and removing them."[273] Without such a structure, unqualified attorneys are appointed to represent individuals charged with serious offenses.[274] The Committee heard repeatedly that CJA plans that contain these types of provisions are necessary to provide high-quality representation by CJA panel attorneys. Conversely, the absence of a plan creates serious concerns about the quality of representation.

Despite the requirements of the CJA, there are districts or divisions where there is no CJA plan, or no list of panel attorneys to be assigned by the courts. The President of NACDL told this Committee, "I get calls from lawyers all the time in civil firms and they are saying I just got an appointment, what should I do?"[275] In one division of the Western District of Texas, every attorney who is a member of the federal bar regardless of practice area is automatically deemed to be a member of the panel. As a result unqualified, inexperienced lawyers receive appointments—one of the problems the Criminal Justice Act was passed to correct. The federal defender for that district told the Committee that she and the two previous defenders before her tried unsuccessfully to get the division to adopt a plan.[276] The division has a tradition, she testified,

> of picking someone out of [the] audience to represent the client or picking up the phone and calling somebody to do it.... [I]f there's only a civil lawyer who has never done criminal work, the first thing they do is they call the branch chief in Austin and our office will help walk that person through the case. It becomes very problematic though, if we have a co-defendant because then we can't offer that assistance because of the privilege and confidentiality issues.[277]

A federal defender in another district in Texas told the Committee about something in his district informally called a "non-voluntary panel," in which lawyers are conscripted to represent defendants.[278] He told the Committee that his office is "currently shepherding through a case where the lawyer...only practices tax law and [has] no real experience in doing these types of cases.[279] Given the complex

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273 Lisa Freeland, FPD, W.D. Pa., Public Hearing—Santa Fe, N.M., Panel 3, Tr., at 13.
274 *Id.* at 13–14.
275 E. Gerry Morris, Pres. NACDL, Public Hearing—Santa Fe, N.M., Panel 4, Tr., at 26.
276 Maureen Franco, FPD, W.D. Tex., Public Hearing—Santa Fe, N.M., Panel 2, Tr., at 26.
277 *Id.*
278 Jason Hawkins, FPD, N.D. Tex., Public Hearing—Santa Fe, N.M., Panel 2, Tr., at 25.
279 *Id.*

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nature of federal criminal litigation, the defense should be "on the same footing as [government] counsel with training and expertise," to protect the rights of the defendant under an adversarial system.[280] Where there is not a current and adhered-to plan codifying practices to establish an effective and efficient system for providing CJA representation, then the statute itself is not being implemented to provide the protections it was designed to ensure.

Other districts have CJA plans that exist on paper but are ignored in practice. A federal defender told the Committee that under the plan in her district, "You are technically on the panel, on the CJA panel, whether or not you are qualified. Every person who is admitted to the bar of the [district] is considered to be on the panel, and that includes whether or not you are dead because they don't strike your name off after you die."[281] She further explained that if her office wants to contact panel attorneys to offer training or other support, "it is very difficult to get a meaningful list of those lawyers who are practicing routinely."[282]

In another district, the Committee was told:

> [W]e have a model CJA plan. We've had it for years, it's been re-adopted any number of times, the last time was 2011. We have it, but the judges of my district totally ignore it. It has different things on it about criteria for admission to the panel. There's supposed to be a mentor panel, you're supposed to have a three-year review. They don't do any of that.[283]

Moreover, because many plans lack review procedures for panel attorneys and don't have structures in place to assist and train them when judges have concerns about the quality of their practice, some panel attorneys find that they are no longer receiving appointments. Judges simply tell the magistrate judge, "Don't send this person back into my courtroom."[284] This hurts the individual attorney and the panel. With proper plans that include policies that provide feedback and training for these attorneys, many of these lawyers would not be faced with exclusion from appointments but instead would be "salvageable."[285] Instead of being identified for training or support that could improve overall quality of representation in the district, they "just magically don't get cases anymore, which doesn't improve the performance standards of anyone."[286]

There are considerable benefits to updating and implementing plans with provisions to promote a qualified and well-trained panel. A panel attorney told the

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280 E. Gerry Morris, Pres. NACDL, Public Hearing—Santa Fe, N.M., Panel 2, Tr., at 26.

281 Tina Hunt, Exec. Dir., CDO, M.D. Ga., Public Hearing—Santa Fe, N.M., Panel 3, Tr., at 1.

282 *Id.*

283 Rochelle Reback, Former CJA Panel Atty., M.D. Fla., Public Hearing—Miami, Fla., Panel 5, Tr., at 12–13.

284 Tina Hunt, Exec. Dir., CDO, M.D. Ga., Public Hearing—Santa Fe, N.M., Panel 3, Tr., at 25.

285 *Id.*

286 *Id.*

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Committee that an updated plan in her district led to the creation of a system in which lawyers are required to apply to be on the CJA panel, and the size of the panel is designed to allow the attorneys to become and remain proficient by regularly receiving appointments. The new plan also has provisions for training.[287] As a result of this updated plan, the panel attorney reported an increase in performance and practice among panel attorneys. It also created an environment which encourages younger, less experienced attorneys to join the panel.[288]

4.2 Aspects of Effective Plans

Many CJA plans do operate well and are effective at ensuring quality representation. Adopting a structure that incorporates best practices not only sets the stage for the consistent provision of high-quality defense; such a plan is also perceived by defense lawyers to be fair and reasonable. As one CJA panel attorney district representative told the Committee, "I think culture comes after structure. I don't think you can get a good culture without a good structure."[289]

4.2.1 Who Should Manage the Panel

Judiciary policy provides that panel administration and management "should be centralized in one organizational element (such as the clerk's office or, where appropriate, the federal defender organization) to ensure that counsel is appointed as expeditiously as possible, appointments are equitably distributed, and information on availability of counsel is maintained."[290] On the whole, testimony this Committee received indicates that a critical aspect of an effective plan is involving the local federal defender organization and panel attorneys in the administration of the plan. CJA panels function more effectively when the defender office, a CJA committee, or a CJA supervisory attorney manages applications from lawyers to join the panel—as well as their removal, if necessary, from the panel—and their appointment to cases. While judicial input is necessary to create a high-quality panel of attorneys, most practitioners believe that panels controlled exclusively by judges generally function less well and are less satisfactory to the participating attorneys. Although a minority view, some witnesses who testified before this Committee disagree. One federal defender told the Committee, "The panel is managed by the district court in my district, and it is preferred to be that way by our panel members."[291] She stated that panel attorneys

[287] Melanie Morgan, CJA Panel Atty., D. Kan & W.D. Mo., Public Hearing—Santa Fe, N.M., Panel 5, Tr., at 14.

[288] *Id.* at 13–14.

[289] Mary McNamara, CJA Dist. Rep., N.D. Cal., Public Hearing — San Francisco, Cal., Panel 6, Tr., at 20.

[290] *Guide to Judiciary Policy*, Vol. 7, Part A, Ch. 2 § 210.30.40.

[291] Doris Randle-Holt, FPD, W.D. Tenn., Public Hearing—Birmingham, Ala., Panel 6, Tr., at 7.

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"believe it's a conflict for the defender [office] to manage the panel."[292] Others who supported judicial management of panels explained: "[J]udges feel that they are in the best position to determine who is doing a good job and who is not."[293]

In districts with judge-managed panels, attorneys often believe they have no avenue to remedy problems in panel administration. More often than not, the Committee heard concerns similar to the ones expressed by a panel attorney district representative who testified that at national CJA conferences, other panel attorneys "tell me that all the time, they say, 'In my district, I couldn't possibly say X, Y and Z to our judge, he would get offended or she would have me off the panel.'"[294] In fact, the Committee faced real difficulty in gathering information about the functioning of the CJA in certain districts because panel attorneys feared their candid testimony might provoke judicial retaliation. Some panel attorneys in districts with judge-managed panels were concerned that speaking out would mean not getting any future appointments. A representative from the New Mexico Criminal Defender Lawyers Association told the Committee that in preparing for her testimony there were lawyers who sought anonymity and others who were willing to speak but raised concerns about discussing these issues.[295] She believes there needs to be a "mechanism for CJA lawyers to share those concerns about that—that fear of reprisal."[296]

These concerns and many others raised during testimony support moving panel administration away from judicial control.[297] In districts where this is already the model, judges still play a critical role in the selection, retention, appointment, and removal of panel attorneys. Witnesses agreed that judicial input, rather than judicial control, is key to the success of CJA panel management. A panel attorney testified, "The judges have to be involved in those kinds of decisions. They have to have some involvement in the process. They see the lawyers, they see issues that we don't know about, but I don't know that they should be the only final arbiter."[298] Another panel attorney stated that with the "buffer that we have in place with our CJA administrator," she believes "there has been a benefit in having the court on that initial selection process."[299] Finally, a former defender told the Committee,

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292 *Id.*

293 Chief Judge Barry Ted Moskowitz, S.D. Cal., Public Hearing—San Francisco, Cal., Opening Test., Tr., at 8.

294 Mary McNamara, CJA Dist. Rep., N.D. Cal., Public Hearing—San Francisco, Cal., Panel 6, Tr., at 37–38.

295 Teresa Duncan, N.M. Crim. Def. Lawyers Assoc., Public Hearing—Santa Fe, N.M., Panel 4, Tr., at 24. Testimony such as this encouraged the Committee to hold closed-door sessions with panel attorneys who wished to remain anonymous.

296 *Id.*

297 Eric Vos, FPD, D.P.R., Public Hearing—Miami, Fla., Panel 1, Tr., at 5; Daniel Albregts, CJA Panel Atty., D. Nev., Public Hearing—San Francisco, Cal., Panel 4, Tr., at 21–22; Jeffrey Lindy, CJA Dist. Rep., E.D. Pa., Public Hearing—Philadelphia, Pa., Panel 4, Tr., at 7.

298 Debra DiIorio, CJA Panel Atty., S.D. Cal., Public Hearing—San Francisco, Cal., Panel 3, Tr., at 26.

299 Melanie Morgan, CJA Panel Atty., D. Kan & W.D. Mo., Public Hearing—Santa Fe, N.M., Panel 5, Tr., at 23.

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> I think that judicial input is necessary. Because when I was first a defender where we wrote the local plan, we had nothing but attorneys and no judges on the selection committee, and I realized fairly quickly that there was no way that those lawyers were going to know enough about whether somebody should be on the panel or off the panel. There should be judicial input and a procedure or process for receiving that [input]; as well as there should be a procedure or a process for clients to be able to register complaints with regard to lawyers.[300]

While a great deal of the work lawyers do in preparing a case is not visible to judges, their input is nevertheless essential in evaluating a lawyer's performance. Certainly, any scheme of panel management should consider judges' views in determining who will be on the panel and, in an individual case, whether work was completed and done well. However, this does not require judicial management. In a number of districts where the panel is managed primarily by the federal defender or a CJA supervising attorney, plans provide for receipt and consideration of judicial input.

Administration of the CJA panel by institutional defenders was widely praised. One defender whose office manages panel administration felt his district could be a model for others: "My office and myself do everything, from A to Z. We select the panel attorneys when we have conflicts, we work closely with them to give them advice all the time. We have extensive training sessions for them. We have a listserv, a newsletter rather, that we give to them."[301] A panel attorney told the Committee that the basis for administration by defender offices exists already in the relationship between CJA attorneys and the defender office.[302] Panel attorneys in many districts already use the defender office as a resource and look to them for assistance. "[I]nformally it happens now anyway. Lawyers reach out, they call, they want advice, and it should be encouraged. . . . I think [formal administration] would be welcomed."[303]

Limited resources can be an impediment to moving administration into defender offices, however. As a defender told the Committee, "[M]y efforts to have a CJA panel administrator in my district were 100 percent dependent on them being my employee. The clerk's office said . . . [t]hey were not going to pay for them."[304] Some defenders believe they could easily absorb panel management if funds were made available.

Another defender offered a similar view:

> I've been so impressed with the panel administrator[s] . . . the way they

300 Franny Forsman, Former FPD, D. Nev., Public Hearing—San Francisco, Cal., Panel 4, Tr., at 18.

301 Thomas McNamara, FPD, E.D.N.C., Public Hearing—Miami, Fla., Panel 1, Tr., at 5.

302 Anthony Ricco, CJA Dist. Rep., E.D.N.Y., Public Hearing—Philadelphia, Pa., Panel 9, Tr., at 37.

303 *Id.*

304 Susan Otto, FPD, W.D. Okla., Public Hearing—Santa Fe, N.M., Panel 1, Tr., at 44.

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> approach the review with the panel, the relationship they have with the panel to be able to persuade the panel to take cases when they have frustrations or when they maybe have full caseloads. . . . That's a cost that the court doesn't have to have. . . . We're not getting any benefit additions to our budget by virtue of taking that administrative responsibility away from the court, but I think we provide an amazing service.[305]

In some other districts, local CJA committees or boards that assist with panel administration have proven to be effective. Tasks of these committees include panel selection and removal and voucher review. Committee members often include judges, the CJA panel attorney district representative, the federal defender, and other experienced defense attorneys. According to a CJA panel attorney representative in one district, the local CJA committee "screens, investigates, does due diligence on every single panel applicant to our district. We are invited by the court to discipline lawyers when and if the need arises."[306] These structural elements, this witness said, are institutionalized in the CJA plan and transparent to panel attorneys, and help create a strong culture of defense in the district. She provided the following example of how the disciplinary process works:

> There was an attorney, a very, very valuable member of our panel. Many of the judges thought he over-billed, thought his bills were excessive, unreasonable. Instead of simply arbitrarily cutting him from the panel, they came to us and they said, "We have a problem with this person. We want you to look at it, tell us, do we have a real problem here or not?" We looked at the issue. . . . We peer counseled that person. The person changed his billing practices. That person is now a fully respected, happy member of our panel, the judges enjoy his work. He turns in excellent work. I think without our structure, that sort of situation could have been combustible. It could have led to rancor. It could have led to somebody being summarily dismissed from the panel and then infecting the attitude in the panel towards the judiciary.[307]

The most common function of these mixed committees involves panel selection. One judge explained how revamping his district's selection committee improved the quality of representation. "When I first started we had people who were appointed to two-year terms, but they were just automatically renewed. Unless you committed some act of misconduct and were removed by the judge you just stayed on the panel forever."[308] Under the current plan, the selection committee

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305 Heather E. Williams, FPD, E.D. Cal., Public Hearing—San Francisco, Cal., Panel 7, Tr., at 26.

306 Mary McNamara, CJA Dist. Rep., N.D. Cal., Public Hearing—San Francisco, Cal., Panel 6, Tr., at 20.

307 *Id.* at 21.

308 Judge Robert Scola, Jr., S.D. Fla., Public Hearing—Miami, Fla., Panel 2, Tr., at 24.

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is chaired by the federal defender and consists of 15 experienced defense lawyers. "They make recommendations to the court as to who should be approved. . . . We really do make an effort to have more geographical, gender, and racial and ethnic diversity on the panel."[309]

Similarly, a panel attorney told the Committee that the change in his district's CJA plan to create not only a selection committee and membership requirements but also a reapplication process and membership requirements had improved representation: "[A] panel selection committee takes applications once a year. . . . Every three years you have to reapply. That seems to be making progress in getting a better qualified panel of attorneys to handle cases."[310]

In another district, where the selection committee consists of the Chief Judge, the federal defender, and five senior panel members, the federal defender explained the process: "We meet once a year to consider the renewal portion of the panel and any new applicants. In advance of that meeting we will have reviewed both a fairly comprehensive written application and the notes from an interview that would have been conducted with each applicant by me and at least one or two members of the selection committee or members of my staff."[311]

However, not all panel administration by committee was praised. Some panel attorneys expressed concern that there was still too much judicial control. One panel attorney told this Committee there is a concern among panel members in his district that the judiciary has undue influence on who gets to sit on the selection committee: "[S]o does the court really have one vote or does it have multiple votes because of who has been appointed to this committee that considers the applications?"[312] And despite the committee process to select attorneys for the panel, when it came to appointments in the district, this same witness described judges in his district who "seek out certain attorneys to handle cases." "I wouldn't question necessarily the experience of those attorneys that are being sought out," he explained, "[but] I think that creates the perception of favoritism."[313]

A consistent theme in testimony was that if committees are involved in panel administration, defense attorneys' voices needed to be heard and they need to be part of the decision-making process. "That the judges consult us first when they have an issue with a lawyer, we feel like we can actually say truth to power," one panel attorney explained. "I really think that's the solution . . . a structure that encourages participation at every level."[314] Similarly, a CJA supervisory attorney told this Committee, "I believe our plan is successful because the court, the panel, and

309 *Id.*

310 Mark Foster, CJA Dist. Rep., W.D.N.C., Public Hearing—Miami, Fla., Panel 6, Tr., at 10.

311 Henry Martin, FPD, M.D. Tenn., Public Hearing—Birmingham, Ala., Panel 6, Tr., at 16.

312 Phillip Sapien, CJA Panel Atty., D.N.M., Public Hearing—Santa Fe, N.M., Panel 5, Tr., at 24.

313 *Id.*

314 Mary McNamara, CJA Dist. Rep., N.D. Cal., Public Hearing — San Francisco, Cal., Panel 6, Tr., at 38.

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the federal defenders all have input into the process. We all have a stake in the outcome and we all meet and discuss issues that arise."[315]

4.2.2 Achieving Quality Representation

As discussed above, updating and implementing CJA plans can improve the quality of representation in a district. Two plan features are particularly important: First, plans must ensure that panel attorneys are appointed to a number of cases sufficient for them to remain proficient in federal criminal practice; and second, plans must require that panel members participate in regular training on topics relevant to CJA practice.

Panel Size and Adequate Appointments

Judiciary policy states: "The membership of the panel should be large enough to provide a sufficient number of experienced attorneys to handle the CJA caseload, yet small enough so that panel members receive an adequate number of appointments to maintain their proficiency in criminal defense work and thereby provide a high quality of representation."[316] In order to ensure balance and fairness in the adversarial process, CJA plans and the appointment practices within the district must provide that panel lawyers receive enough appointments to remain proficient when defending against skilled government attorneys. As one panel member told the Committee, "Criminal defense is not a hobby."[317]

Some districts struggled with finding the balance between having enough panel attorneys able to handle large multi-defendant cases while keeping the panel small enough to ensure members of the panel receive enough cases to remain proficient in federal criminal law. One judge reported: "We have had years where, due to the number of big indictments, we've had conflicts such that we've just plum run out of people who don't have a conflict in a particular case."[318] Another judge told the Committee that, currently in his district, he believes the panel was an appropriate size, but keeping it so is a constant concern.[319] A private attorney told the Committee that districts should, "err I think on the side of having a smaller number of people on the panels so they're doing a larger number of cases. I think in general that's going to get you a better class of lawyer given what you've got to work with."[320] This will require some large districts to reduce the size of their panel, "and really focus on training these people, getting them better qualified, getting them to understand the use of experts, how to use experts, enhancing trial skills, and

315 Diana Weiss, CJA Supervising Atty., N.D. Cal., Public Hearing—San Francisco, Cal., Panel 1, Tr., at 10.

316 *Guide to Judiciary Policy,* Vol. 7A, Ch 2, § 210.30.10(b).

317 Mark Windsor, CJA Panel Atty., C.D. Cal., Public Hearing—San Francisco, Cal., Panel 3, Tr., at 7.

318 Judge Cathy Bissoon, W.D. Pa., Public Hearing—Philadelphia, Pa., Panel 2a, Tr., at 8.

319 Mag. Judge Kelly Rankin, D. Wyo., Public Hearing—Portland, Or., Panel 3, Tr., at 30.

320 James Felman, Former CJA Panel Atty., M.D. Fla., Public Hearing—Miami, Fla., Panel 4, Tr., at 34.

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having just a better well-rounded group of people to pick from."[321] Geography can complicate this calculus, as one panel attorney testified: "One area where we do experience some difficulties and I know the court has experienced some difficulties is the availability of sufficient numbers of qualified counsel in some of the more remote divisions."[322]

According to a report by the Vera Institute of Justice entitled, "Good Practices for Federal Panel Attorney Programs," to stay abreast of new developments in substantive, sentencing, and procedural areas of practice, panel attorneys need at least four appointments per year.[323] Most panel attorneys who testified before this Committee agreed that the number of cases need to maintain proficiency is higher than the Vera report recommendation.[324] One explained why giving panel attorneys a sufficient number of cases is so important:

> I just finished a case a couple of months ago.... There were issues of statutory interpretation as to the applicability of a mandatory minimum. There were guideline issues. There were variance issues.... The district court ultimately agreed with me.... What I find most troubling is that in my research I found a case from this district, from a year or two ago, in which the exact same issue had been raised, and CJA counsel did not raise it. As a result, the defendant in that case ended up with [a significantly longer] sentence because there was no argument about the applicability of the mandatory minimum in those circumstances.[325]

This attorney stressed to the Committee, "These cases are not cases for dabblers or neophytes. The stakes are simply too high."[326]

Training as a requirement for Panel Membership

There was also general agreement that panel membership should include a training requirement.[327] Training of panel lawyers has a demonstrable positive effect. One

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321 Chief Judge Christina Armijo, D.N.M., Public Hearing—Santa Fe, N.M., Panel 1, Tr., at 32.

322 Richard Durbin, U.S. Attorney, W.D. Tex., Public Hearing—Santa Fe, N.M., Panel 6, Tr., at 4.

323 Jon Wool *et al.*, *Improving Public Defense Systems: Good Practices for Federal Panel Attorneys Programs,* Vera Inst. Of Just. 7 (June 2003)*, available at* https://www/vera.org/publications/good-practices-for-federal-panel-attorney-programs-a-preliminary-study-of-plans-and-practices (last viewed 9/25/2017).

324 The Committee was most often told a minimum for proficiency was 5 or 6 appointments. *See* Pete Schweda, CJA Dist. Rep., E.D. Wash., Public Hearing—Portland, Or., Panel 5, Tr., at 17; Jennifer Horwitz, CJA Dist. Rep., W.D. Wash., Public Hearing—Portland, Or., Panel 5, Tr., at 18–19 ("I think the sweet spot is a minimum of 5 to 6 cases a year to stay proficient in federal practice."); Tom Coan, CJA Dist. Rep., D. Or., Public Hearing—Portland, Or., Panel 5, Tr., at 18. One panel attorney recommended 7–10 cases per panel attorney, per year. Jim Ayers, CJA Panel Atty., E.D.N.C., Public Hearing—Miami, Fla., Panel 5, Tr., at 1.

325 Robert Richman, Board Member, Minn. Assoc. of Criminal Defense Lawyers, Public Hearing—Minneapolis, Minn., Panel 4, Tr., at 3–4.

326 *Id.* at 4.

327 For more on training, please see Section 7.

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federal defender, whose office greatly expanded training opportunities, explained: "Last year we offered forty hours of CLE [continuing legal education] that my office sponsored and presented. We have a second chair program, a mentoring program where young lawyers who don't have the experience can come in and go through this year long program. . . . This has proven effective in the quality."[328]

Many districts in the process of updating their plans or that had recently done so recognize the importance of increased training and incorporated requirements into their plans.[329] For example, one district recently put into place a requirement of four hours annually of mandatory CLE in federal criminal practice. Failure to comply with the four-hour training requirement is grounds for removal from the CJA panel.[330] Because most local training opportunities are organized or sponsored by the federal defender organization, they are offered at low or no cost, and thus are widely accessible. Training opportunities can improve communication between panel attorneys and the local institutional defender, and create a feedback loop resulting in training that is more responsive to the specific needs of the panel and issues of concern in the district. And by opening up training to non-panel members, districts potentially can widen the pool of lawyers qualified for admission to the panel.

4.3 Best Practices in Panel Administration

4.3.1 Model Plan

The Defender Services Committee and Judicial Conference have recently adopted an updated Model Plan that "is intended to provide guidance in the implementation and administration of the Criminal Justice Act, as required under 18 U.S.C. § 3006A(b)."[331] Objectives of the plan are "to attain the goal of equal justice under the law for all persons" and "to provide all eligible persons with timely appointed counsel services that are consistent with the best practices of the legal profession, are cost-effective, and protect the independence of the defense function so that the rights of individual defendants are safeguarded and enforced."[332]

This Committee does not recommend a "one-size-fits-all" approach to forming a plan, and the Model Plan is designed to accommodate local districts' individual determinations about CJA administration. At the same time, the model plan highlights structures and practices that have been successful in districts around

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328 Melody Brannon, FPD, D. Kan., Public Hearing—Minneapolis, Minn., Panel 2, Tr., at 17.

329 Lisa Freeland, FPD, W.D. Pa., Public Hearing—Santa Fe, N.M., Panel 3, Tr., at 3–5; Amy Sirignano, CJA Panel Atty., D.N.M., Public Hearing—Santa Fe, N.M., Panel 3, Tr., at 9–12.

330 Amy Sirignano, CJA Panel Atty., D.N.M., Public Hearing—Santa Fe, N.M., Panel 3, Tr., at 10.

331 *Guide to Judiciary Policy*, Vol. 7A, Ch. 2, Appx. 2A: Model Plan for Implementation and Administration of the Criminal Justice Act pg. 1 (hereinafter "Model Plan").

332 Model Plan at 4.

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the country—a compilation of best practices that matches very closely with what numerous witnesses who appeared before this Committee described and recommended as successful practices. Notable among these are the use of a committee to manage the CJA and a training requirement for attorneys selected to the panel.

The Model Plan proposes the establishment of a CJA Panel Committee to administer the panel. The recommended makeup of that Panel Committee is:

> [O]ne district court judge, one magistrate judge, the [federal public defender/community defender], the CJA Panel Attorney District Representative (PADR), a criminal defense attorney who practices regularly in the district who may be a CJA panel member, and an ex officio staff member employed by the [federal public defender/community defender/clerk] who will act as administrative coordinator.[333]

While the Model Plan allows that the composition of the Panel Committee "can be adjusted to reflect the degree of judicial, federal defender, or panel attorney involvement that is desired by each district court,"[334] as demonstrated by suggested membership, its base recommendation is one of judicial input but not control.[335] The duties of the Panel Committee include determining panel membership, recruitment for the panel, an annual report, maintaining a removal process, voucher review, and creating and sustaining a mentoring program.[336]

The Model Plan includes recommendations that districts establish term limits on the panel service and a reappointment process[337] and suggests that districts require CJA panel members to attend a specified number of continuing legal education hours annually relevant to the practice of criminal defense in federal court.[338]

4.3.2 CJA Supervisory Attorney Pilot Program

In 1997, the Judicial Conference of the United States (JCUS) authorized a pilot program to test one of the suggestions of the Prado Committee: that the responsibility

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333 *Id.* at 14.

334 *Id.*

335 Please note that the Model Plan recommends best practices within the constraints of the current structure of the CJA.

336 Model Plan at 16–17. The Model Plan states that the Panel Committee should "[r]eview and make recommendations on the processing and payment of CJA vouchers in those cases where the court, for reasons other than mathematical errors, is considering authorizing payment for less than the amount of compensation claimed by CJA counsel. The judge will, at the time the voucher is submitted to the CJA Committee, provide a statement describing questions or concerns they have with the voucher. Counsel will be notified of the potential voucher reduction and given the opportunity to provide information or documentation relevant to the voucher and concerns raised by the judge. The CJA Committee will issue a written recommendation to the judge." *Id. See also* Section 5 for why removal of voucher review from the judiciary would be consistent with best practices.

337 Model Plan at 19–20.

338 *Id.* at 24.

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for panel management and voucher review be transferred to a local administrator in each district. The pilot ran in three districts, each of which assigned the CJA supervising attorney different duties, though they each had the same core assignments (panel administration, case budgeting, and voucher reviews for reasonableness).[339] The supervising attorney in Maryland was additionally charged with making panel appointments.[340]

At the request of the AO, the Federal Judicial Center (FJC) evaluated the pilot program and in a final report released in April of 2001 entitled *The CJA Supervising Attorney, A Possible Tool in Criminal Justice Administration*, proclaimed the pilot a success, a conclusion that the Judicial Conference endorsed.[341] As the report explained:

> There is no question that these positions have value. Appointed counsel in these districts appreciate…the availability of a central, accessible, knowledgeable resource for assistance with CJA issues. Judges appreciate being relieved of tasks many feel they do not have time for, they are not proficient at, and/or it is inappropriate for them to do.[342]

The FJC concluded that although the position did not directly improve the quality of representation, it "may have indirect positive impacts,"[343] including "effectively managing CJA panels to ensure that they contain only highly-qualified attorneys," and attracting high-quality attorneys by ensuring impartiality in panel administration, given "the possibility that a CJA supervising attorney who supervises how attorneys are assigned to cases can influence attorneys' perceptions of fairness."[344] Notably, this was true in the district in Maryland, where the CJA supervising attorney had the additional responsibility of appointing CJA panel attorneys to cases. Surveys of Maryland judges conducted as part of the evaluation indicated an improvement in their opinions of assignments.[345]

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339 Tim Reagan *et al.*, *CJA Supervising Attorney: A Possible Tool in Criminal Justice Act Administration*, Fed. Judicial Ctr., Apr. 2001, *available at* https://www.fjc.gov/content/cja-supervising-attorney-possible-tool-criminal-justice-act-administration.

340 "Maryland's CJA supervising attorney reviews all payment vouchers with signature authority for vouchers under statutory limits. She also negotiates budgets in capital cases and makes approval recommendations to the court. She supervises appointment of attorneys to the panel and assignment of attorneys to cases. In California Central the CJA supervising attorney has signature authority for all vouchers. He does not participate in case budgeting and he only recently began to assume panel management responsibilities. In California Northern the CJA supervising attorney's primary responsibility is the development and implementation of case budgeting procedures. She reviews some vouchers and makes payment recommendations to the court. Recently she began to supervise mathematical and technical reviews of all vouchers. She has virtually no responsibilities for panel management." Tim Reagan *et al.*, *CJA Supervising Attorney: A Possible Tool in Criminal Justice Act Administration*, Fed. Judicial Ctr., Apr. 2001, at 16.

341 *See generally id.*

342 *Id.* at 1.

343 *Id.* at 2.

344 *Id.*

345 *Id.* at 46.

Each of the three districts chose to maintain the position, even though JCUS did not continue to provide dedicated funding. However, JCUS did recommend that other districts create "supervising attorney positions in courts that would find it of value."[346]

4.4 eVoucher

eVoucher is "an automated solution for the paper-based Criminal Justice Act (CJA) vouchering system to prepare, submit, review, and certify CJA vouchers for payment. It is designed with built-in features to support other CJA-related business functions from case budgeting to reporting."[347] The program,

> eliminates paper and manual processing. An attorney electronically sends a voucher to the court. The court reviews and audits electronically, then sends it to the judge electronically, and when appropriate it is electronically sent to the circuit for review and approval. It can also be sent back to the clerk's office or back to the attorney if a clarification or modification is needed.[348]

Attorney vouchers, as well as those for experts and other service providers, are submitted and reviewed in eVoucher.

Some witnesses who testified before this Committee also offered positive views of eVoucher. A panel attorney said, "eVoucher filing has made it tremendously better for us in not only getting paid but also in letting the court know what it is we've done on the case. . . . You can type in as much as you need."[349] This attorney believes the information helps judges understand the work that goes into representing someone, enabling judges to make a more informed review of the associated expenses.[350]

There are high hopes generally among both panel attorneys and judges for eVoucher. It seems to have lived up to those hopes at the local level. And while there are many advantages to an on-line billing system from an efficiency standpoint, eVoucher also offers the potential of reinforcing judicial conference policy and providing access to never-before-captured payment information. However, as implemented today, eVoucher does not yet live up to the other hopes and expectations many stakeholders had for it on the national level, and it represents a lost opportunity to improve the CJA program nationally.

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346 Report of the Proceedings of the Judicial Conf., JCUS-MAR 02, at 23.

347 Available on JNET, access restricted to judiciary employees, at http://jnet.ao.dcn/court-services/cja-panel-attorneys-and-defenders/evoucher.

348 *Nevada-Grown eVoucher System Going National*, U.S. Courts, May 7, 2014, *available at* http://www.uscourts.gov/news/2014/05/07/nevada-grown-evoucher-system-going-national.

349 Kathy Luker, CJA Panel Atty., N.D. Ala., Public Hearing—Birmingham, Ala., Panel 4, Tr., at 3–4.

350 *Id.*

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A critical advantage of any electronic billing program is the ability to collect and analyze relevant information. The eVoucher program has the potential to provide much-needed data, but the national reporting capabilities are not currently activated to collect the data the program needs for proper management. For example, eVoucher is not currently enabled to collect information on voucher cutting.[351] Additionally, the system does not mandate the input of an explanation before a reduction to a submitted voucher. Both of these would provide valuable information for the CJA program. Because the AO, which has the power to determine the information-gathering capabilities of eVoucher, has not enabled these features, the data required to thoroughly monitor, track, and understand how the CJA program operates across the country remains inadequate.

Further, the governance and oversight of the eVoucher program is not currently placed with the entities that have been tasked with oversight of the CJA program: DSO and DSC. The program is currently managed out of the Case Management Systems Office.[352] While this office may seek input from DSO and DSC, it is an additional level of bureaucracy between the management of the system and the main stakeholders in its use.

The Judicial Conference and Congress increasingly expect that available data will be used to justify requests for program resources and then efficiently manage them. Transfer of authority over the eVoucher program to DSC and DSO would facilitate the management of the systematic collection and use of data to better project needs and oversee the CJA program. Judge Catherine Blake, former chair of the Defender Services Committee, explained, "Nationally, an electronic voucher processing system would give the Committee more accurate and timely projections of future payments and obligations.…That will help us prepare our appropriations request to Congress and responsibly manage the overall defender services program."[353] ●

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351 For example, while the system can show amounts claimed and amounts paid, those figures could reflect vouchers that had withholds, etc. Therefore it is not a reliable indication of voucher reductions made as a part of the court's reasonableness review. Though this particular issue may be addressed in an upcoming eVoucher release, there are still many similar data issues that need to be addressed.

352 See supra Section 3.3.3 for information about the structure of the AO.

353 *Nevada-Grown eVoucher System Going National*, U.S. Courts, May 7, 2014.

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Section 5: Compensation System Under the CJA

The CJA guarantees an appointed attorney "shall, at the conclusion of the representation or any segment thereof, be compensated…for time expended in court" and "for time reasonably expended out of court."[354] Attorneys may also request reimbursement for reasonably incurred expenses. The panel attorneys who are paid on an hourly rate—currently $132 per hour in non-capital felony cases—submit "vouchers" itemizing their time and expenses. As established earlier in this report, judges review those vouchers and ultimately determine how much to compensate and reimburse CJA panel attorneys.[355]

5.1 Policy Regarding Compensation

The Criminal Justice Act sets "case maximums" for compensation providing for increases as the hourly rate increases.[356] The current maximum in non-capital felony cases is $10,300.[357] This cap can be waived if the presiding judge determines the representation is "extended or complex" and "certifies that the amount of the excess payment is necessary to provide fair compensation."[358] The chief judge of the circuit or his designee also must approve any payments that exceed the case maximum. (For discussion of the circuit court approval process, see Section 6. For more on capital cases, see Section 9.)

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354 18 USCA § 3006A (d)(1).

355 18 USCA § 3006A (d)(5).

356 18 USCA § 3006A (d)(2).

357 Case compensation maximum amounts vary by case type and do not include reasonable expenses. *Guide to Judiciary Policy*, Vol. 7A, Ch. 2, §§ 230.23.20 and 230.23.10(d).

358 18 USCA § 3006A (d)(3).

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The statute does not define "extended or complex," and the Guide to Judiciary Policy provides minimal instruction: (1) "If the legal or factual issues in a case are unusual, thus requiring the expenditure of more time, skill and effort by the lawyer than would normally be required in an average case, the case is 'complex'"; and (2) "If more time is reasonably required for total processing than the average case, including pretrial and post-trial hearings, the case is extended."[359] At the current rate of $132 per hour, the case maximum of $10,300 supports just under 80 hours of attorney time. The complexity of cases prosecuted federally has increased significantly since the Prado report. As discussed in other areas of this report, there has been a radical change in the nature and a quantum jump in the volume of discovery. As a result, a substantial percentage of criminal prosecutions are "extended or complex," requiring more than 80 hours for effective representation.

In these more complex cases, panel attorneys may request interim payments while the case is in process: "Where necessary and appropriate in a specific case, the presiding trial judge may arrange for interim payments to counsel and other service providers."[360] In these instances, district court judges are encouraged to withhold 20 percent of each interim payment.[361] At the end of the case, the attorney submits a final voucher seeking payment of the total amount withheld from the earlier vouchers.[362] The final voucher is submitted to the chief judge of the circuit court who decides how much of the withheld funds, if any, will be paid.[363] The process is "designed to strike a balance between relieving court-appointed attorneys of financial hardships in extended and complex cases, and the practical application of the statutorily-imposed responsibility of the chief judge of the circuit court to meaningfully review any claims for excess compensation," as discussed below.[364]

5.2 Problems with Judicial Review

Under the CJA, the presiding judge in a case decides how much the defendant's attorney will be paid. This includes deciding whether work performed by a CJA attorney will be paid and whether the defendant's lawyer will be able to hire investigators, interpreters, psychologists, forensic accountants, or other specialized services providers whom the attorney deems necessary to defend a criminal case.[365] If fees

359 *Guide to Judiciary Policy*, Vol. 7A, Ch. 2, § 230.23.40(b).

360 AO Memorandum from James C. Duff, April 18, 2016, *Review and Approval of CJA Vouchers*; *See Guide*, Vol. 7A, §§ 230.73, 310.60.

361 *Guide to Judiciary Policy*, Vol. 7A, Appx. 2C. The Committee heard that some districts require interim vouchers, but not all district judges are willing to allow interim vouchers even when there is a lengthy trial.

362 *Guide to Judiciary Policy*, Vol. 7A, Appx. 2C.

363 Under another option, the circuit judge periodically reviews cumulative interim vouchers.

364 *Guide to Judiciary Policy*, Vol. 7A, Ch. 2, § 230.73.10(c).

365 *See* 18 U.S.C. § 3006A (d)(5); (e).

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exceed certain statutory thresholds, the chief judge of the circuit or a designee also must approve payment.[366]

This aspect of the CJA is especially problematic. More than 14 years ago, the Vera Report voiced concerns:

> Judges and lawyers alike report that compensation issues, even more than the appointment process, expose the awkward, conflicting nature of the relationship between panel attorneys and the judges who effectively hire them. Unlike defender office attorneys, who are subject only to the fiscal constraints of their organization, panel attorneys are closely regulated by judges in every aspect of their representation. This arrangement poses potential dangers that districts must address if they are to assure high-quality defense services.[367]

Some judges accept this role in approving the defense attorney's fees as a necessary obligation, given that someone must oversee the use of public funds. And some judges see themselves as the actor most capable of (reluctantly) filling this role—being the least bad of several poor alternatives. Still, not a single witness who testified before this Committee described the current process as ideal. Not one wholeheartedly endorsed having judges decide how much to pay one side's lawyer.[368]

Reasons for dissatisfaction with the status quo are many. Some are the inevitable result of any third-party payer system: it is difficult to align the interests of the payer and the client (in this case, the panel attorney); the payer may value services differently than the client; and the payer's knowledge about the need for services is limited. Other problems are peculiar to a system in which individual judges are making these decisions: With more than 1,000 federal judges, it is impossible to impose a high degree of consistency. Additionally, assigning an administrative task to the system's highest-value employees is a poor allocation of resources, and because judges are already overworked it is difficult for them to devote sufficient time to the task. But the most pernicious problems are created by requiring the neutral arbiter in our adversary process to step out of that role and effectively decide what resources one of the two opposing parties can bring to bear on the proceedings. As discussed below, witnesses often described this as a fundamental conflict of interest.

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366 18 U.S.C. § 3006A (d)(3).

367 Jon Wool, K. Babe Howell, Lisa Yedid, *Improving Public Defense Systems: Good Practices for Federal Panel Attorney Programs*, Vera Inst. of Just., 29 (June 2003).

368 *See e.g.* Judge Federico Moreno, S.D. Fla. Public Hearing—Miami, Fla., Panel 6, Tr. at 20; Judge Max O. Cogburn, W.D.N.C., Public Hearing—Miami, Fla., Panel 2, Tr. at 19; Judge Leon Holmes, E.D. Ark., Public Hearing—Birmingham, Ala., Panel 1, Tr. at 16; Judge Leo Sorokin, D. Mass., Public Hearing—Philadelphia, Pa., Panel 2b, Tr. at 13; Mag. Judge Michael Putnam, N.D. Ala. Public Hearing—Birmingham, Ala., Panel 1, Tr. at 18; Judge Richard Boulware, D.Nev., Public Hearing—San Francisco, Cal., Panel 5, Tr. at 8; Chief Judge Michael Seabright, D. Haw., Public Hearing—San Francisco, Cal., Panel 5, Tr. at 23; Chief Judge Raner Collins, D. Ariz., Public Hearing—Santa Fe, NM, Panel 1, Tr. at 18; Chief Judge Vicki Miles-LaGrange, W. D. Okla., Public Hearing—Santa Fe, NM, Panel 1, Tr. at 14.

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5.2.1 Requiring Judges to Determine the Defense Attorney's Compensation Distorts the Adversarial Process

Some witnesses expressed an uneasiness and general lack of comfort, viewing the process as unseemly.[369] One judge explained: "I know when I came on the bench I…did not think about the fact that would have to review vouchers. I hate it. I hate it. I can't stand looking at other lawyers' work and trying to decide if their work is worth what they say that it's worth.… I think it would be fine for somebody else to take it on."[370] Another observed it "seems to put the judge in the position of being something like the client and determining as though the defense lawyer is "working for us, and we're determining whether or not the lawyer's bills are appropriate under all the circumstances. It is a position that I'm not comfortable with."[371]

Many witnesses focused on the fundamental unfairness of the judge deciding how much to pay one side, while the other side is unencumbered by this kind of judicial control. One judge, for example, testified, "I think a system that the judge who presides over the case, determines what experts have been hired, how much someone is paid—I think that's a system filled with problems."[372] A panel attorney elaborated:

> The judges don't oversee whether [the United States Attorney's Office] hire an expert, whether they bring an extra agent onto a case, whether they do any of those things. For some reason, it's ingrained in us that for the defense side, there needs to be some judge overlooking the defense lawyer to make sure that the defense lawyer doesn't overspend the taxpayer money. It's the same taxpayer money on the government side.[373]

Every voucher submitted is an implicit representation by the attorney that she worked the billed hours and believed the work was reasonable in the context of the case. Every refusal by a judge to pay for the hours the attorney billed also carries implicit messages: that the work was not actually done, or that it was unreasonable to expend time on that work, or that it was unreasonable to spend that amount of time. That attorney, in the next case where she believes this same type and amount of work to be necessary, must now consider her own interests. She won't be paid for the work if she does it. And the judge, who often has control over her selection to the panel as well as her appointment to the individual case will consider her professional judgment suspect; after all, she continues to unreasonably expend time on

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369 "They hate having to get down in the weeds with the lawyers on how much time they spent on this, that, or the other and balancing when you have a multi-defendant case, these widely disparate vouchers." Susan Otto, FPD, W.D. Okla., Public Hearing—Santa Fe, NM, Panel 1, Tr. at pg. 42.

370 Judge Max O. Cogburn W.D.N.C., Public Hearing—Miami, Fla., Panel 2, Tr. at 19.

371 Judge Leon Holmes E.D. Ark., Public Hearing—Birmingham, Ala., Panel 1, Tr. at 14.

372 Chief Judge Raner Collins, D. Ariz., Public Hearing—Santa Fe, NM, Panel 1, Tr. at pg. 18.

373 David Markus, CJA Panel Atty., S.D. Fla., Public Hearing—Miami, Fla., Panel 5, Tr. at 29-30.

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CJA representations. The attorney must also consider the client's interest: The judge will make numerous discretionary calls over the course of the litigation that could either help or harm her client.

The problem becomes acute when panel attorneys must challenge a judge's ruling.[374] One panel attorney described his dilemma when confronting a judge who, having denied his motion to suppress evidence, then wanted to cut his fees: "[A]t the same time that he's refusing to pay my bill and he's literally saying that I spent too much time on suppression issues. I am looking at his ruling and memorandum thinking that he's made errors and I need to challenge this."[375]

A defender recounted a case where a panel lawyer moved to recuse a judge because of a conflict of interest in a case. After a denial of that motion and the completion of the case, the same judge then reviewed the panel lawyer's voucher:

> This lawyer was also an experienced CJA lawyer and had previously been in the defender's office. He raised a conflict of interest between the judge overseeing the case . . . where the guards were charged with violating civil rights of some prisoners at a prison. The judge, right off the bat at the very beginning, said, "Well I have represented this prison on many occasions." We kind of saw that as a conflict of interest quite frankly. So that issue was raised. [The judge] was very perturbed that it would be, that he would be called unethical by any standard, and he cut that whole portion of the voucher . . .[376]

A judge's decisions to deny payment in one case can reverberate and affect advocacy in other cases. A panel attorney described one case initially designated "extended or complex" by the district court and in which all of the attorneys representing the defendants who pleaded guilty were compensated well above the case maximum. One defendant went to trial. After conclusion of the trial, the presiding judge decided the case was not "extended or complex" and authorized only the case maximum—which was, at that time, $10,000. This ruling required the attorney who had received interim payments to pay back $50,000 to the court. Defense attorneys observed that this "claw back" has had a "tremendous chilling effect across the panel."[377] The message perceived by members of the panel was that the court thought this case should not have been tried.

Moreover, when attorneys seek approval to hire experts, justifying the request often requires disclosing confidential information to the judge in writing or defending the request in person. As one judge recognized, this can function as "a

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374 E. Gerry Morris, President NACDL, Public Hearing—Santa Fe, NM, Panel 4, Tr. at 9.

375 Mark Shea, CJA Panel Atty., D. Mass. Public Hearing—Philadelphia, Pa., Panel 4, Tr. at 20.

376 Tina Hunt, Exec. Dir., CDO, M.D. Ga., Public Hearing—Santa Fe, NM, Panel 3, Tr. at 35.

377 Mark Windsor, CJA Panel Atty, C.D. Cal., Public Hearing—San Francisco, Cal., Panel 3, Tr. at 14 (for another example of a similar claw back, see Windsor Tr. at 5-8).

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deterrent."[378] "They have to come in and see me face to face…and explain to me why [they] need this particular expert in this particular case."[379] One panel attorney explained he was reluctant to ask judges for expert services because "I don't want them to know that I think that this might be an issue in this case. Because what if the expert, I asked for it and then I don't use the expert, what does the judge think the expert found and is that going to affect the judge?"[380] Similarly, another panel attorney testified: "I feel uncomfortable explaining that process to the same judge that is going to be deciding my client's fate. I do a lot of work in child pornography cases. I do a lot of submissions for experts for forensics reviews. I do a lot of requests for psychologists. Often times I don't use those individuals, and yes I'm concerned [about that]."[381] A panel attorney district representative explained that it can compromise an effective defense to disclose "defense strategies that haven't been fully worked out," and disclose confidential information about your client "that you otherwise would never tell a judge."[382] A federal defender told the Committee, "My attorneys share really intimate and important details of a client's mental health and other parts of their [life] in order for us to decide together whether this is money well spent.…I cannot imagine having to go say those things to any judge."[383]

An attorney reluctant to disclose to the presiding judge confidential information necessary to justify hiring an expert—or an attorney facing a judge who has denied similar services in the past—may simply abandon that line of defense or mitigation.

That judicial review of fees can discourage appropriate advocacy is particularly problematic. As the Supreme Court has made clear, "Attorneys work…under canons of professional responsibility that require the exercise of independent judgment on behalf of the client: 'A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.'"[384] Independence of defense counsel is a bedrock principle of our adversarial criminal justice system. The structure of the CJA which requires the presiding judge to fix compensation of appointed attorneys and approve expert services requests appears to directly violate this principle. If the system is to "advance the public interest in truth and fairness," a defense lawyer must serve "the undivided interests of his client."[385] The Court also stated that, "equally important, it is the constitutional obligation of the State to respect the professional

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378 Mag. Judge Michael Putnam, N.D. Ala. Public Hearing—Birmingham, Ala., Panel 1, Tr. at 22.

379 *Id.*

380 Daniel Albregts, CJA Panel Atty., D. Nev., Public Hearing—San Francisco, Cal., Panel 4, Tr. at 43.

381 Gilbert Schaffnit, CJA Panel Atty. Dist. Rep., N.D. Fla., Public Hearing—Miami, Fla., Panel 6, Tr. at 28.

382 Peter Schweda, CJA Panel Atty. Dist. Rep., E.D. Wash., Public Hearing—Portland, Or., Panel 5, Tr. at 6.

383 Laine Carderella, FPD, W.D. Mo., Public Hearing—Birmingham, Ala., Panel 2, Tr. at 4.

384 *Polk County v. Dodson*, 454 U.S. 312, 321–22, (1981)(quoting DR 5-107(B), ABA Code of Professional Responsibility (1976)).

385 *Polk County* at 318–19 (1981) (quoting *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979)).

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independence of the public defenders whom it engages."[386] Judicial determinations of the defense lawyer's fees and the lawyer's reaction to those determinations may compromise the independent professional judgment the law requires.

These complaints all point to a concern that the CJA distorts the adversarial process by requiring judges to decide what work panel attorneys can do and what experts they can hire. This problem is structural. In every case in which a panel lawyer is appointed, the judge will need to step out of his or her role as judge and become the defense's paymaster. In requiring this, the CJA risks diminishing or distorting the defense attorney's single-minded focus on the client's interests.

It is as if at some point in every baseball game, the umpires would take leave from their primary roles and assume for only one team the manager's duties of determining strategy, selecting players, providing equipment, and then return to umpiring the game. In every game, the players, i.e., the lawyers, know that this will happen in the next case and the next case and the next. And if they want to stay on the team—if they want to play, and be paid to play, and get the proper equipment to play—they know they better not challenge the umpire's calls.

5.2.2 Judges Are Not Well Situated to Decide the Reasonableness of Fees

It would be hard to accept this distortion of the adversarial process even if judges were well-equipped to review defense attorneys' bills—but they are not. In modern federal practice, the work that is visible to the judge is the proverbial tip of the iceberg. Our adversarial system expects that advocates will winnow the mounds of information available and bring to court only that small amount critical to decision-making. As Arizona's chief judge observed, "The judge only sees what happens in the courtroom . . . most of the case happens outside of the court room, away from the judge's eyes."[387] One judge who had been both an Assistant United States Attorney and a federal defender described her own realization that much of the case would never be known to her:

> It was interesting, the very first trial I had I was looking around in my office. I wanted to know where the 302s were and where the statement was and then I realized, "No, no, no, you don't get that. You are an impartial arbiter. You just decide on matters as they're presented to you in trial."[388]

Knowing so little about how the case looked to the attorney who shaped it for presentation in court, this judge found it difficult to decide what services were or weren't reasonable. Another district judge who had been a federal defender—for

386 *Polk County* at 321–22 (1981)(internal citations omitted).

387 Chief Judge Raner Collins, D. Ariz., Public Hearing—Santa Fe, NM, Panel 1, Tr. at 18.

388 Judge Kathleen Williams, S.D. Fla., Public Hearing—Miami, Fla., Panel 3, Tr. at 28.

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more than a decade—described a similar realization: "judges are actually not in a good position to evaluate anything effectively with respect to defense strategy, and I know that now sitting on the bench.... [T]here are things that I don't see, that I can't see in the context of defense of a case and that I'm not likely ever to be able to see."[389] He elaborated:

> First, one of the things as a judge that you never see...is client management issues as it relates to investigation. There's no way to capture that. You won't see why, for example, is someone having to, in a document case that's 200 documents, spending 30 hours to go to the client review there. The client may have mental challenge issues. You may not want the judge to know that. The client may have education issues. You may not want the judge to know that.[390]

The problem this judge faces in reviewing a voucher is not just that he lacks direct knowledge of what goes on outside of his courtroom but also that, in our adversarial system, he shouldn't have access to this information. There are things that a defense attorney should not communicate to the judge who will later decide her client's fate and is duty-bound to act as a neutral arbiter.

One judge explained that, because he simply cannot know the work an attorney puts in outside the courtroom, he evaluates vouchers not using a reasonableness standard but based on his personal familiarity with the panel attorney:

> [T]here is no way that I can know whether a claim for a time item by a lawyer is real or reasonable, or anything of that sort, other than looking at the reputation of the lawyer that I know. If it's a lawyer that I have known for years, and I know is trustworthy, I have no reason to assume that there's going to be a padded or fraudulent voucher submitted to me.[391]

The number of federal judges with significant criminal defense experience is limited. As one judge said: "Personally, I'm not sure we're very competent to do it. Most of us have been out of the practice of law for a long time and...the farther we get removed from the practice of law, I think the more inexpert we become at judging what is a reasonable cost."[392] Another judge stated:

> [W]hen the judge hasn't been trained to be a defense lawyer, never tried a defense case in their life, now is put in a position trying to determine how much money someone should get paid, that's not fair to the judge, it's not fair to the litigant either.[393]

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389 Judge Richard Boulware, D.Nev., Public Hearing—San Francisco, Cal., Panel 5, Tr. at 8-9.

390 *Id* at 25.

391 Mag. Judge Michael Putnam, N.D. Ala., Public Hearing—Birmingham, Ala., Panel 1, Tr. at 18.

392 Judge Rosanna Peterson, E.D. Wash. Public Hearing—Portland, Or., Panel 3, Tr. at 3.

393 Chief Judge Raner Collins, D. Ariz., Public Hearing—Santa Fe, NM, Panel 1, Tr. at 18.

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Targeted training for judges might lessen this problem, but the judges who testified before this Committee reported that their judicial training did not include even an introduction to the basics of criminal defense or any discussion of how to evaluate vouchers. One circuit judge stated that he went through "baby judge school" as a magistrate judge, as a district judge, and as a circuit judge, and despite all the training for each, "there was no discussion of the CJA."[394] Without such training, most judges had no experience or practical knowledge to help them determine what constituted "reasonable" defense work. There was broad agreement that this lack of training does a disservice to all involved.

Some training that was previously provided has been discontinued. A defender who had been faculty for judicial training on the CJA explained: "They stopped doing that and I asked them why and the answer was that they shortened the [training] because of budget issues." [395] Other useful training has also been cut. "[There was a] series of criminal justice management seminars . . . giving [judges] the viewpoint from the CJA and why an expert would be needed. Those seminars went by the wayside about eight or ten years ago when the budget cuts were made."[396] In the absence of training, the only regular communication judges receive on CJA matters is through emails from the Administrative Office. Judges admitted that emails were not enough, as most judges, given the number they receive each day, simply "don't read the emails"[397] or see "a memo from the AO [and] hit delete."[398] Emails are not an adequate substitute for substantive CJA training.

In the absence of formal training, there are some ad hoc efforts to fill gaps in knowledge. Panel attorneys described efforts to educate judges about what defense attorneys do: "I've had meetings with judges about vouchers. . . . [T]here was a learning curve for one of our new judges and he appreciated the fact that I came in and sat down and explained some things and he was just trying to get a feel for what's reasonable."[399]

Sometimes federal defenders fill this role. One judge told the Committee, "One quasi-solution that many of us have come up with is to ask the federal defender's office to take a look at the billing, to see if anything jumps out at them. They do it for us, I think on an ad hoc basis, because we try and work collaboratively."[400] A federal defender confirmed: "I've been contacted on a number of occasions by judges who have received a voucher and want my take on the voucher, and then sometimes my

394 Judge Luis Felipe Restrepo, 3rd Cir., Public Hearing—Philadelphia, Pa., Panel 2a, Tr. at 2.
395 A.J. Kramer, FPD, D.D.C., Public Hearing—Philadelphia, Pa., Panel 6, Tr. at 33.
396 *Id.*
397 Judge John Gleeson (ret.), E.D.N.Y., Public Hearing—Miami, Fla., Panel 3, Tr. at 20.
398 Judge Kathleen Williams, S.D. Fla., Public Hearing—Miami, Fla., Panel 3, Tr. at 21.
399 Cori Harbour-Valdez, CJA Panel Atty., W.D. Tex. & D.N.M., Public Hearing — Santa Fe, NM, Panel 5, Tr. at 25.
400 Mag. Judge Carolyn Delaney, E.D. Cal., Public Hearing—San Francisco, Cal., Panel 7, Tr. at 12.

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assistance with interfacing with the CJA lawyer regarding the voucher."[401] Another defender told the Committee she had "to spend a substantial amount of time educating the bench about what is required [of the defense] in a federal criminal case."[402]

In some cases, Circuit Case Budgeting Attorneys provide needed guidance and advice. One judge told the Committee that when there's a concern about a voucher, she and others in her district request the assistance of the case budgeting attorney, and "the consensus is that this has worked quite well."[403] Although these informal efforts to educate and assist judges are laudable, they do not solve the problem of judges being poorly situated and ill-equipped to review panel attorney vouchers.

5.2.3 Judicial Voucher Review Produces Wildly Inconsistent Outcomes

A system of voucher review involving more than 1,000 independent decision-makers who receive no formal training yet are tasked with deciding whether services rendered are "reasonable"[404] will necessarily produce wildly varying results. Testimony confirmed this. There is no uniformity in how "reasonableness" determinations are made. And given that judges are not held to or constrained by any administrative direction, it is unlikely that uniformity could be imposed. Outcomes vary widely between circuits, between districts, and even between judges in the same district.

A former member of the Defender Service Committee agreed the current review process is extremely inconsistent between judges. He stated, "There are over 600 district court judges that review vouchers…not counting magistrate judges… and they had to do it with their own different way. There's no one way that everybody does it. Those types of things could be more streamlined and more uniform."[405] A panel attorney testified that even where judges are supportive and panel attorneys feel respected, voucher review is still not uniform:"[T]he judges came to the bench from very different paths. They don't all share the same background and they don't all share the same judicial philosophy and they certainly don't all share the same attitude about funding the CJA panel."[406]

Another source of inconsistency is the varying degree of pressure judges feel to contain costs. What is considered "reasonable" can change depending on the general fiscal climate or specific pressures to conserve funds. Although Judicial Conference policy discourages consideration of funding levels or appropriations shortfalls in voucher review,[407] judges candidly admit they are affected by these concerns. As

401 Michael Caruso, FPD, S.D. Fla., Public Hearing—Miami, Fla., Panel 1, Tr. at 30.

402 Lisa Freeland, FPD, W.D. Pa., Public Hearing—Santa Fe, NM, Panel 3, Tr. at 26.

403 Mag. Judge Cheryl Pollak, E.D.N.Y., Public Hearing—Philadelphia, Pa., Panel 2b, Tr. at 2.

404 *See* 18 USCA § 3006A (d)(1).

405 Chief Judge Raner Collins, D. Ariz., Public Hearing—Santa Fe, NM, Panel 1, Tr. at 5.

406 Debra Di Iorio, CJA Panel Atty., C.D. Cal. Public Hearing—San Francisco, Cal., Panel 3, Tr. at 2.

407 *See Guide to Judiciary Policy*, Vol. 7A, Ch. 2, § 230.33.

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one judge confided, "I'm very much concerned with cost containment, and I'm very much concerned that whatever decision I make is also going to affect cost."[408]

One way that districts have tried to promote greater consistency and reduce unwarranted voucher cutting is by adoption of a "presumptively reasonable" standard. One panel attorney told the Committee:

> I do think there also as I said needs to be a degree of deference.... If an attorney that we have entrusted with panel membership says that this was a necessary thing to do, there needs to be a really good reason for you to say that it's not necessary. If somebody is abusing this, they shouldn't be on the panel.... I've seen abuses, they shouldn't be countenanced. [But] we shouldn't be presumed to be abusing. We should be presumed to be reasonable. We should be presumed to be rational, and we should be presumed to be professional. [409]

As one federal defender explained, that is the standard that attorneys at FPDOs and CDOs are held to by their supervisors: "I don't look at the request from my attorneys in my office and say, 'Is it absolutely necessary? Is there anything you could do?' In a normal case.... If they've written an explanation of why they need it and it's the first request, I'm going to approve that presuming it's reasonable."[410] Another federal defender testified that deferring to panel attorney requests as reasonable sends an important message to the entire panel about the value of a zealous defense for every client. He told the Committee that panel attorneys should be concerned about the client and building an effective defense, not about whether a judge will challenge the cost of that defense and potentially withhold payment.[411] That presumption is already used by the CJA supervising attorney in one district, where "part of her job is to go through vouchers line by line reviewing what the attorney had indicated on there. She may ask for clarification or have an attorney maybe explain a little more in detail so the judge understands. But it's presumptively reasonable."[412]

5.2.4 Arbitrary Voucher Cutting

The problems described above, lack of knowledge, experience, training, and inconsistency affect efforts to apply the vague "reasonableness" standard to a particular

408 Judge David Carter, C.D. Cal., Public Hearing—San Francisco, Cal., Panel 5, Tr. at 6.

409 Rachel Brill, CJA Panel Atty., D.P.R., Public Hearing—Miami, Fla., Panel 6, Tr. at 30-31. The Committee heard testimony that some judges required attorneys to submit vouchers accompanied by research trails printed from Lexis or Westlaw in order to justify time researching an issue for their clients and be compensated for it. *See* David Eisenberg, CJA Panel Atty. Dist. Rep., D. Ariz., Public Hearing—Santa Fe, NM, Panel 6, Tr. at 28.

410 Lisa Hay, FPD, D. Or., Public Hearing—Portland, Or., Panel 6, Tr. at 24 (also stating she takes into account whether the expert rate looks reasonable based on the going rates in her district, which she is familiar with in her position as lead defender).

411 Rene Valladares, FPD, D.Nev., Public Hearing—Birmingham, Ala., Panel 3, Tr. at 11.

412 Jessica Salvini, CJA Panel Atty., D.S.C., Public Hearing—Miami, Fla., Panel 4, Tr. at 29.

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bill submitted by a particular attorney in a particular case. These may result in inappropriate cuts to vouchers. However, panel attorneys also find that a presiding judge may decline to approve payment for their services not because that judge has determined that hours were not worked, or were excessive for the tasks accomplished, or that services provided were not reasonable. Instead, panel attorneys regularly see their compensation reduced for reasons unrelated to any evaluation of the work they have done on a particular case. The reasons for these cuts vary, but none are consistent with the requirements of the CJA.

"Pro Bono" Voucher Cuts

A number of circuits and districts regularly cut vouchers with the explanation that CJA representation is part of an attorney's pro bono obligation and therefore counsel should not expect to receive full payment for hours expended.

One federal defender who manages his panel testified that during a set period of time he reviewed 131 excess compensation vouchers from his district and determined that 30 percent of those vouchers had been reduced by the circuit court. In each case, the district court had already reviewed the vouchers, determined that they were reasonable, and authorized full payment. The reason given by the circuit for reduction, in almost every case, was that CJA representation is a form of pro bono work, and as such, attorneys are not entitled to and should not expect full compensation.[413] One attorney described this type of reduction as "systematically reducing the 'real' hourly rate" of CJA work. He noted that while hourly rates had slowly increased over the years, voucher cuts which resulted in less than full payment for the services provided essentially negated those rate increases. For panel attorneys, these voucher cuts convey the message: "…we want you to zealously represent your client but we are not going to pay you for it."[414]

When Congress passed the CJA, it considered attorneys' professional obligation to provide pro bono services and accounted for it with an hourly rate below market levels.[415] Both the plain language of the Criminal Justice Act and the legisla-

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413 David Stickman, FPD, D. Neb., Public Hearing—Minneapolis, Minn., Panel 2, Tr. at p.25. See Appendix F: Chart of 8th Circuit Voucher Cuts.

414 Robert Richman, Board Member, Minn. Assoc. of Criminal Defense Attorneys, Public Hearing—Minneapolis, Minn., Panel 4, Tr. at 3.

415 The Defender Services Committee adopted the following resolution in June 1990:

> The Sixth Amendment to the Constitution places upon the government the obligation to provide, at its expense, effective assistance of counsel to persons financially unable to secure their own legal representation. Pro bono legal services have been an outstanding contribution of the legal profession to our society and have greatly assisted the government in providing these constitutionally mandated services. The complexities of modern criminal litigation and the economics of practice, however, make it fundamentally unfair to expect lawyers to perform increasingly burdensome work for which they are inadequately compensated. It is the sense of the Committee that equal access to justice is impaired when, for those with limited financial resources, that access depends upon mandatory pro bono legal services. Reported to the JCUS in September 1990 at CR-DEFSVS-SEP 90, pg. 20.

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tive history establish that attorneys who provide services under the Act are entitled to receive payment for all time expended that is reasonable and necessary for the representation. The practice of cutting vouchers as a means of imposing an additional pro bono obligation upon panel attorneys is not consistent with the language or the spirit of the Act.

Refusal to Pay for Certain Types of Work

In certain districts and/or circuits, classes of otherwise compensable work are excluded from payment, resulting in substantial cuts to payments. These disfavored expenses include client meetings, travel time, and discovery review.

Client "Hand-Holding"

Time spent meeting with clients has been the subject of particular scrutiny. Multiple meetings with clients are sometimes derisively labeled as "hand-holding," for which judges refuse to approve payment. But building a trusting relationship with clients is one of the most important tasks of a defense attorney. As one panel attorney said:

> I have had success in settling those cases which should be settled precisely because I spend the time to get to know my clients, to listen to what they have to say and to discuss the evidence with them. At that point, when they believe that I've listened to them, it's much easier for them to accept my statement, "Dude, don't go to trial; you're going to get killed!" But you have to put in the time. I don't think it's hand-holding, I think it's an essential part of providing adequate defense to my clients, and I think, ultimately, it saves a bundle of money.[416]

Another panel attorney practicing in a circuit where the former chief judge had announced that multiple client visits were unnecessary came to the same conclusion: In the federal system where "most cases result in a plea, the only way that's going to happen is if your client trusts you as a lawyer, and that requires face time, not only to be an effective advocate for your client, to know who that person is, but for your client to trust you."[417]

Even when judges approve payment for client visits, they often decline to pay for time spent meeting with a client's family. In some districts, communications that do not directly advance the client's case (as for example by arranging bond or obtaining sentencing letters) are considered non-compensable.[418] This is so even though an attorney who does not establish a cooperative relationship with a client's family will have a difficult—and more time-consuming—job arranging for bond or

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416 Debra Di Iorio, CJA Panel Atty., C.D. Cal. Public Hearing—San Francisco, Cal., Panel 3, Tr. at 13.

417 Robert Richman, Board Member, Minn. Assoc. of Criminal Defense Attorneys, Public Hearing — Minneapolis, Minn., Panel 4, Tr. at 19.

418 *Id.*

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obtaining those same sentencing letters.[419] In other districts, even communications on those topics may be considered non-compensable.[420]

Panel attorneys explained that judges sometimes miss the importance of gathering relevant and important information about the client from family and others who know the client best and the value of establishing a relationship with people whom the client knows and trusts. Just how much time is reasonable to spend with a client and his family is not subject to a bright line rule. Where such meetings assist the attorney in building a working relationship with the client, they are reasonable. And failure to establish a trusting relationship with a client can have financial as well as human costs. Most notably, a rupture in the attorney/client relationship requiring appointment of new counsel will always increase CJA costs.

Travel Time

Judges were often reluctant to pay for time attorneys spent traveling to meet in person with clients and witnesses. When clients are housed remotely or witnesses are in far-flung locations, travel by the attorney is essential to proper representation. Judiciary policy provides that, "[C]ompensation must be approved for time spent in necessary and reasonable travel."[421] However, some districts have adopted policies to discourage even necessary and reasonable travel.

A panel attorney district representative in a large western district testified, "A few years ago, the court determined that it would not allow us to travel, that vouchers would be cut for travel cost. Attorneys were placed in the position of wondering whether they would get paid for making the trip, sometimes a very long trip, to meet with their clients."[422] And a federal defender from a rural district emphasized to the Committee, "It is difficult to appropriately represent someone who is detained two-and-a-half hours from your office if one of the things that goes through your mind is a practice that exists to say that two client visits is enough and that amounts after that [are] getting cut."[423]

There is also tremendous inconsistency, even within a single district, as to when payment for travel will be approved. One panel attorney's experiences exemplify what the Committee had heard about these inconsistencies:

I've had the opportunity to have several judges be very understanding

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419 Anthony Solis, CJA Panel Atty. Dist. Rep., C.D. Cal., Public Hearing—San Francisco, Cal., Panel 6, Tr. at 23.

420 See e.g., *U.S. v. Aadal*, 280 F. Supp 866 (S.D.N.Y. 1967) (holding efforts to secure bond not compensable); *U.S. v. Brock*, 2010 WL 4320445 (S.D. Fla.)(holding "handholding" is not compensable); *U.S. v. Cobas* 2010 WL 4814679 (S.D. Fla.)(holding time spent assisting family with bond paper work and explaining sentencing not compensable).

421 *Guide to Judiciary Policy*, Vol. 7A, Ch. 2, § 230.60(a).

422 Wendy Curtis Palen, CJA Panel Atty. Dist. Rep., D. Wyo., Public Hearing—San Francisco, Cal., Panel 6, Tr. at 6.

423 Neil Fulton, FPD, D.N.D. & D.S.D., Public Hearing—Minneapolis, Minn., Panel 2, Tr. at 3.

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> of the role that I play. They've authorized trips to Kabul, Afghanistan to represent Blackwater guards charged with killing Afghan civilians. They've authorized trips to Djibouti to represent Somali pirates. They've authorized trips to Guantanamo Bay. And I've had other judges that have not authorized travel trips thirty minutes to the local jail to meet with the client. I guess the point that I'd like to make and will probably emphasize throughout the entire process is just the disparity and the differences and the randomness by which judges approve and don't approve things.[424]

The Committee recognizes that travel time can require significant resources, especially in large districts. But in the era of remote detention, voluminous discovery, and mandatory minimum sentences, viewing crime scenes and evidence, interviewing witnesses, and meeting with clients to prepare their defense or review their discovery are both reasonable and necessary in every representation. All of these necessary activities will require time spent traveling.

Discovery[425]

The use of technology has greatly increased the volume of discovery in criminal cases. Discovery in a typical multi-defendant drug case, which once consisted of a couple hundred pages of reports, now may consist of those same reports, cell tower data, GPS information, scores of hours of videos from pole cameras, hundreds of hours of audio tapes, texts, emails, social media posts, etc.

Panel attorneys often find judges unwilling to compensate them for the time spent reviewing all of this information. One panel attorney testified, "I have one judge who will tell me point blank if you spend more than two hours in any given day reviewing discovery, it's excessive."[426] Another panel attorney had a similar experience: "I've been told that, 'You're not going to get the kind of money you want because it's just too much money for discovery, ask your client what he did then you'll find out where to look. Go to the U.S. Attorney's office and ask them.'"[427]

The following specific example is telling. In a case involving 41 defendants, in which the attorney's client potentially faced the death penalty, almost 50,000 pages of discovery, 400 hours of audio and video recordings and hundreds of hours of media files were disclosed to the defense.[428] The court found the number of hours spent reviewing documents "unreasonable" because the government had provided 28 pages of "targeted discovery."[429] The court believed that by using this "targeted

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424 James Broccoletti, CJA Panel Atty. Dist. Rep., E.D. Va., Public Hearing—Philadelphia, Pa., Panel 4, Tr. at 1.

425 Discovery, and specifically e-discovery, will be discussed later in the report (see Section 11).

426 Juan Milanes, CJA Panel Atty., E.D. Va. and D.P.R., Public Hearing—Miami, Fla., Panel 4, Tr. at 28.

427 David Eisenberg, CJA Pa nel Atty. Dist. Rep., D. Ariz., Public Hearing—Santa Fe, NM, Panel 6, Tr. at 28.

428 Mark Windsor, CJA Panel Atty., C.D. Cal., Public Hearing—San Francisco, Cal., Panel 3, Writ. Test., at 6.

429 *Id.*

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discovery," the attorney could have significantly reduced the time spent on discovery review.[430] But asking the government what the defendant did or reviewing "targeted discovery" is only a starting point to a full understanding of the defects in the government's case and any possible defenses.

A federal defender explained that judges are often unaware of the amount of discovery work involved.

> I think in the past judges could be fairly confident by looking at the docket sheet or recalling what happened in court to get a general sense of how complex the case was and what type of work went into the defense of the case. Because of the change in our practice, I don't think that's any longer the case.... [There is] a great amount of discovery that has to be reviewed even if there is not a trial.... You need to do a substantial amount of work that's unknown to the district court judge.[431]

A district judge told the Committee that in her experience some judges cut vouchers based on "sticker-shock." "They just believe that the cost for the defense in the case... is just too big."[432] This problem occurs most in cases resolved by plea. One attorney indicated that the judges in his district reflexively cut vouchers to the case maximum when the case was resolved through a plea as opposed to a trial.[433] Of course, it is often only after a thorough review of discovery that a decision can be made, by both client and attorney, that resolving the case through a plea is the best course.

5.2.5 Voucher Cuts Based on Generalizing or Averaging Case Costs

Faced with voucher reviews, a task for which they have inadequate time and training, some judges use shortcuts such as benchmarks or averaging. Some set compensation amounts for different types of cases. For example, a case that involves a felon in possession of a firearm should cost "X." Such benchmarks are often informal; a judge's belief about what that type of case "should" cost. As one federal defender explained:

> I saw a case recently where the case had a lengthy suppression hearing. The government insisted they would not give a plea agreement that preserved the issue. They went almost to trial. Finally the government backed down... It was around a $20,000 voucher. The judge just looked at it with no explanation, said, "This is a run-of-the-mill case. I'm only giving $7,000."[434]

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430 *Id.*

431 Michael Caruso, FPD, S.D. Fla., Public Hearing—Miami, Fla., Panel 1, Tr. at 31.

432 Judge Cathy Bissoon, W.D. Pa., Public Hearing—Philadelphia, Pa., Panel 2a, Tr. at 13.

433 Mark Foster, CJA Panel Atty. Dist. Rep., W.D.N.C., Public Hearing—Miami, Fla., Panel 6, Writ. Test. at 2.

434 Eric Vos, FPD, D.P.R., Public Hearing—Miami, Fla., Panel 1, Tr. at 29.

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Other judges have predetermined what "reasonable" means, regardless of the case or circumstances. A federal defender testified: "A prevailing view by one judge is that a guilty plea is only worth $2,500, regardless of the case facts." [435] Many judges believe they have general ideas of what classes of cases should cost and use these in reviewing vouchers: "Having reviewed that many [vouchers], do I have a gut visceral on what an average § 922 defendant should be or probation revocation should be as far as cost goes? Absolutely. Do I look at everyone independently? Yes."[436]

Voucher averaging also seems to be common. Witnesses described voucher averaging in districts as geographically diverse as Puerto Rico,[437] Montana,[438] the Western District of Pennsylvania,[439] and Texas.[440] The presiding judge will compare the fees of lawyers representing co-defendants and award all fees close to the average. In one case, a judge reduced a panel attorney's voucher after comparing it to the amount a co-defendant had paid retained counsel. The CJA counsel's voucher, although under the case maximum, was more than what the private lawyer had charged to represent the co-defendant.[441] The reviewing judge thought that fact alone merited a reduction in the panel attorney's voucher.[442]

These practices may seem like logical ways to save time or control costs. But by their nature, they are contrary to the letter and spirit of the CJA, which requires judges to review each voucher independently, within the context of the client, the case, and the services provided. The process recognizes that the demands of a case vary not only by the charge but also by the amount of evidence amassed, the potential lines of defense, and the peculiarities of the individual client. Relying on averages and benchmarks ignores these realities. They are inconsistent with the aim of the CJA to procure high-quality representation fitted to the needs of the case and client.

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435 Parks Nolan Small, FPD, D.S.C., Public Hearing — Miami, Fla., Panel 1, Writ. Test. at 4.

436 Chief Mag. Judge John Ott, N.D. Ala., Public Hearing — Birmingham, Ala., Panel 5, Tr. at 18.

437 Judge Aida Delgado-Colon, D.P.R., Public Hearing — Miami, Fla., Panel 3, Tr. at 37: "First of all the averaging not necessarily has the purpose of taking the voucher to an amount below the maximum cap. Sometimes you use it as the model"

438 Tony Gallagher, Exec. Dir., CDO, D. Mont., Public Hearing — Portland, Or., Panel 6, Writ. Test. at 5: "Sometimes panel attorneys perceived that the decision whether to pay a voucher in full was not based on an assessment that the hours worked were reasonable and necessary to provide a defense, but were strictly tied to comparison with others in the case ('your voucher was much higher than the co-defendant's lawyer')."

439 Patrick Livingston, CJA Panel Atty. Dist. Rep., Public Hearing — Philadelphia, Pa., Panel 9, Tr. at 18: "One of the cases that I became aware of in my district involved a lawyer who had done something minimally was discharged in favor of another lawyer, and I don't know the full details of it. The other lawyer came in late in the case, and worked the file, his wiretaps, and he studied and he studied and he studied. Then in two months' time, he got all the wiretaps reviewed and analyzed, and then he put in an interim payment, and that was one of the cases in which the judge compared what he did to what the terminated lawyer did. When I heard about it, I just scratched my head. I couldn't understand it."

440 Richard Esper, CJA Panel Atty., W.D. Tex., Public Hearing — Santa Fe, NM, Panel 5, Tr. at 36: Despite the fact that his case had considerably different charges and circumstances, "the judge, as a justification for cutting my voucher, said it wasn't consistent with the vouchers of the other four lawyers who represented the other four" co-defendants.

441 Cori Harbour-Valdez, CJA Panel Atty., W.D. Tex. & D.N.M., Public Hearing — Santa Fe, NM, Panel 5, Tr. at 33-34.

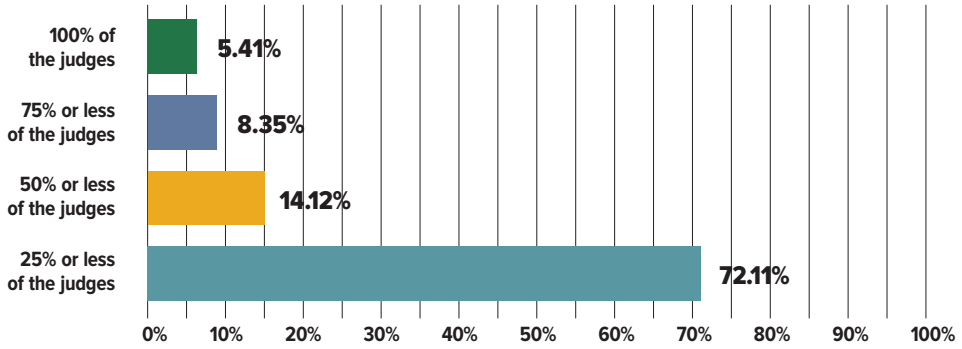
442 *Id.*

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5.3 The Scope and Gravity of Inappropriate Voucher Cutting

A great deal of the written and oral testimony this Committee received concerns judges cutting panel attorney fees. More dissatisfaction was expressed in this area than in any other into which the Committee inquired. In some sense, it is curious that the process of reviewing and paying the bills of attorneys selected by judges to represent the indigent accused should produce so many problems. The standard for payment is simple. Attorneys are to be compensated for time spent in court and time "reasonably expended out of court." The time spent in court is known and is to be compensated whether reasonable or not. In deciding whether time spent out of court should be compensated, a reviewer should need to ask only three questions: Was the work actually undertaken; was the work undertaken a reasonable means of achieving the client's aims in the litigation; and was the time spent to accomplish that work reasonable? These are the questions that the language of the statute implies. In the abstract, answering these questions should not be difficult, particularly when attorneys are selected by judges for their professional competence, and presumably their integrity, as well. Therefore voucher cutting—the failure to pay attorney bills in full—should not be a major concern. Yet it is.

In your experience, how widespread is the cutting or denial of vouchers in your district?



Source: CJA Review Committee Survey on Vouchers (June 2016), available at https://cjastudy.fd.org.

The evidence that inappropriate voucher cutting regularly occurs and is widespread—if not pervasive—was overwhelming. Witnesses, both judges and attorneys alike, described it. No one disputed that it occurs. In addition to this testimony, the Committee conducted a nationwide survey of panel attorneys and consulted independent reports to inform its review. Although the majority of panel attorneys surveyed (72%) believe that voucher cutting happens in just one out of four cases or less, given the volume of cases handled by panel attorneys nationwide that's still an extraordinary number of vouchers being cut.

Two aspects of the Committee's efforts to obtain information on the scope

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and frequency of voucher cutting bear mention. First, although the Prado Report was criticized for the lack of data supporting its recommendation to unburden judges of the responsibility for voucher review, the AO and the judiciary have not, in the intervening 24 years, collected system-wide data on the payment of vouchers. Even today, the newly deployed eVoucher system does not currently have the national reporting capabilities to provide all of the data which the program should have for its management.[443] Second, the Committee was somewhat hampered in collecting information because many panel attorneys feared that criticizing judges could have negative consequences for them and their clients. A federal defender bluntly told the Committee: "Unfortunately, Judge, I suspect you won't hear those testimonials [from panel attorneys]. because if somebody is pulling back on what they need for representation because of the fear of what's happening to people around them or even to themselves in the past they're not going to be very inclined to come forward and make the bold statement that you need to hear."[444] One veteran panel member, who had recently relocated to another area of the country and thus was in a unique position to provide testimony about his previous district, told the Committee: "I'm here today to publicly talk to you about voucher averaging and all of the other problems in that district because I can assure you the vast majority of the members of the panel are not in a position to talk to you. Because they understand. They fear that talking to you publicly may result in them not being on that panel."[445] And the Committee did hear public testimony that panel lawyers who challenged voucher cuts in their districts had suffered negative consequences.[446] Because of these concerns, the Committee held a number of closed-door sessions with witnesses, including panel attorneys. While those individuals are not quoted, their testimony supports what the Committee heard in public hearings and helped inform the Committee's recommendations.

5.3.1 Self-cutting ("Voluntary" Reductions)

One additional factor complicated the Committee's efforts to gather information on the effects of voucher cutting—the practice of "self-cutting," or submitting bills that do not reflect all time reasonably expended on a case. This practice does not include those lawyers, often from large private firms, who choose to consider their CJA work as a contribution to the public good. Rather it concerns the practice of panel attorneys who are unwilling to bill for all time reasonably expended in order to avoid disclosing confidential client information, prevent larger voucher cuts by judges and

443 *See* discussion of e-Voucher in Section 4.4.

444 Deborah Williams, FPD, S.D. Ohio, Public Hearing—Philadelphia, Pa., Panel 10, Tr. at 29.

445 Juan Milanes, CJA Panel Atty., E.D. Va. and D.P.R., Public Hearing—Miami, Fla., Panel 4, Tr. at 9.

446 Cori Harbour-Valdez, CJA Panel Atty., W.D. Tex. & D.N.M., Public Hearing — Santa Fe, NM, Panel 5, Tr. at 2.

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the impression that their billing is "excessive," and/or avoid delays in payment.

Because there is no accurate means to measure these self-cuts, the Committee was left to rely on the surveys discussed above and on testimony about the practice. In the Committee's survey, attorneys were asked to indicate how often they sought full compensation. Of the 2,384 responses, approximately 40 percent of attorneys reported they "rarely" or "never" submitted a bill for all time invested in a case. Just 17 percent reported they "always" bill for all work undertaken.

The practice of self-cutting is encouraged in a number of ways, not all nefarious. For instance, one federal defender whose office reviews vouchers told the Committee that if a voucher is a couple hundred dollars over the case maximum, he will call the attorney to ask if the attorney is willing to take a voluntary cut to bring the voucher below the maximum. As the defender explained to the Committee, "[T]he process of going to the circuit just takes a lot of time. Oftentimes [panel attorneys] would prefer to go ahead and just take the cap rather than wait on the money. It's not used as a threat at all, it's just a courtesy."[447]

Similarly, a judge explained that in his district they did not get many vouchers over the limit, and when they did, his practice was to write the attorney a letter and say, "I'm going to have to send this up for circuit review unless you just want to take the statutory maximum. Most of the time the lawyer will say, 'I'll take the statutory maximum.'"[448] The judge was trying to spare the lawyer the inevitable delay in payment associated with circuit court review but in doing so reinforced the practice of self-cutting.

Circuit court review of vouchers is addressed in more detail below in Section 6, but it is worth noting here that the Committee found that a considerable number of attorneys self-cut their vouchers to remain below the case maximums that would trigger circuit review. Depending on the circuit, this may be done to expedite payment or to prevent the circuit from cutting the voucher.

In one circuit with a known practice of significantly cutting CJA vouchers even when the vouchers have been approved at the district level, district court judges encourage attorneys to cut their vouchers to stay within the case maximum. And judges themselves may "strategically" cut vouchers in an effort to avoid more drastic cuts at the circuit level. Although this is being done to support the lawyers, it has created pressure on them to cut their own vouchers or "accept" cuts that are made for their benefit.[449]

Other times the encouragement of self-cutting is more problematic. Until recently, one district maintained a local policy that no panel attorney, no matter the client or case, could be paid more than $3,500 for any felony case that resulted

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447 Parks Nolan Small, FPD, D.S.C., Public Hearing—Miami, Fla., Panel 1, Tr. at 39.

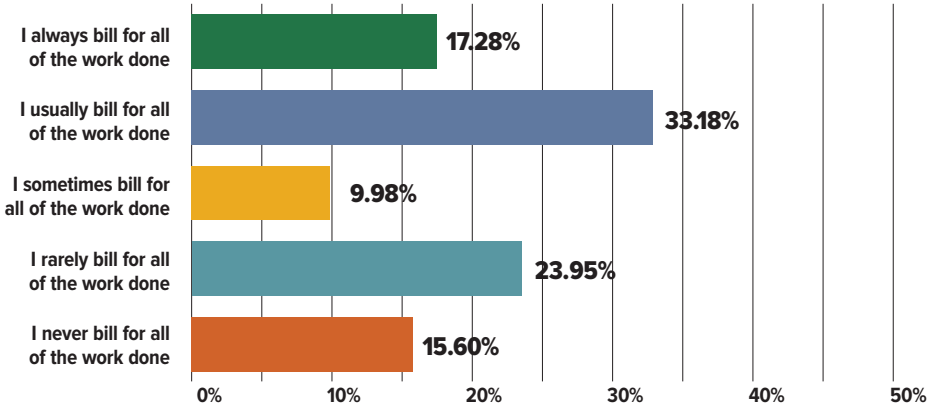
448 Judge Leon Holmes E.D. Ark., Public Hearing—Birmingham, Ala., Panel 1, Tr. at 25.

449 Neil Fulton, FPD, D.N.D. & D.S.D., Public Hearing—Minneapolis, Minn., Panel 2, Tr. at 20; Alexander Reichert, CJA Panel Atty., D.N.D., Public Hearing—Minneapolis, Minn., Panel 5, Tr. at 25-26.

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in a plea in a CJA representation. Panel attorneys received clear feedback from the district court judges that regardless of the reasonableness of their work, they needed to reduce their own vouchers to $3,500 or less. When one panel attorney submitted a voucher for more, he told the Committee, "The judge called me personally . . . and the reason was not that I had billed them too much for the work. . . . It was that the other attorneys on the panel were submitting $3,500 vouchers and it was just not fair for me to submit excess vouchers if they were cutting their vouchers. . . . After that I did cut my vouchers . . ."[450] In another district, "one of the judges had a meeting with the entire CJA panel [and] suggested that the size of CJA attorneys' bills could be a factor that would be considered in deciding whether or not they should be reappointed to the panel."[451] This message was not lost on panel members.[452]

Do you bill for all the time you or other members of your defense team (lawyers, paralegals, investigators, and other experts) spend on a CJA appointment?



Source: CJA Review Committee Survey on Vouchers (June 2016), available at https://cjastudy.fd.org.

Self-cutting exacerbates the problems already discussed. It hides the true cost of the defense from judges and leads them to misunderstand what a zealous defense of an individual requires. This in turn can lead a judge to consider appropriate billing unreasonable. As one lawyer explained, "I worry that judges think that a robbery can always be done underneath the statutory maximum because there are so many people who are just billing under that to avoid making waves." [453]

And self-cutting can discourage advocacy as effectively as judicial cuts. Attorneys who must reduce their own bills will soon learn that it is against their financial interest to be so thorough in their work. One attorney admitted that he found himself second-guessing whether he should prepare a document on behalf of his client because the court might think it was not a reasonable expense. "It

450 LeRoy Percy, CJA Panel Atty., N.D. Miss., Public Hearing—Birmingham, Ala., Panel 7, Tr. at 23.

451 Miriam Conrad, FPD, D. Mass., Public Hearing—Philadelphia, Pa., Panel 3, Tr. at 2.

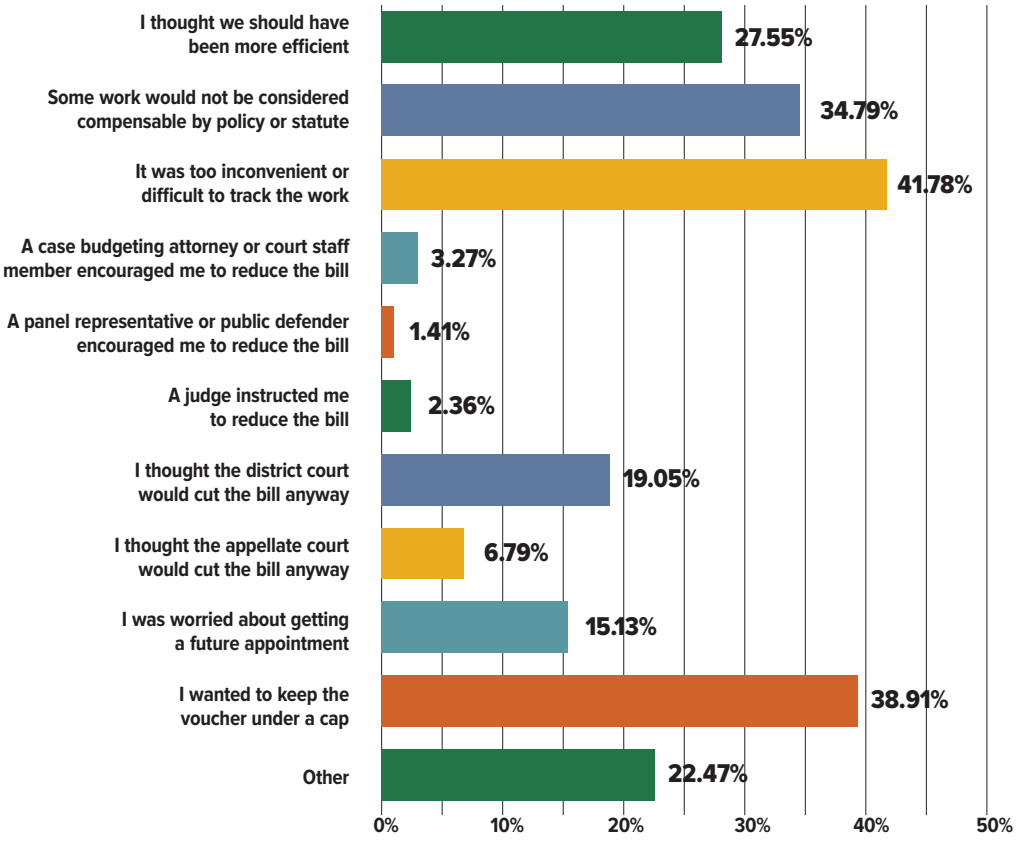
452 *Id.*

453 Teresa Duncan, New Mexico Criminal Defense Lawyers Association, Public Hearing—Santa Fe, NM, Panel 4, Tr. at 25.

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occurred to me, should I be doing a sentencing memo here or are they going to think that I shouldn't have done a sentencing memo here? Just the fact that that even enters my mind now is wrong."[454]

If you have not billed for all the time you or other members of your defense team spent on a panel representation, why was this so?



Source: CJA Review Committee Survey on Vouchers (June 2016), available at https://cjastudy.fd.org.

5.3.2 Voucher Cutting is Increasing

There is also a widespread perception that voucher cutting is becoming more frequent. At every hearing, witnesses testified that voucher cutting has increased markedly over the past few years, particularly since sequestration. The amount of testimony made clear that panel attorneys have become increasingly concerned about judges' decisions to reduce their compensation.

Federal defenders, who are often in the position to see or hear about the voucher cuts, confirmed these trends. One federal defender testified, "I have a lot of lawyers who call me up and say, you know what, I've been on the panel for twenty years and I've never had a voucher cut and all of a sudden I am getting these cuts and…the only explanation is, that is too much money for that kind of case."[455]

454 Mark Shea, CJA Panel Atty., D. Mass., Public Hearing—Philadelphia, Pa., Panel 4, Tr. at 10.

455 Stephen McCue, FPD, D.N.M., Public Hearing—Santa Fe, NM, Panel 2, Tr. at 36.

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Another defender, involved in the voucher review process, told the Committee, "I'm able to see the attorneys whose vouchers are being cut…I do think that it is something that is more frequent now than it was pre-sequestration."[456] And in a written submission, another federal defender informed the Committee that in his District "reductions in compensation have occurred with greater frequency in several high profile, multi-defendant cases in the past twelve months".[457]

Chief Judge Catherine Blake, former chair of the Defender Services Committee, testified that during sequestration voucher cutting was a pervasive problem such that the Defender Services Committee felt the need to address the practice. She testified:

> Essentially we were receiving information from panel attorneys, from some of the advisory groups within the AO that there certainly was at least a perception that vouchers were being cut because of the difficult financial times, that there were judges who genuinely believed that in a difficult financial time cutting everybody a bit was an appropriate way to go to help conserve resources. That of course is contrary to Judicial Conference policy. And also, to the extent that perhaps some judges believed that by cutting voucher they were saving money for their own court, that is of course not correct.[458]

To address this misperception, Chief Judge Blake along with Judge John Bates, then Director of the AO, issued a memorandum to all federal judges dated December 23, 2014, reminding them: "It is the responsibility of judicial officers to carefully review payment vouchers for compliance with the CJA 'reasonableness' requirement. Reducing vouchers simply in the interest of cost-containment, however, or as a result of concerns about the Defender Services budget, is contrary to Judicial Conference policy."[459]

Unfortunately, it appears the practice has not stopped, and "anecdotal information indicates judges are cutting vouchers and denying expert funding requests based on a perception that they need to reduce payments in order to contribute to the overall judiciary cost-containment effort."[460]

5.3.3 Effects of Voucher Cutting

The effects of voucher cutting are very difficult to capture and quantify. It is hard to

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456 Lisa Freeland, FPD, W.D. Pa., Public Hearing—Santa Fe, NM, Panel 3, Tr. at 31.

457 Tony Gallagher, Exec. Dir., CDO, D. Mont., Public Hearing—Portland, Or., Panel 6, Writ. Test. at 5.

458 Chief Judge Catherine Blake, D. Md., Public Hearing—Philadelphia, Pa., Panel 1, Tr. at 26.

459 Judge John Bates and Judge Catherine Blake, Payment of Criminal Justice Act Counsel, December 23, 2014. The memo quoted from the *Guide to Judiciary Policy*, Vol. 7A, Ch. 2, § 230.33 (Impact of an Appropriation Shortfall on Voucher Review) which states clearly that sequestration and budget concerns should not change how vouchers are reviewed.

460 Tony Gallagher, Exec. Dir., CDO, D. Mont., Public Hearing—Portland, Or., Panel 6, Writ. Test. at 6.

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discern what attorneys didn't do because of a concern that they wouldn't be compensated for such work, or what experts weren't retained for the same underlying reason. It is difficult to measure how often concerns about future appointments subtly shift defense strategies to keep vouchers below the case maximum. And the Committee cannot know how many quality attorneys reduced or eliminated their CJA work because of voucher cuts. But what is clear is that as a result of voucher cutting, all of these things are happening to some degree.

The Committee heard testimony from panel attorneys that stories about voucher cuts move quickly through close-knit defense communities in their districts, resulting in a chilling effect among the attorneys. "It's not an across-the-board-problem and it doesn't happen to everybody…[but] when it does happen it spreads through the CJA panel like wildfire because it's a fear, it's a perception that we have," one panel attorney told the Committee."[461] It is the fear of investing the time and effort and then not being paid. Most attorneys accept the possibility of smaller reductions, but few can absorb reductions that equal weeks or even months of unpaid work.[462] The Committee heard from many panel attorneys committed to the work but also struggling financially. As many panel attorneys are solo practitioners or members of small firms, this lost revenue could threaten the viability of their practice. Their main concern is not the low hourly rate—although that is a problem— but the voucher cuts.

One panel attorney, concerned about substantial cuts in her district and enhanced scrutiny of CJA vouchers, explained to the Committee that even though she has the duty to provide effective and zealous representation to her clients, she also has to be concerned whether someone reviewing the voucher will think she spent too much time researching an issue or meeting with her client. "I have to think about whether I'm going to get paid for something before I do it. I have to think about whether or not a district court judge reviewing this for reasonableness [will approve it]."[463] In some districts, the attorneys are placed in the very difficult position of investing hours they almost surely will not be compensated for, or reducing the efforts they make on behalf of their clients. One district representative disclosed, "I know lawyers who have curtailed their research and the brief writing that they've done because they know they are not going to get paid past a certain point….They don't necessarily want it to happen that way but from a business perspective and what they can invest in a case, it affects how they approach the case…"[464] This is the reality whether it is a brief, a five-hour round-trip to the jail that the attorney will not

461 Debra Di Iorio, CJA Panel Atty., C.D. Cal. Public Hearing—San Francisco, Cal., Panel 3, Tr. at 23.

462 Dan Scott, CJA Panel Atty. Dist. Rep., D. Minn., Public Hearing—Minneapolis, Minn., Panel 5, Tr. at 17-19; Mark Windsor, CJA Panel Atty, C.D. Cal., Public Hearing—San Francisco, Cal., Panel 3, Tr. at 5, 13.

463 Marilyn Bednarski, CJA Panel Atty., C.D. Cal., CJA Panel Atty Dist. Rep., Public Hearing—San Francisco, Cal., Panel 6, Tr. at 10.

464 Melody Brannon, FPD, D. Kan., Public Hearing—Minneapolis, Minn., Panel 2, Tr. at 21-22.

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be paid for, or knowing that if a case goes to trial almost none of their time will be compensated. No professional wants to admit that lack of compensation will affect her decision, but at some point there is the real possibility that it will.

Some attorneys are curtailing their efforts so as to avoid submitting a voucher that is above the case maximum. A concern commonly heard was that attorneys felt "pressure to keep fees down" and worried that if their vouchers consistently exceeded the case maximum, they would be cut from the panel.[465] No one wants to be perceived as "milking the CJA system"[466] by submitting a voucher over the case maximum—even when they put in the work. Judge John Gleeson spoke of a culture that exists in some districts where the reality is that panel attorneys do not want their voucher scrutinized and so they make the decision to "either do the work and it's not compensated, or they don't do the work."[467] Either the attorney suffers or the client does.

In the long term, qualified attorneys may reduce the amount of CJA work they accept. One attorney explained that she had decided to expand her privately retained work because she had started to question the value of her CJA services to the courts. In the past she had not been concerned about getting paid for her work, assuming, "It's the government, they'll pay me."[468] Now, she is making changes in her practice. In another large district, CJA representatives reported that morale among panel members had suffered greatly.[469] On a scale of 1 to 10, with 10 being high and 1 being low, 70 percent of the panel reported morale to be 3 or less.[470] In another district, an attorney spoke of how "demoralizing"[471] it was to have his voucher cut. He noted that even if it is not a criticism of the quality of the work, or an allegation that anything about the voucher was improper, the reduction in compensation for work done is still "hard not to take personally."[472] These attorneys continued to accept CJA work, but others have decided not to.

Some attorneys have chosen to give up their CJA practice and leave the panel. A former district court judge told the Committee, "What I understand is that some of the best and the brightest have left the list, so there's a relationship between who you get and how you treat people."[473] Voucher cutting, panel attorneys told the

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465 Lori Nakaoka, CJA Panel Atty., D. Idaho, Public Hearing—Portland, Or., Panel 5, Tr. at 30.

466 Teresa Duncan, New Mexico Criminal Defense Lawyers Association, Public Hearing—Santa Fe, NM, Panel 4, Tr. at 25.

467 Judge John Gleeson (ret.), E.D.N.Y., Public Hearing—Miami, Fla., Panel 3, Tr. at 27.

468 Shaun McCrea, CJA Panel Atty., D. Or., Public Hearing—Portland, Or., Panel 4, Tr. at 34.

469 Marilyn Bednarski, CJA Panel Atty Dist. Rep., C.D. Cal., Public Hearing—San Francisco, Cal., Panel 6, Tr. at 9.

470 *Id.*

471 Robert Richman, Board Member, Minn. Assoc. of Criminal Defense Attorneys, Public Hearing—Minneapolis, Minn., Panel 4, Tr. at 17.

472 *Id.*

473 Judge Nancy Gertner (ret.), Senior Lecturer, Harvard Law School, Public Hearing—Philadelphia, Pa., Panel 2b, Tr. at 9.

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Committee, made them feel they were not being treated as professionals or with the respect they deserved. A federal defender told the Committee that in his district, some of the best criminal defense lawyers he knows have left the panel because of the "hassle," and "the denigration of the defense function that they feel from that. They just don't want to deal with it."[474] Another federal defender also confirmed that the best attorneys in her district were leaving the panels as well. She said that because the panel attorneys have "experienced tremendous voucher cuts, some of the very top layer of the panels over the years have dropped off because they just couldn't tolerate [it]. I've had lawyers tell me 'I can no longer work for free.'"[475]

Not only are attorneys leaving panels in some districts, the Committee was informed of instances in which experts refused to work with panel attorneys for fear of not being paid. A federal defender whose panel had faced a great deal of voucher cuts told the Committee that she was able to retain experts, but panel attorneys in her district no longer could. "[T]he experts themselves have had their bills cut and so they don't trust that the panel lawyers will be able to get them paid. Whereas if they work for defender offices, they know they're always going to get paid." [476]

Voucher cutting also damages efforts to recruit new attorneys to the panel. One CJA panel attorney district representative told the Committee that voucher cutting had harmed his panel's ability to retain promising younger attorneys to take the place of older, retiring attorneys (for more on the aging panel across all districts, please see Section 11). He was also concerned that young attorneys who did join the panel would quickly tire of the cuts and caps and soon abandon CJA practice.[477]

5.4 Other Recurring Issues in Voucher Review

5.4.1 Overbilling

The Committee attempted to determine whether overbilling—inflating or padding CJA vouchers—was a substantial problem. Consistent testimony from both judges and attorneys suggests that while some overbilling occurs, the percentage of vouchers involved is very small. A district court judge in California said that the percentage of panel attorneys who overbill is a "very small number," adding "I don't want the exception to become the rule or leave you with that impression . . . . I never mean to imply that 99.9 percent didn't fairly play by the rules."[478]

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474 Neil Fulton, FPD, D.N.D. & D.S.D., Public Hearing—Minneapolis, Minn., Panel 2, Tr. at 27.
475 Deborah Williams, FPD, S.D. Ohio, Public Hearing—Philadelphia, Pa., Panel 10, Tr. at 29.
476 *Id.*
477 Edward Hunt, CJA Panel Atty., E. D. Wis., Public Hearing—Minneapolis, Minn., Panel 4, Tr. at 25.
478 Judge David Carter, C.D. Cal., Public Hearing—San Francisco, Cal., Panel 5, Tr. at 37.

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Another judge wrote to the Committee that in her district, "the vast majority of panel members seek reasonable reimbursement for their services."[479] A case-budgeting attorney told the Committee that while "every attorney on the CJA panel in the circuit is not a saint," of the vouchers that went to the circuit "probably less than one percent are reduced."[480] And sometimes, witnesses stated, overbilling occurs inadvertently, often by newer attorneys on the panel who lack experience submitting vouchers. [481]

Overbilling by even a small number of panel attorneys has the potential to tarnish the reputation of the program and affect all attorneys in a district. Any multimillion-dollar government program requires financial oversight, but without experience or training in the defense function, and without data that could be analyzed for patterns of financial abuse, it is exceedingly difficult for judges to identify overbilling. The current system of review by individual judges disperses accountability and fails to provide sufficient oversight. Centralizing the process of voucher review and approval would make it much easier to identify unjustified billing patterns.

Consistent with the FJC study's findings on the value of CJA supervisory attorneys, witnesses also stated that individuals with defense experience are better suited than judges to spot problematic billing practices. A panel attorney told the Committee he would be more accurate and strict when necessary in reviewing vouchers than the judges in his district because he has the experience and knowledge about how to run a defense.

> I'll give you an example. A colleague came up to me so excited that a judge approved an investigator to go to South America to get some documents. I said, "I can't believe you got approval for that. It's such a waste of money. You could have gotten an investigator in that country to go over to get the document, to get it notarized, and send it back to you." I would never have authorized that.[482]

Similarly, one federal defender testified that her office would have a better perspective on voucher review than judges because, "we know from our own experience what are and are not reasonable expenses."[483]

Because taxpayer money is being spent, individuals with sufficient knowledge of defense practice should be the ones tasked with reviewing attorney expenditures. And those individuals charged with review should themselves be subject to oversight. Neither district nor circuit judges have the experience, training, or time necessary to perform this monitoring function.

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479 Judge Cathy Bissoon, W.D. Pa., Public Hearing—Philadelphia, Pa., Panel 2a, Writ. Test. at 3.

480 Bob Ranz, Case Budgeting Attorney, 6th Cir., Public Hearing—San Francisco, Cal., Panel 1, Tr. at 12.

481 Mag. Judge Clifford Shirley, E.D. Tenn., Public Hearing—Birmingham, Ala., Panel 5, Tr. at 9.

482 Bobbi Sternheim, CJA Panel Atty., S.D.N.Y., Public Hearing—Philadelphia, Pa., Panel 9, Tr. at 25.

483 Lisa Freeland, FPD, W.D. Pa., Public Hearing—Santa Fe, NM, Panel 3, Tr. at 34.

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5.4.2 Delays in Payment

Except in long and complex cases, the CJA compensation system requires that an attorney complete the representation before submitting a voucher for payment. Yet when a case is of any substantial duration, this can impose a financial hardship on the attorney. This is a particular problem for new attorneys building a practice because "most cases stretch out over months during which the attorney must wait for compensation while absorbing not only general office overhead but also case specific expenses."[484] When payment of the voucher is substantially delayed further hardship results. And delays in payment discourage attorneys from accepting CJA cases.

As in all voucher matters, the timeliness of reimbursement varies among districts and judges. A panel attorney who takes appointments in two different districts explained that in one district where "vouchers are reviewed first by the CJA Administrator for completeness and reasonableness and then submitted to the district court for approval," vouchers are generally paid in "as quickly as two weeks."[485] In the second district in which she practices, however, "the turnaround time for payment has been six to eight weeks."[486] There are judges within districts, the Committee was told, that are timely while their colleagues in the same district are not. A panel attorney wrote to the Committee about the considerable delay in processing vouchers in his district, noting that payment takes an average of two to three months, and if circuit court review is required, the process takes at least six months.[487]

In some districts, the delay in payment is the most significant concern among panel attorneys. "Our biggest problem with vouchers is the delay that some panel members experience in receiving the fee."[488] One panel attorney told the Committee that even in one district which is very supportive of the defense function and does not suffer from unwarranted voucher cutting, the various ways that payment on CJA cases is delayed is a hardship.[489] A defender told the Committee that in the district where he practices, "Criminal cases move quickly. Deadlines are strictly enforced. Yet at the end of the case, vouchers often languish on judges' desks."[490]

As suggested above, when a voucher requires circuit court review, the delay can be considerably longer. Since claiming excess compensation requires circuit court review, panel attorneys must balance the need to receive payment soon

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484 Wendy Holton, CJA Panel Atty., D. Mont., Public Hearing—Portland, Or., Panel 4, Writ. Test. at 4.

485 Melanie Morgan, CJA Panel Atty. Dist. Rep., D. Kan. & W.D. Mo., Public Hearing—Santa Fe, NM, Panel 5, Writ. Test. at 2.

486 *Id.*

487 Rod Personius, CJA Panel Atty. Dist. Rep., W.D.N.Y., Public Hearing—San Francisco, Cal., Panel 4, Writ. Test. at 8.

488 Lisa Costner, CJA Panel Atty., Dist. Rep., M.D.N.C., Public Hearing—Birmingham, Ala., Panel 7, Writ. Test. at 2 ("I am hopeful that e-voucher, which has just been implemented, will resolve this issue.").

489 Jennifer Horwitz, CJA Panel Atty. Dist. Rep., W.D. Wash., Public Hearing—Portland, Or., Panel 5, Tr. at 20-21.

490 Stephen McCue, FPD, D.N.M. Public Hearing—Santa Fe, NM, Panel 2, Writ. Test. at 5.

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against the need to receive excess compensation.

If a panel attorney questions a reduction in a voucher at the district or circuit level, that is also likely to delay payment. One panel attorney testified that while there is already a lengthy wait time for vouchers to be approved, "any complaint or resistance to cuts is met with further delay. The prospect of weeks, and sometimes months, being tacked onto an already-protracted process is an obvious deterrent for attorneys to object to the cuts."[491] The result is that attorneys are effectively discouraged from challenging cuts even when they believe those cuts are unwarranted. As noted above, delayed payments affect the ability and willingness of quality attorneys to accept CJA appointments. It is unfair to delay paying attorneys and unreasonable to expect judges to expediently process vouchers given all of their other responsibilities.

5.4.3 Interim Vouchers to Facilitate Payment

As noted above, judiciary conference policy provides a mechanism for attorneys handling extended and complex cases to seek payments at fixed intervals prior to the conclusion of a case to avoid financial hardship.[492] An attorney must apply and receive approval from the presiding judge to do so. This allows panel attorneys to take on extended and complex representations without facing severe financial hardship. The policy is not a requirement that interim payments be allowed, and in practice the ability to obtain approval to be paid throughout the course of a case varies by district and among judges within a district.[493]

In some districts, approval of interim payments is automatic. Once a case is determined to be "extended or complex," meaning that the costs of representation are likely to exceed the case maximum, or another locally determined threshold is met, interim vouchers are instituted as a matter of course. For instance, "in the District of Kansas, interim vouchers are authorized by local rule every two months" once a representation has reached $2,000.[494] A panel attorney who practiced in the District of New Mexico testified that "anytime it's declared a complex case, when the judge signs that order…interim payments will be allowed."[495] This is also true in the Northern District of California, where the CJA Supervisory Attorney told the Committee, "We require counsel in all mega-cases to submit case budgets every six months and interim vouchers every 60 days."[496] And in one of the largest districts in

491 Rachel Brill, CJA Panel Atty, D.P.R., Public Hearing—Miami, Fla., Panel 6, Writ. Test. at 2.

492 *Guide to Judiciary Policy*, Vol. 7A, Ch. 2, § 230.73: "Where it is considered necessary and appropriate in a specific case the presiding trial judge may arrange for periodic or interim payments to counsel."

493 Edward Hunt, CJA Panel Atty., E. D. Wis., Public Hearing—Minneapolis, Minn., Panel 4, Tr. at 14.

494 Melanie Morgan, CJA Panel Atty. Dist. Rep., D. Kan. & W.D. Mo., Public Hearing—Santa Fe, NM, Panel 5, Writ. Test. at 2.

495 Cori Harbour-Valdez, CJA Panel Atty., W.D. Tex. & D.N.M., Public Hearing — Santa Fe, NM, Panel 5, Tr. at 34.

496 Diana Weiss, CJA Supervising Atty., N.D. Cal., Public Hearing—San Francisco, Cal., Panel 1, Writ. Test. at 2.

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the country, the Central District of California, every panel attorney, even for smaller representations, uses an interim vouchering system.[497]

Where interim voucher payments are approved and used, the Committee heard positive feedback from panel attorneys. One panel attorney testified that his vouchers were generally approved and paid every four to six weeks. "The judge was trying the case, as well as reviewing vouchers… [but] it worked well."[498] Although interim vouchers "increase the number of vouchers to process," a case budgeting attorney told the Committee, "we have found that judges and CJA staff find it easier to audit for technical compliance and reasonableness when the vouchers are shorter in page count and closer in time to when the services were provided."[499] This was confirmed by an assistant federal public defender, who testified that, "In complex cases, some of the judges will require interim vouchers to be submitted every 30 days or 60 days to keep a handle on [the case] and that seems to help."[500] The process benefits the judges by allowing them to avoid having to review months, or years of voucher entries in one voucher, and it benefits the attorneys because it provides them with some compensation during the time the case is pending.

Some districts, however, rarely approve interim payments.[501] In one such district, the Committee was told that it was not uncommon for panel attorneys to experience significant financial losses from extended CJA representations. One panel attorney reported that his representation in an extended case was financially "devastating."[502] He testified that he, "finally had to be placed in the embarrassing position of informing the judge, your Honor, I need this payment because at this point I've run out of all of the reserves. I've been borrowing money to keep up with this case."[503]

Despite the benefits of interim vouchers, panel lawyers are reluctant to avail themselves of this option because they fear providing detailed information to the presiding judge during a case. These panel attorneys found the detail required to be "too intrusive" and were concerned it might "compromise the work product privilege and invade the independence of the lawyer to develop a defense for the client while worrying whether the judge will approve payment for the exploration of that defense."[504] Unfortunately, because the current structure requires judicial review of requests for interim vouchers, panel attorneys must balance their financial needs against the risk of disclosing client information and defense strategy to the court

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497 Judge Virginia Phillips, C.D. Cal., Public Hearing—San Francisco, Cal., Panel 5, Writ. Test. at 10.

498 Jim Ayers, CJA Panel Atty., E.D.N.C., Public Hearing—Miami, Fla., Panel 5, Tr. at 36.

499 Kristine Fox, Case Budgeting Atty., 9th Cir., Public Hearing—San Francisco, Cal., Panel 1, Writ. Test. at 3.

500 Fred Heblich, Jr. Assistant FPD, W.D. Va., Public Hearing—Philadelphia, Pa., Panel 6, Tr. at 28.

501 Judge Aida Delgado-Colon, D.P.R., Public Hearing—Miami, Fla., Panel 3, Tr. at 34.

502 Juan Milanes, CJA Panel Atty., E.D. Va. and D.P.R., Public Hearing—Miami, Fla., Panel 4, Tr. at 7.

503 *Id.*

504 Rochelle Reback, Former CJA Panel Atty., M.D. Fla., Public Hearing — Miami, Fla., Panel 5, Writ. Test. at 6.

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during the pendency of the case.

Regardless of the problems with the interim voucher process, most witnesses agreed that interim vouchering is beneficial to the panel attorneys. The failure to provide interim vouchering could lead qualified and able panel attorneys to refuse more complex cases because of the financial risk. Attorneys who find themselves in the situation of facing a long trial, without any hope of compensation until its completion, could become concerned that without a resolution short of trial, they might face financial hardship. The lawyer's self-interest would then be in conflict with that of his client. This is fair to neither client nor lawyer, and it is not difficult to imagine these circumstances giving rise to a collateral attack on any conviction.

5.4.4 Lack of Due Process

Circuit courts have agreed uniformly that the decision to deny or reduce a voucher is an administrative act that cannot be appealed. Voucher reductions at the district level are final, and panel attorneys are without recourse to judicial review.[505] In most districts, panel attorneys also have no way to seek administrative review of payment determinations. As the Vera Report concluded, this lack of recourse diminishes panel quality in two ways: "First, highly-qualified attorneys may choose to forgo panel membership. Second, some panel attorneys may improvidently cut corners if they cannot be confident that all their work will be compensated or reimbursed."[506]

In 2006, the judiciary policy was amended, to include the following recommendation: **"**If the court determines that a claim should be reduced, appointed counsel should be provided: prior notice of the proposed reduction with a brief statement of the reason(s) for it, and an opportunity to address the matter."[507] Prior notice and an opportunity for a panel attorney to respond is not mandatory, merely suggested; and a memorandum transmitting the new policy made clear that "no hearing, formal or otherwise, is required, and no right to review the judge's decision is conferred."[508] Yet even this recommendation met with signif-

505 See for instance *United States v. French,* 556 F.3d 1091, 1093 (10th Cir. 2009), "Every circuit court of appeals to consider this jurisdictional question has held that CJA fee compensation determinations made by the district court are not appealable," the Circuit had no jurisdiction to consider a voucher reduction); and *In re Carlyle*, 644 F.3d 694, 698-700 (8th Cir. 2011), ("the non-adversarial nature of the CJA voucher process, which is wholly *ex parte,* evidences an administrative act not a judicial decision."); s*ee also Shearin v. United States*, 992 F.2d 1195, 1196 (Fed. Cir. 1993); *United States v. Bloomer*, 150 F.3d 146, 148 (2d Cir.1998); *Landano v. Rafferty*, 859 F.2d 301, 302 (3d Cir. 1988); *United States v. Rodriguez*, 833 F.2d 1536, 1537–38 (11th Cir.1987); *In re Baker*, 693 F.2d 925, 927 (9th Cir. 1982); *United States v. Smith*, 633 F.2d 739, 742 (7th Cir.1980); *United States v. Johnson*, 391 F.3d 946, 948 (8th Cir. 2004); *United States v. Linney*, 134 F.3d 274, 281 (4th Cir.1998); *United States v. Stone*, 53 F.3d 141 (6th Cir. 1995).

506 Jon Wool, K. Babe Howell, Lisa Yedid, *Improving Public Defense Systems: Good Practices for Federal Panel Attorney Programs*, Vera Inst. of Just., 13 (June 2003).

507 *Guide to Judiciary Policy*, Vol. 7A, Ch. 2, § 230.36(a).

508 Committee of Defender Services, AO memo, "New Criminal Justice Act Guidelines Regarding Voucher Reduction Procedures and Policies," April 7, 2006.

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icant resistance. Judge John Gleeson, Chair of the Defender Services Committee during the time the recommendation was proposed and debated, told the Committee:

> I thought this was a no-brainer. We're judges. Notice and opportunity to be heard is our middle name. We don't adjourn a trial without giving somebody an opportunity to be heard. It seemed to me at the time that you take a $20,000 voucher and you cut it to $10,000, that's somebody's livelihood. Where do we get off not giving notice and opportunity to be heard? But I was shocked that the pushback, at how ingrained it was…[509]

A former employee at DSO at the time confirmed how difficult it was for Judge Gleeson to convince his colleagues to make this change in policy. He had to convince them that this was "a fairness issue and [that] judges are about fairness."[510] He added, "I think what's so frustrating from our vantage point at times is how much effort is required to get some very small, what seemed like some very small and reasonable steps. It's still a guideline. Any judge who wants to cut a voucher, and not contact attorneys can do that."[511] And unfortunately, some judges do continue to cut vouchers without providing any due process to counsel, or giving any consideration to the revised judicial policy.[512]

Some judges routinely provide an informal opportunity for defense counsel to advocate for their full voucher amount. One federal defender told the Committee that in his district, in the rare instance a voucher was cut, "the judge will give an order to the panel attorney or letter saying, 'I'm considering a reduction. Please respond to these particular areas.' The attorney then responds and a lot of times the judge does not make the cut at that time."[513] A judge informed this Committee that it was his policy, to "give every lawyer an opportunity to respond. If I intend to reduce a voucher I will send a letter to the lawyer explaining that I'm considering it and I'd like to hear from you and what you have to say."[514] Many of the judges that testified about this issue supported the idea that if a voucher is to be cut, the attorney should be entitled to some due process.[515] One judge advocated for a national standard that would require every CJA plan provide for due process and notice when a voucher is to be cut.

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509 Judge John Gleeson (ret.), E.D.N.Y., Public Hearing—Miami, Fla., Panel 3, Tr. at 4.

510 Richard Wolff, Former Chief, Legal, Policy, and Training Division, DSO, Public Hearing—Philadelphia, Pa., Panel 7, Tr. at 13.

511 *Id.*

512 Mag. Judge Cheryl Pollak, E.D.N.Y., Public Hearing—Philadelphia, Pa., Panel 2b, Tr. at 10.

513 David Stickman, FPD, D. Neb., Public Hearing—Minneapolis, Minn., Panel 2, Tr. at p 27.

514 Senior Judge Donald Graham, S.D. Fla., Public Hearing—Miami, Fla., Panel 2, Tr. at 8.

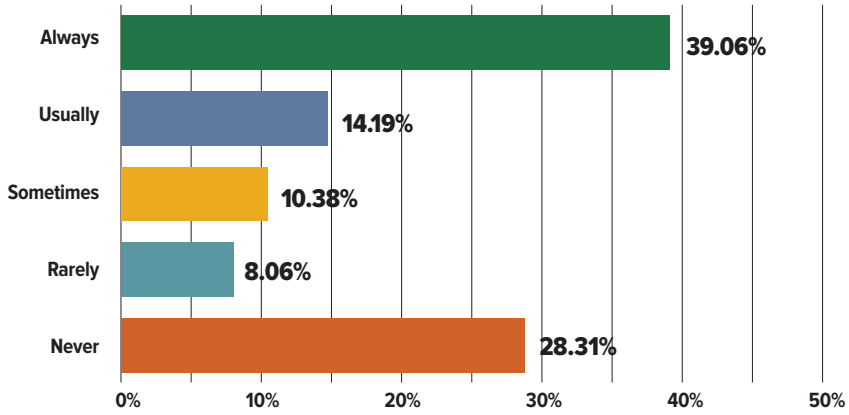
515 *See e.g.* Mag. Judge William Matthewman, S.D. Fla., Public Hearing—Miami, Fla., Panel 3, Tr., at 30; Judge John Gleeson (ret.), E.D.N.Y., Public Hearing—Miami, Fla., Panel 3, Tr. at 4; Judge Luis Felipe Restrepo, 3rd Cir., Public Hearing—Philadelphia, Pa., Panel 2a, Tr. at 6.

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Cuts without explanation

In districts that have not followed the Judicial Conference's recommendation to provide attorneys with notice and an opportunity to address the matter, practitioners often learn of cuts only when they receive a reduced check. No explanation of the cut is provided. Other times, attorneys are told only that the bill was simply too high or that the presiding judge had a "gut feeling" that it should be reduced. Such cuts are particularly demoralizing, driving away qualified attorneys and making recruitment difficult. As seen in the survey results below, among panel attorneys surveyed by this Committee, 29 percent "rarely" or "never" received an explanation for a voucher cut.

If you have had a voucher(s) cut or denied, were you given an opportunity to contest the decision or provide an explanation?



Source: CJA Review Committee Survey on Vouchers (June 2016), available at https://cjastudy.fd.org.

Many panel attorneys expressed frustration during public hearings that they were not informed of the reviewing judge's intention to cut their voucher or the basis for the cut. As one panel attorney testified: "In some districts, we will receive notification when our vouchers are being cut and given the opportunity to respond to that. In other districts, we don't know until we receive a check in the mail."[516] As a result, attorneys are deprived of an opportunity to explain to the judge why the cuts are unwarranted or to fully understand the judge's reasoning and anticipate how to prevent such cuts in the future.

Frustration is highest when judges cut vouchers based on a visceral sense that the voucher is simply too high. A panel attorney expressed frustration with this, testifying, "If you have a judge who cuts your bill by a certain amount of money and says, 'Well, it was just a gut feeling,' how is a panel attorney supposed to take that? What was it about my bill? What line item did you have a problem with?"[517] The lack of any requirement to justify voucher cuts allows cuts to be

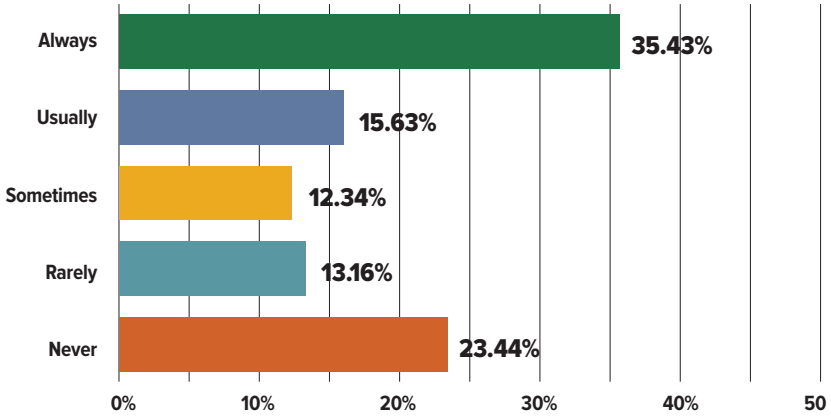
516 Cori Harbour-Valdez, CJA Panel Atty., W.D. Tex. & D.N.M., Public Hearing — Santa Fe, NM, Panel 5, Tr. at 2.

517 Anthony Solis, CJA Panel Atty Dist. Rep., C.D. Cal., Public Hearing—San Francisco, Cal., Panel 6, Tr. at 39.

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based upon a "gut feeling." Reflecting on this attorney's comments made during the course of a Committee hearing, one judge noted, "I'm not sure how those judges who do cut viscerally justify that. I do think that there should be a justification component to any cutting that goes on."[518] Another district court judge voiced her own frustration with these unexplained, or unexplainable, cuts. She described her efforts in trying to encourage her colleagues to revisit their reasons for imposing cuts or denying professional services under the CJA. "[T]here have been occasions where lawyers have come to me and said, 'My voucher was cut' or 'An investigator was denied' and I've gone to the judge and he said, 'Well, I thought it was appropriate.' And that was it."[519]

If you have had a voucher(s) cut or denied, were you given an explanation?



Source: CJA Review Committee Survey on Vouchers (June 2016), available at https://cjastudy.fd.org.

Panel attorneys expressed additional frustration that they sometimes would not learn of a cut until they received a check for the representation. "It's wrong to do work and submit a voucher and get no notice and open the envelope and find that your check is less than what you billed and have no idea that that was coming."[520] Because the payment does not include any notice that the voucher has been reduced, sometimes attorneys do not even realize the voucher has been cut until they go back and compare the amount they billed to the amount they received.

A panel attorney district representative in one district, who is also a former federal defender, testified that in a difficult terrorism case the circuit court cut his voucher by $45,000, representing roughly half of the hours he had worked on the case. He received no notice from the circuit court, learning of the cut only when the district's federal defender notified him. Asked whether he sought some form of due process, he replied, referring to the judge who reviewed his voucher, "He doesn't give due process, so I didn't ask for any."[521]

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518 Judge Cathy Bissoon, W.D. Pa., Public Hearing—Philadelphia, Pa., Panel 2a, Tr at 14.

519 Mag. Judge Cheryl Pollak, E.D.N.Y., Public Hearing—Philadelphia, Pa., Panel 2b, Tr. at 10.

520 Debra Di Iorio, CJA Panel Atty., C.D. Cal. Public Hearing—San Francisco, Cal., Panel 3, Tr. at 3.

521 Dan Scott, CJA Panel Atty. Rep., D. Minn., Public Hearing—Minneapolis, Minn., Panel 5, Tr. at 18.

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A circuit judge and former panel attorney told the Committee, "One of the great frustrations lawyers expressed to me when I was the CJA rep is that vouchers were cut with no explanation and no recourse."[522] He suggested that a change in judicial policy would be an improvement. Specifically, he suggested changing the discretionary language of notification, i.e. the attorney "should" be notified of a proposed voucher reduction, to mandatory language—the attorney "shall" be notified of such a reduction. His proposed changes would also require that attorneys have the right to respond to the proposed cut.[523] Ultimately, he told the Committee, "If there was some transparency in the process and lawyers were told this is why it's being cut, they had at least a dialogue with the individual cutting the voucher, I think it would be a real improvement…"[524]

Inability to Appeal and Repercussions

A decision to reduce an attorney's fees is not appealable. Under the current statute, "If a CJA lawyer wishes to know why his or her voucher has been halved there is not a standard mechanism adhered to by which they can redress that."[525] A CJA panel attorney district representative told the Committee that he had been the substitute for formal process. When a judge had a problem with a voucher, he got a phone call from the judge. "It was a rather new lawyer to the panel and had been submitting vouchers that were getting some eyebrows…. [The judge] called me and asked me to get in touch with the lawyer and discuss his vouchers with him and how they were being viewed. "That's kind of the closest that we've come to a formal process."[526]

Without formal procedures, attorneys are often unwilling to challenge a judge's decision on fees because of the tremendous power judges wield over selection, appointment, and compensation of attorneys. The Committee was told by one federal defender that,

> [The] really good CJA lawyers are reluctant in my district to push back against decisions from our courts about their CJA budgets or their CJA vouchers being cut because judges wield an incredible amount of power. Not just in the decisions…in terms of litigation, in terms of appointments, but there's all the indirect power where lawyers just don't want to be held in the bad graces of the local bench.[527]

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522 Judge Luis Felipe Restrepo, 3rd Cir., Public Hearing—Philadelphia, Pa., Panel 2a, Tr. at 10.

523 *Id.* at 6.

524 *Id.* at 10.

525 Judge Kathleen Williams, S.D. Fla., Public Hearing—Miami, Fla., Panel 3, Tr. at 22.

526 Gordon Armstrong, CJA Panel Atty. Dist. Rep., S.D. Ala, Public Hearing—Birmingham, Ala., Panel 7, Tr. at 17.

527 Jim Wyda, FPD, D. Md., Public Hearing—Philadelphia, Pa., Panel 10, Tr. at 8.

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Even when panel attorneys are provided with some notice or process, the right is not always meaningful. Panel attorneys are frustrated that when they made significant efforts to explain to the court how their vouchers were justified, they still received little or no response.[528] After learning that the court had determined that his claims for discovery review were excessive compared to his co-defendants, an attorney spent four hours setting forth his response to the proposed cuts. He received no response from the judge, only the check with the original proposed cut.[529] Another panel attorney told the Committee about her experiences being given an opportunity to respond to the proposed cut:

> We have a chart that [my paralegal] has created for the amount that we have billed and then the amount that we were ultimately paid, and that's what I reviewed in preparing my testimony today. I can say that 60 percent of my cases this calendar year have received a reduction of some sort. The times that I have been given the opportunity to meet with the judges, I would say about 50 percent of the time, those are still reduced.[530]

In a few districts, panel attorneys who protested voucher cuts have found their names in published opinions described as "scathing."[531] These opinions then influenced the way that the rest of the panel practiced criminal defense. A federal defender told the Committee:

> We have had more than one published opinion cutting in great detail, talking about the pro bono obligations of counsel. They were rather scathing. They were very detailed. At least in one of the cases the judge had asked for a written response from the attorney and then turned around and wrote another opinion quoting what the attorney had said. Judges don't have to do this more than once or twice to get the message across. . . . One of the attorneys didn't take any more cases. It had a very direct chilling effect . . . in how [other] attorneys billed. There was self-cutting no doubt because of those opinions . . .[532]

Models of providing process

Some districts have instituted successful models providing process before vouchers are cut. Many of these districts have a committee or other non-judicial group

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528 Mark Windsor, CJA Panel Atty, C.D. Cal., Public Hearing—San Francisco, Cal., Panel 3, Tr. at 15.

529 Juan Milanes, CJA Panel Atty., E.D. Va. and D.P.R., Public Hearing—Miami, Fla., Panel 4, Tr. at 10.

530 Cori Harbour-Valdez, CJA Panel Atty., W.D. Tex. & D.N.M., Public Hearing — Santa Fe, NM, Panel 5, Tr. at 2.

531 Melody Brannon, FPD, D. Kan., Public Hearing—Minneapolis, Minn., Panel 2, Tr. at 28.

532 *Id.*

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to review questioned vouchers and make independent determinations.[533] A key to their success seems to be the inclusion of attorneys on these committees who understand what is required for an effective defense. In the Western District of Washington, for example, the federal defender explained that the district's standing committee meets four times a year to consider issues with vouchers,[534] reviewing half a dozen each year.[535] The committee reviews vouchers only when the attorney or the judge involved requests a review.[536] The CJA panel attorney district representative described the standing committee's process:

> [W]e just finished reviewing a voucher that was referred to the standing committee, and it was a pretty exhaustive process where we went to the attorney and asked some questions. We went to the judge and really tried to get more clear on the judge's concerns, and went back to the attorney, and then we took a position and I think we've just submitted that to the judge.[537]

This standing committee can intervene where a lawyer has made mistakes in billing and can refer the attorney for "counseling and mentoring."[538] The committee can also investigate vouchers flagged by judges as containing questionable assertions of work done. For example, in one case a voucher requested reimbursement for time spent discussing a suppression motion with the client that was never filed. After inquiring, the review committee found, "There were good reasons to spend time with the client to recommend against filing the motion because of the negative ramifications it would have."[539] Judges would not normally have access to this kind of information when conducting a "reasonableness" review.

A Northern District of Alabama judge described his district's process when attorneys request review of a voucher reduction. Within seven days of receiving notice, a panel attorney can ask a CJA Administrative Committee to review the reduction.[540] The Administrative Committee gives panel attorneys the opportunity to raise concerns about the cuts and the Committee then issues recommendations.[541] As this judge acknowledged, "ultimately it is the district judge's call, but we do provide an opportunity for the committee to have input. . . . I think that gives

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533 One judge in a district without such a committee suggested it as the best option for providing process. Mag. Judge William Matthewman, S.D. Fla., Public Hearing—Miami, Fla., Panel 3, Tr., at 25 recommended districts "establish a committee just like we have committees to review issues of attorney professional misconduct."

534 Mike Filipovic, Former FPD, D. Or., Public Hearing—Portland, Or., Panel 6, Tr. at 15.

535 *Id.* at 2.

536 *Id.* at 21.

537 Jennifer Horwitz, CJA Panel Atty. Dist. Rep., W.D. Wash., Public Hearing—Portland, Or., Panel 5, Tr. at 38.

538 Mike Filipovic, Former FPD, D. Or., Public Hearing—Portland, Or., Panel 6, Tr. at 15.

539 *Id.* at 16.

540 Mag. Judge Michael Putnam, N. D. Ala., Public Hearing—Birmingham, Ala., Panel 1, Tr. at 19.

541 *Id.*

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lawyers on the panel a level of comfort that they're not going to be arbitrarily having their vouchers cut."[542]

Participants in these committee processes emphasize that they do not rubber stamp either the proposed reductions or the original voucher. As one defender explained:

> CJA peer reviewing their colleagues' work is no joke. They do not rubber stamp their colleagues' work, including people who are friends. I've watched them review the vouchers of excellent attorneys in my district who are friends of these attorneys, and they take it dead serious. They cut those vouchers, they recommend cuts to those vouchers, or they support those vouchers, but they do it in a very meaningful way.[543]

In all districts with such committees, recommendations are non-binding, and "the court is free to accept, reject, or modify" the committee's recommendation.[544]

5.4.5 Independent Support for Changing the Current System of Voucher Review

In fall of 2015 the National Association of Criminal Defense Lawyers ("NACDL") issued a report, "Federal Indigent Defense 2015: The Independence Imperative." The report listed "Seven Fundamentals of a Robust Federal Indigent Defense System," the fifth of those fundamentals being "Decisions regarding vouchers must be made promptly by an entity outside of judicial control."[545] According to the report, which considered interviews with panel attorneys, defenders, and judges across the country, many panel attorneys,

> often face arbitrary cuts at the hands of judicial officers whose decisions need not be explained and cannot be challenged. Allowing judges to determine the amount of time and effort an attorney devotes to a case improperly puts the judge in the position of determining the amount of justice for an indigent defendant and forces the private bar to subsidize the government's obligation to provide zealous and meaningful representation. Some lawyers leave the panel as a result of this practice. Control over vouchers must be removed from unreviewable, unregulated judicial control and given to a truly independent administrator outside of the judiciary."[546]

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542 *Id.*

543 Marianne Mariano, FPD, W.D.N.Y., Public Hearing—Philadelphia, Pa., Panel 3, Tr. at 34-35.

544 Leigh Skipper, Exec. Dir., CDO, E.D. Pa., Public Hearing—Philadelphia, Pa., Panel 3, Tr. at 6.

545 NACDL Report pg. 10.

546 *Id.*

The NACDL interviewed former AO Director and District Judge John D. Bates, who admitted that while the AO "has emphasized educating the judiciary about 'fairness' and 'proper examination' of vouchers, the AO could not impose upon district judges a national standard because 'district courts are fiefdoms.'"[547]

The Vera Institute study of the federal defender system supports the assertions made by many of the judges who testified at this Committee's hearings that they did not feel they were qualified for or in the position to adequately review vouchers or service-provider requests. According to that study,

> somewhat more than half of the judges we spoke to stated candidly that they were not fully qualified to make decisions about certain matters such as when an expert should be retained, what is a reasonable fee for their services, or how many hours are reasonable to spend on investigations or plea negotiations. Moreover, even when judges are fully qualified to make these decisions, some judges said they feel it inappropriate to do so as presiding judge in the case because of the ex parte nature of these contacts and the dangers inherent in the court intruding into the strategic planning of the defense.[548]

Additionally, adopted in 2002, the American Bar Association's *Ten Principles of a Public Defense Delivery System* were created to address "the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney."[549] The very first principle on the list is: "The public defense function, including the selection, funding, and payment of defense counsel, is independent."[550]

Finally, in its amicus brief in the recent case of *Christeson v. Roper*,[551] the ABA challenged the notion that attorneys appointed under the CJA in death penalty and habeas representation are supposed to provide their representation pro bono:

> Reliance on *pro bono* representation is no substitute for an adequately funded defense.... Yet federal courts too often fail to grant the funding necessary for... attorneys to provide effective representation... *pro bono* representation cannot be the norm for constitutionally or statutorily mandated counsel.... [It] undermines the court's important role of safeguarding the statutory right to counsel... [and] also conflicts with numerous

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547 *Id.* at 50.

548 Jon Wool, K. Babe Howell, Lisa Yedid, *Improving Public Defense Systems: Good Practices for Federal Panel Attorney Programs*, Vera Inst. of Just., 30 (June 2003).

549 American Bar Association, *Ten Principles of A Public Defense Delivery System* (Feb. 2002), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf (last visited April 26, 2017).

550 *Id.*

551 *Christeson v. Roper* Brief Of Amicus Curiae American Bar Association In Support Of Petitioner, No. 16-2730 (8th Cir) (August 17, 2016).

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> ABA standards, including the 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases and the ABA Standards for Criminal Justice.[552]

For more on death penalty and capital representation under the CJA, please see Section 9

5.5 Alternative Approaches to Voucher Review

In the majority of districts, judges alone conduct a reasonableness review of attorney fees and requests for expert witnesses and other specialized services. But some districts centralize and facilitate the review process by relying upon CJA supervisory attorneys, CJA administrators employed either by the court or the federal defender office, and/or circuit case-budgeting attorneys to review resource requests and vouchers and make recommendations to the presiding judge, who then approves payment. On the whole, these approaches mitigate many of the problems associated with judicial review.

5.5.1 Use of CJA Supervising Attorneys and CJA Administrators

In its 1997 study, the FJC evaluated the use of supervising attorneys to review vouchers, and concluded:

> Appointed counsel in these districts appreciate the prompt and reliable reviews of their payment vouchers that the CJA supervising attorneys provide, and the availability of a central, accessible, knowledgeable resource for assistance with CJA issues. Judges appreciate being relieved of tasks many feel they do not have time for, they are not proficient at, and/or it is inappropriate for them to do.[553]

The FJC cited many benefits to tasking supervising attorneys with voucher review, including:

Effectiveness of Representation

- They can relieve presiding judges of direct supervision of one party's litigation strategies, which alleviates a potential conflict of interest that attorneys

552 *Id.* at 3–5.

553 Federal Judicial Center Report to the Judicial Conference Committees on Defender Services, Judicial Resources, and Court Administration and Case Management, *The CJA Supervising Attorney: A Possible Tool in Criminal Justice Act Administration*, April 2001, Executive Summary, at 1.

might perceive if they think one strategy will help the attorney earn more money but another might be more beneficial to the client.

Fairness to Counsel

- Centralizing voucher review, so that all vouchers are reviewed by a single attorney hired specifically to perform that task, can improve panel attorneys' impressions of fairness, because the vouchers can be reviewed promptly and consistently.

Accountability

- The CJA supervising attorney can facilitate accountability through his or her central oversight of CJA expenses.
- Moreover, the person selected for the position can be hired to have necessary special skills, such as experience with accounting or criminal defense, which judges may not have.
- Case budgeting is growing in importance as an aspect of accountability. CJA supervising attorneys can relieve judges of budgeting responsibilities, which some judges feel ill-equipped for and which some judges and attorneys—but not all—believe present troubling ex parte and role-conflict issues.[554]

Having a single person reviewing vouchers (or supervising review of vouchers) led to much greater consistency for panel attorneys and an increase in the impression of accountability in supervising expenditures among judges.[555] The report concluded that, on the whole, judges lacked the time needed to thoroughly review vouchers, leading to delays in payment and/or cuts that were either too severe, or on the other hand, insufficient.[556]

A report by the Vera Institute of Justice completed in 2003 reached similar conclusions, finding that placing voucher review into the hands of a centralized administrator with defense experience was a better model than saddling the judiciary with the sole responsibility for reviewing vouchers. The report, *Improving Public Defense Systems: Good Practices for Federal Panel Attorney Programs,* stated, "Those who have experience with this method report that it has yielded great improvements in the speed, fairness, and consistency of panel attorney compensation. By serving as a single, expert intermediary between the individual presiding judge and panel attorneys, the administrator promotes fairness and consistency and mitigates conflicts that may arise with judicial contacts."[557]

Echoing the report's conclusion, one judge who testified before this Committee

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554 *Id.* at 2–3.

555 *Id.* at 83, 84.

556 *Id.* at 126.

557 Jon Wool, K. Babe Howell, Lisa Yedid, *Improving Public Defense Systems: Good Practices for Federal Panel Attorney Programs*, Vera Inst. of Just., 30-31 (June 2003).

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underscored the vital role of supervising attorneys in voucher review:

> When all of us in all of our various districts were looking to cut back, we as judges were adamant [the CJA Supervising Attorney] was not going to be cut because it is such as a critical part of our process. . . . The key ingredient in our view for why that process works is that the person who sits in that seat is a respected former member of the defense bar, and that, I think, is important.[558]

A district's CJA panel representative agreed, testifying that, "it's very important to note that [the CJA Supervising Attorney] is a very, very well respected member of the defense bar, has been a CJA lawyer for over two decades. We all know her. When she says a voucher is unreasonable, it's unreasonable and none of us complains about it. She comes with inherent credibility."[559] A CJA Supervising Attorney echoed these views:

> I was a panel member for over ten years and I've been working on CJA cases in this district for almost thirty years prior to taking this position. I know the judges who I practiced before who I'm now working with as well as the panel members. . . . I do a reasonableness review of the vouchers. Having an experienced federal practitioner and a former member of the panel gives both the court and the panel confidence that there will be a fair and reasonable review of vouchers.[560]

A district judge in Maryland admitted that while the system, "is not perfect," having a supervising attorney "has gone a long way to bring some consistency to what would otherwise be ten or fifteen different district judges who all may take slightly different approaches to the idea of reviewing the vouchers."[561]

Other districts have since added supervising attorney positions, sometimes as court employees, other times as employees of the federal defender office (as discussed in the next section). The Committee heard positive reviews of these positions, wherever they were located.[562] South Carolina placed its CJA administrator within the defender office. According to the defender, this system guards against arbitrary voucher cutting. A panel attorney also praised the administrative attorney position, telling the Committee:

> I cannot tell you what a difference that has made and how valuable that attorney is to our panel in South Carolina. I have been a panel attorney

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558 Judge Yvonne Gonzalez Rogers, N.D. Cal., Public Hearing—San Francisco, Cal., Panel 5, Tr. at 1.

559 Mary McNamara, CJA Panel Atty. Dist. Rep., N.D. Cal., Public Hearing—San Francisco, Cal., Panel 6, Tr. at 3.

560 Diana Weiss, CJA Supervising Atty., N.D. Cal., Public Hearing—San Francisco, Cal., Panel 1, Tr. at 10.

561 Chief Judge Catherine Blake, D. Md., Public Hearing—Philadelphia, Pa., Panel 1, Tr. at 21.

562 Rich Curtner, FPD, D. Alaska, Public Hearing—San Francisco, Cal., Panel 7, Writ. Test. at 3.

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> for twelve years. I have seen from the start to finish exactly what the difference has been once she came on and started assisting panel attorneys with the review of vouchers. It has been invaluable. I think the Committee has heard that in South Carolina, the amount of vouchers that are cut systematically has dropped drastically.[563]

A panel attorney from Kansas told the Committee that the CJA Administrator in that district acted as a "buffer" between panel attorneys and the courts.[564] Also a highly respected former criminal defense attorney, "she has the ability to red flag things that she knows might cause the judge some question or concern and talk to the lawyer about that. She also then is a conduit with the court. When the court says, 'Why would this attorney think it was necessary to spend all of this time?' she can get that information."[565]

Having an intermediary between themselves and the judges before whom they appear assisted the panel attorneys immensely. Additionally this intermediary, by making the system more efficient, can reduce long-term costs. A panel attorney in Oregon told the Committee that the administrator intervened to obtain funding when the attorney had an urgent need for an investigator. "I kept calling our CJA administrator asking what's happening here, and she courageously needled the judge a little bit and it got done. . . . To me, the bottom line is that efficiency at that end creates efficiencies at the other too. Lots of money was saved once we got that investigator," allowing the attorney to "settle this case at a different level."[566]

Finally, witnesses from districts that did not have a CJA supervising attorney or administrator position suggested them as partial solutions to problems with the current system. A federal defender told the Committee that such a position "would have a number of beneficial effects," including lowering defense costs.[567] Not only would panel attorneys feel more comfortable requesting funds from a former defense attorney acting as an administrator, the position "would be part of a cost-containment strategy in that if those experts' requests are funneled through a single administrator, then that administrator on behalf of the CJA could achieve some of the bargaining power that the FPDs have."[568]

5.5.2 Voucher Review by Federal Defender Organizations

There are a number of districts where the federal or community defender office performs an initial review of vouchers and issues a recommendation to the presiding

563 Jessica Salvini, CJA Panel Atty., D.S.C., Public Hearing—Miami, Fla., Panel 4, Tr. at 14.

564 Melanie Morgan, CJA Panel Atty. Dist. Rep., D. Kan. & W.D. Mo., Public Hearing—Santa Fe, NM, Panel 5, Tr. at 14.

565 *Id.*

566 Thomas Hillier, Former FPD, W.D. Wash., Public Hearing—Portland, Or., Panel 1, Tr. at 14.

567 Michael Caruso, FPD, S.D. Fla., Public Hearing—Miami, Fla., Panel 1, Tr. at 17.

568 *Id.*

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judge.[569] Some witnesses questioned whether it is appropriate for the FPDO or CDO to be involved in reviewing vouchers and requests for service providers by panel attorneys. For defenders considering housing a CJA administrator within their office, the major concern was financial, since most defender offices are already understaffed.[570] One federal defender admitted to the Committee that she has long believed her office should take on the responsibility of administering the panel and reviewing vouchers, but simply does not have the resources.[571]

The second concern involves conflicts of interest. Some believed having the defender office responsible for review is an "inherent conflict," given the basic functioning of the hybrid system of defense: "Where there is a public defender and there are CJA lawyers involved, there is a conflict by defenders representing either another defendant that is indicted or cooperating individual."[572] A federal defender agreed, "There's this inherent conflict between our office and the panel. . . . We have a conflict with almost every case they have."[573] Others, however, believe the conflict exists more in theory than in practice. One panel attorney told the Committee, "I think we have to get away from the notion that simply because perhaps [an administrator is] housed within the federal public defender's office that means that they are somehow controlled by the federal public defender or that there's going to be a conflict of interest." [574] The panel attorney explained that the CJA administrator and the federal defender office run on separate and independent computer systems, each "password-protected and secure," and the administrator's office is set apart from the other defenders.[575] The panel attorney concluded, "It works for us."[576] A federal defender who has a CJA Supervising Attorney housed within her office told the Committee that "[w]e haven't really run into any conflicts, and we have a backup system for conflicts right now."[577] Others also described putting safeguards in place

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569 *See e.g.* Rebecca Hudsmith, FPD, M.D. La. & W.D. La., Public Hearing—Birmingham, Ala., Panel 2, Writ. Test. at 2 ("The office reviews all vouchers submitted by the panel attorneys for payment of compensation and expenses prior to forwarding same to the presiding judicial officer for final approval. An employee in each of the three offices is primarily responsible for the initial voucher review. I conduct the final voucher review for all CJA vouchers over $3,500 and prepare memos to the Courts for all vouchers over the statutory maximum."); Claude Kelly, W.D. La., Public Hearing—Birmingham, Ala., Panel 2, Writ. Test. at 2 ("It is the responsibility of the FPD office to review all attorney and expert vouchers and obtain approval for funding and payment."); A.J. Kramer, FPD, D.D.C., Public Hearing—Philadelphia, Pa., Panel 6, Writ. Test. at 1 ("Our office also reviews all vouchers for lawyers and experts submitted in district court cases (we do not process vouchers for the court of appeals). The vouchers are reviewed, a recommendation is made, and they are sent to the judge for final approval.")

570 *See e.g.* Public Hearing—Portland, Or., Panel 6, Tr. at 17-25.

571 Maureen Franco, FPD, W.D. Tex., Public Hearing—Santa Fe, NM, Panel 2, Tr. at 26.

572 E. Gerry Morris, President NACDL, Public Hearing—Santa Fe, NM, Panel 4, Tr.at 13.

573 Eric Vos, FPD, D.P.R., Public Hearing—Miami, Fla., Panel 1, Tr. at 20.

574 Melanie Morgan, CJA Panel Atty. Dist. Rep., D. Kan. & W.D. Mo., Public Hearing—Santa Fe, NM, Panel 5, Tr. at 28.

575 *Id.*

576 *Id.*

577 Melody Brannon, FPD, D. Kan., Public Hearing—Minneapolis, Minn., Panel 2, Tr. at 9.

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to prevent or mitigate potential conflicts of interest.[578]

On the whole, testimony about FDO and CDO involvement in voucher review was overwhelmingly positive. The Chief Judge in the District of Minnesota, whose federal defender office performs an initial review of vouchers, testified that it was "a very good system," and the judges "appreciate the hard work the office does with the voucher system, making sure that there are no mistakes made in the calculations, flagging issues for us to review."[579]

Federal defenders involved in voucher review told the Committee that having their offices involved, even though the voucher ultimately had to be approved by the judge, is beneficial. One defender wrote that voucher review "requires considerable time," but he believes that review "benefits both the judges and the panel attorneys….Because I have been a federal criminal trial attorney for 50 years, the judges trust my judgment."[580] The federal defender from Oregon agreed that the review takes a great deal of time, but stated: "We are willing to expend the time and resources on the panel because having a united, strong defense bar improves the quality of the criminal justice system, which helps all of our clients." [581] Explaining the value added of involving the federal public defender, she wrote, "A separate administrator would not have the institutional knowledge and perspective of the FPD that comes from managing what is essentially a medium-sized law firm. The FPD is more likely than a separate administrator to be aware of areas for efficiency, new developments in the law, and systemic solutions that can be proposed to the court."[582]

5.5.3 Case-Budgeting Attorneys

Although circuit CJA case-budgeting attorneys (CBAs) are placed in the office of the circuit executive, their involvement with budgeting at the district court level makes discussion of the important role they play appropriate here.

In 2004, the Defender Services Committee launched a pilot program to "[e]stablish a source to provide objective case-budgeting advice for judges, in order to limit the costs of representations in capital and large [non-capital] mega-cases."[583] A case budgeting program was intended to provide better management of the highest-cost cases. Many of these cases involved multiple defendants. Though amounting to less than three percent of all representations, these high-cost cases accounted for

578 Steve Wax, Legal Director, Oregon Innocence Project, Public Hearing—Portland, Or., Panel 1, Tr. at 7, 28.

579 Chief Judge John R. Tunheim, D. Minn., Public Hearing—Minneapolis, Minn., Panel 6, Tr. at 13.

580 Thomas McNamara, FPD, E.D.N.C., Public Hearing—Miami, Fla., Panel 1, Writ. Test. at 2.

581 Lisa Hay, FPD, D. Or., Public Hearing—Portland, Or., Panel 6, Writ. Test. at 9.

582 *Id.*

583 Adopted by the Judicial Conference (Report of the Proceedings of the Judicial Conference of the United States, Sept. 2004, at 6–7).

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one-third of the cost of all representations.[584] In creating this program, DSC hoped to help both judges and panel attorneys develop reasonable budgets for these high-cost cases and also assist attorneys in obtaining the resources necessary to provide effective representation. DSC also hoped to better coordinate and obtain more control over service provider rates.[585] The pilot was designed with "the recognition that many judges do not have the time, training, expertise, or tools to assess whether payment claims made by attorneys and service providers are necessary and reasonable."[586]

The pilot program ran for three years, and placed CBAs in the Second, Sixth, and Ninth Circuits. DSC funded the positions, but the attorneys were hired by and reported to the circuits.

Their primary responsibility was to provide "objective case-budgeting advice to attorneys and judges and enhanc[e] case management in the pilot circuits."[587] One of the Ninth Circuit CBAs described her role:

> We meet with counsel to assess case management needs, including electronic discovery issues and forecasting case expenses. In multi-defendant cases, we try to identify ways counsel can share investigative, expert, paralegal, and electronic discovery management resources. The budgets we develop encompass both estimated attorney hours and service providers needed for multiple stages of litigation, and we assure counsel that a budget can be supplemented or amended if circumstances change.[588]

The Judicial Conference had previously encouraged courts to require panel attorneys to submit proposed litigation budgets for all capital habeas and capital prosecution representations, as well as in non-capital felony representations that were likely to become "mega cases" (defined at the time as in excess of 300 attorney hours or total costs for attorney and service providers to exceed $30,000).[589] Yet both attorneys and judges struggled to plan and manage large case budgets and contain costs while ensuring effective representation for clients. DSC believed CBAs could assist by providing consistent compensation standards, developing case budgeting training programs, designing cost containment initiatives, and making

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584 Margaret S. Williams, *Circuit CJA Case-Budgeting Attorney Pilot Project Evaluation (2007–2009)*, Federal Judicial Center Final Report, p. 1. [hereinafter FJC Case Budgeting Attorney Study].

585 Judge John Gleeson (ret.), E.D.N.Y., Public Hearing—Miami, Fla., Panel 3, Tr. at 26.

586 FJC Case Budgeting Attorney Study at 1.

587 *Id* at v.

588 Kristine Fox, Case Budgeting Atty., 9th Cir., Public Hearing—San Francisco, Cal., Panel 1, Writ. Test. at 3.

589 *Guide to Judiciary Policy*, Vol. 7A, Ch. 2, § 230.26 (as adopted JCUS-MAR 97, p. 23); and § 640. The non-capital provision which defines a "mega-case" was amended in September 2015 to allow for escalation in the threshold corresponding to increases in the panel attorney hourly rate, with the new "mega-case" threshold being 300 attorney hours or total costs for attorney and service providers to exceed $40,000. JCUS-SEP 15 at 16.

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recommendations on case budgets.[590]

The pilot program proved exceedingly effective. CBAs lowered the costs of capital and mega-cases while providing a valued resource for the courts and defense counsel. The CBAs streamlined the vouchering process; not only were interim vouchers processed more efficiently, "but changes to vouchers, when they occur[ed], [were] understood more easily by counsel."[591] Judges reported feeling "more confident in the changes they [made]," while attorneys had "a source they can go to when they have questions about the changes made."[592] The Report found:

> Overall, the work of the CBA on district court voucher review is viewed positively by both attorneys and judges. Attorneys see the work of the CBA as making the process more efficient, leading to faster payment, and giving them a resource in the review process. Judges see the work of the CBA as making their review faster and easier, and giving them a resource in the review process.[593]

The FJC estimated that CBAs saved the CJA program approximately $3.7 million over two years, $2 million more than the program cost to implement.[594] Not only did they save money, CBAs implemented a budgeting system, provided internal controls to monitor spending, and maintained or improved the quality of representation in the cases they helped manage.[595] Judges and panel attorneys both "agreed that budgeted cases are better managed and may actually result in better representation of the client because budgeted cases are better planned."[596] In fact, cases that were budgeted with the help of CBAs utilized "more resources (attorneys and service providers) than the non-budgeted cases, but at no higher cost."[597] In a defender system plagued by low use of service providers (see Section 7), the CBAs had "a positive effect on the awareness of resources available for the defense of CJA clients."[598] And both judges and panel attorneys agreed that cases that are "thought through by counsel at an earlier stage" result in "improved representation of the client."[599]

Recognizing the importance of the program, all circuits except for one now

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590 FJC Case Budgeting Attorney Study at 2.

591 *Id.* at 34.

592 *Id.*

593 *Id.* at 26.

594 *Id.* at vi.

595 Additionally, "72 percent of attorneys and judges said that the same amount of money could not be saved without the CBAs." *Id.* at vi.

596 *Id.* at 34.

597 *Id.* at 28.

598 *Id.* at vi.

599 *Id.* at. vi, 28.

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have CBAs.[600] It should be noted that the success of the program results in large part from the universal practice of hiring experienced and respected former criminal defense attorneys as CBAs. Judge Gleeson, former DSC chair, told this Committee, "Who occupies the position strikes me as really critical. We chose a respected panel attorney."[601] Another judge testified that he "was so complimentary of the case budgeting attorney…because she was able to look at those budgets across the board with her experience as defense counsel, not looking at it through the eyes necessarily of a judge, but looking at it [as] what does an experienced defense counsel need."[602] Reviewing vouchers, a judge told the Committee, is "a challenge for judges…because we do feel conflicted at times." [603] Having a CBA who help shape the case budget helped alleviate these concerns. The Ninth Circuit Appellate Commissioner stated, "Once we have a budget, I feel very comfortable in approving interim payments as we go along."[604] One of the CBAs explained, "[judges] relied on me because I came to the job with 28 years' experience as a CJA attorney. I had done the practice and I was familiar with it."[605] Case budgeting is an effective means to manage costs and improve quality of representation. Because judges and attorneys require help to efficiently implement budgeting coordinate resources and assist with case planning, CBAs have proven to be an important asset to the CJA program. ●

600 The two circuits without a CBA are the 11th and D.C. The Ninth Circuit now has three CBAs. One is paid from Circuit funds because the Circuit determined that its case load justifies the additional position and experience has shown that the program assists both judges and panel members.

601 Judge John Gleeson (ret.), E.D.N.Y., Public Hearing—Miami, Fla., Panel 3, Tr. at 26.

602 Mag. Judge Paul Warner, D. Utah, Public Hearing—San Francisco, Cal., Panel 7, Tr. at 15.

603 Mag. Judge Carolyn Delaney, E.D. Cal., Public Hearing—San Francisco, Cal., Panel 7, Tr. at 11.

604 Peter Shaw, Appellate Commissioner, 9th Cir., Public Hearing—San Francisco, Cal., Panel 1, Tr. at 7.

605 Jerry Tritz, Case Budgeting Attorney, 2nd Cir., Public Hearing—San Francisco, Cal., Panel 1, Tr. at 13.

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Section 6: Circuit Court Oversight

The CJA provides federal circuit courts significant authority over three different aspects of the federal defense program: 1) approval of panel attorney vouchers and ancillary service provider requests that exceed the case maximums;[606] 2) appointment of federal public defenders and setting their compensation;[607] and 3) approval of the number of attorneys for federal public defender offices.[608] There is widespread agreement among judges, circuit executives, federal public defenders, and panel attorneys that the involvement of circuit courts in the federal public defense system is inconsistent, inefficient, and burdensome for judges.

6.1 Circuit Review of Panel Attorney Vouchers and Ancillary Service Provider Requests

As discussed in the previous section, the CJA has established panel attorney compensation limits on non-capital felony cases.[609] For a non-capital felony appointment, the case compensation maximum amount is statutorily set at $10,300 per case.[610] Compensation may exceed this amount only if the presiding district court

606 18 U.S.C. § 3006A(d)(2)–(3).

607 18 U.S.C. § 3006A(g)(2)(A).

608 18 U.S.C. § 3006A(g)(2)(A).

609 *Guide to Judiciary Policy*, Vol. 7A, Ch. 2, § 230.23.20. Case compensation limits do not apply to expenses and the circuit has no role authorizing the payment of such expenses. *Guide to Judiciary Policy,* Vol. 7A, Ch. 2, § 230.23.10(d).

610 18 U.S.C. § 3006A(d)(2); *Guide to Judiciary Policy*, Vol. 7A, Ch.2, § 230.23.20. This new, higher cap became effective May 5, 2017. The Judicial Administration and Technical Amendments Act of 2008, Pub. L. No. 110–406, amended the CJA to raise the compensation maximums "simultaneously" with aggregate percentage increases in the maximum non-capital hourly compensation rate.

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judge determines that the matter is "extended or complex" and that payment above this statutory threshold is "necessary to provide fair compensation."[611] The chief judge of the circuit—or another circuit judge who is delegated that authority—must then approve the payment.[612] The CJA also limits payments for service providers to $2,500 per case[613] and allows for payments in excess of this amount only with approval from the circuit court. While district court review of vouchers presents many problems, as described elsewhere in this report, there is even less rationale for review by the circuit courts. District judges directly oversee criminal cases as they move through pretrial proceedings and trial. Thus, the presiding district judge has firsthand knowledge of the specific circumstances of each case and is better positioned to evaluate how much time and what resources are necessary to effectively represent a particular defendant. By contrast, circuit judges are removed from the day-to-day litigation in the trial courts and do not have sufficient familiarity with individual cases to effectively evaluate attorney fee requests. As one case-budgeting attorney said, "I have always wondered about why does the circuit need to sign off on it. Did Congress not trust the district court judges? I don't know what the reasoning was there, but the judges familiar with the case should have the most input into the case."[614] Though it might be supposed that circuit assessment was intended to provide an extra level of review to control costs, the most expensive cases, capital prosecutions, are not subject to that additional scrutiny. A federal defender expressed similar bemusement, saying, "Why the circuit has any role in reviewing the district court vouchers is beyond me. I thought it was an appeal, but it's been interpreted that they can't increase the amount, they can only decrease, which seems to me to make no sense."[615]

6.1.1 Burdens on Judges Created by Circuit Review Requirement

Few circuit judges have previously worked in federal criminal defense. One exception is Judge Luis Felipe Restrepo of the Third Circuit. He is a former federal defender and CJA panel attorney. Judge Restrepo believes his experience with criminal defense work is essential to his ability to perform his role in reviewing excess vouchers. He explained, "A lot of it is visceral, quite frankly. I was a CJA lawyer for 13 years. I know what these cases look like."[616] Still, Judge Restrepo agreed that "the district court judge probably has a better idea as to what the case involved than

611 18 USC § 3006A(d)(3).

612 18 USC § 3006A(d)(3).

613 This cap also became effective May 5, 2017.

614 Bob Ranz, Circuit Case Budgeting Atty., 6th Cir., Public Hearing—San Francisco, Cal., Panel 1, Tr., at 12. The legislative history offers no explanation for circuit review.

615 A.J. Kramer, FPD, D.D.C, Public Hearing—Philadelphia, Pa., Panel 6, Tr., at 6.

616 Judge Luis Felipe Restrepo, 3d Cir., Public Hearing—Philadelphia, Pa., Panel 2a, Tr., at 5.

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anybody reviewing the voucher [at the circuit level]."[617]

Circuit judges commonly believe they are poorly positioned to evaluate vouchers. As the Ninth Circuit Appellate Commissioner reported, "None of [the circuit judges] feel well equipped to do that.…[I]t seems irrational to give that kind of auditing review to people at the top of the management level who don't have any prior experience, insight, into the details of the case.…I think I can freely say to you that the unanimous view of the judges who've played that role in our circuit is that they don't want to do it and they don't see the rationale."[618]

Finally, circuit court review of excess vouchers creates additional work for district as well as circuit judges. District judges must draft a document to the approving circuit judge describing the case and explaining in detail why the excess cost should be approved.[619] A chief district judge wrote, "The Circuit has encouraged judges to write memorand[a] justifying the requested amounts, but with our extensive workload, it is difficult to find the time to provide further justification….[W]e request that the Ad Hoc Committee recommend elimination of circuit court review of vouchers." [620]

6.1.2 Burdens on CJA Attorneys Created by Circuit Review

The current system also requires panel attorneys to expend "a substantial amount of time" to try to justify vouchers in excess of the maximum, and that time is not compensable.[621] In the end, circuit review delays, sometimes significantly, payment of vouchers, and can result in substantial cuts to an attorney's fees. One district CJA representative surveyed panel attorneys in his district about circuit review and reported that, in the best case scenario, an attorney's voucher is "found to be reasonable" and is "paid anywhere from three months…to six months later" than when the attorney would have otherwise been paid.[622] Substantial testimony also showed that some circuits regularly reduce fees with little or no justification.

CJA panel attorneys, many of whom are solo practitioners, often have difficulty absorbing the costs of extended delays of and reductions in payment. Rather than wait for payment and risk cuts at the circuit level, some panel attorneys simply choose to not bill for otherwise reimbursable work in order to keep the voucher below the amount requiring circuit court review. One district judge told the Committee that when a CJA panel attorney in his district submits a

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617 *Id.* at 10.

618 Peter Shaw, Appellate Comm'r, 9th Cir., Public Hearing—San Francisco, Cal., Panel 1, Tr., at 17–18.

619 Bob Ranz, Circuit Case Budgeting Atty., 6th Cir., Public Hearing—San Francisco, Cal., Panel 1, Tr., at 12; *see also Guide to Judicary Policy,* Vol. 7A, § 230.30(b)(2).

620 Chief Judge John R. Tunheim, D. Minn., Public Hearing—Minneapolis, Minn., Panel 6, Writ. Test., at 1.

621 Robert Richman, Board Member of Minn. Assoc. of Criminal Defense Lawyers, Public Hearing—Minneapolis, Minn., Panel 4, Tr., at 24.

622 Mark Windsor, CJA Panel Atty., C.D. Cal., Public Hearing—San Francisco, Cal., Panel 3, Tr., at 6.

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voucher requesting more than the case maximum, he sends the lawyer a letter explaining, "I'm going to have to send this up for circuit review unless you just want to take the statutory maximum."[623] According to that judge, "Most of the time the lawyer will write back and say, 'I'll take the statutory maximum,' and it never goes up for review."[624] For many attorneys, remaining under the cap is "so much easier . . . than trying to jump through all the hoops . . . and having to go to the circuit judge."[625] Accordingly, panel attorneys testified that they frequently "just absorb the cost."[626]

Panel attorneys testified that it is sometimes difficult for them to zealously represent their clients while continually weighing whether expenditures will be viewed as reasonable and reimbursable by a reviewing circuit judge.[627] As the Federal Public Defender for the Districts of North Dakota and South Dakota explained, it is "difficult to provide appropriate representation . . . if one of the things going through the back of your mind is whether your voucher's going to be cut if the person goes to trial or you put the appropriate amount of time in to handle the case."[628] Attorneys who must constantly make these types of calculations are not able to serve the "undivided interests" of their clients as the Sixth Amendment requires.[629]

Testimony showed further that in some circuits voucher cutting is used as an inappropriate cost-saving measure. For example, attorneys in the Eighth Circuit frequently experience significant cuts to their vouchers.[630] Of the 131 excess vouchers submitted to the circuit from the District of Nebraska between December 2012 and May 2016, "thirty percent were cut at the chief judge level."[631] These cuts were made despite the fact that the presiding district judges had concluded that the cases were "extended or complex" and that reimbursement was "necessary to provide fair compensation."[632] The circuit did not cut the vouchers because it disagreed with the district judges' findings of reasonableness. Rather, the circuit denied these attorneys full payment because the reviewing judge believes that "part of CJA representation should be a public service" and that "no lawyer is entitled to full compensation for services for the public

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623 Judge Leon Holmes, E.D. Ark., Public Hearing—Birmingham, Ala., Panel 1, Tr., at 25.

624 *Id.*

625 James Broccoletti, CJA Panel Atty. Dist. Rep. E.D. Va., Public Hearing—Philadelphia, Pa., Panel 4, Tr., at 29.

626 *Id.*

627 *See, e.g.,* Robert Richman, CJA Panel Atty. D. Minn., Public Hearing—Minneapolis, Minn., Panel 4, Tr., at 3.

628 Neil Fulton, FPD, D.N.D & D.S.D., Public Hearing—Minneapolis, Minn., Panel 2, Tr., at 3.

629 *Polk Cty. v. Dodson*, 454 U.S. 312, 318–19, (1981) (quoting Ferri v. Ackerman, 444 U.S. 193, 204 (1979)).

630 See Appendix F.

631 David Stickman, FPD, D. Neb., Public Hearing—Minneapolis, Minn., Panel 2, Tr., at 1.

632 18 U.S.C. § 3006A(d)(3).

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good."[633] Another federal defender in the circuit interpreted these measures as an effort towards cost containment, saying, "We have a chief judge of the circuit who cuts vouchers as a cost-cutting measure. He's open about that."[634]

The circuit's involvement in approving excess vouchers and expert costs can also diminish confidence in its appellate review. The Constitution requires that defendants be provided with adequate funds to hire appropriate experts.[635] This constitutional command is all the more critical in capital cases. The case of *United States v. Snarr* is illustrative.[636] In *Snarr*, a capital defendant, having been convicted and sentenced to death, argued that he was denied due process because the circuit's chief judge denied the funding request for a "Mexican cultural expert" who would have presented mitigating information at sentencing, in part because she believed that "it would be inappropriate for testimony to be adduced by either party characterizing the defendant according to his national origin."[637] In doing so, this chief judge in effect supplanted the authority of the district judge to rule on the admissibility of evidence in a capital case, and did so as part of his voucher review responsibility and not as part of appellate review of the case.[638] And when that defendant appealed after conviction, the appellate panel was forced to consider whether the chief judge's action was correct and whether it was harmful. In the end, the panel found the chief judge's decision had not prejudiced the defendant because he had been able to present some of this evidence through other witnesses.[639]

Giving the circuit both judicial and administrative functions has the potential to undermine respect for the rule of law. The *Snarr* case highlights how having these functions at the circuit level can lead to a situation which, at the very least, appears to put the circuit court in the position of reviewing its own administrative decision as a part of its judicial review.

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633 David Stickman, FPD, D. Neb., Public Hearing—Minneapolis, Minn., Panel 2, Tr., at 25. In support of these decisions, the former chief judge repeatedly cited *In re Carlyle*, which states that "CJA service is first a professional responsibility, and no lawyer is entitled to full compensation for services for the public good." 644 F.3d 694, 699 (8th Cir. 2011).

634 Neil Fulton, FPD, D.N.D & D.S.D., Public Hearing—Minneapolis, Minn., Panel 2, FPDs Tr., at 2–3.

635 *Ake v. Oklahoma*, 470 U.S. 68 (1985).

636 *U.S. v. Snarr*, 704 F.3d 368 (5th Cir. 2013).

637 *Id.* at 403.

638 Although the focus here is on the conflict of having circuit courts involved in approving funding requests for cases which are being litigated in district court and then reviewing that decision on appeal, this case also illustrates that the judicial role in authorizing experts can interfere with the defense counsel's ability to pursue a particular strategy in a case.

639 *Id.* at 405–406.

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6.2 Appointment and Oversight of Federal Public Defender Offices

Federal public defender[640] offices across the country offer robust, efficient, and dedicated defense to their clients, and the delivery of that defense is typically free from any direct judicial interference. However, testimony described judicial involvement that diminished the independence of individual federal public defenders. Federal public defenders were reticent to speak frankly with the Committee about this interference. Nevertheless, defenders described effects of judicial control over their offices, as well as actual judicial involvement in defender operations.

6.2.1 FPD Appointment and Reappointment Issues

The CJA provides circuit courts the authority to appoint the federal public defender for each district within the circuit for a renewable four-year term.[641] Similar to a panel lawyer, the defender representing litigants before the court has their future job status controlled by that same court. As one federal public defender explained, the four-year renewal cycle can undermine the stability of defender offices:

> Currently, when a Defender position is advertised, the circuit makes clear that there is no presumption that the incumbent will be reappointed. Presumably, this language is included to encourage qualified individuals to apply for the position. The language, however, creates uncertainty over the future direction of the office that has a potentially destabilizing impact.[642]

Not all circuits handle the reappointment process this way. In some circuits, if an FPD seeks reappointment, the position is not advertised nor are additional candidates sought. Instead, a reappointment committee is formed to evaluate the current FPD's performance. And although this is not as potentially disruptive to the office as the uncertainty caused by the advertising of the head of the office's position every four years, it still can be unsettling for the organization.

The circuit court reappointment process can create the perception, whether correct or not, that the judiciary has undue influence over the defense. While the federal defender is appointed by the circuit, district court judges provide input on selection and reappointment determinations.[643] One federal public defender wrote that the "selection of federal defenders by the circuit was meant to provide some

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640 Federal public defenders are appointed by the circuit and are judicial employees, as opposed to community defenders, who are appointed by an independent board of directors and are not judicial employees. *See* 18 U.S.C. § 3006A(g)(2).

641 18 U.S.C. § 3006A(g)(2)(A).

642 Michael Caruso, FPD, S.D. Fla. Public Hearing—Miami, Fla., Panel 1, Writ. Test., at 6.

643 U.S.C. 18 § 3006A(g)(2)(A).

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buffer between defenders and the district courts before whom they more routinely appear. But defenders know, or at least perceive, that the circuit judges rely heavily on the comments from their colleagues on the district court bench."[644] This arrangement may lead some federal public defenders to base their decision-making at least in part on the preferences of district court judges, rather than focusing on what is best for their clients. One recently-appointed federal defender explained this conflict as follows: "I can tell you as a new defender having to make decisions; it's there in your mind that the judges are the ones that have appointed you. Not that you made any conscious decisions that way, but it's there."[645]

A former Deputy Assistant Director of the Defender Services Office told the Committee that:

> There is a certain pressure that comes from having a regular four-year appointment that's true for federal public defenders that doesn't really exist for community defender organizations. [Some judges] regularly feed candidates to an office and say, I'd like you to hire these people, insist on vetting assistant defender hires, [or tell defenders,] "I don't know that I want you providing representation in this class of cases because it's taking too long. It's not as efficient."[646]

The Committee also received private testimony about a federal public defender whose refusal to allow circuit involvement in the office's budgeting of capital cases jeopardized the defender's reappointment. Review of defender office litigation budgets is beyond the powers granted to the circuit court by the CJA. Heads of community defender organizations, by contrast, are insulated from this kind of pressure because they are hired by the organization's own independent board of directors.

The current structure creates conflicts between federal defenders' self-interest in reappointment and their ethical duty to provide effective and zealous representation to their clients. In most cases, circuit appointment of federal public defenders does not significantly hinder the defense function. Nonetheless, in an adversarial system, where judges are neutral arbiters, any actual or perceived control of the defense function by the judiciary can undermine the legitimacy and effectiveness of the criminal justice system as a whole.

6.2.2 Staffing Issues

Under the CJA, "The Federal Public Defender may appoint…full-time attorneys in such number as may be approved by the court of appeals of the circuit."[647] As

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644 David Patton, Exec. Dir., CDO, E.D.N.Y. & S.D.N.Y., Public Hearing—Philadelphia, Pa., Panel 3, Writ. Test., at 2–3.

645 Thomas Patton, FPD, C.D. Ill., Public Hearing—Minneapolis, Minn., Panel 2, Tr., at 13.

646 Steve Asin, Former Deputy Assistant Director, Public Hearing—Philadelphia, Pa., Panel 7, Tr., at 30.

647 18 U.S.C. § 3006A(g)(2)(A).

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part of the recent work measurement study conducted by the Policy and Strategic Initiatives Division of the Human Resources Office (the staff within the AO that provide support to the Judicial Resources Committee), data collected from FPD offices was used to create a work measurement formula that indicates how many staff were needed for each office. The work measurement study showed that many of these offices are currently understaffed. However, circuit courts retain ultimate staffing authority over the number of assistant federal public defenders an FPDO can have. According to one federal public defender, "The judiciary can now decide whether my office grows, remains at its current level, or goes out of existence simply by manipulating the number of appointments."[648]

Some circuits have demonstrated an unwillingness to increase staffing levels for offices that have requested additional attorneys. This has been true in some instances where the staffing formula would provide an office with additional positions but the circuit will not approve requested assistant positions. This has led to drastic disparities in staffing in different parts of the country.[649] For example, in recent years, the Fifth Circuit has been unreceptive to approving additional attorneys for FPD offices, even when those attorneys were needed to meet the offices' growing caseloads.[650] According to the former Deputy Assistant Director of the Defender Services Office, federal public defenders in the Fifth Circuit historically did not feel "comfortable in putting a request for attorney staff increases that they felt that they needed to the circuit court of appeals because of reactions that it would draw."[651] Federal public defenders expressed concern to the Committee that if they asked the circuit for additional attorneys, "their job status would be impacted," and they might not be reappointed.[652]

Indeed, the former Federal Public Defender for the Northern District of Texas described experiencing a "culture of no" shortly after assuming his appointment: "Despite rising caseloads and the fact that the prior defender received assurances of 2 additional slots for AFPDs, the prior defender had not filled those spots for fear of being looked upon as wasteful by the Fifth Circuit."[653] The Federal Public Defender for the Southern District of Texas recounted a similar experience:

> Throughout recent decades, we have had to make strenuous arguments to justify an increase in the number of AFPD's positions, and our arguments have at times been at least partially unsuccessful. For example, when our

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648 Bruce Eddy, FPD, W.D. Ark., Public Hearing—Birmingham, Alabama, Panel 6, Writ. Test., at 6.

649 Report of the Proceedings of the Judicial Conf., JCUS-SEP 15, p. 24-25.

650 *See generally* Maureen Franco, FPD, W.D. Tex., Public Hearing—Santa Fe, N.M., Panel 2, Writ. Test.; Jason Hawkins, FPD, N.D. Tex., Public Hearing—Santa Fe, N.M., Panel 2, Writ. Test.; Marjorie Meyers, FPD, S.D. Tex., Public Hearing—Birmingham, Ala., Panel 6, Writ. Test.

651 Steve Asin, Former Deputy Assistant Director, Public Hearing—Philadelphia, Pa., Panel 7, Tr., at 30.

652 *Id.*

653 Richard Anderson, Former FPD, N.D. Tex., Public Hearing—Minneapolis, Minn., Writ. Test., at 3.

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caseload exploded in 2003, we requested 12 additional AFPD positions. The Circuit approved only nine and required that they be filled over a two-year period.[654]

In her view, the struggle to obtain the necessary number of attorneys to handle the office's workload "has had an impact on our effectiveness and on our morale."[655]

While local conditions and practices sometimes create different staffing needs across districts, the number of attorneys an office receives should not be determined by the individual philosophies of the various circuit judges tasked with approving attorney levels. Judges play no role in the selection of U.S. Attorneys and their staffs or in CDO staffing, and the same independence should apply to federal public defenders. A chief district judge who served on the Defender Services Committee summed up this structural defect, observing, "I have great respect for my circuit brethren," but "I have some doubt about how they are in the best position to determine what the staffing level of any federal defender organization should be."[656] ●

654 Marjorie Meyers, FPD, S.D. Tex., Public Hearing—Birmingham, Ala., Panel 6, Writ. Test., at 3.

655 *Id.*

656 Chief Judge Raner Collins, D. Ariz., Public Hearing—Santa Fe, N.M., Panel 1, Writ. Test., at 1.

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Section 7: Quality of Representation

The CJA program has been described as both the "gold standard" and the "jewel in the crown" of public defense systems. It deserves this praise, especially when compared to state systems which, seldom adequately funded, have been starved of resources for years. The judiciary deserves much praise for insisting that representation under the CJA be provided consistent with the best practices of the profession and for safeguarding and enabling the program's growth. Yet despite these accomplishments, there is substantial evidence the Criminal Justice Act increasingly fails to fulfill its aim of ensuring all defendants equal justice under the law.

Testimony reflected that federal criminal justice has become a three-tiered system. This stratification exists not from lack of talent or commitment but rather from lack of resources and independence. Resources and independence matter. Without the resources necessary for effective representation (including an attorney's time) and the independence to act solely in the best interests of the client, an attorney cannot hope to provide quality representation.

From the standpoint of resources and independence, Assistant U.S. Attorneys sit on the top tier. They call upon the extraordinary resources of the entire Department of Justice and associated agencies that provide investigative and other support. They have extensive opportunities to attend high-quality training—and are paid their salaries while doing so. They are fully independent, able to pursue single-mindedly the best interests of their client, the United States.

On the second tier, federal defenders have less resources and sometimes less independence, but they are specialists in federal criminal law who benefit from institutional resources, support, and training—though never at the level of federal prosecutors. In general, assistant federal defenders are free to act solely in the interests of their clients.

At the lowest tier are CJA panel attorneys. They most likely cannot devote

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themselves exclusively to federal criminal practice. As solo practitioners or members of small firms, they have little or no institutional support. They receive inadequate compensation which they must forgo to attend training. They depend upon the judicial officer presiding over an individual case for any resources and even for their own pay. While pursuing the best interests of their clients, panel attorneys must keep one eye on the judge who holds the purse strings.

This system is segmented further by local variation. Some districts have established local plans that safeguard the independence of panel lawyers by diminishing or doing away with the role of the presiding judge in approving attorneys' fees and the use of ancillary service providers. Some of these same districts administer their plan by CJA committees that manage selection to the panel, insulating the lawyers further from the judges before whom they appear. These committees can provide panel lawyers with meaningful access to decision-makers and due process in voucher disputes. In these districts, panel attorneys, less constrained by lack of resources and impediments to independence, function more like individual assistant federal defenders, diminishing the quality gap.

In other districts, judges maintain control over the selection, appointment, and compensation of attorneys as well as authorization to use ancillary service providers. Some districts impose informal, artificial limits on the work panel lawyers can do on behalf of their clients. Sometimes this is in the form of limits on fees set well below statutory case maximums.[657] Other times it is the discouragement, if not outright bar, of payment for certain facets of a representation (see Section 5). In such districts, both the independence and the effectiveness of panel lawyers can be severely compromised.

7.1 Quality of Representation by Panel Attorneys

Quality of representation by panel attorneys received both harsh criticism and high praise. A private defense attorney, a former chair of the ABA's Criminal Justice Section and liaison to the Sentencing Commission, told the Committee that from his perspective, panel attorneys "generally . . . are state court practitioners who make a living on a high volume of cases. They're willing to take the federal court appointments because they'll pay more . . . . They don't have enough experience day in and day out with the federal sentencing guidelines to do an effective job" representing clients.[658]

Stephen Bright, President of the Southern Center for Human Rights, told

657 LeRoy Percy, CJA Dist. Rep., N.D. Miss., Public Hearing—Birmingham, Ala., Panel 7, Writ. Test., at 1.

658 James Felman, Former CJA Panel Atty., M.D. Fla., Public Hearing—Miami, Fla., Panel 4, Tr., at 34.

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the Committee that the attorneys he knows on CJA panels are trying to get off the panels and stop taking appointments. According to Mr. Bright, these attorneys were trying to move into private practice "where they can make some money.... They're just practicing on the panel. As soon as they build up enough of a reputation, they're out of there. They're going to go off and make some money somewhere. They're sure not going to make it doing court-appointed work."[659]

Mr. Bright, who primarily works on death penalty cases, told the Committee that in his experience with CJA panel attorneys representing defendants in capital habeas cases, there were "a number of cases where the lawyers didn't even realize their clients were intellectually disabled because they didn't spend enough time with them. They talked to them so little that they didn't even pick up on that.... You get what you pay for as they say, and you're not paying very much."[660]

However, there were many panel members and federal defenders who disagreed with the generalized criticism about panel attorneys. One panel attorney said that in his experience, "I could not more emphatically disagree with the statement that the CJA lawyers are generally of poor quality.... Only the best of the best get on the panel."[661] Another panel attorney testified, "I have to respectfully disagree because I think we have the best attorneys in the district on our panel. They're not attorneys who do it because they need $129 or whatever it is. They do it because they want to help indigent people."[662]

Given conflicting testimony about the quality of representation provided by panel attorneys, the reasonable conclusion to draw was best captured by a professor at the public hearing in Miami, who stated, "I think there's a mix on the panels."[663] And there is a general consensus that the quality of representation provided by panel lawyers is lower than that provided by federal defenders. This view is supported by the results of surveys of judges. Though in these judges' view, the gap in quality between federal defenders and panel attorneys is closing, the panel still rates consistently lower.[664]

In 2003, 93.3 percent of all judges reported that federal defenders in non-capital representations were "very good" or "excellent," whereas only 71.3 percent of judges rated panel attorney quality in assigned CJA cases similarly.[665] By 2008, 94.8 percent of judges ranked the overall quality of federal defender representation as "very good" or "excellent," while 75.9 percent of judges ranked panel attorneys similarly.[666]

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659 Stephen Bright, President, Southern Center for Human Rights, Public Hearing—Miami, Fla., Panel 4, Tr., at 32.

660 *Id.* at 33.

661 Juan Milanes, CJA Panel Atty., D.P.R. & E.D. Va., Public Hearing—Miami, Fla., Panel 4, Tr., at 34.

662 Sabrina Puglisi, CJA Panel Atty., S.D. Fla., Public Hearing—Miami, Fla., Panel 4, Tr., at 33.

663 Professor Ricardo Bascuas, U. of Miami School of Law, Public Hearing—Miami, Fla., Panel 4, Tr., at 33.

664 Westat Survey. See Appendix C: Survey Data Considered.

665 *Id.*

666 *Id.*

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In the most recent study in 2015, 95.6 percent judges ranked overall non-capital federal defender representation as "very good" or "excellent," and 80.9 percent of judges gave panel attorneys high scores for providing quality representation.[667] The recent survey showed a higher percentage of judges ranking panel attorney quality of representation as "very good" or "excellent" across all competency areas surveyed.[668] Of course, these surveys must be considered with some caution. As discussed elsewhere, judges see only a small part of the representation, that which takes place in court. And there is also the phenomenon revealed by surveys conducted during the course of the Allen Committee's study. In 1962 two editors from the Harvard Law Review conducted their own research into the state of federal public defense.[669] They found that without institutional support or payment, assigned counsel's role was limited, and most of these attorneys spent less than three hours of out-of-court preparation per client.[670] Guilty pleas were prefaced only by "a hurried ten-minute conference in a corner of the courtroom."[671] Those who were assigned counsel received young, inexperienced lawyers, "little versed in the technicalities of the criminal law or the questioning of accused persons," with "little if any courtroom experience."[672] Attorneys were reluctant to refuse a judge's assignment to a case because "they might later have to appear before [the judge] on an important matter."[673]

Despite the negative conclusions the article came to about the system as a whole, the majority of lawyers and judges interviewed found the ad hoc system to provide "adequate" or "very adequate" representation.[674] Perhaps because of the low expectations of counsel for indigent defendants, or perhaps because those within the system had limited perspective and exposure, 93 percent of lawyers and judges believed that counsel performed sufficiently.[675]

That dynamic in which a system's participants become blind to the system's defects is likely still a factor today.

7.1.1 Resources

Nearly all witnesses agreed that the lack of resources available to panel attorneys is one major source of disparity. As one defender stated, "[T]here is simply

667 *Id.*

668 *Id.* The greatest increase was 8.3 percent in competency of courtroom technology, followed by an increase of 7.9 percent in knowledge/application of U.S. Sentencing Guidelines and case sentencing law, and 7.1 percent increase in oral advocacy. *See id.*

669 Bruce J. Havighurst & Peter MacDougall, Note, *The Representations of Indigent Criminal Defendants in the Federal District Courts*, 76 Harv. L. Rev. 579 (1963).

670 *Id.* at 588.

671 *Id.* at 589.

672 *Id.* at 596.

673 *Id.* at 591.

674 *Id.* at 588.

675 *Id.*

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no comparison really in the resources available to our office versus the CJA panel attorneys."[676] Because panel attorneys must first request resources and then wait for approval, "There's no question that there's a delay in getting resources to the panel attorneys."[677] One defender explained, "I've got ten investigators and paralegals in my office. When I have got a huge white collar fraud case, I've got an investigator that is an accountant and a certified fraud examiner. I just hand her the case. There is simply no comparison really in the resources available to our office versus the CJA panel attorneys."[678]

Panel attorneys need these resources if they are not to be overwhelmed by the government. As a panel attorney testified, "Every federal [government] case…is going to come with an investigator, the case agent, sometimes two, who often is an attorney or an accountant. The resources that they have are seemingly unlimited."[679] Witnesses agreed "that there is nothing even close to a level playing field between the U.S. Attorney's Office and a CJA panel member."[680] As a magistrate judge explained, after he became a judge, he could clearly see "the disparity of resources between one side and another, and what a difference it makes in your ability to represent your client. [I presided over] a criminal case, [and] you could see what unlimited resources could do."[681]

One panel attorney described the disparity in a recent case to which he had been appointed,

> The case was a mortgage fraud case that had been investigated for years. I was appointed the lead defendant who was facing and received an extremely long sentence. I just want to give you a feel for what it's like as a CJA panel attorney. Like many, I'm in practice by myself. When I first met with the prosecution team, I met with four lawyers, two full-time agents—one a Las Vegas Metropolitan Police Department financial crimes expert and an FBI agent; they had a financial analyst, two or three paralegals; and on the other side of the table was me.[682]

Another panel attorney described a challenge he confronted in a counter-terrorism case to which he was assigned:

> I did a domestic terrorism case several years ago. My client was accused

676 Jason Hawkins, FPD, N.D. Tex., Public Hearing—Santa Fe, N.M., Panel 2, Tr., at 21.

677 Steve Wax, Legal Director, Oregon Innocence Project, Public Hearing—Portland, Or., Panel 1, Tr., at 24.

678 Jason Hawkins, FPD, N.D. Tex., Public Hearing—Santa Fe, N.M., Panel 2, Tr., at 21.

679 Mark Jones, CJA Panel Atty., M.D.N.C., Public Hearing—Miami, Fla., Panel 5, Tr., at 3.

680 Scott Dattan, CJA Panel Dist. Rep., D. Alaska, Public Hearing—San Francisco, Cal., Panel 3, Writ. Test., at 2.

681 Mag. Judge John Acosta, D. Or., Public Hearing—Portland, Or., Panel 2, Tr., at 43.

682 Daniel Albregts, CJA Dist. Rep., D. Nev., Public Hearing—San Francisco, Cal., Panel 4, Tr., at 2.

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> of planning to blow up a federal building. One of the things that the government did was they did a three-dimensional reconstruction, and they had to provide me with the fees that were expended to this particular engineering firm to do this project. It was 40 grand. By the same token, I was applying to the court to get, I think it was like $5,000, to get my own expert to take a look at the incendiary devices that were going to be used to see if, in fact, the amount of destruction was considered to be a mass destruction case. I was struck by the total inconsistency of the approach in that particular case.[683]

The Committee is concerned about both the perception and realization of unfairness and the legitimacy of outcomes in federal criminal proceedings when there are such clear disparities between the quality of representation and resources the government can bring to bear in a case, as compared to the resources a defendant without financial means can access.

Many witnesses emphasized that the uneven resource allocation in our adversarial system makes the entire system unfair. As one witness stated,

> I submit that the argument for parity is so simple and so obvious it's not hard to sell to the public or to funders. . . . Why parity in resources? Because even a superior athlete is at a disadvantage if she has inferior equipment. While for an athlete it may just be the loss of competition, how can we disadvantage people who are facing decades of prison time and even death? If you want a quality system, a fair system, the panel system must be paid on a par with prosecutors, and it must have access to similar resources.[684]

Some CJA panel attorneys expressed deep frustration over the disparity. One panel attorney testified that in her district,

> [I]f you look at the fact that 40 percent of the clients are being represented by appointed counsel, CJA counsel, that's a good percentage of people who are getting funneled through the system and they are not getting access to the services that the federal defender has and they should not be deprived of those services just by luck of the draw. Our federal defender is excellent; they are staffed with incredible attorneys. They have incredible resources and they do a great job and I think that there's a consensus in Idaho that the CJA panel attorneys don't match up to the federal defenders for obvious reasons.[685]

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683 Robert LeBell, CJA Dist. Rep., E.D. Wis., Public Hearing—Minneapolis, Minn., Panel 4, Tr., at 10.

684 Julia Leighton, General Counsel, Public Defender Service for D.C., Public Hearing—Minneapolis, Minn., Panel 1, Tr., at 3.

685 Lori Nakaoka, CJA Panel Atty., D. Idaho, Public Hearing—Portland, Or., Panel 5, Tr., at 7.

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Another panel attorney testified that when the public defenders try a case, "there's always two lawyers, there's almost always a paralegal in the courtroom, as well as an investigator, and if they need other staff they're there as well. It's unfortunate, I do everything I can on my appointed cases…but it's almost inevitable that there's a disparity" when a defendant does not have the benefit of being represented by a public defender.[686]

Finally, one panel attorney explained that panel attorneys simply want parity with federal defenders in their ability to access resources to close the quality gap. She told the Committee that she hoped what would come from this CJA review are solutions "that free up CJA counsel, give us the resources that we want, give us the ability to access them quickly like the federal defender has. Literally, I want what they want, they have. I want the resources that the federal defender has."[687]

7.1.2 Expert Service Providers

Disparity in resources, between the panel and government attorneys or between the panel and federal defenders is most obvious when reviewing the use of experts or other service providers. Testimony showed the extensive use of experts by the government in the preparation and presentation of cases, from forensic experts employed by federal law enforcement agencies[688] to private psychiatrists and neuropsychologists, whose rates for their services are "substantially greater than what would be approved under the CJA."[689] As a magistrate judge described his experience as a former assistant U.S. attorney, "in my prosecutions, I always had a primary case agent, and routinely supplemented his/her expertise with a financial analyst/accountant and other experts like medical doctors, chemists, finger print analysts, etc."[690]

Service providers—whether investigators, paralegals, or discovery coordinators—are critical to effective representation. Investigators, for example, are used by the government in every case and federal defenders in nearly every case. Investigators "locate and interview potential witnesses, obtain copies of police reports and criminal records of convictions, engage in background investigations of potential witnesses, photograph crime scenes or areas relevant to criminal allegations, meet with the client and his family on certain issues," among other valuable services.[691] These are tasks required by every case that does not settle quickly. This is true even when the government provides full discovery and even when that

686 Daniel Albregts, CJA Dist. Rep., D. Nev., Public Hearing—San Francisco, Cal., Panel 4, Tr., at 41.

687 Lori Nakaoka, CJA Panel Atty., D. Idaho, Public Hearing—Portland, Or., Panel 5, Tr., at 8.

688 Lynn Panagakos, CJA Dist. Rep., D. Haw., Public Hearing—San Francisco, Cal., Panel 4, Writ. Test., at 3.

689 Joseph St. Amant (submitted via Judge Marcia Crone), Senior Appellate Conference Atty., 5th Cir., Public Hearing—Birmingham, Ala., Panel 1, Writ. Test., at 6.

690 Mag. Judge Charles Coody, M.D. Ala., Public Hearing—Brimingham, Ala., Writ. Test., at 2.

691 Mag. Judge William Matthewman, S.D. Fla., Public Hearing—Miami, Fla., Panel 3, Writ. Test., at 3.

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discovery seems to show that the client is clearly guilty. A panel lawyer's story of an arson case to which he was appointed illustrates this point vividly:

> From the discovery, [my client] appeared culpable. Very culpable. I instructed my investigator to interview every person named in the discovery because the police reports were sketchy. I also kept asking the prosecution for the interview of one named witness that was omitted from the discovery. My investigator eventually was able to contact the omitted witness. He was an uninvolved passerby who confirmed completely the defendant's story that she was just standing there and her companion broke the window, started the fire, and then told her, "You'd better run." The charges against her were dismissed, and she was released from jail. In the aftermath, I laid in bed staring at the ceiling, feeling I had narrowly avoided allowing a horrible injustice to occur.[692]

Assistance of other experts is essential in many cases. A panel attorney offered the Committee a succinct explanation for expert use:

> [First, they can] assist a lawyer in understanding the facts [of a case]. Second, an expert can help determine why a defendant acted as he or she did .... Third, an expert may be instrumental in providing the defense attorney information about the defendant that supports a reduction in the charges or a lesser sentence because of the history and characteristics of the defendant .... The bottom line is: using an investigator and expert more often than not makes a difference in the outcome of the case. The prosecution is more likely to negotiate a reduction in the charges or to agree to a lesser sentence or not oppose the defense request for a lesser sentence.[693]

Experts are especially valuable at sentencing in the wake of the Supreme Court's decision in *United States v. Booker*.[694] Now that the federal sentencing guidelines are advisory and not mandatory, "psychiatric or psychological experts may be the only way to individualize the defendant, to demonstrate" that a sentence is sufficient but not greater than necessary, as required by 18 U.S.C. 3553(a).[695]

Furthermore, the "explosion in financial fraud and child pornography cases"[696] has necessitated greater use of experts, including specialists in forensic computing, forensic accounting, and mental health. However, the need for experts is not limited to such cases; in securities fraud cases, experts are needed to analyze and interpret

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692 Shaun McCrea, CJA Panel Atty., D. Or., Public Hearing—Portland, Or., Panel 4,Writ. Test. at 5–6.

693 *Id.* at 6–7.

694 543 U.S. 220 (2005).

695 Judge Nancy Gertner (ret.), D. Mass., Public Hearing—Philadelphia, Pa., Panel 2b, Writ. Test., at 4.

696 Michael Caruso, FPD, S.D. Fla., Public Hearing—Miami, Fla., Panel 1, Writ. Test., at 11.

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market data;[697] in national security cases, interpreters are needed to review discovery in foreign languages like Arabic, Pashto and Urdu; and in other cases, "emerging technologies, including location-based tracking techniques such as GPS and cell-site tracking data, frequently require expert review."[698]

FPDOs and CDOs typically have investigators on staff and rely upon their services in most of their cases. In fact, in many federal defender offices, "every case is staffed with a staff investigator."[699] Similarly, these offices usually have the funds necessary to secure other expert assistance when needed.

Because panel attorneys must seek judicial approval for service providers and experts, significant disparities exist in some districts between the number of cases in which service providers and experts are used by panel attorneys, as compared to the number of cases in which such services are employed by FDOs and CDOs.

Comparing the work of his office to the panel attorneys in the Northern District of Texas, the Federal Public Defender noted that he "employ[s] ten investigators and paralegals on staff," without which his colleagues "would find it extremely difficult to represent clients."[700] Yet in fiscal year 2014, panel attorneys in his district sought and secured service providers of any kind in only 4.5 percent of their representations.

Similar disparities exist in other districts. The federal defender in the District of Puerto Rico explained that while he had only twice as many cases as the panel, his office spent ten times as much on expert and professional services. [701]

Panel Attorneys' Usage Rates of Service Providers—U.S. District Courts in North Carolina, FYs 2013 and 2014

Districts in North Carolina	Average usage FY 2013	Average usage FY 2014
Eastern District	32 percent	40 percent
Middle District	4 percent	1 percent
Western District	2 percent	2 percent

Empirical data, which included three national surveys conducted by the Westat research group[702]of judges, panel representatives and attorneys, public defenders, and resource counsel, plus payment information from the system utilized by the AO before eVoucher,[703] show a low rate of expert usage by panel attorneys. Data from the payment system in fiscal years 2011–2014 showed that across

697 *Id.*

698 *Id.*

699 Lisa Freeland, FPD, W.D. Pa., Public Hearing—Santa Fe, N.M., Panel 3, Tr., at 3.

700 Jason Hawkins, FPD, N.D. Tex., Public Hearing—Santa Fe, N.M., Panel 2, Writ. Test., at 6.

701 Eric Vos, FPD, D.P.R., Public Hearing—Miami, Fla., Panel 1, Writ. Test., at 5.

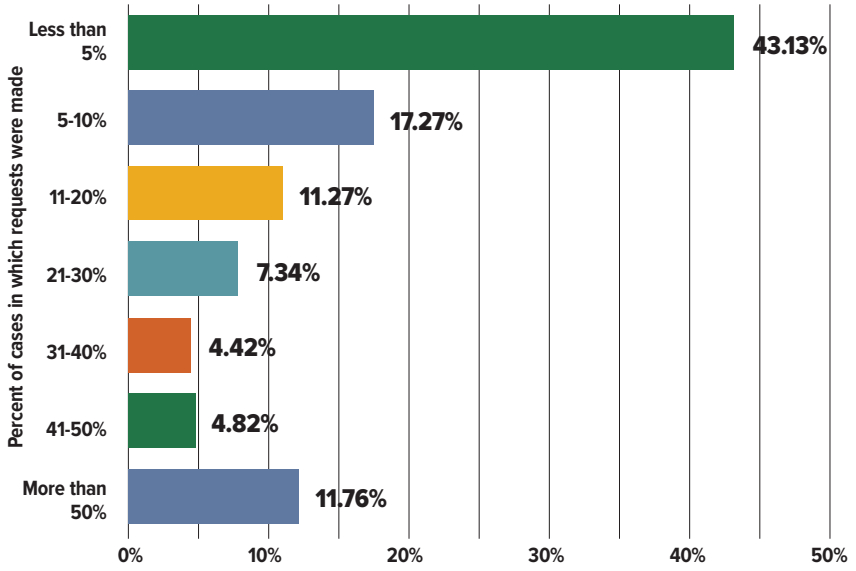
702 Westat Survey. See Appendix C: Survey Data Considered.

703 Information drawn from 6x payment system provided to the Committee. See Appendix G.

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the country CJA panel attorneys on average used service providers in only 14 to 15 percent of their cases.[704] During this same period, utilization of such services in several districts was as low as one percent.[705] The highest use was 53 percent for one district in only one fiscal year.[706] This compares to federal defenders who told the Committee that they use service providers in all of their cases.

Over the last five years, in what percentage of your cases have you sought permission of the court to engage a service provider (e.g., investigator, paralegal or other expert*) in a non-capital case?



*Interpreters/translators are not included in this question.
Source: CJA Review Committee Survey on Use of Service Providers (June 2016), available at https://cjastudy.fd.org.

The Committee reviewed data about panel attorneys' utilization of service providers in non-capital, non-immigration matters. Over the course of the last three fiscal years, the district with the highest rate of use was the Middle District of Tennessee, where CJA lawyers employed a service provider in just under half of all representations. By contrast, panel attorneys in the Southern District of Alabama employed a service provider in two percent of representations. The Northern District of Mississippi reported the very same two percent rate of usage, and the Southern District of Georgia and the Western District of Arkansas showed similar data.

Within a state, districts vary in usage rates and average payments. In one state, each of three districts had widely varying uses of experts, ranging from a high in one district of 40 percent to a low of 1 percent in the neighboring district.[707]

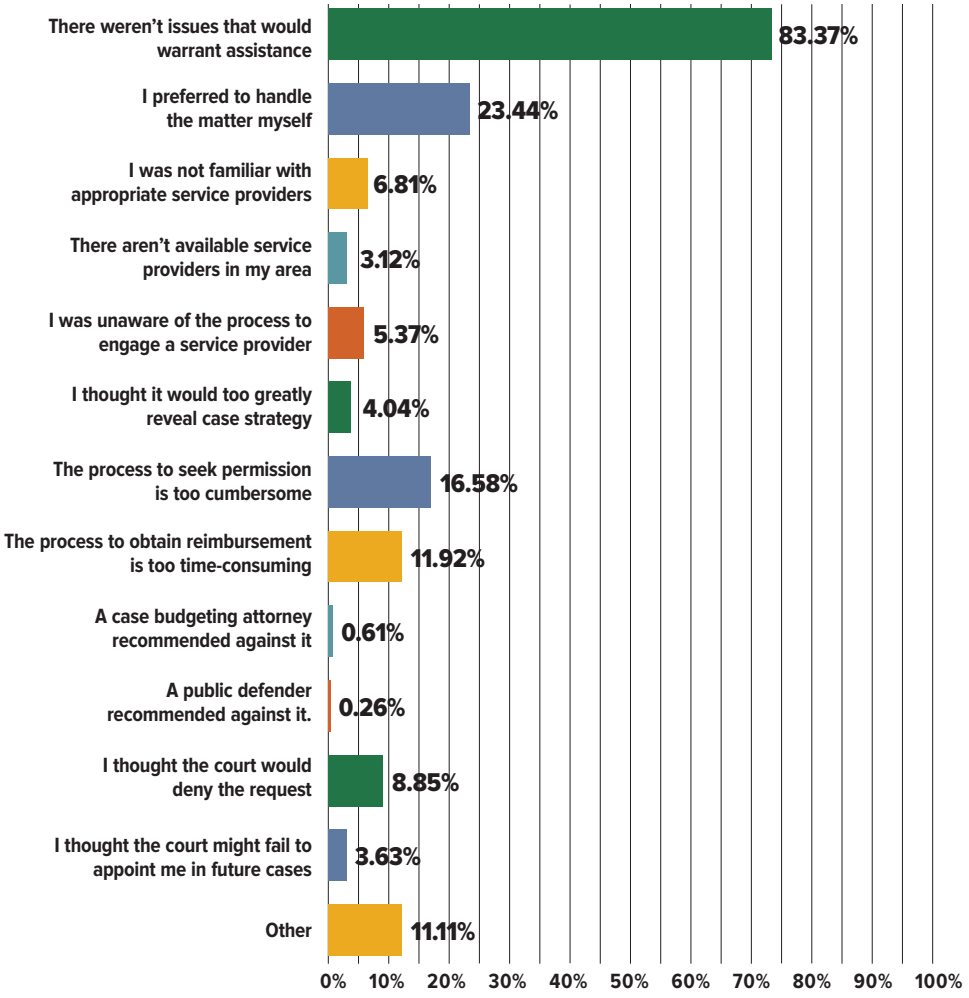
The Committee conducted its own survey of panel attorneys to learn more about their usage of service providers. The results from those surveys are consistent

704 *Id.* Data does not include service providers in capital cases, immigration cases, or interpreters.
705 *Id.*
706 *Id.*
707 *Id.*

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with other evidence on expert use by panel attorneys. As the table above indicates, sixty percent of lawyers in the Committee's survey said that they employ a service provider less than ten percent of the time. In fact, fewer than 12 percent of panel attorneys have requested a service provider in a majority of their cases. When asked why they do not seek service providers, almost 84 percent of responding panel attorneys said that most of their cases do not include issues that warrant assistance. These responses are provided in the following table. At hearings, panel attorneys offered similar explanations, but the responses stand in contrast to the practice of federal and community defenders, who regularly employ permanent investigators and paralegals in their cases and who testified to the importance and value of such assistance.

If you have not sought to engage a service provider in a non-capital case, why is this so?



Source: CJA Review Committee Survey on Use of Service Providers (June 2016), available at https://cjastudy.fd.org.

Some panel attorneys indicated that they prefer to handle the issue themselves and conduct their own investigations in lieu of employing an investigator. Panel attorneys also offered this explanation at the Committee's hearings. One public

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defender explained that there are financial incentives for panel lawyers to complete the investigation themselves:

> [For] the majority of the panel attorneys . . . their sole source of income is what they earn off of appointments. If they can do the work themselves and bill out that two, three, or four hours then they get money they otherwise would not. . . . It appears that what they're wanting to do is to try to maximize the amount of money they can earn on each case, and one of the ways they try to do that is not ask for experts but rather do it themselves[708]

The Committee also heard other explanations for the low rate of service providers. In rural areas, such as the Dakotas, Wyoming, and New Mexico, it was reported that particular types of experts are in short supply, making it "difficult to engage them on appropriate cases due to schedule, physical proximity, and conflicts with their other obligations."[709] Nationally, some panel attorneys explained that they rely on investigators and expert assistance provided by the FDO when assisting a client whose co-defendant is represented by the public defender. Others testified that they can obtain the same information as an investigator through other means and at a lower price. As one federal defender explained, though all cases can benefit from an investigator, in illegal re-entry cases one of the key issues is the defendant's "prior convictions, which you can get on a computer," thus saving the cost of an investigator.[710]

These explanations do not fully account for the low rates at which panel attorneys use experts. Some witnesses believed the phenomenon was explained by the differing cultures of districts. Rates of expert usage show systematic, geographic differences, reflective of what one district judge called "a matter of court culture and what people expect."[711] "I think most of it is culture," a federal defender told the Committee, and further noted, "I think most people are solo practitioners, come out of state court where they just don't use experts much. I think all cases can benefit from experts."[712] A judge echoed this point, testifying that "notwithstanding that this topic is covered in educational seminars, CJA panel attorney members simply may not be aware of the variety of investigative and expert services for which compensation is available under the CJA."[713] Or, as a federal defender, testified:

> I think it's also that [panel attorneys have] not used experts in the past. They don't know how to work with one, they don't know what type of

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708 Bruce Eddy, FPD, W.D. Ark., Public Hearing—Birmingham, Ala., Panel 6, Tr., at 26.
709 Neil Fulton, FPD, D.S.D. & D.N.D., Public Hearing—Minneapolis, Minn., Panel 2, Writ. Test., at 5.
710 Marjorie Meyers, FPD, S.D. Tex., Public Hearing—Birmingham, Ala., Panel 6, Tr., at 36.
711 Chief Judge Catherine Blake, D. Md., Public Hearing—Philadelphia, Pa., Panel 1, Tr., at 24.
712 Marjorie Meyers, FPD, S.D. Tex., Public Hearing—Birmingham, Ala., Panel 6, Tr., at 36.
713 Mag. Judge Charles Coody, M.D. Ala., Public Hearing—Birmingham, Ala., Writ. Test., at 2.

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> information to give them. They don't know the advantages that an expert can bring to your case whether you're going to trial or whether it's mitigation for sentencing expert. They just don't know how to take the information that an expert can bring them and then what to do with it. I think there's a lot of that, they're just uncomfortable. They've never used them, don't know how to use them.[714]

Comparing her district to another district where panel attorneys regularly employ paralegals, a panel representative explained the attorneys don't feel "entitled to use a paralegal in every case. It's a cultural thing, and I think that maybe we don't have strong leadership in the CJA community. We are kind of on our own, and we look to our judges for what we are thinking is the appropriate use of resources."[715] In another district, a panel attorney identified culture and lack of institutional support as a problem as well: "We've got a good panel, but there is timidity. Those same people are timid about applying for experts and investigators…we've got to change the culture."[716] However, there is currently no support to change that culture, the attorney explained. "In our area, our neck of the woods so to speak, we have a community federal offender organization. Good people, really talented lawyers as well, but they operate as kind of a private law firm separate and apart from us, the panel."[717]

These cultural explanations carry some weight, but like the reasons offered by panel lawyers in response to the Committee's survey, they are not a full explanation. Ultimately, it is clear that requiring judicial approval of expert services requests deters some attorneys from seeking necessary assistance. Multiple panel lawyers testified about the "chilling effect"[718] the current approval process has, in addition to it being a "time-consuming [and] cumbersome procedure that goes uncompensated for the lawyers."[719]

Attorneys may also find themselves in an unpleasant negotiation with the presiding judge on the expert fees. As a panel representative in one such district described her experience:

> Routinely, when I request an expert and I say, "Look. I've talked to the expert. This is what they charge. This is how many hours I think I'm going to need. This is the amount I'm asking for," I'm not approved for

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714 Bruce Eddy, FPD, W.D. Ark., Public Hearing—Birmingham, Ala., Panel 6, Tr., at 35.

715 Lori Nakaoka, CJA Panel Atty., D. Idaho, Public Hearing—Portland, Or., Panel 5, Tr., at 40–41.

716 Edward Hunt, CJA Panel Atty., E.D. Wis., Public Hearing—Minneapolis, Minn., Panel 4, Tr., at 22–23.

717 *Id.* at 23.

718 Lori Nakaoka, CJA Panel Atty., D. Idaho, Public Hearing—Portland, Or., Panel 5, Tr., at 41.

719 As an attorney explained, "Most panel lawyers are small firm or solo practitioners, so they must rely on the court to fund the extraordinary expenses of the case. The time they must spend to file motions and memoranda and attend hearings to justify obtaining necessary defense resources…on investigators, experts, translators, forensic accountants, paralegals, document management, technical aid and the like, is often excessive and intrusive." Rochelle Reback, Former CJA Panel Atty., M.D. Fla., Public Hearing—Miami, Fla., Panel 5, Writ. Test., at 6–7.

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> the amount I'm asking for. I'm just trying to think . . . if there's been an explanation or if it's just been the judge crossing the amount out and just saying, "I'm just going to give you $2500 right now." Then I had to go back several times."[720]

If multiple experts are required, the attorney will have to repeat this process multiple times, on each occasion disclosing information concerning the proposed defense.[721] In addition, attorneys sometimes face requests from the judge presiding over the case to seek a reduced rate from the selected expert. Multiple lawyers spoke of the challenge of recruiting "qualified experts willing to handle CJA appointments at hourly rates which are non-competitive in the private sector."[722]

As one panel attorney noted, ultimately, "judicial involvement in management of resources can negatively impact the quality of our representation,"[723] creating the current disparity between CJA panel attorneys and federal defenders. Another panel attorney was emphatic in stating that judicial review of expert requests entrenches resource disparities and unfairness:

> There is categorically, from my perspective as a defense lawyer, no reasonable, logical, ethical, lawful explanation why there should be a distinction between the defense function and the prosecution function. There is no reason why as defense lawyers we should have to go to the judiciary and basically be beholden to their largess . . . The prosecution doesn't go through these machinations. We should not have to. It certainly impacts on the quality of representation.[724]

7.1.3 Attorney Effort

The low use of expert services by panel attorneys is the most visible disparity in resources between panel lawyers, federal defenders, and government attorneys. But limits on the time panel attorneys can devote to a representation are even more critical. The ways in which judicial management of panel lawyers' compensation serves to limit attorney effort are discussed fully in Section 5 on compensation. They include the refusal to pay for categories of work, bench marks for how much a type of case should cost, and "pro bono" voucher cuts. In these and many

720 Jennifer Horwitz, CJA Dist. Rep., W.D. Wash., Public Hearing—Portland, Or., Panel 5, Tr., at 41.

721 The maximum compensation for investigative, expert, and other services without prior authorization is $800. *See* 7 Guide to Judiciary Policy § 310.20.30 (2013).

722 Gilbert Schaffnit, CJA Dist. Rep., N.D. Fla., Public Hearing—Miami, Fla., Panel 6, Writ. Test., at 6. For example, as a panel lawyer told the Committee, "the approved rate for a forensic accountant is $150 per hour. However, the 'going' rate charged by a forensic account is approximately $270 [per hour] for a partner, $185 for a manager, and $140 for an associate." David Eisenberg, CJA Dist. Rep., D. Ariz., Public Hearing—Santa Fe, N.M., Panel 6, Writ. Test., at 4.

723 Lori Nakaoka, CJA Panel Atty., D. Idaho, Public Hearing—Portland, Or., Panel 5, Tr., at 41.

724 Robert LeBell, CJA Dist. Rep., E.D. Wis., Public Hearing—Minneapolis, Minn., Panel 4, Tr., at 3.

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other ways discussed there, the CJA discourages panel attorneys from doing all they can do for their clients, or indeed all federal defenders do for theirs. As one federal defender told the Committee, "[T]here is a disparity of the representation… [that] is not because we don't have excellent attorneys on our panel, because we do. But my office, the lawyers in my office, the investigators, the paralegals, they are permitted to do more for their clients than the panel is permitted to do in my district."[725] This dynamic exists even when judges impose no specific limitations on representational services, and it is the primary source of disparity. A case budgeting attorney put the disparity in stark terms when he testified before the Committee, stating: "I would venture a guess that to the best of my knowledge, AUSA's have never been told, 'Prosecute this case as cheaply as you can,' which is, although it might not be as blunt as that, that is pretty much what a CJA attorney is given to understand."[726]

Quality legal work requires time. When attorneys are told, directly or indirectly, that they should not spend time traveling to meet with witnesses, meeting with their clients, or reviewing discovery, the quality of their work will be reduced. When an attorney must constantly be concerned with what a judge would consider reasonable, it can affect her professional judgment and the quality of her work.

7.1.4 Institutional Support

Compared with federal defenders or federal prosecutors, panel attorneys are at a disadvantage because they lack institutional support. One panel attorney spoke about the ability of federal defenders to easily converse with colleagues and use more experienced attorneys in their office as resources. Most panel attorneys are sole practitioners or members of small firms and cannot easily access this type of collective knowledge. As a witness explained, "[W]hat you do have in a federal defenders system is a solidarity that is critical in this criminal defense work of being able to go next door and talk to someone who is an expert… it is really vital to… effective and adequate representation and you don't have that… in the panel."[727]

The benefits of being part of a cadre of skilled federal criminal practitioners could be replicated for the sole practitioner panel attorney. Many federal defender offices are able to act as resources for panel attorneys. Their own colleagues may also be willing and able to do so. But the CJA, as currently administered, discourages such collaborative work or brainstorming: most judges will not allow compensation for time spent in these activities.[728] And as discussed in the Compensation section, the hourly rate is already so inadequate that it discourages

725 Hilary Potashner, FPD, C.D. Cal., Public Hearing—San Francisco, Cal., Panel 7, Tr., at 24.

726 Bob Ranz, Circuit Case Budgeting Atty., 6th Cir., Public Hearing—San Francisco, Cal., Panel 1, Tr., at 2.

727 Professor Barbara Creel, Law & Indigenous Peoples Program, U. of New Mexico, Public Hearing—Santa Fe, N.M., Panel 4, Tr., at 34.

728 See Rochelle Reback, Former CJA Panel Atty., M.D. Fla., Public Hearing—Miami, Fla., Panel 5, Tr., at 23; Jessica Salvini, CJA Panel Atty., D.S.C., Public Hearing—Miami, Fla., Panel 4, Tr., at 12–15.

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panel attorneys from embarking on any work that will not be compensated. Ironically, it is possible that providing compensation for these activities would save the taxpayer money. This is true of both brainstorming specific issues relevant to particular cases as well as more general discussion of legal issues relevant to criminal practice. By consulting with colleagues who can point them toward precedent, or transcripts, or even knowledge of a particular judge's views of a subject, federal defenders save time by avoiding dead ends and quickly locating useful resources. Federal defenders are able to spot and cull issues, to know whether to pursue a line of legal or factual investigation, or having decided to pursue it, where to begin. Panel attorneys, were they freer to consult with federal defenders and their colleagues, could reap some of these same benefits.

7.1.5 Expertise

Federal defenders are experts in federal criminal law because they do nothing else. In many districts, panel lawyers receive only a few appointments each year, often not enough to maintain proficiency in federal defense, and almost never enough to make a living. They must devote a substantial portion of their energies to areas other than federal criminal defense. Even in those districts where there are a large number of appointments in a given year, panel lawyers are often advised they should not make the CJA their entire practice. More than 90 percent of all federal defendants have appointed counsel. Some of the remainder who hire counsel will rely upon the white-collar crime practice groups of large firms. Therefore, the typical panel lawyer cannot devote herself solely to the practice of federal criminal defense. She is disadvantaged in comparison to both federal defenders and prosecutors.

7.1.6 Compensation

The CJA's low rate of payment for attorney work diminishes the quality of representation provided. It drives some of the best attorneys out of panel work. As one panel attorney testified, "More importantly, it is my opinion and the opinion of some others that what we are experiencing right now in [the district] is the loss of an entire generation of our best and brightest panel attorneys."[729] A circuit court judge told the Committee, "We do lose people. We do lose a lot of good people to the rate system."[730] While a magistrate judge testified, "I can only hope and pray that you guys are going to raise the rates so that we can keep our panel at the same quality."[731] A panel attorney in Boston told the Committee that qualified attorneys are leaving his panel for financial reasons. As he explained, "The economics of doing

729 Mark Windsor, CJA Panel Atty., C.D. Cal., Public Hearing—San Francisco, Cal., Panel 3, Tr., at 7.
730 Judge Luis Restrepo, 3rd. Cir., Public Hearing—Philadelphia, Pa., Panel 2a, Tr., at 12.
731 Mag. Judge Cheryl Pollack, E.D.N.Y., Public Hearing—Philadelphia, Pa., Panel 2b, Tr., at 28.

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this in Boston are pretty tough.... We're willing to take certain things that we have to do to do the work we love, but at a certain point, some people, that maybe have better financial sense than I do, take a walk. And the quality of representation is going to go down if that starts to happen."[732]

In addition, low pay, and the possibility of voucher cuts, leads some CJA attorneys to plead their clients guilty as quickly as possible. One panel attorney said, "[T]here are, and...not saying everybody, and certainly not in every case, but there are attorneys that want to shut down that case fast. There was a nickname we used to have for them in courthouse coffee shops, that they were 'V6ers.' They were walking violations of the Sixth Amendment."[733]

7.1.7 Independence

The sine qua non of effective representation is independence. An attorney must be able to exercise professional judgment in pursuing the best interests of the client.[734] If this pursuit is hindered by self-interest or other concerns, quality will suffer. The section on Compensation discusses various ways in which judicial control of appointment and compensation directly compromise an attorney's independence, her ability to act solely on behalf of the client. The concerns described there are not theoretical or abstract. An example shows the direct effect on a lawyer's judgment this judicial control can have:

> I ran into a recusal issue in a state case where, through investigation I learned that the judge and the prosecutor had some kind of a very close relationship. It was an open secret in the community, but no one had ever filed a recusal motion. I said, "Why didn't you file a recusal motion?" The answer from every one of the very good, talented lawyers in that town were, "If I file that motion, I can't work here anymore." I did not live in that town, that was the only case I had, I was able to file that recusal motion, and we got through that motion, and that judge was recused.[735]

In a similar vein, a federal defender described how judicial approval of panel attorney expert requests can compromise their independent judgment. She testified that panel attorneys in her district learn quickly that asking for resources can get an attorney removed from the panel. She said that all it takes is for a single panel attorney to request an expert or service provider once or twice,

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732 Mark Shea, CJA Panel Atty., D. Mass., Public Hearing—Philadelphia, Pa., Panel 4, Tr., at 26.

733 Edward Hunt, CJA Panel Atty., E.D. Wis., Public Hearing—Minneapolis, Minn., Panel 4, Tr., at 22.

734 "[P]artisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." United States v. Cronic, 466 U.S. 648, 655 (1984) (quoting Herring v. New York, 422 U.S. 853, 862 (1975)).

735 George Kendall, Director, Public Service Initiative, Squire Patton Boggs, Public Hearing—Minneapolis, Minn., Panel 3, Tr., at 6.

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> to be told no and then it's review time and a judge says, 'Oh that person always wants A, B, C, or D.' Then all of a sudden that person is no longer on the panel. That sends a very loud message and . . . you can bet that requests for assistance will drop off immediately because the message is very clear.[736]

These attorneys forgo expert requests for their clients because their independence has been compromised by self-interest. The quality of representation, and their clients, suffer.

As the Executive Director for the Sixth Amendment Project pointed out, this is a logical result of the current system. "Judicially-controlled indigent defense systems often follow or adjust to the needs of each judge in each court, rather than focusing on providing constitutionally effective services to each and every defendant. Fearing the loss of income by not pleasing the judge overseeing their compensation," panel attorneys will tend to construct a defense strategy around a judge rather than a client. [737] The lack of independence accorded CJA panel attorneys can adversely affect the quality of representation they provide, and undermine the intent and purpose of the CJA. As the director of the Sixth Amendment Center explained, without necessary independence, "[d]efense attorneys simply bring into their calculations what they think they need to do to garner favor with the judge, thereby not advocating solely in the interests of the clients, as is their ethical duty. Such practices stand in contrast with Sixth Amendment case law."[738]

7.1.8 The Importance of Training

Both panel attorneys and federal defenders identified insufficient training of panel attorneys as a cause of the quality gap between defenders and the panel. A panel attorney told the Committee that, "there is truly a disparity between defenders and CJA, and that disparity comes in training."[739] A federal defender agreed, testifying that, "I think a lot of the deficiencies in the panel is not for lack of ability, or lack of energy, but simply lack of knowledge."[740]

Training cannot remedy deficits of independence or resources, but it is critical to improving and maintaining lawyers' expertise. The Prado Committee recognized that attorneys need access to high quality training if they are to provide representation consistent with the best practices of the profession and recommended that:

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736 Deborah Williams, FPD, S.D. Oh., Public Hearing—Philadelphia, Pa., Panel 10, Tr., at 18.

737 David Carroll, Executive Director, Sixth Amendment Center, Public Hearing—Minneapolis, Minn., Live Stream, Tr., at 1.

738 *Id.*

739 Melanie Morgan, CJA Dist. Rep., D. Kan. & W.D. Mo., Public Hearing—Santa Fe, N.M., Panel 5, Tr., at 13.

740 Frederick T. Heblich, Jr., FPD, W.D. Va., Public Hearing—Philadelphia, Pa., Panel 6, Tr., at 12.

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"The Criminal Justice Act should be amended to require the CJA's national administrative entity to provide on-going training in federal law and practice, on a par with that provided to the prosecutors, to attorneys supplying service pursuant to the CJA."[741] The need for training is as great today as it was in 1993. The National Association of Criminal Defense Attorneys' president explained why: "Indigent defense counsel must have the requisite expertise to provide representation consistent with the best practices in the legal profession.... [F]ederal criminal defense has just become too complicated, too specialized. The lawyers that handle those cases should have expertise and training in that area of the law.... [T]raining must be comprehensive, ongoing, and readily available."[742]

Heeding the Prado Committee's recommendation, the Defender Services Office has created a dedicated Training Branch to organize training events for both federal defenders and CJA panel attorneys. It sponsors national and regional trainings on a broad range of topics relevant to federal criminal practice. Panel attorneys and federal defenders praised the Training Branch's efforts. The regional and national training programs sponsored by the Training Branch were valued particularly for the opportunity they provide to learn from colleagues around the nation.

> Now years later looking back, I think that the national conferences are absolutely essential to the success of this program because what happens is that the lawyers get together and find a common ground with their experiences. Lawyers in smaller districts get good ideas from lawyers from the big city districts, and the lawyers from the big city districts get good ideas from the lawyers from the smaller districts. The beneficiary of it of this is the people we represent, and the improvement of the program. That kind of exchange would never take place if we didn't at least get together once a year to discuss the issues that we confront.[743]

A federal defender emphasized the importance of having national training events. She told the Committee, "I think there's a real benefit both for CJA lawyers and for federal defender staff to go to national trainings and to interact with their counterparts from other areas. We just learned so much from what's happening in other districts, things that you might not think about in the culture of your district."[744]

National and regional training serves as an antidote to parochialism. Attorneys not exposed to practices from other areas may be unable to recognize the limitations of their approaches to federal criminal defense. In the experience of a former federal defender, "every district believes that it's doing a good job. Every judge, every

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741 Prado Report at 56.

742 E. Gerry Morris, President, National Assoc. of Criminal Defense Lawyers, Public Hearing—Santa Fe, N.M., Panel 4, Tr., at 9.

743 Anthony Ricco, CJA Dist. Rep., E.D.N.Y., Public Hearing—Philadelphia, Pa., Panel 9, Tr., at 9.

744 Lisa Freeland, FPD, W.D. Pa., Public Hearing—Santa Fe, N.M., Panel 3, Tr., at 15.

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defender thinks, wow, the way we do it is really the way it should be done ….My perception however is that those variations include a tremendous disparity in the quality of the representation that's provided" from district to district.[745]

NACDL and the National Legal Aid and Defender Association also sponsor national and regional training that could improve the quality of panel lawyers' work. But these programs can be costly. A defender explained, "There are offerings through NACDL and other organizations that require membership that cost a lot more money for the panel members, even for defenders when I want to send my staff to a NACDL, program, if they're not members our cost is higher as well."[746]

As useful as national and regional programs are, they cannot fully meet the panel's need for more training. The Committee was told by a defender that "[t]he [DSO] training division does a wonderful job, they always get great reviews; however, panel lawyers have a hard time closing up shop and traveling across the country or regionally for several days."[747] Most panel attorneys are solo practitioners who operate their own practices. As one panel attorney observed, "I think it is often difficult for solo or small firm attorneys who are on the panel to attend some of the out of state CLEs."[748] For panel attorneys from rural areas, the problem is greater still. A defender told the Committee, that especially in these rural districts, travel to attend regional training programs takes longer and is more expensive. She testified,

> It is a financial burden on them.…We have many lawyers who could benefit from those programs but because of the costs and the time and the fact that they are solo practitioners in these largely rural areas it creates a huge burden on them to be able to receive the training.[749]

A panel attorney who practices in a rural district agreed that even regional training was difficult to attend. She told the Committee, "It is estimated that each regional CLE credit costs approximately $75 per credit, which requires [additional] time, airfare, and hotel expense and meals. Moreover, the CJA attorney is not able to bill while attending training."[750] The community defender from Montana explained that, while he thinks there are very good training opportunities through his office, "I would like [CJA attorneys] to attend the really great programs put on by the defender services training branch. Those can cost somebody from Montana about a thousand dollars to go to, more than that, even though the tuition is free."[751] A panel attorney from Montana explained that the geography of the state also affects training

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745 Steve Wax, Legal Director, Oregon Innocence Project, Public Hearing—Portland, Or., Panel 1, Tr., at 6.
746 Lisa Freeland, FPD, W.D. Pa., Public Hearing—Santa Fe, N.M., Panel 3, Tr., at 15.
747 Elizabeth Ford, Exec. Dir., CDO, E.D. Tenn., Public Hearing—Birmingham, Ala., Panel 6, Tr., at 24.
748 Phillip Sapien, CJA Panel Atty., D.N.M., Public Hearing—Santa Fe, N.M., Panel 5, Tr., at 10.
749 Tina Hunt, Exec. Dir., CDO, M.D. Ga., Public Hearing—Santa Fe, N.M., Panel 3, Tr., at 16.
750 Amy Sirignano, CJA Panel Atty., D.N.M., Public Hearing—Santa Fe, N.M., Panel 3, Tr., at 11–12.
751 Wendy Holton, CJA Panel Atty., D. Mont., Public Hearing—Portland, Or., Panel 4, Tr., at 7.

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opportunities: "We have a huge district, we have one division, the Billings division is actually larger than 24 states, so it's hard for us to get around to each of the offices, and get our panel together and train them."[752] Another federal defender in a largely rural district told the Committee that it is difficult to get the panel attorneys the "training that they need to learn how to get and use resources to assist their clients. So that is something that we are working on as putting together a bank of resources they can use that the judges would approve payments for, so that they can do a better job representing their clients."[753]

In light of these realities, providing local training programs for the panel is critically important. Witnesses agreed, "We need to expand the local training opportunities" to give panel attorneys more opportunities to attend.[754] As a panel attorney explained,

> I have to pay to go to those [regional and national] trainings. I have to pay for the hotel when I go to those trainings. I have to take time away from my cases and not bill on my cases when I go to those trainings. Most people don't go to those trainings because they just simply can't afford to take the time away and simply financially afford to go to those trainings. Number one, I think that training should be localized where possible.[755]

Because DSO lacks the current capacity to sponsor the large number of local events needed to adequately train panels in 94 districts, the job falls to federal defender organizations. DSO's Training Branch supports these efforts, but it lacks sufficient funding and personnel to provide needed training directly or to supply the level of support defenders require to meet the need for panel training. Federal defenders put considerable effort into local training programs. One federal defender explained:

> I felt a responsibility to build a stronger alliance between our office and the CJA panel. We did that in several ways but we expanded the training we offered greatly. Last year we offered forty hours of CLE that my office sponsored and presented. We have a second chair program, a mentoring program where young lawyers who don't have the experience can come in and go through this year long program. The judges like that very much because there is some basis, there is some qualification before someone gets the panel. This has proven effective in the quality.[756]

Another defender stated that for his office, "part of our mission was to raise

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752 Tony Gallagher, Exec. Dir., CDO, D. Mont., Public Hearing—Portland, Or., Panel 6, Tr., at 18.

753 Tina Hunt, Exec. Dir., CDO, M.D. Ga., Public Hearing—Santa Fe, N.M., Panel 3, Tr., at 2.

754 Phillip Sapien, CJA Panel Atty., D.N.M., Public Hearing—Santa Fe, N.M., Panel 5, Tr., at 10.

755 Jessica Hedges, CJA Board Chair, D. Mass., Public Hearing—Phildelphia, Pa., Panel 9, Tr., at 19.

756 Melody Brannon, FPD, D. Kan., Public Hearing—Minneapolis, Minn., Panel 2, Tr., at 17.

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the quality of representation in our district. . . . When we give the yearly training, we don't just invite CJA panel members, we invite all lawyers in our district to attend who may want to attend; it's free."[757]

Many defenders' efforts were highly praised. One panel attorney who practiced in two districts told the Committee that the "CLE programs that are offered by the federal public defender service in both districts: outstanding."[758] Another panel attorney stated, "Our federal defender office, it seems like every couple of weeks we have a CLE over at the federal defenders office that the vast majority of panel attorneys attend, and most of the assistant federal defenders themselves attend."[759] A defender described how his office hosts "monthly lunch and learns, monthly round tables, we have a list-serve that the panel developed now that's busy every day. . . The interaction, we regularly take calls and visits and so it's really like one big office to a large extent."[760] In another district, attorneys can satisfy CLE requirements for panel membership by attending the federal defender's one-hour monthly CLE training session.[761]

Defenders sometimes find their best efforts to be inadequate. For example, in some rural districts, panel lawyers find it difficult to attend even local training. A federal defender from a rural district described the problem: "[I]t is very difficult to reach out to the panel and train them in any sort of meaningful way. We use a website. We use mailings. We have a protected forum on our website to answer questions. We field phone calls on a daily basis." [762] Still, the defender reported that neither she nor the judges felt the CJA attorneys were receiving adequate training.[763]

And the training defenders provide can vary from district to district. Where FDOs do not provide training the quality of representation in their districts will suffer. A panel attorney urged that more needed to be done to ensure "consistent training. You can't have one district that has fabulous seminars and then another district down the road has no seminars, nor can you depend on just brown bag [discussions]. . . . It's got to be something better than that."[764]

And even in the best of circumstances, defenders cannot hope to provide training equivalent to that available to federal prosecutors. Government attorneys have access to a permanent training institution, the National Advocacy Center, or the NAC, and receive training regularly to promote a high quality of lawyering. One federal defender observed, "The U.S. Attorneys are forever going to the NAC, and forever going to training. "[765] In fact, defenders do not have this level of institutional

757 Carlos Williams, Exec. Dir., CDO, S.D. Ala., Public Hearing—Santa Fe, N.M., Panel 3, Tr., at 19.
758 Juan Milanes, CJA Panel Atty., D.P.R. & E.D. Va., Public Hearing—Miami, Fla., Panel 4, Tr., at 9.
759 Matthew McHenry, CJA Panel Atty., D. Or., Public Hearing—Portland, Or., Panel 2, Tr., at 41.
760 Henry Martin, FPD, M.D. Tenn., Public Hearing—Birmingham, Ala., Panel 6, Tr., at 25.
761 Mag. Judge Michael Putnam, N.D. Ala., Public Hearing—Birmingham, Ala., Panel 1, Tr., at 7–8.
762 Tina Hunt, Exec. Dir., CDO, M.D. Ga., Public Hearing—Santa Fe, N.M., Panel 3, Tr., at 1.
763 *Id.* at 1–2.
764 Edward Hunt, CJA Panel Atty., E.D. Wis., Public Hearing—Minneapolis, Minn., Panel 4, Tr., at 37.
765 Frederick T. Heblich, Jr., FPD, W.D. Va., Public Hearing—Philadelphia, Pa., Panel 6, Tr., at 13–14.

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support for their own training.

As essential as defenders' training efforts are, going forward, FDOs may find it more difficult to provide the panel with necessary training. Upon being given responsibility for defender staffing and compensation, the Judicial Resources Committee created defender staffing formulas. These formulas do not provide additional personnel to defenders for their efforts to train the panel. Rather, these formulas consider only defenders' work on cases in determining how many employees an office is allowed. For ethical reasons, defenders must prioritize representation of their own clients over training CJA panel lawyers. Because DSO's Training Branch lacks the capacity to provide training at the local level, quality of representation by panel lawyers is likely to suffer.

Training attorneys inexperienced in federal practice to join the panel requires more extensive efforts. As discussed in our diversity section, almost 60 percent of panel attorneys report being 50 years of age or older. Fewer than 12 percent of panel attorneys are younger than 40. Unless younger attorneys can be brought into the program, it will face a crisis in the coming years. To recruit and train new attorneys for their panel, districts have taken a variety of approaches. The most aggressive approach taken is the creation of mentorship programs to help attorneys acquire the experience necessary to effectively represent CJA clients. Mentees not yet qualified to be members of the panel work under the supervision of either federal defenders or experienced CJA attorneys.[766] In the most successful of these programs, some compensation is offered to mentees.[767] The length of the mentorship and its particular requirements vary from district to district. For a fuller discussion of these programs see diversity Section 8. As one judge observed, where new attorneys, "have the talent but they don't have the experience, I think mentorship is one way to do that and try to build that into the system."[768]

7.2 The Quality of Representation Provided By Federal and Community Public Defenders

There are 81 defender offices operating in 91 of the 94 federal districts. Only three districts do not have a defender office—the Southern District of Georgia, the

766 Andrew Skier, CJA Dist. Rep., N.D. Ala., Public Hearing—Birmingham, Ala., Panel 7, Tr., at 21–22. Mag. Judge Kelly Rankin noted though, that panel attorneys "have to first get permission from the trial court, the court that's assigned to the case" to bring on a mentor. Mag. Judge Kelly Rankin, D. Wyo., Public Hearing—Portland Or., Panel 3, Tr., at 14.

767 John Convery, CJA Dist. Rep., W.D. Tex., Public Hearing—Santa Fe, N.M., Panel 6, Tr., at 33.

768 Chief Judge Christina Armijo, D.N.M., Public Hearing—Santa Fe, N.M., Panel 1, Tr., at 16.

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Eastern District of Kentucky, and the District of the Northern Mariana Islands. Sixty-four of these offices are Federal Public Defender Offices (FPDOs) and 17 are Community Defender Offices (CDOs). The CJA empowers district courts to determine whether a district will have a defender office and, if so, whether it will be a CDO or an FPDO.[769] In addition, the court has authority to close an office or convert it to either an FPDO or CDO with approval from the circuit's judicial council.[770]

Federal Public Defender Offices

FPDOs are federal government entities within the judicial branch. Federal Public Defenders are appointed by the court of appeals for a term of four years and may be reappointed for an unlimited number of four-year terms. The circuit sets the defender's salary at a rate not greater than that of the U.S. Attorney in that district. Federal Public Defenders hire their own staff, but the circuit determines the number of assistant federal defenders they may employ.

Community Defender Offices

CDOs are non-profit legal services organizations incorporated under the laws of the state in which they reside and operating under the supervision of a board of directors. These are not federal government offices. CDOs are funded similarly to FPDOs, but receive their funding as grants. The executive director of a CDO is employed under the conditions and terms determined by the board. The executive director hires staff subject to the same formulas that govern Federal Public Defenders. These offices are subject to state employment protections and regulations, state corporate and non-profit law, and local tax laws.

CDO executive directors and judges from districts with CDOs testified that their defender offices had greater independence. Judge Gleeson argued, "They should all be CDOs in my view. I respectfully disagree with the comments made yesterday by one of our brother judges…who suggested that CDOs are not more independent. They're more independent. They're appointed, the executive directors are appointed by a board."[771] A circuit judge agreed, "If I had to endorse a model, I would probably endorse the community-based federal defender that is completely independent of the Circuit."[772] He preferred the CDO model, "for the simple reason that I think that it's really important that the defender office be and be seen as independent from the judiciary. I think that's critically important in dealing with our clients I think it's critically important as the public looks at the way that the criminal

769 18 U.S.C. § 3006A(g)(2) (2012).

770 *Id.* § 3006A(a).

771 Judge John Gleeson (ret.), E.D.N.Y., Public Hearing—Miami, Fla., Panel 3, Tr., at 33.

772 Judge Luis Restrepo, 3rd. Cir., Public Hearing—Philadelphia, Pa., Panel 2a, Tr., at 3–4.

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justice system functions."[773] While a CDO director said that he and his office interact regularly with the judiciary on issues involving the court, cases, or attorney performance, the district judges do not engage with the office on "the inner workings and management of my office, or the structure of my office. That lies with my board."[774]

The independence of a CDO is limited by the power of the district court to change its local CJA plan and convert the CDO to an FPDO or dissolve it entirely. Vesting this authority in district courts was criticized. One federal public defender observed, "Having elected which type of defender office a jurisdiction will have, I think then the judiciary has to step away. Otherwise, its motives for wanting to change the structure really will be called into question, even if it's the best motives."[775] Another defender, the head of a CDO, stated,

> I think it is a problem that it's placed on the judges to have that responsibility. If a judge thinks a US Attorney's office is not doing a good job, they have ways of communicating that or participating in some discussion about that, but they don't have the ability to fire the US Attorney. And I don't think the corollary power should exist.[776]

Federal public defender offices are also subject to conversion or dissolution. And, as described in the Section 6 on circuit oversight, their independence is further constrained by the circuit's power to appoint and reappoint the defender and to decide the number of assistant federal defenders. These impingements on institutional defenders' independence are threats to the quality of representation in the same manner as limitations on panel lawyers' independence.

Federal defender offices have also struggled with problems of inadequate resources. Providing quality representation requires resources, the most critical of which is the attorney's time. As the work measurement study conducted by the Judicial Resources Committee showed, defenders have been chronically understaffed. The degree varied by district and circuit. But in some districts, the distance between staffing needed and that available was large.

Despite limitations of both independence and resources, FDOs are generally believed to provide the highest quality of representation. They are rated as good or excellent by close to 96 percent of judges who responded to the surveys discussed above.[777] Panel attorneys also believe that federal defenders provide their clients

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773 Judge Restrepo went on to say "Anecdotally, the other defenders from the circuit that are appointed by the circuit, I've never heard a complaint, but I do like the concept of the independence that the defender in the Eastern District has." Judge Luis Restrepo, 3rd. Cir., Public Hearing—Philadelphia, Pa., Panel 2a, Tr., at 4.

774 Leigh Skipper, Exec. Dir., CDO, E.D. Pa., Public Hearing—Philadelphia, Pa., Panel 3, Tr., at 37.

775 Marianne Mariano, FPD, W.D.N.Y, Public Hearing—Philadelphia, Pa., Panel 3, Tr., at 38.

776 David Patton, Exec. Dir., CDO, S.D.N.Y & E.D.N.Y, Public Hearing—Philadelphia, Pa., Panel 3, Tr., at 40.

777 Westat Survey. See Appendix C: Survey Data Considered.

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representation of the highest quality while improving the overall quality of defense in a district. One panel attorney told the Committee that the primary reason the CJA program has been,

> so spectacularly effective is that we've managed to put a defender in [nearly] every district in the country. A defender who receives enough money to do their job and to do it well . . . what's happened in the smaller districts I think over the last ten or fifteen years, what's happened is that it's raised the bar in the district. The Judges now see what competent counsel on the defense side is, and they are starting to expect it from all of their lawyers.[778]

Defender offices enhance the quality of representation by modeling best practices and demonstrating the importance of access to resources. They can also improve the panel by assisting in its management, answering questions from panel attorneys, supplying guidance regarding the use of service providers, and providing training for panel attorneys. As one defender testified, "I don't think you can discount the importance of the relationship of the defender office as setting a standard, hopefully with consistent representation that all the panel members will see." [779] The defender emphasized that his office offers panel attorneys training and personal assistance and advice, which are required necessities, "especially as the federal criminal practice has become increasingly far more technical and littered with land mines."[780]

By contrast, in districts without defender organizations, quality suffers. The defender from the Middle District of Georgia testified that in the Southern District, which does not have a defender office, "they have bankruptcy lawyers representing bank robbers who have no idea what is going on, and what the rules are and how to implement the rules, how to even do the most basic things."[781] This defender went on to explain that, while her office fields calls from panel attorneys in the Southern District, it's "a whole different ballgame there and we are not as familiar with the judges in that district as we are with our own. So, they are at a disadvantage and their clients are placed at an enormous, enormous disadvantage."[782]

This system produces grievous consequences for clients appointed these attorneys. A panel attorney described an insurance attorney who decided to start taking CJA panel cases, was assigned to represent a client facing a potential life sentence, and then was proud, "he plead[ed] out his client to a life sentence."[783] Resource

778 Daniel Scott, CJA Dist. Rep., D. Minn., Public Hearing—Minneapolis, Minn., Panel 5, Tr., at 4.

779 Louis Allen, FPD, M.D.N.C., Public Hearing—Miami, Fla., Panel 1, Tr., at 7.

780 *Id.*

781 Tina Hunt, Exec. Dir., CDO, M.D. Ga., Public Hearing—Santa Fe, N.M., Panel 3, Tr., at 13.

782 *Id.*

783 Amy Lee Copeland, CJA Panel Atty., S.D. Ga., Public Hearing—Miami, Fla., Panel 5, Tr., at 9.

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counsel for the Southern District of Georgia echoed the same sentiments. He testified that quality "[r]epresentation in our district falls to those lucky enough to maybe get somebody competent.... There's no review as to whether or not you stay on the panel or whether you're competent. There's just no criteria."[784] He testified further that there is,

> the absolute need in my district for a federal public defender...to counterbalance an extremely professional United States Attorney's Office.... We average about 600 indictments a year over the last five years in the district. Of those 600, 45 on average a year were multi defendant cases. That leaves somewhere in the neighborhood of 550 individual defendants that probably could have been represented by a federal public defender office. The vast majority of those individuals would have received far better service with a dedicated federal public defender office.[785]

Although FDOs provide high quality representation, several defenders spoke of a need to guard against blindness to their own deficiencies and to enhance the quality of representation by instituting standards for FDO representation. A working group of defenders and panel attorneys organized by the Defender Service Office has adopted performance guidelines based on those developed by the National Legal Aid and Defender Association. However, with no independent defense body to carry out evaluations, these guidelines are not enforced or monitored.[786] A community defender told the Committee that while defender offices value their independence, "I also don't think it's a bad thing to have some accountability to a group that is solely focused on quality representation. I think it's a much more difficult dynamic when the supervision is by the judiciary that doesn't have that as its main mission.... I would much prefer that it come from a governing body whose sole mission is quality representation."[787]

Another federal defender agreed, telling the Committee that some kind of national defense center could assist in raising standards among defender offices: "I think that we should look at ourselves. We think we're doing great, we [get] some good feedback, but everything isn't great everywhere."[788] He opined, if the CJA program was placed within a structure dedicated to the same mission as the defender offices, "a national center would elevate everybody."[789] Expounding on the benefits such a center could produce, the same federal defender said, "[I]f we had a CJA

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784 Steve Beauvais, Resource Counsel, S.D. Ga., Public Hearing—Miami, Fla., Panel 6, Tr., at 4.

785 *Id.* at 5.

786 Carlos Williams, Exec. Dir., CDO, S.D. Ala., Public Hearing—Santa Fe, N.M., Panel 3, Tr., at 24.

787 David Patton, Exec. Dir., CDO, S.D.N.Y & E.D.N.Y, Public Hearing—Philadelphia, Pa., Panel 3, Tr., at 16.

788 James Wade, FPD, M.D. Pa., Public Hearing—Philadelphia, Pa., Panel 3, Tr., at 33.

789 *Id.* at 17.

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center [it could be] spreading ideas maybe we should be looking at."[790] Panel members also offered support for these ideas, "the federal defenders performance standards, and have a baseline [for] best practices for our panel members, the quality of representation would definitely go up."[791]

7.3 Additional Issues that Affect the Quality of Representation

Three additional issues that affect the quality of representation are 1) access to interpreters, 2) remote detention, and 3) the challenges associated with representing Native American defendants. These issues are not mutually exclusive, and when they overlap, even greater difficulties confront defense attorneys, especially CJA panel attorneys. While the Committee is unable to adequately address these issues within the scope of this study, the testimony establishes these are problems that must be addressed to improve the quality of defense services provided in federal criminal cases.

7.3.1 Ability to Retain Interpreters

Many attorneys testified about their need for interpreters to effectively communicate with their clients, even when the attorney has some ability to speak the client's language. Many attorneys who speak the defendant's language understand how important it is to have an interpreter, lest "something gets missed in terms of translation of a plea agreement or something."[792] As one panel attorney explained,

> [T]here are Spanish speakers and then there are real Spanish speakers. . . . I can carry on a conversation. I can understand things. They understand me. But when you start explaining to them what are their available paths, what are the particular nuances of evidence that exist against them, explaining to them these federal sentencing guidelines . . . explaining adjustments, explaining offender characteristics, explaining the § 3553(a) factors and variant sentences and grounds for it. I believe you really have to have someone that is a real Spanish speaker with you.[793]

A federal defender testified that having an interpreter is paramount. Referring to bilingual attorneys, he said, "I just wonder with some of them the level of their expertise and I always feel more comfortable if they're using a certified interpreter because I have no way of knowing otherwise whether the accuracy of the

790 *Id.* at 33.

791 Amy Sirignano, CJA Panel Atty., D.N.M., Public Hearing—Santa Fe, N.M., Panel 3, Tr., at 27.

792 Phillip Sapien, CJA Panel Atty., D.N.M., Public Hearing—Santa Fe, N.M., Panel 5, Tr., at 20.

793 Richard Esper, CJA Panel Atty., W.D. Tex., Public Hearing—Santa Fe, N.M., Panel 5, Tr., at 6.

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interpretation is good or acceptable."[794]

While an interpreter is fundamental to ensuring the accurate and meaningful exchange of information, panel attorneys reported that they often have difficulty obtaining the funding for them from the court and/or finding interpreters to hire. A panel attorney who practices in two districts explained that in one district, "Non-Spanish speaking panel attorneys must provide their own interpreters and cannot bill the court for this expense."[795] In the other, contract interpreters certified by the court are provided as a matter of course in all cases where the defendant is a non-English speaker and panel attorneys are not required to seek approval or request funding for interpreter services.[796] Noting this fundamental difference she opined, "I believe this is a service that should be provided without question. Having a trained professional adequately and accurately explain the complex legal process is a necessary component of indigent defense and effective representation."[797]

A panel attorney stated "I take my own interpreter, but again, that's an expenditure that I think can be covered under the Criminal Justice Act."[798] He explained that he and other panel attorneys fear judges will not understand how necessary a trained interpreter is when the attorney can speak conversational Spanish. "I know a lot of lawyers who are afraid to ask for that because you are going to get a voucher cut, number one, and number two, you are going to be questioned about, wait a minute, you are a Spanish speaker, what's the problem here? Why do you need an interpreter?"[799]

Other panel attorneys reported difficulties even finding interpreters to assist them, either because of the low compensation rate or a shortage of qualified interpreters. One panel attorney stated, "I had difficulty on occasion finding a contract interpreter that was willing to do it for the CJA rate."[800] Another panel attorney who practices in Alabama testified about the lack of federally certified interpreters in a three-state area, "…there's three in Georgia and I think two in Tennessee. There's none in Alabama…"[801] The defender for the Dakotas testified that in his rural districts, his staff defenders and panel attorneys had difficulty obtaining interpreters. He testified, "One of the biggest problems we run into is availability of interpreters. Generally there is, for example, in Fargo, one interpreter who is relied on and the

794 David Stickman, FPD, D. Neb., Public Hearing—Minneapolis, Minn., Panel 2, Tr., at 34.

795 Cori Harbour-Valdez, CJA Panel Atty., W.D. Tex. & D.N.M., Public Hearing—Santa Fe, N.M., Panel 5, Writ. Test., at 3.

796 *Id.*

797 *Id.*

798 Richard Esper, CJA Panel Atty., W.D. Tex., Public Hearing—Santa Fe, N.M., Panel 5, Tr., at 6.

799 *Id.* at 7.

800 Phillip Sapien, CJA Panel Atty., D.N.M., Public Hearing—Santa Fe, N.M., Panel 5, Tr., at 41.

801 Ken Gomany, CJA Panel Atty., N.D. Ala., Public Hearing—Birmingham, Ala., Panel 4, Tr., at 33. Mr. Gomany also told the Committee that certified interpreters are expensive to retain, and said, "I understand certified interpreters, they have like a three percent pass rate." *Id.* at 9. However, because of the expense, it makes the cap on service providers very difficult to acquire their services.

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court uses them as well, so we run into massive scheduling problems."[802]

Remote detention of defendants located long distances from their attorneys can also compound this problem. A panel attorney who also practices in the Dakotas testified that when clients are detained remotely, "[t]here are no interpreters there, so I have got to try and convince one of our interpreters, who is usually a . . . person that is doing this on a very part-time basis, that they should take an entire day off, travel with me to this remote jail and interpret for maybe an hour." [803] Additionally, panel attorneys have to balance their need for other experts or service providers for their cases, when considering whether to seek funding for an interpreter. The $800 limitation applicable to experts and other service providers, without judicial approval, is the "aggregate for the whole case," so if an interpreter is hired, that could easily deplete the entire service provider allowance.[804]

The need for interpreters also intersects with the difficulties defense attorneys face when appointed to cases with Native American clients. Seeking to bridge this gap, the University of New Mexico has created a program to train in basic court procedures individuals who will function as interpreters for indigenous language speakers.[805] A district judge testified that Arizona faces similar difficulties with indigenous language interpretation. She stated, "[W]e have so many dialects that come through . . . a trial that I have in December [requires] a Ch'ol interpreter, who only happens to speak Spanish herself, so it's going to be a problem with English to Spanish to Ch'ol and then Ch'ol to Spanish to English."[806]

Finally, witnesses explained that judges have been reluctant to pay for interpreter services when a panel attorney has the prosecution's translation.

> An example would be the denial of a request for an interpreter to review taped phone calls when the government has already had their own interpreter translate them. A key function of the defense is the independent investigation of the evidence disclosed by the government. Should a key phrase in the transcription be wrong, the entire defense could be compromised. While common sense would seem to suggest it is duplicative work for the defense to conduct their own investigation, it actually is a dereliction of our duty to do any less.[807]

All of these issues affect a criminal defendant's right to receive effective assistance of counsel under the CJA.

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802 Neil Fulton, FPD, D.S.D. & D.N.D., Public Hearing—Minneapolis, Minn., Panel 2, Writ. Test., at 34.

803 Alexander Reichert, CJA Dist. Rep., D.N.D., Public Hearing—Minneapolis, Minn., Panel 5, Tr., at 11.

804 Natalie Harmon, CJA Administrator, FPDO, W.D. Wash., Public Hearing—Philadelphia, Pa., Panel 4, Tr., at 28.

805 Chief Judge Christina Armijo, D.N.M., Public Hearing—Santa Fe, N.M., Panel 1, Tr., at 6.

806 Chief Judge Raner Collins, D. Ariz., Public Hearing—Santa Fe, N.M., Panel 1, Tr., at 8.

807 Kathy Nester, FPD, D. Utah, Public Hearing—Portland, Or., Panel 6, Additional Writ. Test., "Report to the Cardone Committee from the District of Utah" at 2–3.

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7.3.2 Remote Detention of Defendants

Districts or divisions of districts comprised of large rural areas make client representation more difficult for federal defenders and panel attorneys.[808] A district judge in the Western District of Texas explained,

> The biggest issue we have, and one that makes us unique, is that the Pecos Division is larger in land area (30,445 square miles) than 11 states; it is half as large as 31 states and larger than 60 judicial districts, as well as having a 500 mile border with Mexico. This is one division, not a district. The distances within the division create serious obstacles for litigants, participants and the overall due process in the federal court. The only means of travel is by motor vehicle over large stretches of highway.…Defendants are kept in several county jails spread across the division.[809]

When clients are detained in remote locations, meeting with them can be expensive, time consuming, and physically demanding for defense counsel. One panel attorney from Montana explained the hardship created by remote detention this way:

> At this time of year, we can have really bad roads and the daytime hours are short. I really, at this time of year, cannot make that trip and spend some time with my client and get home in a day. I don't think it's safe. In the summer, I'll do it. I can't do it in the winter. That's an eight-hour round trip, so just in windshield time, that's more than a thousand dollars. If I have other travel costs, which I do, getting a hotel, food, mileage, that's probably twelve to thirteen hundred dollars for just a trip to Shelby.[810]

When clients are detained long distances from their attorneys, local court rules can make reviewing discovery more onerous. As a panel attorney explained , "…[W]e have a rule, a local rule that when a document is designated sensitive material then it can only be reviewed in the presence of counsel. We can't give it to the client for him to review so…I got to drive 500 miles to see this guy."[811] This "windshield time" can add up quickly, especially in multi-defendant cases. For example, in a case with sixty-two defendants, approximately thirty were represented by CJA counsel

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808 The difficulty caused by having clients remotely detained can be compounded by technology and discovery issues. A panel attorney told the Committee, "The problem that I see repeatedly, as far as remote detention, is when there is a protective order regarding discovery….all materials are sent on CD, and each jail has its own process for dissemination of that information, or access to it, and invariably there are problems, my clients don't have nowhere near enough time to access the information in a case where there's volumes and volumes of material. If there could be some plan that's consistent from jail to jail to ensure that our clients have the same access to the discovery that we do, that they should have." Robert LeBell, CJA Dist. Rep., E.D. Wis., Public Hearing—Minneapolis, Minn., Panel 4, Tr., at 21. For more on this issue please see Section 8 on e-discovery.

809 Judge Rob Junell, W.D. Tex., Public Hearing—Santa Fe, N.M., Panel 1, Writ. Test., at 1.

810 Wendy Holton, CJA Panel Atty., D. Mont., Public Hearing—Portland, Or., Panel 4, Tr., at 5.

811 Palmer Hoovestal, CJA Panel Atty., D. Mont., Public Hearing—Portland, Or., Panel 5, Tr., at 12.

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and detained in facilities that were a five to seven hour round trip from where the lawyers were located. The federal defender told the Committee, "[Y]ou can imagine the cost for CJA counsel…to go visit their clients. You figure a seven hour trip at even $100 an hour and time to sit down and visit with a client that's about $1000 a trip. At thirty counsel, that's $30,000 for the lawyers to see their clients once."[812]

As one panel attorney stated, "Finding ways to house our clients nearer to us would cut CJA bills dramatically and would help engender more effective representation."[813] Other solutions that might address the challenges resulting from remote detention also pose their own problems. For example, federal defenders and panel attorneys voiced concern about instituting video conferencing to reduce the need for travel. A district judge explained that in her district, "We have instituted something which I am not sure is successful or not, but our community defender organization…and our probation office have each set up video conferencing abilities…with at least some of our detention centers." [814] The judge admitted, however, that while some things could be accomplished by video conference, it was probably not adequate to protect the attorney-client privilege. [815] The judge acknowledged, "I think it's a very poor substitute for meeting with the individual and certainly, a number of CJA attorneys have said they can't build up the trust with their client by meeting with them over video, and I think that's absolutely right. I don't have any good solutions for that."[816] A federal defender voiced similar concerns, saying that he was personally opposed to video conferencing, stating, "Maybe at some point in the future that might be a way to help out, but it's fraught with problems right now, both technological and with personal issues as well…we have so many different facilities that it's just not really a good option for us."[817]

In some districts, federal defenders and U.S. Marshals have worked together to reduce travel and increase the opportunities for attorney-client contact. While this may not be possible in every district, some districts are taking steps to address remote detention, by having the various stakeholders meet to discuss alternatives that could save money and also improve services provided under the CJA.[818]

Because remote detention is a complicated and multifaceted issue, in 2008 a Remote Detention Ad Hoc Group was created to address these difficulties.[819]

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812 Andrea George, Exec. Dir., CDO, E.D. Wash. & D. Idaho, Public Hearing—Portland, Or., Panel 6, Tr., at 8.

813 Wendy Holton, CJA Panel Atty., D. Mont., Public Hearing—Portland, Or., Panel 4, Writ. Test., at 5.

814 Judge Rosanna Peterson, E.D. Wash., Public Hearing—Portland, Or., Panel 3, Tr., at 21.

815 *Id.*

816 *Id.*

817 David Stickman, FPD, D. Neb., Public Hearing—Minneapolis, Minn., Panel 2, Tr., at 30.

818 David Stickman, FPD, D. Neb., Public Hearing—Minneapolis, Minn., Panel 2, Writ. Test., at 3.

819 The group included members from relevant Judicial Conference Committees, court unit executives, and executive branch agencies. Members included: Committee on Judicial Security, Committee on Defender Services, Committee on Criminal Law, Committee on the Budget, The Attorney General's Federal Detention Trustee, Federal Bureau of Prisons Deputy Assistant Director, USMS Assistant Director for Prisoner Operations, a Chief Probation Officer, a Chief Pretrial Services Officer, a Federal Public Defender, and a Criminal Justice Act Panel Attorney.

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Many of its recommendations address the problems the defenders and CJA attorneys continue to face because their clients are being held in detention facilities far away from their attorneys. If implemented, the Remote Detention Ad Hoc Group's recommendations would help to improve the ability of CJA attorneys and defenders to meet with their clients.[820]

7.3.3 Representation of Native Americans

Appointed counsel face significant challenges in delivering quality representation to Native Americans charged with federal crimes. Most federal criminal cases involving Native Americans arise on reservations. Because many reservations are located long distances from major cities and the attorneys and investigators who work on these cases, significant travel is required. Counsel and investigators must sometimes "travel to remote locations to view the scene and interview eyewitnesses. Because some communities are spread out over large areas…CJA practitioners and investigators frequently make multiple trips to complete their investigations."[821] This additional required travel time increases the cost of the case. Just one trip to a reservation five hours away from an attorney's home base to interview witnesses adds a minimum of $1500 to the cost of the case (10 hours x $132 per hour plus mileage). In districts where the court is reluctant to pay for "windshield time," the possibility of not being compensated for these travel hours can be a deterrent to accepting these cases.[822]

Another challenge that these cases present is that "…reservations are small closed societies, everyone knows both the victim and the defendant, but the attorneys are outsiders—not to be trusted."[823] While these are generalizations, surveys of both federal defender offices and CJA panels establish that very few attorneys providing representation in these cases are Native.[824]

While it is important for defense attorneys to establish a trusting relationship with all clients, perhaps it is even more necessary with Native clients. As one federal defender explained, "[b]uilding a relationship with Native clients is essential, as they must make life-changing and life-affecting decisions while learning to understand what is in essence a foreign system."[825] Recognizing the importance of understanding the differences between their clients and themselves in this context, panel attorneys "identified the need for additional training for attorneys and investigators in Native American culture and cultural differences."[826]

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820 These recommendations are available at https://ows.usdoj.gov/DDCWS.

821 Theresa Duncan, CJA Panel Atty., D.N.M., Public Hearing—Santa Fe, N.M., Panel 4, Writ. Test., at 2.

822 See section 5.2; *see also* Neil Fulton, FPD, D.S.D. & D.N.D., Public Hearing—Minneapolis, Minn., Panel 2, Tr., at 21.

823 Daniel Scott, CJA Dist. Rep., D. Minn., Public Hearing—Minneapolis, Minn., Panel 5, Writ. Test., at 3.

824 See Diversity Section 8.

825 Stephen McCue, FPD, D.N.M., Public Hearing—Santa Fe, N.M., Panel 2, Writ. Test., at 2.

826 Theresa Duncan, CJA Panel Atty., D.N.M., Public Hearing—Santa Fe, N.M., Panel 4, Writ. Test., at 2.

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Attorneys experienced in representing Native people emphasized the importance of establishing a rapport with members of the client's family.[827] An experienced CJA attorney who practices in Indian country noted, "It is difficult to put on a voucher, 'making client and his family understand I am not a part of the system and I am there to help them.'" [828] Time spent with the family is an investment in establishing a trusting relationship with the client, [829] but many judges do not view it as compensable.

Another challenge is that these cases are not investigated by federal law enforcement like traditional federal cases:

> [T]ribal law enforcement and other tribal officials lack training and the results of their investigation and documentation leave much to be desired. This requires more work in investigation of witnesses, scenes and documents than is normally required. This requires a far greater use of outside experts and investigators than in a normal case. It also requires more attorney time for simple tasks that in other cases are taken for granted.[830]

This need for more investigation than in the "normal case" is complicated further by a shortage of qualified investigators with experience working with tribal communities.[831] All these challenges mean that "reservation cases are resource intensive, i.e., expensive."[832] Given the obstacles confronting CJA panel attorneys receiving funding for cases generally, the current structure puts Native American defendants at greater risk of receiving an underfunded, and consequently, less effective defense.

Professor Barbara Creel of University of New Mexico School of Law recommended the following to ensure adequate representation for Native Americans:

> 1) Parity with the federal prosecution efforts in Indian Country, including additional defenders and other personnel, programs and resources; 2) Training in Indian law, including specialized training in the intersections with criminal and constitutional law involved in representing Native American Defendants, and; 3) Cultural literacy in the issues that arise in working with Tribal Peoples and the Tribal Nations, and; 4) employment of Native American personnel in all aspects of the federal defender organizations.[833]

Professor Creel makes two additional recommendations. The first is "the

827 Daniel Scott, CJA Dist. Rep., D. Minn., Public Hearing—Minneapolis, Minn., Panel 5, Writ. Test., at 2.
828 Alexander Reichert, CJA Dist. Rep., D.N.D., Public Hearing—Minneapolis, Minn., Panel 5, Writ. Test., at 3.
829 Daniel Scott, CJA Dist. Rep., D. Minn., Public Hearing—Minneapolis, Minn., Panel 5, Writ. Test., at 2–3.
830 Alexander Reichert, CJA Dist. Rep., D.N.D., Public Hearing—Minneapolis, Minn., Panel 5, Writ. Test., at 3.
831 Theresa Duncan, CJA Panel Atty., D.N.M., Public Hearing—Santa Fe, N.M., Panel 4, Writ. Test., at 2.
832 Daniel Scott, CJA Dist. Rep., D. Minn., Public Hearing—Minneapolis, Minn., Panel 5, Writ. Test., at 3.
833 Professor Barbara Creel, Law & Indigenous People Program, U. of New Mexico, Public Hearing—Santa Fe, N.M., Panel 4, Writ. Test., at 1.

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creation of a Tribal Liaison" position in the Federal Defender offices "to assist with the coordination of defense services for Native Americans facing federal prosecution from Indian Country jurisdiction." [834] Professor Creel notes that there are already tribal liaisons in the U.S. Attorney's Offices to assist in prosecution, but there is no corresponding position for the defense. A tribal liaison position within the Federal Defender Organizations would "bridge the gap between the two cultures and judicial systems."[835] Professor Creel's second recommendation is that the CJA statute should be amended to clarify what constitute "ancillary matters" and whether the definition extends to matters in tribal courts.[836] In recognizing that the Department of Justice has authorized special assistant US Attorneys to prosecute matters in tribal court and represent the United States in federal court, Professor Creel opines that these tribal court proceedings may be "critical stages" of what will become a federal prosecution. She further testified, "Representation at all critical stages is required to adequately represent Native Americans in Indian Country.... [Defenders] should be allowed under the local plan to represent Indian individuals in ancillary matters in tribal court under their federal appointment to protect the federal constitutional rights of Indians."[837]

Finally, in echoing Professor Creel's testimony, a panel attorney requested more training on the representation of Native American clients. As he observed, "Currently there is little training given on issues in Indian Country.... Indian country law is not something to be dabbled in, yet we are asking lawyers to do this every day in very complex cases."[838] ●

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834 *Id.* at 9.

835 *Id.*

836 18 U.S.C. § 3006(A)(c) (2012).

837 Professor Barbara Creel, Law & Indigenous People Program, U. of New Mexico, Public Hearing—Santa Fe, N.M., Panel 4, Writ. Test., at 8.

838 Alexander Reichert, CJA Dist. Rep., D.N.D., Public Hearing—Minneapolis, Minn., Panel 5, Writ. Test., at 3.

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Section 8: Diversity

8.1 The Importance of Diversity

Apart from perceptions about the system overall, some defendants are uncomfortable with or have difficulty putting their trust in lawyers who do not share or understand the experiences of someone of their race, ethnicity, gender, or religious beliefs.[839] As a federal public defender told the Committee, some commonality—whether it be shared race, ethnicity, or background—is important "to bring some level of comfort to our clients."[840] In fact, "sometimes, that's all [an attorney] can do. [Often,] these guys are just really in a pickle,"[841] and counsel has "to start building a level of trust immediately in order to be able to get to the point where [they can] deliver what is very often terrible news about what the possible verdict or sentence is going to be."[842] As defense attorneys testified, if clients "not only know but feel that there is a personal interest, a vested interest,"[843] on the attorneys' part, "clients will have a high enough level of trust in what we're telling them that they will accept responsibility for their actions and get a lesser sentence than they otherwise would. . . . [D]iversity is part of that."[844] And attorneys themselves need to be comfortable working with a diverse population of clients; that level of comfort "is

839 "When lawyers and clients come from different backgrounds and cultural viewpoints, they often have a more difficult time creating a trusting lawyer-client relationship in which both parties feel comfortable sharing honest and accurate information." Serena Patel, *Cultural Competency Training: Preparing Law Students for Practice in Our Multicultural World*, 62 UCLA L. Rev. Disc. 140 (2014) (citing Poverty, Health and Law: Readings and Cases for Medical Legal Partnership 52 (Elizabeth T. Tyler et al. eds., 2011)).

840 Laine Cardarella, FPD, W.D. Mo., Public Hearing—Birmingham, Ala., Panel 2, Tr., at 36–37.

841 *Id.* at 37.

842 Jenniffer Horan, FPD, E.D. Ark., Public Hearing—Birmingham, Ala., Panel 2, Tr., at 37.

843 Laine Cardarella, FPD, W.D. Mo., Public Hearing—Birmingham, Ala., Panel 2, Tr., at 37.

844 Jenniffer Horan, FPD, E.D. Ark., Public Hearing—Birmingham, Ala., Panel 2, Tr., at 37.

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important to successful management of clients and successful results in a trial."[845]

Aside from the crucial role that race, ethnicity, gender, and age play in fostering trusting attorney-client relationships, there are other benefits of building a diverse workforce. Witnesses described the improved group performance that can result from bringing more diverse perspectives to the table, helping an office develop a more mature culture and operations.[846] As one defender said, "it is clearly understood in my district that a diverse workforce…is a 'win-win' solution for all."[847]

Diversifying CJA panels similarly "broadens the perspective that lawyers bring to their advocate's role."[848] Defense representation is more effective when performed by "individuals from diverse backgrounds with sharp minds, powerful life experiences, and innovative ideas," a panel attorney told the Committee.[849] He explained, "Those ideas and perspective serve to enrich…criminal defense, where understanding of subtle nuances and having a willingness to explore non-traditional remedies and innovative approaches to the presentment of evidence" can positively influence outcomes and sentencing.[850]

8.2 Current Composition of Those Working Under the CJA

Although most federal defendants are young men of color,[851] the attorneys who represent them under the CJA tend to be older, white, and male. This Committee's information on the demographic make-up of these lawyers is based upon data collected by the judiciary as well as the Committee's surveys of panel attorneys

845 Doris Randle-Holt, FPD, W.D. Tenn., Public Hearing—Birmingham, Ala., Panel 6, Writ. Test., at 2.

846 Kevin Butler, FPD, N.D. Ala., Public Hearing—Birmingham, Ala., Panel 2, Tr., at 37. *See also* Marie-Élène Roberge & Rolf van Dick, *Recognizing the Benefits of Diversity: When and How Does Diversity Improve Group Performance?* 20 Hum. Resource Mgmt. Rev. 295 (2010). By breaking up workplace homogeneity, you can allow your employees to become more aware of their own potential biases—entrenched ways of thinking that can otherwise blind them to key information and even lead them to make errors in decision-making processes. *See* David Rock & Heidi Grant, *Why Diverse Teams Are Smarter*, Harv. Bus. Rev. (2016), https://hbr.org/2016/11/why-diverse-teams-are-smarter.

847 Doris Randle-Holt, FPD, W.D. Tenn., Public Hearing—Birmingham, Ala., Panel 6, Writ. Test., at 2.

848 Patrick M. Livingston, CJA Dist. Rep., W.D. Pa., Public Hearing—Philadelphia, Pa., Panel 9, Writ. Test., at 2.

849 Anthony Ricco, CJA Dist. Rep., E.D.N.Y., Public Hearing—Philadelphia, Pa., Panel 9, Writ. Test., at 8.

850 *Id.*

851 In fiscal year 2016, for example, 86.2 percent of defendants were men; of all defendants 53.3 percent were Hispanic, 20.4 percent were African American, and 22.3 percent were white. Note that Hispanics are over-represented in part because they make up 96 percent of the immigration cases. African American women are slightly disproportionately represented in the federal criminal justice system, constituting 13.8 percent of female defendants as compared to 13.3 percent of the total female population in the United States. The median age of federal defendants in 2016 was 35 years old, with one-third of defendants below 30 years old. U.S. Sentencing Commission, 2016 Datafile, USSCFY16, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2016/stats_Nat.pdf.

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nationwide. As the following table indicates, roughly 80 percent of responding panel attorneys identified as white and male, and more than 60 percent report being 50 years of age or older. Fewer than 12 percent of panel attorneys are younger than 40.

Demographics of CJA Panel Attorneys Responding to Surveys (2016)

Demographics	Composition of Panel Attorneys[1]
Race	
White/Caucasian	82 percent
Black/African American	7 percent
Hispanic	9 percent
Asian	1 percent
Native American	< 1 percent
Multiple	2 percent
Gender	
Male	80 percent
Female	20 percent
Age	
20-29	< 1 percent
30-39	11 percent
40-49	25 percent
50-59	27 percent
60-69	29 percent
70 or older	7 percent

Source: CJA Review Committee Survey on Use of Service Providers and Survey on Vouchers (June 2016), available at https://cjastudy.fd.org.

This survey data is consistent with testimony the Committee received. In the Northern District of Florida, for example, which includes Tallahassee, Gainesville, and Pensacola,[852] the panel representative acknowledged, "We don't have any Spanish-speaking lawyers on our panel. We have no Latinos on our panel. We have no African Americans on our panel."[853] This same attorney spoke of his "fear for the future of the panel.…Everyone on my panel is my age or older. They're retiring, they're all white, they're all male."[854] Reports from other locations were similar. Describing the CJA panel in her district, a community defender explained, "I have trouble finding diverse people to add to my CJA panel, period. I've got a very…I don't want to say elderly, but older Caucasian male panel, and I've been working to try and diversify that."[855]

In one district where the total population of the major city is almost 75 percent

852 For context, Tallahassee is 35 percent African American, Pensacola is 28 percent African American, and Gainesville is 23 percent African American. The three cities are 6.3 percent, 3.3 percent and 10 percent Hispanic, respectively. U.S. Census Bureau, QuickFacts Data for Gainesville City, Tallahassee City, and Pensacola City, Florida, *available at* https://www.census.gov/quickfacts/table/PST045216/1225175,1270600,1255925.

853 Gilbert Schaffnit, CJA Dist. Rep., N.D. Fla., Public Hearing—Miami, Fla., Panel 6, Tr., at 15.

854 *Id.* at 3.

855 Monica Foster, Exec. Dir., CDO, S.D. Ind., Public Hearing—Minneapolis, Minn., Panel 5, Tr., at 12.

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African American, only ten percent of panel members are lawyers of color.[856] A federal defender told the Committee that in his district, although a mentoring program had been created for the panel, they "still struggle to fill the void there. We do have a small panel [of] twenty-three [attorneys]. We do have one African American male . . . [and] several Hispanics [whom] we particularly recruited from other districts to participate on the panel."[857] One defender told the Committee, "I'm frustrated in trying to attract minority candidates to the panel. We have had a fair amount of success in the district increasing the participation of women on the panel but [racial diversity is] still, again, a work in progress. I'm not satisfied. Still working."[858]

In comparison to CJA panels, federal defender and community defender organizations are more diverse. In fact, defender organizations outpace the national federal workforce in the hiring of women and minorities.[859] In fiscal year 2015, employees of federal defender offices, including both attorneys and staff, were approximately 62 percent white, 10.5 percent black, and 22 percent Hispanic. These numbers are reflective of the national population and show that these offices as a whole are fairly diverse.[860] Diversity diminishes, however, when looking only at the attorneys in these offices: Although 10 percent of them are African American, lawyers who identify as Hispanic comprise just over 11 percent of all attorneys. Seventy-two percent of assistant federal defenders are white, with white males comprising the largest demographic category at 40.5 percent.[861]

While diverse non-lawyer staff is important—investigators and other staff interact with clients as well—diversity is most important within the corps of lawyers themselves. As discussed above, these attorneys must be vigorous and creative advocates for their clients and to succeed they must develop trusting relationships with them.

Lack of diversity is more pronounced at the top of the defender office hierarchy, with half of defender office executives being white men,[862] while white women lead 30 percent of defender offices. African American men head only 10 percent of FDOs, and African American women just 2.5 percent. Men who identify as Hispanic or Latino run a tiny 1.3 percent of FDOs, and there are no women who identify as Latina leading a federal defender organization.[863]

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856 *See* Kathy Luker, CJA Panel Atty., N.D. Ala., Public Hearing—Birmingham, Ala., Panel 4, Tr., at 34; CJA Review Committee Panel Attorney Surveys; U.S. Census Bureau, QuickFacts Data for Birmingham City, Alabama, *available at* https://www.census.gov/quickfacts/fact/table/birminghamcityalabama/PST045216.

857 Edson Bostic, FPD, D. Del., Public Hearing—Philadelphia, Pa., Panel 10, Tr., at 32.

858 Terence Ward, FPD, D. Conn., Public Hearing—Philadelphia, Pa., Panel 10, Tr., at 30.

859 Defender Services Committee Materials, June 2017, provided at request of the Committee by the Chair of the Defender Services Committee. The exception to this is in the category of Asian/Pacific Islanders.

860 Admin. Office of the U.S. Courts, The Judiciary Fair Employment Practices Annual Report, Fiscal Year 2016; U.S. Census Bureau, QuickFacts Data for United States, *available at* https://www.census.gov/quickfacts/fact/table/US/PST045216.

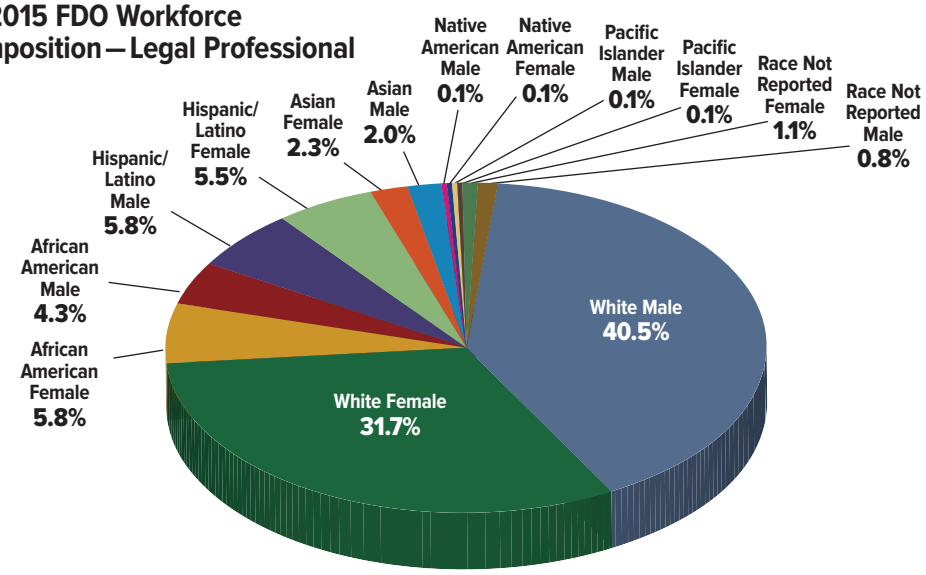
861 Defender Services Committee Materials, June 2017.

862 *Id.*

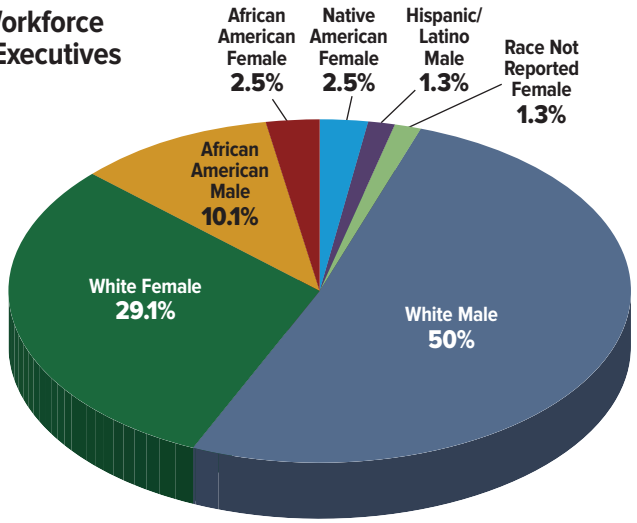
863 *Id.*

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FY 2015 FDO Workforce Composition — Legal Professional



FY 2015 FDO Workforce Composition — Executives



Federal defenders who have focused on recruiting attorneys of color have acknowledged modest successes.[864] But almost all federal defenders, when asked by the Committee, said they were dissatisfied with the current makeup of their offices and were working to improve the diversity of their workforce.[865]

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[864] Doris Randle-Holt, FPD, W.D. Tenn., Public Hearing — Birmingham, Ala., Panel 6, Writ. Test., at 2; Jim Wyda, FPD, D. Md., Public Hearing — Philadelphia, Pa., Panel 10, Tr., at 30. This includes lawyers and non-lawyers.

[865] *See, e.g.*, Deborah Williams, FPD, S.D. Ohio, Public Hearing — Philadelphia, Pa., Panel 10, Tr., at 30 ("I will say that I'm working on it."); Michael Desautels, FPD, D. Vt., Public Hearing — Philadelphia, Pa., Panel 10, Tr., at 30 ("I would say work in progress also in the district of Vermont."); Richard Coughlin, FPD, D.N.J., Public Hearing — Philadelphia, Pa., Panel 10, Tr., at 31 ("It's gotten a lot better than when I started and over time, hopefully, we'll continue to improve.").

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8.3 Challenges in Recruiting Diverse Attorneys

Although many professionals within the CJA community understand that diversifying the attorney pool is important, achieving that goal can be difficult, especially in those districts that face demographic limitations and geographic challenges.

In districts with a large number of Spanish-speaking clients, panels struggle to attract criminal defense lawyers who speak Spanish with sufficient fluency to communicate effectively with their clients. As a federal public defender from a border district told the Committee, "most of the clients in our border office speak Spanish. We advertise for lawyers as 'Spanish fluency preferred,' but the language issue further limits an already small pool of interested and qualified applicants."[866] This problem could be partly ameliorated with the use of qualified language interpreters. However, in remote districts with a high volume of foreign-language-speaking defendants, some who speak rare indigenous languages, the lack of interpreters is a further complication. Often, even when interpreters are available, there aren't enough to handle the heavy volume of cases, especially since interpreters are needed on multiple occasions throughout a case. Attorneys rely on an interpreter to effectively communicate with their client on a one-to-one basis, which may require traveling to remote detention locations. And in preparation for trial, attorneys require the use of an interpreter to review discovery, plea agreements, and other documentation.

The Committee also heard testimony that in some districts the majority of panel attorneys, especially those who are bilingual or of color, live in cities, hours away from where the majority of cases are prosecuted. In New Mexico, for example, a panel lawyer explained: "Our 2015 CJA Panel has approximately 101 members in Albuquerque and 35 members in Las Cruces."[867] Despite the small size of the panel in Las Cruces, the vast majority of criminal cases in the district are brought there, and most require Spanish-speaking attorneys. Given that Las Cruces is a three-hour drive from Albuquerque, it is rare for panel attorneys in Albuquerque to be assigned to cases in Las Cruces.[868] The Committee heard that this scenario repeats itself in district after district where some of the busiest federal courts require attorneys to travel extended distances from their homes in metropolitan areas.

In other districts, the problem is attracting attorneys to a rural location. In the Middle District of Georgia, for example, the community defender explained:

> It's very difficult . . . to find diverse employees, and the reason that I say

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866 Stephen McCue, FPD, D.N.M., Public Hearing—Santa Fe, N.M., Panel 2, Writ. Test., at 3.

867 Amy Sirignano, CJA Panel Atty., D.N.M., Public Hearing—Santa Fe, N.M., Panel 3, Tr., at 9.

868 *Id.* at 21. The panel attorney explained that CJA panel attorneys in Albuquerque only "get appointed on a case down in the southern part of the state . . . if we get these multiple defendant cases where they just [run] out of CJA panel members." *Id.*

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> that is because again, we are a very rural district. If you tell someone, "Hey, come live in Macon, Georgia," those people will go, "Where is that?" [Laughing.] And if you say it's in the heart of Georgia, then the next question is, "Why would I want to do that?"…It is difficult [to attract employees], especially Spanish speakers, especially Latinos.[869]

Another problem is that in many situations, young lawyers and lawyers of color have amassed significant educational debt and cannot afford to perform public interest legal work. They may "really, really, really want to be a criminal defense lawyer…but they don't know if they're going to be able…to afford it."[870] Meanwhile, "they're being recruited heavily by major law firms to do [more lucrative] work. They have a huge student debt load that they have to service when they get out of school,"[871] and as a result, they are "not in a position to accept court-appointed cases where the hourly compensation is a fraction of what is paid on the private level."[872] According to both panel members and defenders, the problem of diversity in the defender and panel community is going "to get worse very, very soon" as more law graduates with high debt loads enter the profession.[873]

While some panel members said they look to state court practitioners to diversify federal panels, they find lawyers who have practiced exclusively in state court are intimidated by federal court practice. Because federal criminal defense work may seem formidable to those without experience in the federal system, especially when it comes to the intricacies of sentencing, a chief district judge told the Committee that state defense attorneys are "reluctant to put a foot in federal court."[874] The Committee heard similar sentiments from multiple districts. "Federal court is a very intimidating place for many, many reasons," explained a panel attorney.[875] "There are many young lawyers who have become comfortable practicing in state court, but taking that step over the threshold of this building is a completely different exercise."[876]

8.4 Current Diversity Initiatives

In many districts, judges, defenders, and panel attorneys "are keenly aware of…and committed to the belief that diversifying the panel broadens the perspective that

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869 Tina Hunt, Exec. Dir., CDO, M.D. Ga., Public Hearing—Santa Fe, N.M., Panel 3, Tr., at 23.
870 Shaun McCrea, CJA Panel Atty., D. Or., Public Hearing—Portland, Or., Panel 4, Tr., at 31.
871 Gilbert Schaffnit, CJA Dist. Rep., N.D. Fla., Public Hearing—Miami, Fla., Panel 6, Tr., at 15.
872 Gilbert Schaffnit, CJA Dist. Rep., N.D. Fla., Public Hearing—Miami, Fla., Panel 6, Writ. Test., at 4.
873 Shaun McCrea, CJA Panel Atty., D. Or., Public Hearing—Portland, Or., Panel 4, Tr., at 31.
874 Chief Judge Michael Seabright, D. Haw., Public Hearing—San Francisco, Cal., Panel 5, Tr. at 28.
875 Robert Richman, Board Member of Minn. Assoc. of Criminal Defense Lawyers, Public Hearing—Minneapolis, Minn., Panel 4, Tr., at 32.
876 *Id.*

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lawyers bring to their advocate's role and develops greater trust and confidence with clients."[877] Nonetheless, efforts to increase diversity have mainly involved ad hoc, local efforts. While efforts to diversify CJA panels and defender offices are, as one panel attorney testified, "something that we have to accomplish on a local level," that same panel attorney also pointed out that these conversations about diversity are repeated every year at conferences without much change.[878]

Notable examples of local initiatives include the fellowship program implemented by the FPDO in the Eastern District of Washington. "These were one-year termed positions. [Fellows] received . . . intensive training while they handled immigration cases [and] supervised release violations, petty offenses and other low-level felonies before [being integrated into] the big wide world of indigent criminal defense work. [Today], many graduates of the fellowship program serve as assistant federal defenders across the country while others serve on CJA panels."[879] According to the current federal defender in that district, the program not only successfully prepares lawyers for positions across the country, it also provides their own office with a more diverse applicant pool.[880] As in other rural locations, the pool of people applying to work in the Eastern District of Washington is not particularly diverse. The one-year fellowship program has become "an excellent mechanism to recruit young and inexperienced attorneys of color who might not otherwise apply for a permanent position."[881]

Other federal defenders told the Committee that they also have an interest in creating fellowship programs, some similar to those offered by law schools that subsidize the work of new graduates. This desire, however, is often restrained by work measurement and staffing limits. "I would like to be able to hire a . . . fellowship lawyer," explained a community defender, "to take a young lawyer and shape them in the culture that we are building, give them a step-up into another office or stay with mine and stay on track."[882] Because of staffing limits, the defender has instead hired a lawyer as "paralegal investigator, who we are basically grooming for the next attorney position. And because we wanted her to see things from all aspects . . . the best way to do that at the current [staffing levels] was to place her in a [paralegal] position where she would see everything sort of from the bottom up."[883]

In a number of jurisdictions, defenders and panel representatives have created opportunities for younger lawyers and attorneys of color to acquire the federal

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877 Patrick M. Livingston, CJA Dist. Rep., W.D. Pa., Public Hearing—Philadelphia, Pa., Panel 9, Writ. Test., at 2.

878 Anthony Ricco, CJA Dist. Rep., E.D.N.Y., Public Hearing—Philadelphia, Pa., Panel 9, Tr., at 15.

879 Andrea George, Exec. Dir., CDO, E.D. Wash. & D. Idaho, Public Hearing— Portland, Or., Panel 6, Writ. Test., at 1.

880 *Id.* at 2.

881 *Id.*

882 Tina Hunt, Exec. Dir., CDO, M.D. Ga., Public Hearing—Santa Fe, N.M., Panel 3, Tr., at 22.

883 *Id.*

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litigation experience needed to be selected for district CJA panels. In Minnesota, for example, the FPDO created what another defender calls "the gold standard"[884] of mentoring programs. Attorneys with state court experience participate in a two-year mentorship program where they are assigned to a "second-chair position" alongside an experienced panel attorney.[885] Court funding pays for their time,[886] with the hope that those lawyers will later be in a position to join the CJA panel.[887]

New York has one of the oldest and most successful mentoring programs for panel attorneys. The program, which is designed to increase diversity, is open to everyone. Active for seven years, it has channeled 19 lawyers from diverse backgrounds on to the CJA panel who "have met with the high standards and approval of the court," a clear measure of success.[888]

Similar programs in other districts have proven successful in attracting and preparing young, diverse attorneys for federal criminal defense work. In the Middle District of North Carolina, for example, younger attorneys who want to join the panel are "matched with regular panel attorneys . . . to bring up younger attorneys so that as [the] panel ages, [the district has] new attorneys ready to go."[889] Similarly, in Wyoming, some of the more experienced panel attorneys serve as voluntary mentors, working with mentees, and then recommending qualified mentees to the Standing Committee and the court, who manage the panel.[890] Even with a relatively small bar, the Wyoming panel "maintains approximately eight to 10 mentees at any given time."[891]

In addition to formal mentoring programs, some districts offer CLE credit and other training programs to expose younger and more diverse attorneys to federal criminal defense practice, helping them gain experience.[892] A judge in one district testified, "We are planning a free training session geared to lawyers who are less experienced in federal criminal defense. We are also experimenting with an informal

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884 Andrea George, Exec. Dir., CDO, E.D. Wash. & D. Idaho, Public Hearing — Portland, Or., Panel 6, Writ. Test., at 2.

885 Robert Richman, Board Member of Minn. Assoc. of Criminal Defense Lawyers, Public Hearing — Minneapolis, Minn., Panel 4, Tr., at 32.

886 In an effort to develop and diversify the district's CJA panel, in 2007 the Court authorized the Second Chair Program. During the course of the program, participants act as "second chair" attorneys on three CJA cases and attend dozens of hours of training, designed specifically for new federal practitioners. A paid program coordinator develops and provides the training, in addition to supervising the program participants. The funding for the program is provided by the District Court's Attorney Admission Fund and the FPDO administers the program.

887 Robert Richman, Board Member of Minn. Assoc. of Criminal Defense Lawyers, Public Hearing — Minneapolis, Minn., Panel 4, Tr., at 32.

888 Anthony Ricco, CJA Dist. Rep., E.D.N.Y., Public Hearing — Philadelphia, Pa., Panel 9, Tr., at 10.

889 Lisa Costner, CJA Dist. Rep., M.D.N.C., Public Hearing — Birmingham, Ala., Panel 7, Tr., at 11.

890 Mag. Judge Kelly Rankin, D. Wyo., Public Hearing — Portland, Or., Panel 3, Writ. Test., at 5.

891 *Id.*

892 *See, e.g.*, Mag. Judge Mark Hornsby, W.D. La., Public Hearing — Birmingham, Ala., Panel 5, Writ. Test., at 2.

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misdemeanor panel to help lawyers gain experience in handling matters in our court."[893] According to the defender in the Western District of Washington, his office has "opened up free, all-day CLE to non-CJA lawyers, and specifically the membership of minority bar associations, in an attempt to generate interest in the CJA [panel]."[894] That office has also been a leader in offering training sessions on implicit bias, helping attorneys to understand how "unconscious bias can affect…relationships with clients."[895] Implicit bias can also be a barrier to developing a diverse workforce in federal and community defender offices if those making the hiring decisions unconsciously "favor individuals who look and speak like we do."[896]

Recognizing this possibility, some FPDOs and CDOs have achieved further diversity in their ranks "by consciously expanding [their] recruiting efforts."[897] The Federal Defender for the Eastern District of Pennsylvania described the need for defender offices to have a "concrete plan" to raise the diversity of representation in their district.[898] Such a plan could include outreach to various minority groups, such as the Black Law Students Association, "so people are familiarized with the [CJA] program and the commitment to the work.…[If you] attend those job fairs…[and] participate in those conferences, then you're piquing interest there," he said.[899]

One witness, a former law school dean, recommended recruiting minority law students after their second year of law school, and offering them paid summer positions in defender offices as a way of increasing retention after graduation.[900] Targeted recruitment can pay dividends. The federal defender for the Northern District of Texas wrote to the Committee:

> I realized it was not enough to simply advertise positions nationally and hope that more African-American attorneys would apply. So I have recently determined that, if these candidates will not come to us, we will go to them. [In the past month,] two of my attorneys and I traveled to two of the historically black law schools (Howard University School of Law and Florida A&M Law School) to tell the students who we are and to recruit them to submit their resumes for attorney employment with our office. (The initial results

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893 *Id.* The Judge told the Committee that in his district of the Western District of Louisiana, "Maintaining diversity among the panel attorneys is a real challenge. In Shreveport, there is only one African American who routinely accepts appointments. There are only three women who routinely accept appointments. None of the lawyers speak Spanish. The panels in Monroe, Alexandria, Lafayette, and Lake Charles face these same issues." *Id.*

894 Michael Filipovic, FPD, W.D. Wash. Public Hearing—Portland, Or., Panel 6, Writ. Test., at 8.

895 *Id.*

896 Stephen McCue, FPD, D.N.M., Public Hearing—Santa Fe, N.M., Panel 2, Writ. Test., at 4.

897 Jason Hawkins, FPD, N.D. Tex., Public Hearing—Santa Fe, N.M., Panel 2, Writ. Test., at 4.

898 Leigh Skipper, Exec. Dir., CDO, E.D. Pa., Public Hearing—Philadelphia, Pa., Panel 3, Tr., at 7.

899 *Id.* at 20.

900 Professor Norm Lefstein, Professor of Law and Dean Emeritus, Robert H. McKinney School of Law, Indiana Univ., Public Hearing—Minneapolis, Minn., Panel 3, Tr., at 27.

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have been outstanding.) Furthermore, we also attended the Equal Justice Works Career Fair in Washington D.C., . . . and we plan also to attend the Public Interest Law Center Career Fair at the New York University School of Law. . . . I am confident that, by consciously expanding our recruiting efforts, we will achieve further diversity in our attorney ranks.[901] ●

[901] Jason Hawkins, FPD, N.D. Tex., Public Hearing—Santa Fe, N.M., Panel 2, Writ. Test., at 4.

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Section 9: Capital Representation

9.1 Background—Capital Trials, Direct Appeals, § 2254, § 2255, and Habeas

One of the particular areas of defense practice that this Committee examined involves providing representation to those facing capital punishment. Capital representation under the CJA occurs in two main contexts. [902]

First, there are the "direct death"[903] cases that originate from federal grand jury indictments and are governed by the Federal Death Penalty Act.[904] Convictions and sentences of death in these cases are appealed in the same manner as ordinary felonies, first to the Circuit Courts of Appeal and then by writ of certiorari to the Supreme Court. Practitioners often refer to these as "direct appeals."

Second are cases involving collateral review of convictions and death sentences that have become final after the conclusion of the direct appeal process. These are further divided between collateral review of federal "direct death" sentences under 28 U.S.C. § 2255 and review of state death sentences under 28 U.S.C. § 2254. Section 2254 cases are by far the most numerous type of capital representation and, therefore, provide the context in which the inadequacies of the defense system are most often evident. A significant portion of the following discussion draws examples from § 2254 litigation. But while litigation in each of these contexts

902 For a chart representing the usual progression of a capital case, please see Appendix H.

903 See generally Public Hearing—Birmingham, Ala., Panel 3, Writ. Test. (discussing the Federal Death Penalty Act and referencing common shorthand terms).

904 18 U.S.C. §§ 3591–3599.

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is quite different, a number of problems are common to all.

There are several statutes that govern the provision of counsel in pre- and post-conviction capital cases. Under 18 U.S.C. § 3005, a defendant charged with a federal capital offense, a "direct death" prosecution, is entitled to the appointment of two trial attorneys, at least one of whom should "be learned in the law applicable to capital cases." The statute states that, "In assigning counsel under this section, the court shall consider the recommendation of the Federal Public Defender organization, or, if no such organization exists in the district, of the Administrative Office of the United States Courts."[905] This provision is unique to "direct death" cases.

Post-conviction litigation, commonly referred to as "habeas corpus,"[906] begins when the defendant's capital sentence has become final upon the conclusion of any direct appeals. Under 28 U.S.C. § 2254, a defendant convicted of a state capital crime can, after exhausting state remedies, submit a habeas corpus petition to a federal district court to consider violations "of the Constitution or laws or treaties of the United States."[907] 28 U.S.C. §2255 provides the basis for a habeas petition[908] when a defendant has been convicted of a federal capital crime. Habeas petitions allow petitioners to argue claims that,

> the Government failed to prosecute them according to constitutionally prescribed rules, or that the jurors who convicted and sentenced them harbored biases that interfered with their ability to be fair, or that their trial lawyers neglected to undertake the work necessary to defend them properly against capital charges or to persuade a jury that they did not deserve a sentence of death.[909]

The right to counsel in capital habeas cases, as the Supreme Court has held that in habeas review, "[t]he complexity of our jurisprudence in this area…makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law."[910] Associate Justice Harry Blackmun called habeas corpus proceedings, with all their procedural requirements, a "Byzantine morass."[911]

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905 *Id.* § 3005.

906 The right to habeas corpus is a constitutional right that the Supreme Court has ruled is distinct from any statutory scheme. However, as post-conviction proceedings are generally referred to and function as a habeas review, and a separate habeas petition is rarely filed, proceedings under § 2254 and § 2255 will be referred to as "habeas" here.

907 28 U.S.C. § 2254.

908 Again, while this statute provides for the filing of a motion to set aside or vacate a conviction or sentence, the petitions to do so are still commonly referred to as habeas petitions.

909 Ruth Friedman, Director, Federal Capital Habeas Project, Public Hearing—Birmingham, Ala., Panel 3, Writ. Test., at 2.

910 McFarland v. Scott, 512 U.S. 849, 855-56 (1994) (citations omitted).

911 Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting). Please see Appendix H for charts to show the tortuous path these cases generally take.

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For both § 2254 and § 2255 habeas petitions, 18 U.S.C. § 3599(a)(2) requires the appointment of counsel and securing of funding for "any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services." However, the same section places limits on funding for representation and related services. Section 3599(g)(1) sets the hourly rate of capital counsel, authorizing the Judicial Conference to raise it as required; it is currently set at $185 an hour. Section 3599(g)(2) sets a cap of $7,500 for "[f]ees and expenses paid for investigative, expert, and other reasonably necessary services" that can be obtained from the district court without circuit approval. Although Congress has raised the hourly rate over the years, the presumptive cap on reasonably necessary services has not been increased since 1996.[912]

Expenses for investigative or expert services may only exceed this decades-old cap of $7,500 if: 1) payment in excess of that amount is certified by the district court as necessary to provide fair compensation for services of an unusual character or duration; and 2) the excess payment is approved by the chief judge of the circuit court of appeals or the chief judge's designee.[913] Habeas corpus is a review of matters collateral to, and thus outside of, the trial record. Development of such claims requires the investigation, or re-investigation, of matters which might have been but were not litigated at trial, on appeal, or even in the initial state habeas petition. This work cannot be done without significant assistance from expert witnesses and other specialized service providers who may or may not have been involved in the original trial.[914] Given the crucial role that specialists play in capital habeas petitions, the presumptive limit of $7,500 is far too low, and the vast majority of habeas cases require authorization for additional funds, as discussed below.[915]

Despite habeas being a "highly complex and challenging area of law," requiring investigation of matters outside the trial and appellate record, both § 2254 and

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912 Richard Burr, Texas Regional Habeas and Assistance Project, Public Hearing—Birmingham, Ala., Panel 3, Writ. Test., at 8 n.6.

913 18 U.S.C. § 3599(g).

914 Many federal and some state capital trial defense teams utilize mitigation specialists. A mitigation specialist is an expert qualified to investigate, evaluate, and present psychosocial and other mitigating evidence to persuade a judge or jury that a death sentence is an inappropriate punishment for the defendant. A mitigation specialist coordinates the investigation of the defendant's life history, identifies issues requiring evaluation by a psychologist, psychiatrist, or other professional, and helps attorneys find experts to present testimony and documentary materials for review. A defense counsel's failure to investigate or present mitigating evidence at the state or federal trial level could have harmed the defendant and possibly result in a claim of ineffective assistance of counsel. Therefore, habeas counsel often need to conduct their own investigation into the mitigating circumstances for a defendant. For more, *see generally* Public Hearing—Birmingham, Ala., Panel 3 transcript and written submissions.

915 This is true in direct death cases as well as authorized death cases in federal district courts routinely exceed the $7,500 threshold. A 2010 AO study found that the median service provider cost in an authorized case was $83,029, and was even higher if the case went to trial. *See* Jon B. Gould & Lisa Greenman, Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases, Report to the Committee on Defender Services, Judicial Conference of the United States (2010).

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§ 2255 allow defendants only one year to file motions attacking their convictions.[916]

Finally, § 3599(f) also establishes that "[n]o ex parte proceeding, communication, or request may be considered" for "any investigative, expert, or other services [that] are reasonably necessary for the representation of the defendant" unless "a proper showing is made concerning the need for confidentiality." This provision may, therefore, require habeas counsel to disclose the theory of the case and defense strategy to both the judge and the government, while also requiring that habeas counsel, if the government objects, be forced to litigate for the funding for any third-party services while the one-year statute of limitations is running.

The Antiterrorism and Effective Death Penalty Act of 1996 enacted special fast-track procedures for capital habeas petitions brought under § 2254.[917] These provisions include a shortened six-month (180 day) statute of limitations, limitations on review of unexhausted claims and petition amendments, and expedited review by the district and appellate courts. They are applicable only to § 2254 capital habeas petitions filed by prisoners in states that "opt in" by establishing a mechanism for the appointment and compensation of state post-conviction counsel. The responsibility for certifying a state for fast-track habeas review rests with the Attorney General of the United States. In 2013, the Attorney General finalized regulations to implement a certification procedure.[918] As of September 2017, Arizona and Texas have applied and their applications are pending. Such certification could put great strain on the already taxed federal resources to handle habeas petitions, as discussed below.

The Judicial Conference also has policy which governs capital representation. As noted above, federal capital trials require the appointment of two counsel, one of whom must be "learned." Judicial Conference policy mandates that such "learned counsel" have distinguished prior experience in the trial, appeal, or post-conviction review of federal death penalty cases, or distinguished prior experience in state death penalty trials, appeals, or post-conviction review that, in combination with co-counsel, will assure high-quality representation.[919] A court may appoint more than two attorneys when exceptional circumstances and good cause are shown. Under CJA Guidelines governing these trials, "[t]here is neither a statutory case compensation maximum for appointed counsel nor provision for review and approval by the chief judge of the circuit of the case compensation amount in capital cases."[920]

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916 28 U.S.C. § 2244(d)(1), 28 U.S.C. § 2255(f); Kristine Fox, Circuit Case Budgeting Atty., 9th Cir., Public Hearing—San Francisco, Cal., Panel 1, Writ. Test., at 2. However, the statute of limitations may be tolled in § 2254 petitions for a defendant to return to state court where state claims have not been exhausted.

917 *See* 28 U.S.C. §§ 2261–2266 (codifying the fast-track procedures).

918 Certification Process for State Capital Counsel Systems, 78 Fed. Reg. 58183 (Sept. 23, 2013) (codified at 28 C.F.R. pt. 26(B)).

919 James R. Spencer, Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation, Subcommittee on Federal Death Penalty Cases, Committee on Defender Services, Judicial Conference of the United States (1998).

920 CJA Guideline § 630.10.20 (2014).

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9.2 Current Resources

9.2.1 Federal Death Penalty Resource Counsel Project

The Federal Death Penalty Resource Counsel Project, established in 1992 by the Defender Services Office, assists appointed counsel, federal defenders, and the judiciary with matters relating to the defense function in federal capital trial cases. Comprised of veteran capital defense attorneys, the Project monitors all federal death penalty cases; consults with trial counsel regarding identification of experts, mitigation specialists, and investigators; undertakes legal research, drafting pleadings, and jury instructions; and provides on-site assistance before and during capital trials. The Project also identifies and recruits qualified defense counsel for possible appointment and assists DSO in responding to judicial inquiries concerning the defense function, case management, and budgeting of federal capital cases.

The Project includes attorneys who serve as Federal Capital Appellate Resource Counsel. They recruit, train, consult with, and assist attorneys appointed to federal death-penalty appeals and provide direct representation in a limited number of cases. The Project also has a National Mitigation Coordinator, a Defense Victim Outreach Coordinator, and a Life Support Project comprised of a number of individuals who previously faced capital charges and who assist defense teams with clients who are reluctant to have mitigation investigated or to accept a plea agreement for a sentence less than death.[921] Finally, the Project includes Capital Resource Counsel who are full-time assistant federal defenders who focus on federal capital cases assigned to federal defender organizations.

9.2.2 Federal Capital Habeas Corpus Project (2255 Project)

The Federal Capital Habeas 2255 Project, established in 2004 by DSO, assists federal courts with appointment of counsel in § 2255 federal death penalty habeas proceedings and ensures that all individuals sentenced to death in federal court, who have completed their direct appeals, receive representation consistent with the highest standards of the legal profession. The Project is composed of six attorneys, a paralegal, and an administrative assistant who work under the auspices of the Federal Public Defender for the District of Maryland. The Project's main focus is to recruit qualified counsel, monitor pending § 2255 litigation, consult with post-conviction attorneys on all aspects of proceedings, represent petitioners directly in a limited number of cases, organize training seminars on legal developments and effective litigation strategies, and assist judges and their staffs with budgeting, counsel concerns, or any other issues related to capital § 2255 representation.

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921 At the time of this writing there is no Defense Victim Outreach Coordinator, and the Life Support Project operates on an ad hoc basis.

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9.2.3 Capital Habeas Units (CHUs)

Nineteen of the 81 federal defender offices have Capital Habeas Units (CHUs). These units primarily represent state prisoners sentenced to death whose convictions have proceeded through state court appellate and collateral review and are now before the federal court in § 2254 proceedings. CHUs also handle § 2255 motions for prisoners sentenced to death following conviction of a capital-eligible offense in federal court. The following federal defender offices currently support CHUs:

1. Middle District of Alabama
2. District of Arizona
3. Eastern District of Arkansas
4. Central District of California
5. Eastern District of California
6. District of Delaware
7. Northern District of Florida
8. Northern District of Georgia
9. District of Idaho
10. Western District of Missouri
11. District of Nevada
12. Northern District of Ohio
13. Southern District of Ohio
14. Western District of Oklahoma
15. Eastern District of Pennsylvania
16. Middle District of Pennsylvania
17. Western District of Pennsylvania
18. Eastern District of Tennessee
19. Middle District of Tennessee

Two new CHUs—for the Western and Northern Districts of Texas—have been budgeted for FY 2018. A CHU has also been authorized for the Middle District of Florida and the Southern District of Indiana, which will be funded in FY 2019.

Because of their specialized skill and experience, CHU attorneys are often appointed to represent defendants in other federal districts. However, unless the district's CJA plan provides for such representation, these appointments must be approved by DSO after notice to the chief judge of both the circuit in which the CHU is located as well as the circuit where the appointment will be made.

9.2.4 Habeas Assistance and Training Counsel (HATs)

The Habeas Assistance and Training Counsel Project (HAT), established in 1996 by DSO, provides assistance to courts and counsel in § 2254 federal death penalty

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habeas proceedings. HAT counsel are experienced federal habeas corpus practitioners who work part-time on a contract basis with the Defender Services Office and provide consulting, training, and related services to CHUs, CJA panel attorneys, and the federal judiciary. There are currently four regional HATs and one national HAT.

9.3 Problems in Federal Capital Representations

As outlined in other sections of this report, there are significant weaknesses in the structure and delivery of federal defense under the CJA. Capital representations put those structural failures in stark relief.

Many federal judges are not familiar with the nature of criminal defense and are even less knowledgeable about what it takes to provide a strong defense in a death penalty case, because these cases are relatively rare.[922] Only a small minority of federal judges have presided over a capital prosecution. And federal judges who work in states without the death penalty may be even less familiar with capital habeas corpus proceedings.

Lacking this experience—and/or in some places lack of access to qualified attorneys—judges often struggle with selecting and appointing the learned counsel required in direct death cases and capital habeas cases. A district court judge confirmed this, telling the Committee, "Capital habeas cases, like capital prosecutions, necessitate experienced attorneys since the stakes are high. Locating an appointed qualified counsel is not always easy, nor [is] reviewing vouchers for reasonableness, and capital habeas cases tend to be more difficult than . . . standard cases."[923]

In habeas cases, given the one-year statute of limitations (or even 6 months under fast-track procedures discussed below), the failure to promptly appoint qualified counsel can have dire consequences. Delay in appointing counsel may result in a significantly curtailed investigation and therefore an incomplete habeas petition.

Lacking capital experience, many judges may also be unaware of the need

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922 Per DOJ policy, the U.S. Attorney General must personally review and authorize any case where the death penalty is sought. Between 1995 and 2000, the U. S. Attorney General authorized U.S. Attorneys to seek the death penalty for 160 out of 1,070 capital-eligible defendants (14.9%). The death penalty was authorized for 247 out of 1,260 capital-eligible defendants (19.6%) between 2001 and 2008, and for 52 out of 1,209 capital-eligible defendants (4.2%) between 2009 and 2016. These data show, even over some recent periods, that few defendants were authorized for the death penalty in relation to those potentially eligible for it. The highest average was in the early 2000s with approximately 31 capital prosecutions per year. The most recent years had an average of just over seven capital prosecutions per year.

923 Judge Marcia Crone, E.D. Tex., Public Hearing—Birmingham, Ala., Panel 1, Tr., at 3.

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for extensive investigative, mitigation, and other expert assistance in both capital prosecutions and habeas petitions.[924] The same lack of experience also hampers a judge's ability to evaluate requests to fund these services, sometimes resulting in significant delays. According to Ruth Friedman, Director of the 2255 Project, some federal judges "may be unfamiliar with what constitutes mitigation, for example, or with the extent to which habeas counsel must reexamine all aspects of the prior proceedings in the case in order to determine what claims to raise. This can make evaluating the reasonableness of specific requests difficult and again more time-consuming."[925] This delay reduces the time a petitioner has to collect evidence in support of potentially meritorious claims.

Lack of knowledge among federal judges can have serious consequences when it leads to appointment of poorly-qualified counsel or failure to approve adequate expert assistance or to do so in a timely fashion. In federal capital prosecutions, the 2010 Spencer Report Update found that, "there is a negative, or inverse, relationship between the attorneys' hours on a case and their client's risk of being sentenced to death; the more hours dedicated to a case, the lower the risk of a death sentence."[926] While the Spencer Report reviewed capital trial representations, this dynamic is repeated in habeas cases. The Committee heard significant testimony from attorneys that the more time and resources they had for investigators and experts for habeas petitions, the greater the probability that their petition would be successful.[927] These issues will be discussed in greater detail below.

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924 For example, a guideline from the ABA's Death Penalty Representation Project explains: "The defense team must conduct an ongoing, exhaustive and independent investigation of every aspect of the client's character, history, record and any circumstances of the offense, or other factors, which may provide a basis for a sentence less than death. The investigation into a client's life history must survey a broad set of sources and includes, but is not limited to: medical history; complete prenatal, pediatric and adult health information; exposure to harmful substances in utero and in the environment; substance abuse history; mental health history; history of maltreatment and neglect; trauma history; educational history; employment and training history; military experience; multi-generational family history, genetic disorders and vulnerabilities, as well as multi-generational patterns of behavior; prior adult and juvenile correctional experience; religious, gender, sexual orientation, ethnic, racial, cultural and community influences; socio-economic, historical, and political factors." Supplementary Guidelines for The Mitigation Function of Defense Teams in Death Penalty Cases § 10.11 (2008).

925 Ruth Friedman, Director, Federal Capital Habeas Project, Public Hearing—Birmingham, Ala., Panel 3, Writ. Test., at 18.

926 Kevin McNally, Director, Federal Death Penalty Resource Counsel Project, Public Hearing—Birmingham, Ala., Panel 3, Writ. Test., at 6.

927 An FPD explained: "One of our clients in federal habeas walked out of death row after 20 years and four successor petitions. The Ohio courts found that there was DNA and Brady [exonerating evidence] that was not turned over. We were able to do that because we were the Federal Defender and we had the resources. If it was a CJA panel [attorney], would they have been able to have the experts, the tenacity, the investigators? Would a court have allowed them to do what we have done over the years? That person is out now because of the dedication of the Federal Defenders, but when you have a Judge making a decision, "Well, I've given you money for this, why do I need to give you money for that?" Jon Sands, FPD, D. Ariz., Public Hearing—Minneapolis, Minn., Panel 5, Tr., at 28.

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9.3.1 Inconsistent Defense Across the Nation

As with voucher review and other aspects of the system for delivering public defense, the Committee found significant disparities in capital cases across districts and circuits. Ruth Friedman, who as Capital 2255 Project Director works to coordinate representation in these cases across the country, told the Committee that in some circuits, "there is a history, there is a culture," of not adequately funding and supporting effective capital representation, whether at trial or on habeas review. She said that in these circuits there are clear, "across the board" challenges to effective capital representation. "It's true in terms of money spent, it's true in terms of whether the courts listen to or accept our recommendations. It's true in terms of who gets sentenced to death and how many."[928]

She summed up the concerning state of affairs:

> The level of funding litigants receive for expert and investigative services, as well as the compensation their CJA counsel receive, appears to be an accident of geography, rather than the result of any uniform standard applied across all federal jurisdictions. Certainly some differences may be expected across the country. But where neither state law concerns nor state practices are legally relevant, the wide variation in the kind of process a federal capital prisoner receives in his collateral proceedings is troubling at best.[929]

A federal defender in the Philadelphia hearings noted that "the disparity [in] funding between districts in certain regions in this nation versus the funding given in other districts is incredibly dramatic. . . . [I]t's the core of what I've described as a fundamental flaw in the system, [which] is that we've got a totally deregulated system that turns on individual judges' appreciation of the defense function."[930] Therefore, a person facing a death sentence in one district may have a "wildly differently funded defense" than someone in another district under what should be a national standard of due process and effective Sixth Amendment representation.[931] The Committee is deeply concerned that sheer geography or judge assignment could prove to be a substantial factor in deciding whether a defendant will be sentenced to death and executed.

The Committee heard testimony that disparities can be rooted in both formal and informal policies. The Fifth Circuit, for instance, has a presumptive cap on attorney's fees in habeas representations. That circuit has set its own limitations, adopting a presumptive cap of $35,000 for federal capital habeas representation in

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928 Ruth Friedman, Director, Federal Capital Habeas Project, Public Hearing—Birmingham, Ala., Panel 3, Tr., at 37.

929 Ruth Friedman, Director, Federal Capital Habeas Project, Public Hearing—Birmingham, Ala., Panel 3, Writ. Test., at 17.

930 Jim Wyda, FPD, D. Md., Public Hearing—Philadelphia, Pa., Panel 10, Tr., at 21.

931 *Id.*

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the District Courts and $15,000 in the Court of Appeals.[932] The Committee was told, "These presumptive caps, coupled with a history in some cases of actually capping counsel's fees at these amounts, have operated as a deterrent to competent counsel accepting appointments in capital habeas cases."[933]

As previously discussed, presumptive caps limit effective representation by panel attorneys and discourage zealous advocacy in any type of case. The caps for capital representation are onerous "especially in Texas, because of the historically poor representation in state habeas proceedings and the Supreme Court's decision in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), allowing federal habeas counsel to raise new ineffective assistance of trial counsel claims in federal court" if they can show that state habeas counsel were ineffective in not raising those claims.[934] But that right is hollow if the lawyers bringing those claims in federal court don't have the resources to mount an effective defense.[935] Caps in some circuits but not others ensure that defendants within a national federal system receive varying levels of resources and representation. This is anathema to any criminal justice system based on due process and equal protection under the law, especially since defendants' lives are at stake.

9.3.2 Failings Specifically in Capital Habeas Representation

The Committee heard a significant amount of testimony about the failure of the CJA to provide effective, quality representation for defendants in capital habeas proceedings, whether the habeas petitions were submitted under § 2254 or § 2255. The Committee agrees with a former DSO employee who testified, "I've always felt in my experience working in the program for all these years that death penalty representation puts into high relief problems that exist throughout the entire system."[936]

Timeliness of appointment

As mentioned above, judges who lack experience with capital habeas representation often take longer to make crucial decisions, beginning with the appointment of counsel. The expedient appointment of qualified and knowledgeable counsel can be the difference between a successful habeas petition and a death sentence. As Ms. Friedman explained, "[M]ost troubling are the failures of some appointing courts

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932 United States Court of Appeals for the Fifth Circuit, *CJA Frequently Asked Questions*, http://www.lb5.uscourts.gov/cja/cjaForms/cjaFAQ.htm (last visited October 5, 2017).

933 Richard Burr, Texas Regional Habeas and Assistance Project, Public Hearing—Birmingham, Ala., Panel 3, Writ. Test., at 6 n.6.

934 Maureen Franco, FPD, W.D. Tex., Public Hearing—Santa Fe, N.M., Panel 2, Writ. Test., at 4.

935 *Id.*

936 Steven G. Asin, Former Deputy Assistant Director, DSO, Administrative Office of the United States Courts, Public Hearing—Philadelphia, Pa., Panel 7, Tr., at 11.

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to recognize what constitutes, and then to appoint, qualified federal capital habeas counsel…or to make appointments of counsel at the earliest possible moment a case enters post-conviction proceedings."[937]

Delay can lead to severe consequences. There is no reliable mechanism for extending the statute of limitations; if counsel is only appointed after a three-month delay, that is three months lost for the petitioner to have claims investigated and supported in the subsequent habeas petition. A federal habeas petition is usually the last opportunity a person sentenced to death may have to raise legal and factual claims that could negate that sentence. Therefore, "any exhausted issue that has potential merit must be included in the petition, and any previously unexhausted, unavailable, or unknown factual/legal issue must be the subject of investigation, development, and litigation"[938] in order to determine if it has merit. Given the statute of limitations, timeliness is of the essence. Within that one year:

- A defense team must be identified, recommended, and appointed;
- Counsel must learn the existing record, which in federal cases is extensive;
- The team must meet and develop a rapport with the client;
- Counsel must begin to assess avenues for investigation;
- Counsel must determine preliminary funding needs;
- Appropriate expert and investigative resources must be secured;
- Records not collected by trial counsel must be obtained and reviewed;
- A thorough fact investigation must be undertaken;
- A thorough mitigation investigation must be undertaken;
- Post-conviction claims must be identified;
- Counsel must prepare and litigate necessary pleadings; and
- A § 2255 [or § 2254] motion with all applicable claims and sufficient factual support must be filed.[939]

As noted above, the Resource Counsel's main focus, as part of the Federal Capital Habeas § 2255 Project, is to recruit qualified counsel and assist judges and their staff on issues related to capital § 2255 representation, including identifying qualified counsel. The Model CJA Plan adopted by the JCUS recommends that judges consult with the local federal defender, who can consult with other offices and projects to assist with the appointment of habeas representation. This, however, is not a

937 Ruth Friedman, Director, Federal Capital Habeas Project, Public Hearing—Birmingham, Ala., Panel 3, Writ. Test., at 5.

938 Richard Burr, Texas Regional Habeas and Assistance Project, Public Hearing—Birmingham, Ala., Panel 3, Writ. Test., at 1.

939 Ruth Friedman, Director, Federal Capital Habeas Project, Public Hearing—Birmingham, Ala., Panel 3, Writ. Test., at 3.

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requirement. Because it is not mandatory, district court judges are under no obligation to accept federal defender, HAT counsel, or Capital Habeas Project's recommendations for learned counsel, often resulting in the appointment of unqualified counsel and unnecessary delays.

Ms. Friedman told the Committee that attempts to assist in the timely appointment of qualified counsel have not always been well-received, and that defendants suffer the consequences.

> We have tried very hard in each one of the cases that comes along to find a cost-effective, qualified team ready to go within the time period, and a judge can and has just said no.... Not only does no reason have to be given for why they are not appointing the team, but they can wait.... [T]he statute of limitations goes in these cases so quickly because they are so big and there's no tolling provisions, statutory tolling provisions ... and if a judge wants to sit on that, he or she can and just eat into that statute.[940]

No defendant facing execution should receive less than the full amount of time the statute of limitations grants to prepare a habeas petition, and no defendant should be represented by less than qualified counsel. To do otherwise is to compromise due process in the federal criminal justice system.

Failure to Appoint Qualified Counsel

Finding Willing and Able Counsel

The first and most important step to effective representation in a post-conviction case is the appointment of qualified counsel, yet the Committee heard substantial testimony about the difficulty in finding experienced attorneys who are willing to accept § 2254 and § 2255 cases.

A district court judge told the Committee that when she needs to appoint private counsel to a post-conviction case, "[V]ery few of the attorneys on the CJA panel qualify as 'learned counsel' or are willing to accept capital cases."[941] A federal defender agreed, writing to the Committee that when asked to assist judges in finding qualified private counsel to handle federal capital habeas cases, she was shocked and dismayed that the judges, "did not have a list of qualified court-appointed attorneys to handle this type of highly technical and specialized litigation" to ensure timely appointment.[942] "Additionally, it became readily apparent that the number of attorneys who are truly qualified and capable of handling this type of litigation were few and far between and were already burden[ed] with a pending caseload of capital

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940 Ruth Friedman, Director, Federal Capital Habeas Project, Public Hearing—Birmingham, Ala., Panel 3, Tr., at 16.

941 Judge Marcia Crone, E.D. Tex., Public Hearing—Birmingham, Ala., Panel 1, Writ. Test., at 8.

942 Maureen Franco, FPD, W.D. Tex., Public Hearing—Santa Fe, N.M., Panel 2, Writ. Test., at 4.

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habeas cases and could not take on additional work."[943] She characterized the task of finding counsel to accept these cases as "extremely difficult."[944]

The work of post-conviction review is a strain on private attorneys. "It's very time consuming. If you take one of these cases it can consume your practice. A couple of the panel attorneys essentially lost their practices because they do capital habeas work."[945] Attorneys that accept habeas appointments also face "significant changes in the law rendering representation of habeas petitioners more challenging, and increased responsibilities associated with representing a condemned prisoner, especially after an execution date is set."[946] On top of those challenges are the scarce resources granted to post-conviction review, resulting in fewer attorneys willing to accept or become qualified to accept habeas cases. One federal judge told this Committee that "Voucher cuts, delayed payments, and relatively low hourly rates may discourage these attorney[s] from continuing to represent capital defendants and may deter new attorneys from engaging in this specialty." [947] As noted immediately above, this means that the few attorneys qualified and willing to be appointed to post-conviction review already have full caseloads. One of the regional HAT attorneys told the Committee that, "Within Texas, most of the lawyers who are really qualified and understand the mission of federal habeas can't take any more cases. We are full, so we are looking out-of-state."[948]

The difficulty in locating qualified counsel willing to accept § 2254 or § 2255 cases is not limited to Texas. A case budgeting attorney for the Ninth Circuit told the Committee that "[t]he number of qualified CJA attorneys willing to accept representation of a capital habeas petitioner has decreased over the past two decades. As a result, district courts within and outside the Ninth Circuit have had difficulty finding qualified CJA attorneys."[949] One of the reasons for this included "counsel's inability to obtain adequate resources in some districts or circuits."[950] Indeed, the Committee was told that, "most private lawyers at this point won't take on a case unless they're accompanied by a Capital Habeas Unit of a federal defender for the reason that…they're not going to get the resources paid."[951]

The Director of the ABA's Death Penalty Representation Project, Emily

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943 *Id.*

944 *Id.*

945 Susan Otto, FPD, W.D. Ok., Public Hearing—Santa Fe, N.M., Panel 1, Tr., at 38.

946 Kristine Fox, Circuit Case Budgeting Atty., 9th Cir., Public Hearing—San Francisco, Cal., Panel 1, Writ. Test., at 2.

947 Judge Marcia Crone, E.D. Tex., Public Hearing—Birmingham, Ala., Panel 1, Tr., at 2.

948 Richard Burr, Texas Regional Habeas and Assistance Project, Public Hearing—Birmingham, Ala., Panel 3, Tr., at 32.

949 Kristine Fox, Circuit Case Budgeting Atty., 9th Cir., Public Hearing—San Francisco, Cal., Panel 1, Writ. Test., at 2.

950 *Id.*

951 Ruth Friedman, Director, Federal Capital Habeas Project, Public Hearing—Birmingham, Ala., Panel 3, Tr., at 33.

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Olson-Gault, told the Committee that without qualified CJA counsel readily available to be appointed, "at least half the work" of her project to assist in finding representation for defendants in post-conviction proceedings is now dedicated to "recruiting law firms to take post-conviction cases, state and federal. It is enormously time consuming and difficult and getting law firms to sign onto these cases is incredibly hard and we are often unsuccessful."[952] In her testimony, Ms. Olson-Gault referenced a large law firm in Alabama that told her it had received a call from the chief of the Alabama Supreme Court essentially begging the firm to take death penalty cases pro bono. "It had come to that…that there was not a readily-available pool of volunteer lawyers to do this."[953]

Those within the criminal justice system told the Committee that they were deeply concerned about their continuing ability to appoint experienced counsel to federal habeas cases. One federal judge testified that she was particularly concerned about the lack of new, younger attorneys pursuing this line of work. "Most of the people who we appoint are my age or older, and they're retiring, they're not going to continue to accept these cases."[954] And Ms. Friedman told the Committee that the burden on offices dedicated to taking capital habeas cases was becoming too great; the offices were concerned about their own staffing and resources. "[A] lawyer I'm very fond of who runs a Capital Habeas Unit says [that] when he hears that I'm on the phone he picks up the phone and says 'no.' It's true. Where do we go?…I literally don't know where I'm going to go when the next cases come."[955]

Caseloads and Quality Representation

Witnesses told distressing stories about what happens in the growing number of cases in which a highly qualified attorney is not available. As one witness said,

> counsel are often appointed who do not provide effective representation. The results are disastrous for their clients. In at least ten Texas capital habeas cases, lawyers have missed the statute of limitations—including one Houston lawyer who missed the deadline in three cases. The lawyer who missed three deadlines continued to receive federal capital habeas appointments until a reporter interviewed the Chief Judge of the Southern District at the time, who had been unaware of the problem.[956]

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952 Emily Olson-Gault, Director, ABA Death Penalty Representation Project, Public Hearing—Birmingham, Ala., Panel 4, Tr., at 25.

953 *Id.* at 25.

954 Judge Marcia Crone, E.D. Tex., Public Hearing—Birmingham, Ala., Panel 1, Tr., at 2.

955 Ruth Friedman, Director, Federal Capital Habeas Project, Public Hearing—Birmingham, Ala., Panel 3, Tr., at 33.

956 Richard Burr, Texas Regional Habeas and Assistance Project, Public Hearing—Birmingham, Ala., Panel 3, Writ. Test., at 2 (citing Lisa Olsen, *Texas Death Row Lawyers' Late Filings Deadly to Inmates: Tardy Paperwork Denies Final Appeals for 9 Men, 6 of Whom Have Been Executed*, Hou. Chron., Mar. 22, 2009, at A1).

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The Committee on Defender Services' Report on Death Penalty Representation recommended that a full-time attorney in an institutional defender office work on approximately four to six cases at any one time.[957] But panel attorneys, who typically lack the support staff and other assistance available to assistant federal public defenders in CHUs, routinely have to juggle more of these very serious cases.

> For example, in 2013 a Northern District judge and Southern District judge appointed the same lawyer to two capital habeas cases with petitions due on the same day in 2014. This same lawyer was appointed to two capital habeas cases from different districts due within the same week in 2016, and he has 11 other capital habeas cases as well as a significant non-capital CJA appellate workload. . . . Lawyers with impossibly large caseloads cannot perform the work necessary for adequate representation in these complex and labor-intensive cases.[958]

Because there is no centralized office or database to track appointments and caseloads, "the courts often appoint lawyers who have little or no capital habeas experience or have such large caseloads that they are unable to give the cases the attention they require."[959] This means that petitioners with meritorious claims may be appointed counsel who fail to file the habeas petition within the one-year statute of limitations, precluding any federal review of their clients' claims. The Committee did not need to rely on testimony and written submissions alone to document these failures; news reports have confirmed that overworked habeas attorneys miss statute of limitations deadlines with alarming frequency in articles like "Slow Paperwork in Death Row Cases Ends Final Appeals for 9,"[960] "The Burnout,"[961] and "Death by Deadline."[962] While the weaknesses of the current structure of defense delivery under the CJA are deeply concerning in other areas of criminal defense, they are most stark in these cases where defendants, whose lives hang in the balance, fail to receive adequate and effective representation.

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957 Committee on Defender Services, Report on Death Penalty Representation (1995), p. 12.

958 Richard Burr, Texas Regional Habeas and Assistance Project, Public Hearing—Birmingham, Ala., Panel 3, Writ. Test., at 3.

959 Mark Olive, National Habeas Assistance and Training Counsel, Public Hearing—Birmingham, Ala., Panel 3, Writ. Test., at 7.

960 Houston Chronicle (March 21, 2009), http://www.chron.com/news/houston-texas/article/Slow-paperwork-in-death-row-cases-ends-final-1736308.php.

961 Marshall Project (June 9, 2015), https://www.themarshallproject.org/2015/06/04/the-burnout#.f7Uksx05b.

962 Part One, Marshall Project (November 15, 2014), https://www.themarshallproject.org/2014/11/15/death-by-deadline-part-one#.bMnJCSsNv. *See also* Part Two (November 16, 2014), https://www.themarshallproject.org/2014/11/16/death-by-deadline-part-two#.xWvcNyorv.

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Out-of-District Appointments

Because finding qualified counsel willing to accept federal habeas cases can be exceedingly difficult, district judges sometimes seek to appoint federal defenders from outside their district or circuit. These federal defenders regularly improve the quality of representation and bring resources necessary in these cases. There was a particular need for outside assistance in the circuits which had banned their own federal defenders from creating CHUs. However, some of these same circuits have also discouraged the appointment of defenders located outside their circuit.[963] Objections voiced by those circuits' judges led to the creation of a Defender Services Committee policy making more burdensome the appointment of federal defenders from outside their district. A retired district court judge testified that during the time he was Chair of the Defender Services Committee, shortly after an out-of-state attorney was appointed to a capital habeas case, he received a call from the chief judge of the circuit in which that case was pending:

> Not even asking, basically directing me to unappoint that capital habeas unit lawyer. I told the chief judge I couldn't do that. I hadn't appointed the lawyer and couldn't unappoint him, but I asked why. The [circuit judge answered] there were plenty of law school clinics within this circuit that would represent death row inmates for free, including in the capital habeas setting. . . . It's a national program, and it's not only not a bad thing to have, to use the resources from one circuit to fill the needs in another, but it's actually a good thing. [However,] the chief judge of a United States Court of Appeals [responded] that it violates the principles of federalism for a federal defender to go from one circuit to another to help [on] a federal habeas petition.[964]

This was not an aberration; the Committee heard multiple stories of judges who would not appoint qualified lawyers from outside their districts, even though the lawyers were known to be highly experienced and willing to accept CJA rates substantially below their own. One witness described a federal capital habeas proceeding in the Eighth Circuit, where shortly after a team of private attorneys agreed to represent the defendant, the district court informed the attorneys,

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963 AO Memo from Theodore J. Lidz to all Federal Public/Community Defenders Re: Out-of-District Representations [Revised], Nov. 10, 2008 at 2. "Requirement: All out-of-district representations (other than those established in the local CJA plan) must be approved by the Office of Defender Services (ODS) prior to the appointment. Prior to approving a representation for a federal public defender organization (FPDO), ODS or the requesting FPDO will notify the chief judge of the circuit of the FPDO, and ODS will notify the chief judge of the circuit in which the appointment would be made. In addition to the foregoing requirements, and any other notifications that may be required by your district or circuit, all FDOs should consider informing the chief judges of their district and the district where the representation will occur (and, for CDOs, the chief judges of their circuit and the circuit where the representation will occur)."

964 Judge John Gleeson (ret.), E.D.N.Y., Public Hearing—Miami, Fla., Panel 3, Tr., at 3–4.

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> "You can't come in and represent this fellow because you're from out of state and we don't want to pay to bring you in from out of state." These were people who actually knew what they were doing.... The lawyers quite graciously said, "We won't charge you for traveling to Missouri to represent this person. We'll just charge you for our time." [The court] still wouldn't appoint them. They entered pro bono, and [the court] still [wouldn't] appoint them.... The Eighth Circuit affirmed that, and, of course, the Supreme Court reversed and said you've got to appoint the lawyers. Then, the lawyers submitted a budget of $161,000, and the District Judge gave them $10,000.[965]

The refusal by judges in some districts and circuits to allow panel attorneys or defenders from CHUs outside of the district or the circuit to be appointed to represent the petitioner may have resulted in greater costs, and almost certainly lowered the quality of the petitioner's representation. Despite the need for high-quality, cost-effective counsel, "some circuits have categorically barred federal defenders [even those within the circuit] from representing any habeas petitioners under any circumstances... Thus, the community of lawyers with the most federal experience, independence, and access to resources has been excluded from litigating federal habeas issues."[966]

Professor Sean Kennedy wrote to the Committee that, "All these administrative restrictions on federal habeas counsel chill zealous, high-quality representation in death penalty cases and interfere with counsel's ability to make key strategic decisions that carry huge consequences for the client. Consequently, I urge this Committee to recommend that the administrative restrictions be abolished forthwith."[967]

Inadequate Funding

As the Supreme Court has repeatedly affirmed, "death is different,"[968] and so any structural or policy impediments to full and effective representation are inimical to a criminal justice system that values fairness, process, and rule of law. The issues

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965 Stephen Bright, President, Southern Center for Human Rights, Public Hearing—Miami, Fla., Panel 4, Tr., at 3–4.

966 Professor Sean Kennedy, Center for Juvenile Law & Policy, Loyola Law School—Los Angeles, Public Hearing—Birmingham, Ala., Panel 3, Writ. Test., at 1 (provided to the Committee).

967 *Id.*

968 *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 286–89 (1972) (Brennan, J., concurring) ("[d]eath is a unique punishment"; "[d]eath...is in a class by itself"); Gregg v. Georgia, 428 U.S. 153, 188 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) ("penalty of death is different in kind from any other punishment" and emphasizing its "uniqueness"); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) ("penalty of death is qualitatively different from a sentence of imprisonment, however long"); Lockett v. Ohio, 438 U.S. 586, 604 (1978) ("qualitatively different"); Spaziano v. Florida, 468 U.S. 447, 459 (1984) ("qualitative difference of the death penalty"); *id.* at 468 (Stevens, J., concurring in part and dissenting in part) ("death penalty is qualitatively different....and hence must be accompanied by unique safeguards"); Wainwright v. Witt, 469 U.S. 412, 463 (1985) (Brennan, J., dissenting) (citing "previously unquestioned principle" that unique safeguards necessary because death penalty is "qualitatively different").

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facing private attorneys appointed to capital habeas cases are ones explored previously in this report regarding CJA panel attorneys generally—voucher cutting, unreasonably low presumptive caps, and the failure to approve necessary resources. Each is discussed below in the context of capital habeas litigation.

Voucher Cutting

The Committee heard concerns from across the country about CJA panel attorneys not being paid, service providers that were not approved or paid, and repeated complaints about voucher cuts. Emily Olson-Gault, director of the ABA's Death Penalty Representation Project, testified that her project receives a "constant stream of people contacting us at both the state and the federal level in post-conviction saying, 'My judge isn't giving me what I need. I don't know if I can pay my rent next month. I don't know if I can stay on this case.' It's a huge ethical conflict [for the attorney]. It's a huge problem in terms of recruitment of lawyers and it's pervasive throughout the system."[969]

Depending upon geography or judicial assignment, vouchers in death-penalty cases may be substantially cut. One private attorney who works in both the Eighth and Tenth Circuits told the Committee that she had never had vouchers cut in the Tenth Circuit, only in the Eighth. She explained that the Eighth Circuit regularly reduces capital vouchers and that her law partner, has also had her death-penalty vouchers cut. "We have challenged those. One time it was by about a third, and when we challenged it, we got a little bit more money but not the vast majority of it. . . . [I]t was just questioning whether the work that was done in end-stage litigation was proper or not."[970] The panel attorney believed the difference between the circuits was due to circuit culture and judges' personalities. "There is a real split on the court as to their views on the death penalty generally and I think sometimes it is reflected in the voucher."[971]

National Habeas Assistance Training Counsel confirmed that voucher cutting threatened effective representation and the ability to recruit qualified counsel for capital representation work. He offered the following examples: Attorney fee of $50,000 cut to $25,000, a fee of $38,000 cut to $3,500, representing more than a 90 percent reduction in compensation, and a fee of $126,000 cut to $30,000.[972] Those cuts are not only putting lawyers on notice not to zealously advocate for clients, but "with that cutting it's very difficult to recruit new people or to have very efficacious representation with the people that are committed to do the [federal capital habeas] work."[973]

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969 Emily Olson-Gault, Director, ABA Death Penalty Representation Project, Public Hearing—Birmingham, Ala., Panel 4, Tr., at 18.

970 Melanie Morgan, CJA Dist. Rep., D. Kan. & W.D. Mo., Public Hearing—Santa Fe, N.M., Panel 5, Tr., at 37–38.

971 *Id.* at 38.

972 Mark Olive, National Habeas Assistance and Training Counsel, Public Hearing—Birmingham, Ala., Panel 3, Tr., at 8.

973 *Id.*

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Barriers to Hiring Experts and Specialized Services

The greatest obstacle to fairness for habeas litigants, assuming they have been appointed qualified and capable attorneys, is the inability to obtain adequate resources to effectively mount a habeas defense. "Without sufficient expertise, or necessary investigative or expert help, even the best-intentioned attorneys will not be able to properly investigate, plead and establish constitutional or statutory violations in the one post-conviction proceeding to which their clients are entitled."[974] The failure to provide resources for habeas work has severe consequences for petitioners whose appointed lawyers cannot adequately represent them without such resources.

As with many other aspects of the CJA, where a habeas petitioner's case is being heard can determine whether they will receive the necessary resources. The Committee was informed that, "while some circuit courts extend deference to the district court's judgment that the requested services are necessary, others routinely cut and/or deny the level of funding approved by the district court."[975] Attorneys in some districts may receive no resources at all; the Committee was told that one district judge "has an announced practice of providing no funding for any investigative, expert or other services provided for by Section 3599(f)."[976] While some districts or circuits are particularly hostile to funding habeas work, the Committee heard complaints from across the country about lack of approved funding for experts. The Committee received written testimony that,

> Among the requests that were denied was an application for the services of a forensic pathologist to examine the wounds present on the body of the deceased, which the Government successfully argued at trial proved the aggravating factor [that triggered the capital sentence] that the victim had been tortured by a stun gun before being killed. Habeas counsel was unable to challenge the Government's version of the crime because of the court's funding denial. After the § 2255 motion was denied without an evidentiary hearing, a forensic pathologist opined that the alleged "stun

974 Ruth Friedman, Director, Federal Capital Habeas Project, Public Hearing—Birmingham, Ala., Panel 3, Writ. Test., at 2. Richard Burr, Texas Regional Habeas and Assistance Project, also explained: "In more than half of the capital federal habeas petitions filed in Texas, counsel raise only record-based issues. Only on rare occasions can record-based issues lead to relief in federal court. The reason is obvious: Numerous other courts have reviewed the same issues and found them wanting. The rate of success is exponentially higher if the petition includes well-investigated-and-developed, non-record-based issues such as ineffective assistance of counsel for failing to investigate material facts, the concealment of facts by the prosecution that would have been helpful to the defense, and the demonstrable unreliability of scientific evidence presented by the prosecution. These are the kinds of issues that change the equities in a case…" Richard Burr, Texas Regional Habeas and Assistance Project, Public Hearing—Birmingham, Ala., Panel 3, Writ. Test., at 2.

975 Ruth Friedman, Director, Federal Capital Habeas Project, Public Hearing—Birmingham, Ala., Panel 3, Writ. Test., at 15.

976 Richard Burr, Texas Regional Habeas and Assistance Project, Public Hearing—Birmingham, Ala., Panel 3, Writ. Test., at 5–6.

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gun wounds" were actually the product of post-mortem insect bites.[977]

Some district judges don't understand what is involved or necessary in habeas proceedings, and so will deny requests for services to develop evidence outside the record. One district judge stated to habeas counsel, "I can't imagine why you would need an investigator to file a Section § 2255 petition which should only involve legal issues" even though such an investigation is crucial to the petition; this judge also informed the appointed attorney that the petitioner "could obtain the services of either a psychologist or a psychiatrist, but not both, despite a demonstrated need in the case for the different types of expertise each could offer. The district judge then cut the requested amount of funds for this expert by two-thirds without explanation."[978] In contrast, one district court judge explained, the statutory presumptive limit of $7,500 under § 3599(g) is "inadequate by more than an order of magnitude."[979]

While appointed attorneys face ethical conflicts about how to conduct their appointed cases, petitioners' due process and Sixth Amendment rights are at stake. A lawyer from Texas described the situation that he and others face:

> You're always way past $7,500, so you have to have the district judge[']s approval, and the district judge then recommends to the chief judge of the circuit or designee to approve that budget. . . . They take a long time, and the clock is running on the statute of limitations. It creates a terrible vice when you're working against a one-year statute of limitations. You need the funding, the district court has recommended the funding, it's way over $7,500, and you're waiting for the chief judge's approval or cut. You can't hire people until that's done. When you do finally get word that it's been approved, then you have to have time to catch back up with your investigators and experts because their lives have gone on and they're continuing to work on other cases. It's a very difficult process.[980]

This process for funding investigative and expert services is so fundamentally flawed that the Committee was told it was not voucher cuts but the inability to get resources for service providers that kept attorneys from taking § 2254 and § 2255 appointments.

> It's not their fees. It's funding for investigation and experts. We know that's been a huge difficulty within our circuit and within our state. . . . When I get somebody interested from out of state . . . I have to talk with them

977 Ruth Friedman, Director, Federal Capital Habeas Project, Public Hearing—Birmingham, Ala., Panel 3, Writ. Test., at 14–15.

978 *Id.* at 15.

979 Joseph St. Amant (submitted via Judge Marcia Crone), Senior Appellate Conference Atty., 5th Cir., Public Hearing—Birmingham, Ala., Panel 1, Writ. Test., at 5.

980 Richard Burr, Texas Regional Habeas and Assistance Project, Public Hearing—Birmingham, Ala., Panel 3, Tr., at 32.

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> about the battle to get funding for resources for investigation and experts, and that is a huge deterrent to people coming in. Because people understand that without those resources they cannot do their job.[981]

Finally, § 3599(f), which provides for payment upon a finding that "investigative, expert, or other services are reasonably necessary for the representation of the defendant" also provides that "no ex parte proceeding, communication, or request may be considered" for purposes of making such a finding "unless a proper showing is made concerning the need for confidentiality." In theory, this should not impose a great burden on counsel. In practice, some courts have read this as a near categorical proscription of ex parte requests for expert and other services. As a result, habeas counsel in some districts and circuits are forced to litigate for the funding for any third-party services while the one-year statute of limitations is running. This unnecessarily takes time away from a defendant's ability to have issues adequately investigated and mount a defense.

This is a particular problem in Texas, which rarely allows ex parte requests and where the state often mounts opposition to funding requests in § 2254 habeas proceedings. The problem is compounded by inevitable delays in seeking circuit approval of expert costs. While requests for resources are necessary in all cases, those requests in Texas have,

> become the subject of adversarial opposition by the Respondent in Texas cases. Although case budgeting and requests for ancillary services…are administrative in nature, the process has become enmeshed in adversarial litigation, and therefore more inefficient and much more costly than necessary….The delays associated with this process as a whole too often means that, even if the requested services are eventually authorized, they arrive too late for counsel to make effective use of the services before the statute of limitations expires.[982]

Insufficient Training

As the United States Supreme Court explained in *McFarland v. Scott*, 512 U.S. 849 (1994), the statutory right to habeas counsel "reflects a determination that quality legal representation is necessary in capital habeas corpus proceedings in light of the seriousness of the possible penalty and…the unique and complex nature of the litigation."

During this Committee's hearing in Santa Fe, a panel attorney testified that he had never had any training to take a habeas case. He recalled that, upon being appointed to one, "I thought I was going to pass out because I had never handled one. And so, what I did is I reached out to some colleagues in Austin who had done death penalty cases and got some guidance from them and tried to figure out how I

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981 *Id.*

982 Richard Burr, Texas Regional Habeas and Assistance Project, Public Hearing—Birmingham, Ala., Panel 3, Writ. Test., at 6–7.

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should navigate representing someone whose death penalty has been imposed."[983] He informed the Committee that he was not aware of anyone in the district who had been given any habeas training, and that was something needing to be addressed.[984]

Comprehensive training is a necessity in death penalty cases. Without training, attorneys overlook claims or make mistakes that could fatally undermine their clients' ability to obtain relief. Emily Olson-Gault told the Committee that her ABA Project utilizes strategic counsel and experienced advisors to assist less-knowledgeable counsel. The purpose is to try and prevent,

> failure to investigate certain types of claims that might not be obvious to someone who hasn't done this work before. There are several very, very tricky parts to capital representation, but one of the tougher parts is that the law is so constantly changing…and if you don't preserve a claim right now, even if that claim isn't a viable claim under current law, the law may well change long before your client's case reaches the end. If you didn't bring it up now, it's now waived.[985]

Inexperienced counsel cannot adequately prepare capital cases alone. Another panel attorney told the Committee that after being appointed to a case, "We did seek the services of a third lawyer who has expertise in death penalty.…We have submitted an extensive budget plan, asking for funds for expert witnesses. It really opened my eyes to the necessity of training…some really comprehensive training to handle these types of cases."[986]

National HAT Counsel told the Committee it was true that habeas corpus law is difficult and complex. "It is manageable, however, and people can learn it and people can apply it and people do."[987] One of the issues with learning this law, he said, was the need for continuous training: "Unfortunately, it changes so rapidly once you learn it, it is as if the ground is moving beneath you."[988] A CJA panel attorney supported this point in her testimony, telling the Committee that although the federal defender was trying to train panel attorneys to handle habeas cases, the training was "just so infrequent…then you are finding people who are thrown into really end-stage litigation, who don't have the extensive knowledge base that is required."[989]

Regional HAT Counsel Dick Burr not only confirmed the lack of adequate training for panel attorneys who work capital habeas corpus cases, he noted a culture in his state of refusing outside assistance. He told the Committee that while

983 Richard Esper, CJA Panel Atty., W.D. Tex., Public Hearing—Santa Fe, N.M., Panel 5, Tr., at 7.
984 *Id.*
985 Emily Olson-Gault, Director, ABA Death Penalty Representation Project, Public Hearing—Birmingham, Ala., Panel 4, Tr., at 26.
986 Richard Esper, CJA Panel Atty., W.D. Tex., Public Hearing—Santa Fe, N.M., Panel 5, Tr., at 44.
987 Mark Olive, National Habeas Assistance and Training Counsel, Public Hearing—Birmingham, Ala., Panel 3, Tr., at 7.
988 *Id.*
989 Melanie Morgan, CJA Dist. Rep., D. Kan. & W.D. Mo., Public Hearing—Santa Fe, N.M., Panel 5, Tr., at 45.

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there are approximately 175 inmates on death row in Texas, only about half of their attorneys work with the nine Texas HAT resource counsel. "We can make some difference when lawyers work directly with us, but no matter what kind of training we do, what materials we provide, how much exhortation we provide, many, many of the lawyers who are appointed treat these cases as direct appeals in federal court and that is fundamentally what they are not." Unfortunately, even with access to assistance, some appointed attorneys were not taking advantage of it, and it "has created a system whereby the mission of federal habeas has been decimated."[990]

Some courts are taking constructive actions to address the training shortfall. A district court judge told the Committee:

> In southern Nevada we have initiated a pilot program regarding the training, support, and review of our CJA appellate/habeas attorneys. This program was initiated last year. It has two components. First, it includes an intensive training component. All CJA appellate/habeas attorneys were required to participate in a two-day training seminar sponsored by the Court. This two-day seminar included nationally recognized speakers in appellate advocacy. During the two-day seminar, appellate attorneys were encouraged to bring drafts of current briefs they were drafting. Second, the program includes a mandatory support component. All appellate/habeas attorneys were/are required to submit a current brief they are drafting to an advisory/support committee.[991]

Capital Habeas Units

Overwhelming evidence shows that CHUs provide zealous and effective representation. And CHUs, like traditional federal defender offices, do not need to seek judicial approval for needed expert and other services. For this reason, attorneys working within a CHU are seven times more likely to use experts in habeas corpus proceedings.[992] Over time, more circuits and districts have turned to CHUs to provide the full-time attorneys and support staff necessary to litigate these cases. A federal defender explained,

> In order to navigate this "unique and complex" area of jurisprudence, CHUs employ attorneys, investigators, paralegals, and other administrative support personnel and train them in the art of capital representation. In turn, CHU staff members investigate, develop, and plead claims of constitutional error for their clients. . . . CHU staff must not only become

990 Richard Burr, Texas Regional Habeas and Assistance Project, Public Hearing—Birmingham, Ala., Panel 3, Tr., at 5.

991 Judge Richard Boulware, D. Nev., Public Hearing—San Francisco, Cal., Panel 5, Writ. Test., at 3.

992 Mark Olive, National Habeas Assistance and Training Counsel, Public Hearing—Birmingham, Ala., Panel 3, Tr., at 8.

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> experts at conducting civil discovery, for example, but must also be able to delve into highly sensitive matters such as the client's family, social, mental health, and other medical history to develop the case in mitigation; reinvestigate the case from the trial level; absorb and synthesize reams of documents pertaining to the client's life history; and assemble and gain command of a court record that often spans years of prior litigation.[993]

CHUs are uniquely qualified to accept and effectively represent death penalty habeas clients while keeping costs lower than those expended on private attorneys providing commensurate representation. Many of the federal judges who addressed the issues surrounding capital habeas corpus cases also are strong supporters of CHUs. A district court judge who has handled a large number of capital habeas cases told the Committee, "I'm in favor of the establishment of a capital habeas unit comprised of a small group of specialized attorneys who handle capital habeas cases originating in both federal and state court, who would be more efficient and cost effective. That sentiment is shared by the US Attorney and the federal public defender from my district."[994]

Creation of a CHU is just a first step; the unit must also be adequately funded and staffed. A former DSO employee testified that, "there are circuit courts…aggressively limiting the resources made available to counsel appointed in capital cases, and arbitrarily limiting the number of attorney staff in federal defender offices. Whether this is being done for ideological or financial reasons, it is an affront to the right to counsel and the independence of the defense function."[995] This attitude seems to be softening. As noted above, the Fifth Circuit recently embraced the creation of two CHUs within its jurisdiction.

Professor John Carroll, who spoke of the "spotty," and in some places "incredibly bad" representation in capital habeas cases, recommended having a CHU in every district and circuit that has sufficient need for them:

> Federal habeas corpus really represents the only hope that a person on death row has for any sort of relief in early involvement of the federal defender. I think emphasizing the need for Capital Habeas Units, the value that they bring to the system is the approach that I would take.[996]

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[993] Rene Valladares, FPD, D.Nev., Public Hearing — Birmingham, Ala., Panel 3, Writ. Test., at 4; it should be noted that habeas appeal is a civil, not criminal, matter. *E.g.*, McFarland v. Scott, 512 U.S. 849 (1994).

[994] Judge Marcia Crone, E.D. Tex., Public Hearing — Birmingham, Ala., Panel 1, Tr., at 3.

[995] Robert Burke, Former Chief, Training Division, DSO, Public Hearing — Philadelphia, Pa., Panel 7, Writ. Test., at 4.

[996] Mag. Judge John Carroll (ret.), M.D. Ala., Public Hearing — Minneapolis, Minn., Panel 3, Tr., at 13.

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9.4 Opt-in and Prop 66—Future Concerns

9.4.1 State "Opt-in" Under Federal Law

As discussed earlier, the Antiterrorism and Effective Death Penalty Act of 1996 created special fast-track procedures for capital habeas cases if the state "has established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings."[997] Thus far, no state has established its eligibility for these fast-track procedures. However, Texas and Arizona have applied for opt-in certification.

No decision has been made on certification for either state. The Final Regulations require DOJ to publish notification of applications in the Federal Register and make the applications available on the Internet. A public comment period is also required before final certification. If DOJ does certify that a state has established mechanisms for the appointment and compensation of competent counsel and the provision of adequate resources to them, that decision can be appealed to the District of Columbia Court of Appeals for a de novo review.

Under opt-in, a petitioner has 180 days to file a petition rather than one year. This time begins to run when the direct appeal is final. If state habeas counsel has not filed a petition promptly upon conclusion of direct appeal, the petitioner may have even less time. Counsel appointed to the case will have to complete not only an investigation into the underlying case, but also an investigation into whether the state habeas lawyer provided effective representation. This work is difficult to complete even within a year; with half that time, the task will be Herculean.

The Federal Defender in Arizona estimated that 37 of their active capital habeas corpus cases would be directly impacted by opt-in certification. There are nine additional capital habeas corpus cases in Arizona staffed by attorneys from other CHUs or CJA panel members. All will need training and advice on litigating these cases under opt-in. Additionally, the District of Arizona FPDO anticipates that if the state obtains certification and opt-in becomes effective, the FPDO could receive as many as 47 new cases over the next five years. The Arizona CHU does not have a sufficient number of qualified attorneys to handle a surge in filings of this magnitude. The federal defender estimates he would have to double the current size of his CHU. Specifically, the office would need 48 additional staff to work these extra cases: 16 attorneys, eight fact investigators, eight mitigation investigators, eight paralegals and eight assistant paralegals. In Texas, experts project that over 200 cases are potentially impacted by opt-in, the vast majority of which are already in federal court.

The impacts are not just on the attorneys; there will be increased pressure

997 28 U.S.C. §§ 2261–2266.

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on the courts as well. The district court will have 450 days from the date the petition is filed or 60 days from the date the case is submitted for decision, whichever is earlier, to reach a final determination, with at most a possible 30-day extension. The court of appeals will have 120 days after the reply brief is filed to issue an opinion. If Texas and Arizona, as well as other states, are granted opt-in, it will put tremendous strain on a system that is already insufficient to handle capital habeas petitions. While the costs to defender and court budgets would be enormous, the danger this poses for petitioners, who may not receive quality representation and due process, is most concerning.

9.4.2 California—Proposition 66

In November 2016, California voters narrowly passed Proposition 66 (commonly referred to as "Prop 66"). Prop 66 provides that the current backlog of approximately 515 capital habeas cases be eliminated within five years. It also provides that in the future all review of appellate and post-conviction death sentences be completed within five years of imposition. The proposition effectively eliminates successive habeas petitions. It will also force the state Judicial Council to reevaluate the standards for appointing counsel to make them less restrictive and bar qualified counsel from declining appointments to these cases. Authority to appoint capital counsel would move from California Supreme Court to the trial courts, and appellate counsel and habeas counsel would be appointed at the same time to create parallel litigation tracks.

Counsel at the state level would be required to file a state habeas petition within one year of their appointment, and the trial court would be required to render a decision on the habeas petition within one year of the filing. An appeal to the intermediate court of appeal must be filed within five years. The proposition would also allow for ineffective assistance of counsel claims to be raised on habeas appeal, even though the direct appeal would be running concurrently.

In deciding a facial challenge to the proposition, the California Supreme Court ruled that the proposition's time limits are directive rather than mandatory. More than 350 people convicted and sentenced to death in California are currently awaiting appointment of habeas counsel. Thirty-two are preparing their petitions, and 125 have a petition on file.

If California courts hew strictly to these time limits, the four federal districts in California can anticipate that these 515 cases will be added to their current caseloads within the next five years. This would approximately triple their total current capital caseload. It is doubtful that they can find sufficient numbers of qualified counsel able and willing to take these cases. Additionally, there are only two CHUs in California, and they do not have the necessary staff to litigate these cases. ●

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Section 10: Concerns About Defender Information Technology

In an increasingly technology-driven world, data collection and analysis is central to program administration. Studying the Criminal Justice Act program in the early 1990s, the Prado Report highlighted the difficulty that the Committee faced trying to evaluate a program for which there was no reliable data. At the time, there was "no comprehensive system for identifying and obtaining pertinent, reliable data and evaluating the overall efficiency and effectiveness of the program."[998] The absence of such a system, and the ensuing lack of "appropriate and comprehensive administrative oversight"[999] and "focused data collection and evaluation procedures," represented "serious deficiencies in a government program."[1000] At the time of those findings, the CJA program budget was only $200 million annually. It is now more than $1 billion, but lack of access to reliable data about the program is no less of an issue today than it was twenty-five years ago.

As already discussed, data on the CJA panel is seriously deficient, especially in the area of voucher review. But there is also a dearth of systematic, national data on the work of federal defender offices. Individual offices collect their own data to inform staffing, provide internal accountability, and secure funding that is essential to [their] mission.[1001] Data generated by federal defenders does not only involve budgets and oversight, however. In the course of representing their clients, defenders generate vast amounts of sensitive information that is privileged work product, protected under attorney-client privilege and which defenders have an ethical obligation to keep confidential. At this time, however, the data defenders

998 Prado Report at 41.

999 *Id.* at 43. The Committee also stated that any administrative oversight should include, "a safe mechanism for reporting improper interference with the delivery of legal services." *Id.*

1000 *Id.*

1001 Steve Kalar, FPD, N.D. Cal., Public Hearing—San Francisco, Cal., Panel 7, Writ. Test., at 2.

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collect is neither secure nor readily usable for purposes of effectively managing and overseeing these offices.

Attorneys have two separate obligations that govern their actions regarding information generated in the course of representing clients: a legal obligation to maintain attorney-client privilege and the work-product doctrine, and an ethical duty to maintain client confidentiality.[1002] The confidentiality requirement "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."[1003] Attorneys must also undertake "efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[1004] The prohibition against disclosure of confidential information is broad, and "applies to disclosures by a lawyer that do not in themselves reveal protected information *but could reasonably lead to the discovery of such information by a third person.*"[1005] In short, information security is absolutely necessary to the practice of public defense.

10.1 IT Programs and Functions

There are three different software programs (collectively "defender data" or "defender IT") that defenders use to collect, send, and analyze confidential information regarding their clients:

1. Lotus Notes email, which is used daily by defenders and contains massive amounts of highly confidential information about client representations."[1006] The email program is the vehicle for communicating with clients and co-counsel, discussing strategy, and preparing every aspect of a defendant's case. Many of these emails clearly fall under the categories of work product or attorney-client communication.
2. defenderData, or "dData," the federal defender timekeeping and case management system. Defender offices open and close cases and input time spent into the system, and some offices input detailed case notes that include summaries of witness interviews, attorney client conversations, and strategy decisions, among other privileged information. The application also links to the discovery associated with a representation.[1007] Federal

1002 See Model Rules of Prof'l Conduct r. 1.6, 5.3 (explaining that the attorney-client privilege belongs to the client and can be waived only by the client's informed consent).

1003 See Model Rules of Prof'l Conduct r. 1.6 cmt. 3.

1004 Model Rules of Prof'l Conduct r. 1.6(c).

1005 Model Rules of Prof'l Conduct r. 1.6 cmt 4 (emphasis added).

1006 Letter from Jon Sands, FPD, D. Ariz., to Cait Clarke, Chief, Defender Services Office, Administrative Office of the United States Courts (December 2, 2013) (discussing defender misgivings about reorganization and defender IT).

1007 *See* Memorandum to Judge John Bates on Sensitivity of Defender Services Data (2013).

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defenders accepted this case management system "only after several prerequisites were met. Chief among these was that the database administration would remain under the control" of the Defender Services Office and the National Information Technology Operations and Applications Development (NITOAD)branch.[1008]

3. DSMIS "collects and aggregates data about cases from multiple sources into a single database for program analysis,"[1009] including from dData, and thus contains confidential information. It does not contain information as sensitive as dData itself, but because defenders were concerned about the violation of their professional responsibilities, a protocol for implementation and use of DSMIS was developed with the AO. The principles guiding that protocol were: "(1) ensuring defenders could provide information without violating their ethical duties of confidentiality; and (2) the Judiciary's recognition that DSO exclusivity is essential to preserving the confidential attorney-client information and the independence of the defense function."[1010]

All three of these systems either contain or directly link to systems that contain confidential and privileged client information. Even though the defender program is managed by the AO, it is "imperative to keep the technology systems of a federal public defender office, including specifically federal defender emails, case management programs, and statistical systems separate" from those of the AO.[1011]

In addition to data-management programs, there are two other systems that hold information generated by defender offices and occasionally between attorneys and their clients—video conferencing services and the network that connects defender offices, DWAN. The National Information Technology Operations and Applications Development (NITOAD) currently runs both.

Until only a few years ago defender email, dData, and DSMIS were run entirely by the Office of Defender Services, the precursor to the current, reorganized Defender Services Office. There were two branches of ODS that ran defender IT, but only one still exists: NITOAD. NITOAD is located in San Antonio, and day-to-day operations are overseen by the defender office for the Western District of Texas. Because each defender office operates as an independent entity, sharing data with employees of another defender office can raise ethical concerns. However, NITOAD's access to and compiling of defender data is unlikely to destroy

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1008 Letter from David Stickman, Chair of the Defender Services Automation Working Group (DAWG), to Laura Minor (August 1, 2013).

1009 Letter from Jon Sands, FPD, D. Ariz., to Cait Clarke, Chief, DSO, Dec. 2, 2013. The DSMIS "financial, personnel, workload, timekeeping (without case notes) and CJA payment system data taken collectively and reported out of DSMIS is among the most powerful and sensitive information we have, e.g. cost per rep, cost per FTE, and CJA panel vs FDO statistics" and "only in DSMIS are they available collectively." *Id.*

1010 *Id.*

1011 Maureen Franco, FPD, W.D. Tex., Public Hearing—Santa Fe, N.M., Panel 2, Writ. Test., at 5.

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confidentiality and privilege because disclosure of that data is "impliedly authorized in order to carry out the representation."[1012] Maintaining privilege and confidentiality is the underlying principle governing all of NITOAD's decisions regarding defender data. NITOAD's unique placement is a,

> guarantee that [defender] work product is protected by staff that are part of the Defender Services community. This concept is…continually addressed and considered by the Defenders as systems, infrastructure, and software are implemented and deployed. The ethical obligation of the attorney-client privilege is the cornerstone for the design, security and maintenance of their electronically stored information.[1013]

10.2 Reorganization and the Compromise Reached

In 2013, the AO reorganized offices, divisions, and supervisory authority in an effort "to reduce operating costs and duplication of effort, simplify the agency's administrative structure, and provide enhanced service to the courts and the Judicial Conference."[1014] Stated principles guiding reorganization included: "Simplify organizational structures;" "Empower managers and streamline governance;" and "Create flexibility to respond to changing circumstances."[1015]

The reorganization created a new office, the Case Management Systems Office (CMSO), "designed to combine the case management functions from the Defenders Services Office, Probation and Pretrial Services Office, and the Court Administration Offices."[1016] The reorganization plan called for the defender data programs "to be merged with and controlled by the AO."[1017] The merger would have given AO staffers "both access to and control of the confidential information contained in the defender computer programs." [1018]

Defenders objected to the plan, as it would have "stripped control and supervision of extraordinarily sensitive client information (and related funding data) from these established groups and put it under the control of what was, effectively, a

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1012 Model Rules of Prof'l Conduct r. 1.6(a).

1013 Internal Draft Memorandum, *NITOAD Branch—Why it Must Remain in ODS* at 1.

1014 Memorandum of Association Director Minor to Federal Public / Community Defenders and Memorandum of Understand. at Exh. B (April 24, 2014). This is discussed in greater detail in Section 3.

1015 *See generally* Administrative Office of U.S. Courts, AO Document: Restructuring the Administrative Office: Maintaining Excellence in an Era of Fiscal Austerity.

1016 Andrew Zaso, Chief, Case Management Systems Office, Administrative Office of the United States Courts, Public Hearing—Minneapolis, Minn., Panel 3, Writ. Test., at 2.

1017 National Association of Criminal Defense Lawyers, Ethics Opinion 13–01 at 5 (2013).

1018 *Id.* at 7.

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completely foreign agency: CMSO."[1019] To give an outside group control would have "violated ethical confidentiality" and could have constituted "a waiver of both the attorney-client privilege and the work product privilege contained in the information" in the defender data programs.[1020] Steve Kalar, Federal Public Defender from the Northern District of California, stated that moving NITOAD would not only be unethical, but would frustrate the goals of the reorganization, as defenders believed the transfer of NITOAD's functions to the AO to be "neither workable nor cost effective."[1021] And in an opinion written in response to a defender's question about the proposed merger, the NACDL Ethics Advisory Committee wrote that defenders had no other option than to protest and refuse to participate in the reorganization, because it would be "unethical for the Federal Defenders to participate in a data merger program that does not adequately protect confidential information for past and present clients."[1022]

After receiving feedback from DSO, defenders, and the NACDL,[1023] the AO decided to not pursue the planned merger. A compromise was reached between the AO, DSO, and defenders, resulting in the creation of memorandums of understanding (MOUs) to govern processes for managing defender data. The *Memorandum of Associate Director Minor to Federal Public/Community Defenders* and accompanying *Memorandums of Understanding* were designed to "limit CMSO access to these processes; create a DSO Liaison position within DSO 'to act as Liaison between CMSO and DSO;' and confirm that employees of the National IT Operations and Applications Development (NITOAD) Branch would remain Federal Public Defender employees within the Western District of Texas Office."[1024] The MOUs were signed by representatives from DSO, CMSO, the Federal Public Defender for the Western District of Texas, and NITOAD.

Currently, this means that although NITOAD is staffed by the federal defender office of the Western District of Texas, CMSO functions in an advisory role. According to CMSO Chief Andrew Zaso, "I've no control over [NITOAD] because of the independence. It's separately funded through separate appropriation from Congress, and again, the people, I don't hire or fire them."[1025] However, CMSO holds the contracts for, controls, and maintains the applications that manage and transmit defender data. As a result, defenders must work through CMSO to request changes, updates, or additions to their programs. While the Chief of NITOAD reports to the

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1019 Steve Kalar, FPD, N.D. Cal., Public Hearing—San Francisco, Cal., Panel 7, Writ. Test., at 4.

1020 Ethics Opinion at 7.

1021 Letter from David Stickman to Laura Minor.

1022 NACDL Ethics Opinion at 7.

1023 Letter from David Stickman to Laura Minor.

1024 Heather Williams, FPD, E.D. Cal., Public Hearing—San Francisco, Cal., Panel 7, Writ. Test., at 8.

1025 Andrew Zaso, Chief, Case Management Systems Office, Administrative Office of the United States Courts, Public Hearing—Minneapolis, Minn., Panel 3, Tr., at 18.

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Western District of Texas for human resources, administrative, and personnel issues, he works primarily with CMSO on operational issues, strategic planning, and daily IT functions. Mr. Kalar told the Committee:

> With the new CMSO bureaucratic overlay, the IT administrative structure for defenders is now hopelessly Byzantine. It is unclear to the defenders whether the new "Chief of Defender IT Support Division, Case Management Systems Office, Department of Program Services" answers to CMSO, or to DSO, or to neither, or to both. When Defenders have encountered problems, our questions trigger a tsunami of flow-chart discussions and conference calls on bureaucratic structures.[1026]

10.3 Results of the Reorganization

10.3.1 Unintended Consequences

While the principles guiding the AO's reorganization of defender data services included simplifying organizational structures, empowering managers, streamlining governance, and creating flexibility to respond to changing circumstances—all to cut costs—the actual outcome has been much the opposite. The reorganization has not met its objectives. Though it was intended to cut costs and promote efficiency, the "CMSO acquisition of Defender IT has fallen far short of the stated goals of the 2013 re-organization."[1027]

Testimony indicated that "[o]perating costs have increased, as layers of redundant CMSO bureaucracy have been added on top of Defender IT."[1028] This is because "efforts must be expressly duplicated" when working with any of the defender systems, as CMSO supervisors are not legally permitted to see the privileged data that these databases contain.[1029]

The new structure is inefficient in other ways. Because CMSO maintains all contracts with outside vendors, the Chief of CMSO must approve all modifications or alterations to the three software programs that house defender data. [1030] Defenders cannot directly update or troubleshoot their data programs and have less flexibility to react to changes in circumstances, as "simple and inexpensive IT fixes are inexplicably delayed," and "requests languish in the shifting maze of CMSO bureaucracy."[1031] Because MOUs are in place to protect the confidentiality of the data, in order

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1026 Steve Kalar, FPD, N.D. Cal., Public Hearing—San Francisco, Cal., Panel 7, Writ. Test., at 5.

1027 NACDL Ethics Opinion at 7.

1028 *Id.* at 4–5.

1029 *Id.* at 5.

1030 Andrew Zaso, Chief, Case Management Systems Office, Administrative Office of the United States Courts, Public Hearing—Minneapolis, Minn., Panel 3, Tr., at 19.

1031 Steve Kalar, FPD, N.D. Cal., Public Hearing—San Francisco, Cal., Panel 7, Writ. Test., at 5.

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for CMSO to work with the defender data programs, the data must be replicated and anonymized to protect confidentiality and privilege. For example, Mr. Kalar told the Committee that when defenders pointed out routine fixes needed in dData,

> the embedded CMSO supervisor suggested that the database be replicated with an anonymous set of data so CMSO could oversee the repairs. By way of reference, during the eight-week study period of Work Measurement, dData generated *150 million* points of data. Replication and anonymization of the massive, privileged defenderData database into a specially-created CMSO sandbox, for the sole purpose of permitting CMSO staff to 'supervise' a simple repair, illustrates how absurd our current structure has become.[1032]

Given the inefficiency built into the current administrative structure, in October 2015 the Defender Services Advisory Group and the Chief of CMSO agreed that project management of data should be returned to NITOAD control. Despite the agreement, the "entanglements of CMSO in NITOAD project management of dData continue."[1033]

It is not only defenders who believe that re-organization has made defender IT functions less manageable. Andrew Zaso himself expressed frustration with the current structure. Mr. Zaso testified that he cannot unilaterally make changes to the defender data systems, and has "no control over implementing certain features that could benefit defenders."[1034] Additionally, although his office has been criticized for the poor functioning of DSMIS, "[we] can't even get the data over to see if it's coming over correctly through the interface," all because of the legitimate need to maintain confidentiality and the attorney-client privilege.[1035]

Moreover, the data in these systems are not always useful for defenders themselves. When a new version of DSMIS was recently rolled out, defenders believed they had not been adequately consulted or given the opportunity to review the modifications — something that the MOUs explicitly require — before the new version went live. Defenders stated that the updated DSMIS failed to account for how the defender offices use the information to formulate their budgets and request funding. Defenders told the Committee that their inability to get accurate, useful data was an impediment to making basic decisions about how to run and staff their offices. One defender stated:

> I have a very difficult time projecting my billing and my funding, not from lack of congressional support, not a lack of funds, from the lack of

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1032 *Id.* at 6.

1033 *Id.*

1034 Andrew Zaso, Chief, Case Management Systems Office, Administrative Office of the United States Courts, Public Hearing — Minneapolis, Minn., Panel 3, Tr., at 18.

1035 *Id.* at 29.

> information. My primary concern is when I am projecting very significant expenditures for capital defense or I'm staffing a capital case, I'm constantly creating basically a shadow network of information that we, the defenders share among ourselves to try to project our weighted case open figures, our staffing figures, our funding figures.[1036]

The inability of defender offices to project budgets and determine staffing levels for their offices due to a lack of data was an issue at the time of the Prado Report, and it continues to be an issue in 2017. The CJA program is a billion dollar program, and data collection and analysis should be "commensurate with the great responsibilities that [defenders] now bear"[1037] to provide accountability and justification for such a budget. That cumbersome management of Defender IT should make this data inaccessible to defenders is unacceptable. Despite the best efforts of all parties to achieve efficiency and flexibility, reorganization resulted in a more convoluted and less manageable bureaucracy for the management of defender IT systems.

10.3.2 Continuing Ethical Concerns and Subsequent Breach

Defenders testified that despite the MOUs in place and continuing assurances of confidentiality, they remain concerned. Maureen Franco, defender from the Western District of Texas, where NITOAD is staffed and operated, provided the following examples demonstrating that some AO IT managers still do not understand what confidentiality entails and why it is important:

> [O]ne AO IT manager explained that he had 'top secret' clearance and thus we (defenders) should not be concerned if he had access to our data. He did not understand that having access to our data when he is not a defender employee violates the duty of confidentiality owed to our clients. Another AO IT manager wanted access to our protected case management system (defenderData) in order to test applications within that protected realm—not realizing that allowing her through the firewall would jeopardize thousands of clients' confidential data and information.[1038]

Another defender agreed that the MOUs are not sufficient, given the lack of understanding among AO staffers as to why they are necessary. She explained the agreements are simply "no substitute for what ought to be physical separation of our data management."[1039]

Defenders repeatedly explained that this is a structural problem. Structural or

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1036 Steve Kalar, FPD, N.D. Cal., Public Hearing—San Francisco, Cal., Panel 7, Tr., at 23.

1037 *Id.* at 6.

1038 Maureen Franco, FPD, W.D. Tex., Public Hearing—Santa Fe, N.M., Panel 2, Writ. Test., at 5–6.

1039 Virginia Grady, FPD, D. Colo. & D. Wyo., Public Hearing—Santa Fe, N.M., Panel 2, Tr., at 35.

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not, distrust and miscommunication complicate the relationship between defenders and CMSO. This distrust was evident in testimony. For example, Mr. Zaso, stated that CMSO employees had never attempted to gain access to a defender data program without first informing NITOAD or DSO, after defenders had previously testified that this had, in fact, occurred.[1040] And although Mr. Zaso stated that the relationship between his office and the defenders could be productive, he voiced frustration with the challenges to CMSO's ability to fulfill its role maintaining defender software contracts, as "…problems have been occurring for years, to be honest with you. In fact, two of the last people that left my office one of the reasons they cited when they left was some of the issues in dealing with the [defender] contract issues."[1041]

Regardless of past conflicts, it is clear that the current structure has created conflict between defenders and the Administrative Office. Such tension is neither inevitable nor irreparable. However, it is the result of a reorganization that tried to force defender IT into a broader IT system for the courts, where it does not fit. There is a reason lawyers have particular ethical responsibilities and must demonstrate knowledge of those responsibilities in order to be members of the bar. The ethical obligations of the judiciary are no less important, but they are different. Defenders work in an adversarial system that the courts oversee, but are not a party to. An attorney's obligation to maintain client confidentiality is just that—*the attorney's* obligation, and it is among the most important of responsibilities. Thus, defenders cannot entrust their clients' confidences to an institution they do not and cannot control. In short, the inherently different obligations of the AO and defenders' offices inevitably result in tension, miscommunication, and uncertainty.

Brian Wiggins, Chief of NITOAD, wrote in 2015:

> Putting aside the risk from rogue IT admins or malicious users, having direct access by outside (non-defender) parties to certain data such as case statistics, can be risky. Funding of Defense attorneys for accused criminals is often not a popular item. Judges, outside organizations, and research institutions frequently request statistics on representations, including costs, which can be manipulated by someone without a full understanding of the organization's operations…This is why it is critical for Defenders, including the Defender Services Office, to strictly control access to this data.[1042]

This concern was prescient. The Committee learned firsthand during the

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1040 See the exchange between Mr. Zaso and Committee member Reuben Cahn on a perceived "breach" into defender data. Public Hearing—Minneapolis, Minn., Panel 3, Tr. at 29–30. Emails received after the hearing by the Committee showed that a CMSO employee did try to access to a test environment in a defender data program without informing DSO or NITOAD. While there was no confidential data in that test environment, such an incursion registered as an attempt to breach the system.

1041 Andrew Zaso, Chief, Case Management Systems Office, Administrative Office of the United States Courts, Public Hearing—Minneapolis, Minn., Panel 3, Tr., at 20.

1042 Brian Wiggins, Deputy Chief, NITOAD Branch, Administrative Office of United States Courts, Writ. Test., at 2.

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course of its work that defender concerns about confidentiality were not baseless when the AO itself breached confidential defender data. In response to a Committee request about general expert usage, a contractor at a helpdesk in the AO, working in an entirely separate division from both the Defender Services Office and CMSO, accessed defender data and downloaded specific, non-anonymized, confidential, documentation and information that had been sealed by a court order in extremely high-profile cases, and sent it to a Committee member. Given the highly confidential and client-sensitive nature of the materials, DSO would never have authorized the release of this information under its protocols. When the breach was discovered, this Committee's Chair was informed; she then contacted the Committee member who had initially requested expert usage information and asked that the material be destroyed. Further, the confidential material produced was not even what had been requested, and was not responsive to the original request.

Laura Minor, director of the Department of Program Services at the AO at that time, responded to the breach by stating, "On so many levels this is bad."[1043]

- The contractor was not covered by the MOUs which govern access and control of defender data. The MOU binds CMSO, DSO, the defenders, and NITOAD. CMSO and DSO are under the Department of Program Services at the AO. The contractor was in an entirely different division in the AO, the Department of Administrative Services, a division that has no agreement with defenders regarding access to and usage of their confidential information. Please see the AO organizational chart in Section 3.3 at p. 35
- NITOAD, CMSO, DSO, and defenders were entirely unaware that Department of Administrative Services had built a "back door" into defender data and information. Furthermore, it appears that DPS had or has greater access to more specific and detailed data than CMSO, DSO, NITOAD can currently access through the defender IT systems. An employee at DSO noted that the material was, "better than what we could provide through DSMIS."
- There are established protocols for the access and release of any defender information. Release of data must be approved through DSO and, if the data are specific, the individual defender office for which that data was accessed. There is no process in DAS designed for clearing or vetting information before releasing it, nor any limits that the Committee is aware of on who that department can supply (and has supplied) data.
- Such third-party access could conceivably destroy privilege and confidentiality.

[1043] Ms. Minor was unaware of and not responsible for the unauthorized access and release of the information.

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This occurrence highlights the poor structural fit of the defenders' IT systems, which must maintain confidentiality between defenders and their clients, within a bureaucracy that is charged with serving the courts. Breaches to client confidentiality such as this one may force federal defender offices to consider abandoning these national database systems altogether, which would severely compromise the national administration of the CJA program. Even before the significant data breach described above, one defender pointed to this issue as the most important thing for this Committee to address:

> For me it is the independence of our IT function. It has just become critically apparent to me that if we don't get this solved quickly and affirmatively and definitively, then every defender office, I would recommend that they get their own server and they work their own e-mail system or defender data system, their own statistical recording because there is a third party that has access to our information. It completely destroys the attorney/client privilege . . . to restore that independence in our IT function, I think is for me is a very hard line in the sand and we really need for that to happen.[1044] ●

[1044] Maureen Franco, FPD, W.D. Tex., Public Hearing—Santa Fe, N.M., Panel 2, Tr., at 34.

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Section 11: Electronic Discovery & Litigation Support

Since the Prado Report, federal criminal litigation has changed drastically. Electronic discovery, often referred to as e-discovery or electronically stored information ("ESI"), has become the norm. Even in cases that are not "extended or complex," the government may have computer and smartphone files, information from social media accounts like Facebook and Twitter, hours of video surveillance, wiretaps, and GPS tracking information.

This evidence may be delivered in a variety of formats and files that cannot be examined without a working knowledge of multiple software programs and processes, as well as familiarity and comfort with reviewing different file formats. Defending a client in a case with a large amount of electronic discovery is time-intensive and costly. For example, current smartphones with 128 GB of memory can hold information equivalent to 9.6 million pages of paper.[1045] Without adequate training, support, and financial assistance for defenders and panel attorneys grappling with e-discovery, defendants will not receive effective representation.

Defense attorneys have a professional obligation to keep up with the technological advancements needed to effectively represent their clients.[1046] The obligation to provide effective representation does not vary with the amount and type of the evidence involved. As explained below, the current ad hoc, improvised system of handling ESI in criminal cases complicates and adds to the burdens on the defense. Handling ESI during discovery in a criminal case requires the prosecutor, the defense attorney, and the court to understand the technology involved and work together to protect the defendant's rights and the overall integrity of the

[1045] This is based on a conversion rate of 75 pages per megabyte. *See* http://www.sdsdiscovery.com/resources/data-conversions/ (last visited on January 5, 2017).

[1046] Twenty-three state bars and the ABA model rules require attorneys remain versed in relevant technology.

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criminal justice system. A model of this necessary cooperation, the Joint Working Group on Electronic Technology, a group dedicated to addressing best practices for efficiently and effectively managing electronic discovery, created a guide for judges on how to manage electronic discovery and ancillary issues. (The Working Group is comprised of federal and community defenders, DOJ representatives, panel attorneys, DSO employees, and representatives of the AO and the federal judiciary.[1047]) Its publication, "Criminal e-Discovery: A Pocket Guide for Judges," supplements the bench book provided to every federal judge to assist them in carrying out their duties. Ensuring that all defendants, even those who cannot afford a lawyer, receive high-quality representation requires additional investment in ESI support and in procedures that promote coordination in this area among all parties. These investments will not only protect fundamental constitutional rights but will also conserve both human and financial resources.

11.1 Defending Clients in the Age of Digital Technology

11.1.1 Nature of the Challenge

To meet their ethical obligations and mount a zealous defense to charges brought by a government with considerably more resources and institutional support for the management of electronic evidence, defense attorneys face a number of hurdles.[1048] ESI has made it difficult for defenders, especially panel attorneys, to effectively represent their clients. Witness after witness before the Committee spoke of the myriad problems presented by ESI discovery. Indeed, it was said that because of ESI, "in recent years, it's just impossible to review that discovery in a way that you can effectively represent your client."[1049]

The initial problem is the sheer volume of ESI a defense attorney receives. As one witness explained, "It is not uncommon in this district to have fraud cases where three [terabytes] of information have been provided to counsel. [That comes out to] 6,000 filing cabinets . . . . Imagine the CJA lawyer who's a solo practitioner who has to make sense of 6,000 file cabinets and not have the support staff."[1050]

As noted above, those records are often supplied in a range of formats, and "the technology and the delivery of the discovery varies from agency to agency."[1051]

1047 Sean Broderick's submitted written testimony to the Committee.

1048 Donna Lee Elm testified to the Committee, "You know the million-dollar budget . . . . just for the training facility for DOJ? That's our entire budget for all of our federal defender defense." Donna Lee Elm, FPD, M.D. Fla., Public Hearing—San Francisco, Cal., Panel 2, Tr., at 5.

1049 David Markus, CJA Panel Atty., S.D. Fla., Public Hearing—Miami, Fla., Panel 5, Tr., at 6.

1050 Michael Caruso, FPD, S.D. Fla., Public Hearing—Miami, Fla., Panel 1, Tr., at 10.

1051 *Id.* at 36.

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This means that defense attorneys must use a number of different software programs and need access to multiple platforms to properly go through discovery.[1052] Attorneys have to maintain not only a working knowledge of ever-updating and expanding technology but also access to the various tools needed to review the ESI.[1053] As one panel attorney explained, "To use an audio analogy, the ATF is maybe using a [vinyl] LP to get the thing to us, somebody else is using an 8-Track player, somebody else is using a cassette tape, [and] somebody else is using an MP3 player."[1054] Even if defenders and panel attorneys try to request discovery in similar formats, one witness stated that the government's response to him was, "We don't control what those agencies use as a platform."[1055]

Panel attorneys have an especially difficult time handling ESI. Many are solo practitioners with little or no staff, and they do not have the training, experience, or assistance needed to access and review ESI.[1056] Some lack even basic technical knowledge, and many do not have access to paralegals knowledgeable about electronic document review. In rural areas panel attorneys struggle to find paralegals with the necessary skills, while those working in large cities have difficulty finding technologically-adept paralegals who are willing to work at the current CJA rate of between $35 and $50 per hour. One federal defender stated that she "heard about e-discovery that the U.S. Attorney's Office is using where you download discovery from a cloud. A lot of the panel attorneys don't know what a cloud is."[1057]

Even panel attorneys with the knowledge and skill can face insurmountable barriers. One witness testified that even where the government has tried to organize discovery by agency and saved the discovery on discs, the ESI was still inaccessible. One witness described instances where the software needed to read those files is now obsolete; panel attorneys don't have those older programs and operating systems. This same witness also explained that even when the U.S. Attorney's Office tries to be helpful, they sometimes deliver a database that is defective.[1058]

1052 While defense attorneys are trying to keep up with the applications necessary to review files, they also must understand the underlying nature of various file formats. By converting files into a single format, information from those original files may be lost or obscured. While having, for instance, a searchable "PDF"file for all documents may make review seem simpler, important information included in the original documents can be lost in the conversion. Defense attorneys need to know enough about the original format of discovery files to request it in formats other than what has been provided by the government, even before they need to have knowledge and access to the software necessary to capture the information from the original file.

1053 Robert Burke, Former Chief, Training Division, DSO and Supervisor of the National Litigation Support Team: "There's so much digital information and the technology changes so fast that it's difficult for people to keep up with it." Robert Burke, Former Chief, Training Division, DSO, Public Hearing—Philadelphia, Pa., Panel 7, Tr., at 28.

1054 Gilbert Schaffnit, CJA District Rep., N.D. Fla., Public Hearing—Miami, Fla., Panel 6, Tr., at 28.

1055 *Id.*

1056 Virginia Grady, FPD, D. Colo. & D. Wyo., Public Hearing—Santa Fe, N.M., Panel 2, Tr., at 8.

1057 *Id.*

1058 Jessica Salvini, CJA Panel Atty., D.S.C., Public Hearing—Miami, Fla., Panel 4, Tr., at 12.

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One panel attorney stated that the U.S. Attorney's Office should be required to turn over discovery "in a format that doesn't make us expend [unnecessary] time [to access the data] and inflate our invoice. We don't want to bill for that time. We'd rather be representing our clients but we need to get the discovery in the formats that's reasonable for us to be viewing."[1059] The time required to review such discovery and the refusal of some judges to approve payment for that time means, at best, some panel attorneys will review voluminous amounts of discovery without any hope of payment and, at worst, will make a cost-benefit analysis and decide to forgo necessary review. One judge described the current way panel attorneys are asked to handle ESI discovery as "absolutely not sustainable."[1060]

A related struggle for defenders and panel attorneys alike is their inability to present and discuss ESI discovery with their clients who are in detention.[1061] Technology for discovery review is rarely available within jails or prisons, making it difficult for defense attorneys to review electronic evidence with their clients.[1062] This strains the ability of the defender to meet Sixth Amendment requirements while also balancing significant defense costs, especially when clients are held in remote facilities. One federal defender stated that, "Judges don't want to pay an attorney to go into the lockup and physically go over the discovery with them. They would like to have mechanisms that would make it more convenient to review electronic discovery, and, I think, save costs at the same time."[1063]

11.1.2 Disparities in Practice

The quality of criminal representation in an ESI-heavy case varies dramatically depending on the district in which a case is brought, the judge a case is before, and the attorney assigned to the case.

Discovery in a criminal case begins with the government. Many U.S. Attorneys work with defense attorneys to ensure that discovery is produced in accessible, searchable formats. One U.S. Attorney told the Committee, "We've got a system

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1059 Gilbert Schaffnit, CJA Dist. Rep., N.D. Fla., Public Hearing—Miami, Fla., Panel 6, Tr., at 28.

1060 Judge Yvonne Gonzalez Rogers: "[T]he the platforms are different, and that was a big shock to me. When hundreds of thousands of pages are delivered to the defense attorneys in TIFFs, where every single page has to be clicked to open it, how can we be surprised that the costs don't skyrocket? It's just not…and it's just a waste of time." Judge Yvonne Gonzalez Rogers, N.D. Cal., Public Hearing—San Francisco, Cal., Panel 5, Tr., at 14.

1061 Former Judge Nancy Gertner: "I think it's become much more substantial where the defendant would get a file of gigabytes of material in it and then rush to the judge for an expert to help them search it, some mechanism for reviewing the files with the client in the prison, which is an incredibly difficult thing to do." Judge Nancy Gertner (ret.), Harvard Law School, Public Hearing—Philadelphia, Pa., Panel 2b, Tr., at 24–25.

1062 Judge Richard Boulware: "[F]or those defendants who are in custody, the cost of getting this amount of massive data into a prison and also allowing for someone to review the data if in prison can be very significant in terms of what type of technology used to allow for that to actually happen." Judge Richard Boulware, D. Nev., Public Hearing—San Francisco, Cal., Panel 5, Tr., at 35.

1063 James Wade, FPD, M.D. Pa., Public Hearing—Philadelphia, Pa., Panel 3, Tr., at 24.

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worked out within our offices and with the CJA panel lawyers so that they can get discovery quickly and have it provided in a readable, searchable manner."[1064] But the government does not always cooperate in this way. One senior judge said discovery disclosure in his district was referred to as "the dump truck method. The government drives up the dump truck, dumps off all of the discovery, five thousand documents, fifty tapes, and now we have to go through all of that to make a determination as to what's relevant or not."[1065] Even within a district, practices may vary depending on the prosecutor bringing the case. A federal defender told the Committee:

> [H]ere in this district…the process is quite haphazard. We may have a case where you just get a document dump. You're getting terabytes of information with no clue as to what that discovery contains. We have other cases where prosecutors will provide a skeletal index. We have other cases where the prosecutors provide a full index and will sit down and talk with you and walk you through everything that's in the 1,000 PDFs that's contained in this one particular folder. Unless there is a uniform standard, especially in the area of electronic discovery, I don't know if there's much we can do except bargain on…a case by case basis for a better outcome.[1066]

In addition, the government has complete control over discovery, and the government can inflate the costs of defense representation exponentially with its ESI disclosure practices. One witness testified that one of her cases "became so protracted because of the government's failure to provide timely discovery and failure to document what it had provided."[1067] Though certainly not the case in every district, another judge stated that in his experience, despite attempts to work with the U.S. Attorney's Office "about how we can handle this and keep costs down, the U.S. Attorney's response is, 'I don't really care about your costs. That's not my problem.'"[1068]

One panel attorney spoke about how frustrating it is to try to keep his own costs low while the government's inefficient handling and disclosure of ESI discovery materials inflated those expenses. Recalling a case involving 20 separate document dumps the attorney stated, "We spend so much time talking about fiscal responsibility from the defense side and all of those things, and the government just gets a pass on all that."[1069] The witness went on to explain that the way discovery is disclosed "affects the length of the trial…and then it affects the cost that I'm billing the government to represent [my client]."[1070]

1064 Billy J. Williams, U.S. Atty., D. Or., Public Hearing—Portland, Or., Panel 3, Tr., at 10.
1065 Senior Judge Donald Graham, S.D. Fla., Public Hearing—Miami, Fla., Panel 2, Tr., at 9.
1066 Michael Caruso, FPD, S.D. Fla., Public Hearing—Miami, Fla., Panel 1, Tr., at 33.
1067 Lynn Panagakos, CJA Dist. Rep., D. Haw., Public Hearing—San Francisco, Cal., Panel 4, Tr., at 17.
1068 Chief Judge Michael Seabright, D. Haw., Public Hearing—San Francisco, Cal., Panel 5, Tr., at 12.
1069 Daniel Albregts, CJA Dist. Rep., D. Nev., Public Hearing—San Francisco, Cal., Panel 4, Tr., at 19.
1070 *Id.*

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The quality of representation in ESI-heavy cases can also vary depending on the judge to whom the case is assigned. Some judges understand technology, so they understand, for example, the need for native formats[1071] or searchable documents. In a complex case with a large number of documents and other ESI, it may be necessary to hire an outside vendor to assist with the copious amount of discovery. Judges who are less familiar with ESI might not know why such a vendor's services may be necessary. In addition, outside vendors can be expensive, and even judges who recognize their need may still experience sticker shock and balk at paying the necessary expenses to enable defense attorneys to mount a zealous defense.[1072]

In one multi-defendant case, an outside vendor was required to handle the document production and processing for the panel attorneys. On the eve of trial, the panel attorneys received notice that the judge didn't want to pay for the discovery management software anymore. Their response was plain. They told their panel attorney district representative, "We can't try this case. There are millions of documents in this case. If on the eve of trial the software to manage those documents is taken away from us, we are very experienced attorneys, but there is no way that we can do that."[1073] Ultimately this judge did not cut funding for the software, but effective assistance should not hinge on whether any particular judge presiding over an ESI-heavy case has sufficient training and experience necessary to understand and adequately fund defense needs in these cases.

Judges themselves take a number of different approaches to managing ESI. There are judges who take an active approach and require the U.S. Attorney's office to produce usable discovery. One such judge told the Committee that discovery must be reviewable, and that "judges have a role in that . . . . We have a lot of cases that are document intensive. We have a lot of large-scale drug cases with hundreds of recorded conversations. Narrowing the focus will save the public a lot of money."[1074] Another judge said that if a defense attorney came to him with concerns about ESI, the judge would "sit down with a prosecutor and say":

> You have to have this information in a format to work in my courtroom with these computers. You have the ability to get it in a format that it's usable by other people besides whatever agency [provided it] or your office. Get it to this attorney in the same format so they're not going to spend thousands of hours and have to hire a forensic expert just to get to the information.[1075]

1071 Receiving files in native format allows defense attorneys to see the meta- and embedded data, or hidden data, associated with the file, which is not preserved when the file is converted into a different format. Meta- and embedded data can include time stamps, locations, and other specific information which can be extremely important for defense attorneys to provide effective representation.

1072 Russel Aoki, Coordinating Discovery Atty., Public Hearing—San Francisco, Cal., Panel 2, Tr., at 27.

1073 Jessica Hedges, CJA Board Chair, D. Mass., Public Hearing—Philadelphia, Pa., Panel 9, Tr., at 15.

1074 Senior Judge Donald Graham, S.D. Fla., Public Hearing—Miami, Fla., Panel 2, Tr., at 9–10.

1075 Judge Robert Scola, Jr., S.D. Fla., Public Hearing—Miami, Fla., Panel 2, Tr., at 28.

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Some judges have standing orders to encourage the efficient disclosure of discovery, allowing defense attorneys more time to properly review ESI and keep case costs from ballooning.[1076] Other judges schedule conferences with prosecutors and defense attorneys in all of their criminal cases to discuss coordinating discovery.[1077]

There are judges, however, who believe it is inappropriate to become involved in document and ESI discovery altogether. One judge explained that the process relies on the "goodwill of the U.S. Attorney's Office. We can only push so far. . . . I am not sure that I agree it would be appropriate for the court, with the state of the law as it is now, providing almost no rights to discovery for the defendant, for the court to step in."[1078]

11.2 Limited Resources Currently Available

11.2.1 National Litigation Support Team

The National Litigation Support Team (NLST) is funded through the Defender Services Office and overseen by that office's Training Division. Its mandate is to assist, advise, provide training, and act as a resource for the entire CJA program. It currently employs a National Litigation Support Administrator and three staff members to provide electronic data support for the federal judiciary, federal and community defenders, and the almost 10,000 panel attorneys nationwide.[1079] NLST provides in-person and on-line training and resources,[1080] works with vendors to negotiate lower prices for software panel attorneys can access, and assists directly on complex ESI discovery cases. But as one witness stated, the budget and staff is "woefully inadequate."[1081]

NLST also faces particular barriers to providing training on ESI discovery. Most notably, training on technology to handle ESI discovery should take place in person. The NLST Administrator explained that to properly train defense attorneys,

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1076 Russell Aoki: "Judges will ask me, from my experience, what really helps cut back on expenses. That is, getting people engaged in the case right away, setting deadlines. Judge Fischer has a wonderful order that gets people up and running in the first forty-five days." Russel Aoki, Coordinating Discovery Atty., Public Hearing—San Francisco, Cal., Panel 2, Tr., at 34.

1077 Judge Richard Boulware: "I have a discovery conference in every single one of my criminal cases, and I ask the U.S. Attorneys, what is the status of the data? How can we coordinate that?" Judge Richard Boulware, D. Nev., Public Hearing—San Francisco, Cal., Panel 5, Tr., at 14.

1078 Judge Rosanna Peterson, E.D. Wash. Public Hearing—Portland, Or., Panel 3, Tr., at 26.

1079 Bob Ranz, Case Budgeting Attorney: "Sean Broderick's office does a wonderful job, but again, Sean has a small office and they're dealing with what I think is ten thousand CJA panel attorneys." Bob Ranz, Circuit Case Budgeting Atty., 6th Cir., Public Hearing—San Francisco, Cal., Panel 1, Tr., at 3.

1080 In FY 2016, the NLST provided training in national training programs organized by DSO as well as in seventeen districts across the United States. Fourteen of those programs were hands-on trainings providing direct instruction to panel attorneys, federal defenders, and defender office staff on e-discovery and litigation support.

1081 Donna Lee Elm, FPD, M.D. Fla., Public Hearing—San Francisco, Cal., Panel 2, Tr., at 4.

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"we do need hands-on programs, where people use the technology in similar ways they do their cases, or when possible, in their own cases. Sitting in a presentation or two on technology will not do the trick."[1082] But panel attorneys often lack the time to attend even a brief training outside where they live and work. Further, NLST is tasked not only with training panel attorneys, judges, and defenders. It also must provide training in criminal discovery to ESI vendors that previously have worked only in civil litigation.[1083] Vendors need to understand, for instance, that in criminal cases client information is confidential, that no documents should be redacted, and that they should refuse to turn over any information at the government's request. It falls to NLST to educate them on such matters.[1084]

NLST employs three Coordinating Discovery Attorneys (CDAs) on a contract basis who are based in Seattle, Kansas City, and New York City. These three CDAs are skilled in using electronic discovery software and in processing various media and file types, and their job is to assist panel attorneys.[1085] The CDAs are intended to reduce the panel attorneys' reliance on the government, assist with communication in large and multi-defendant cases, and contain defense costs.[1086] But the NLST Administrator, Sean Broderick, testified that the initial plan and budget assumed 10 active cases per CDA. At this point, the three of them are collectively handling twice that number, roughly 60 cases.[1087] According to one CDA, not only do panel attorneys reach out for assistance weekly, but courts and even some U.S. Attorney Offices in large ESI discovery cases are requesting, and in some cases requiring, that defense attorneys obtain the assistance of a CDA.[1088] The demand for assistance with electronic discovery far out-strips what these three already overburdened CDAs can provide. The CDA program is simply inadequately staffed to address the problems raised by electronic discovery.

1082 Sean Broderick, National Litigation Support Administrator, Public Hearing—San Francisco, Cal., Panel 2, Tr., at 7.

1083 Russel Aoki, Coordinating Discovery Atty., Public Hearing—San Francisco, Cal., Panel 2, Tr., at 8–9.

1084 Rusell Aoki: "We certainly had this happen on one occasion, where the government wanted to know if the lawyers are accessing the database, and when they're accessing it, and who is accessing it. The database company has to know you cannot give that information. Absent an order, you're not going to give that out. How many database companies would have folded as soon as somebody flashed their FBI badge in front of them?" *Id.* at 10–11.

1085 The NLST has been authorized to hire a fourth CDA.

1086 Damon Martinez, U.S. Attorney, on the helpfulness of a CDA: "Such a coordinator can assist the CJA attorneys in handling discovery, especially e-discovery, reduce the need for CJA attorneys to rely on the government for technical assistance and more important, provide the defense with a central line of communication with respect to discovery in large cases. Any such coordinator should be skilled in using discovery software and processing various media for doing, downloading, and duplicating electronic products." Damon Martinez, U.S. Atty., D.N.M., Public Hearing—Santa Fe, N.M., Panel 1, Tr., at 13.

1087 Sean Broderick, National Litigation Support Administrator, Public Hearing—San Francisco, Cal., Panel 2, Tr., at 20.

1088 Russel Aoki, Coordinating Discovery Atty., Public Hearing—San Francisco, Cal., Panel 2, Tr., at 10.

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11.2.2 Defender Offices

In some districts, the local defender office serves as a resource to assist panel attorneys with ESI. Defender offices, unlike panel attorneys, have dedicated funding for software, review platforms, services, and training, and often have the paralegals and IT support staff to manage ESI discovery. In multi-defendant cases, in particular, the defender office often takes the lead in organizing discovery materials. As one defender testified:

> [We] work with the panel attorneys as best we can, understanding that there's potential conflicts, so that we can organize that the discovery materials and the panel attorneys can have access to it by coming to our office, and we try to work with our co-counsels to lessen the bill, so to speak, to the CJA attorneys.[1089]

CJA panel attorneys testified to the Committee that when an FPDO or a CDO is involved in assisting with ESI discovery, it made a tremendous difference. One community defender not only "took on the cost" of handling all the ESI, it then gave all the panel attorneys searchable discs so they could easily access the files.[1090]

But while some FPDOs and CDOs can be of great assistance to panel attorneys — or at least in some cases — others are often not in position to do so, either legally or financially. A conflict of interest can prevent an office representing one defendant in a multi-defendant case from assisting panel attorneys who are representing co-defendants. In other cases, lack of resources is the problem. One federal defender explained that her office simply did not have the resources to continue assisting panel attorneys with their clients after her office's client settled.[1091] As discussed in Section 3.6, FPDO and CDO staffing and budgets are based on a work measurement formula that does not take into account this kind of technical assistance to panel attorneys. As one defender pointed out, when such assistance is provided but "unpaid," it both subsidizes and hides the true cost of these "incredibly complex cases brought by the federal government."[1092] The result: judges may walk away with the mistaken impression that these cases can be handled less expensively than is possible. [1093] And the deeper changes in the system through better cooperation and more resources for panel attorney are left unaddressed.

Using FPDOs and CDOs as a solution to ESI discovery is not sufficient or sustainable, and while NLST and the CDAs have done an exemplary job, they are not equipped to adequately address the Sixth Amendment issues raised by modern

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1089 Jerry Needham, AFPD, D. Or., Public Hearing — Portland, Or., Panel 2, Tr., at 26.

1090 Judge Rosanna Peterson, E.D. Wash. Public Hearing — Portland, Or., Panel 3, Tr., at 26.

1091 Hilary Potashner, FPD, C.D. Cal., Public Hearing — San Francisco, Cal., Panel 7, Tr., at 31.

1092 Steve Kalar, FPD, N.D. Cal., Public Hearing — San Francisco, Cal., Panel 7, Tr., at 31.

1093 *See, e.g.*, *id.* at 30–31.

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technology. The need to provide systemic and institutionally-based assistance for defense attorneys, especially panel attorneys, in the area of e-discovery will continue to grow. As sophisticated electronic devices become cheaper and hold more data, and as networks become faster, the sheer amount of e-discovery will continue to increase exponentially.[1094] Unless steps are taken, ESI will negatively impact both the cost and the quality of indigent defense. ●

[1094] Looking at just a single device, from 2013 to 2015, the average monthly data usage of a cell phone user increased from 269 MB to 804 MB. It is projected that average monthly cell phone data usage by the year 2021, however, will be 8.9 GB. *See* http://www.ctia.org/industry-data/ctia-annual-wireless-industry-survey (last visited January 6, 2017); http://bgr.com/2016/06/02/smartphone-data-usage-2021-gigabytes-erricson/ (last visited January 6, 2017).

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Section 12: Transportation & Subsistence for Non-Custodial Defendants

12.1 Lack of Statutory Authority

The statute pursuant to which the U.S. Marshals Service provides for transportation of non-custodial defendants to criminal proceedings, 18 U.S.C. § 4285, only directs the Marshals to provide costs when: 1) an arrested person who is financially eligible is released from custody back to their residence; and 2) a defendant must travel to court for judicial proceedings and has satisfied an additional inquiry that he or she is unable to pay for travel. The statute grants no authority to pay subsistence during the course of the proceedings or travel expenses for the return trip to the defendant's residence after proceedings.

This problem is not new. It was addressed in the Prado Report, which recommended that the Criminal Justice Act be amended to provide costs for non-custodial defendants who qualify during and after their criminal proceedings.[1095] The Judicial Conference of the United States also addressed the issue in its Report on the Federal Defender Program in March 1993:

> The present lack of clear statutory authority to pay for travel and subsistence expenses in these situations has resulted in substantial hardships to certain defendants, particularly those who have no funds and are required to attend lengthy court proceedings. Accordingly, there should be explicit statutory authority for the courts to provide assistance with transportation, housing, and food for financially eligible defendants in appropriate circumstances.[1096]

1095 *See* Prado Report, Recommendation D–2 at 70–71.

1096 Report of the Judicial Conference of the United States on the Federal Defender Program at 36 (1993).

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The Defender Services Office, along with the Office of Legislative Affairs at the AO, has submitted proposed legislation to Congress in previous years as part of a courts improvement package. But under Office of General Counsel and Appropriations rules, if a statute already provides monies for a service, another agency or branch cannot provide funds for the same service—and § 4285 does provide money to the Marshals for transportation expenses, however limited. Thus, the proposed legislative change has always been to the statute that governs the Marshals providing costs, rather than a proposal to change the Criminal Justice Act to provide for funding. However, the Department of Justice, which houses and funds the U.S. Marshals Service, has consistently and staunchly opposed such a statutory change, and therefore the proposal has not been adopted.

Even if it could be argued that supplying funding for subsistence and return travel did not violate appropriations rules, the use of CJA funds has been generally disallowed. It would require statutory change to provide these costs. Currently, Volume 7A of Judiciary Policy prohibits the use of CJA funds for "cost of services of a personal nature and expenses incident thereto."[1097]

12.2 Burden of Problem on Defendants and Their Attorneys

Since the time of the Prado Report, courts have seen a significant rise in the number of multi-district criminal cases, requiring an even greater number of non-custodial defendants to appear in court outside of their home districts. But because there has been no statutory fix, as one judge explained, "the gap remains unfilled."[1098] "[W]ith anyone who is from out of the district who has to return for court they will have a problem,"[1099] a federal defender told the Committee. "I've had some clients who slept overnight in their truck."[1100] Other defendants might find themselves lodged at the YMCA, a halfway house, or worse. As one defender told the Committee, "I can bring them to court, but they're stranded on the streets after court."[1101]

The attempted solutions have been ad hoc at best. One defender testified, "We have taken that out of a fund and taken up a collection. Have done that many, many times."[1102] He told the Committee, "Every now and then I'll see an order from another district on a Rule 5 case where a judge in another district has allowed

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1097 § 230.66.20.

1098 United States v. Mendoza, 734 F. Supp. 2d 287 (E.D.N.Y. 2010).

1099 Christine Freeman, Exec. Dir., CDO, M.D. Ala., Public Hearing—Birmingham, Ala., Panel 6, Tr., at 9.

1100 *Id.*

1101 Doris Randle-Holt, FPD, W.D. Tenn., Public Hearing—Birmingham, Ala., Panel 6, Tr., at 8.

1102 Michael Desautels, FPD, D. Vt., Public Hearing—Philadelphia, Pa., Panel 10, Tr., at 32.

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for two-way transportation…but I don't see any precedence statute for that."[1103] Another defender said that in his district, "we routinely prosecute people who fail to pay child support from across the country. Those folks who aren't paying child support who don't have money to pay child support are hauled to the district of South Dakota and automatically typically released on bond."[1104] Recently, the defender office was faced with one such client who could only be released in the district. "Who could he be released to? His daughter who he supposedly had not paid child support to? His daughter had to drive to Sioux Falls, six hours…pick her father up, drive him home, and house him and he was charged with not supporting her."[1105]

Courts across the country have struggled with problems like this for decades, to little avail.[1106] So by default, the financial burdens of transportation and subsistence often fall on defender offices and panel attorneys, who have limited budgets or who will not receive reimbursement for such expenses, to try to keep clients out of unsafe situations while attending court proceedings.

A federal defender told the Committee that he paid for travel and subsistence out of his own pocket because he didn't want his client to "have to spend a couple weeks of his life bouncing around 20 different county jails to get home and I'm not going to have him hitchhike. It seems like the only humane thing to do and it seems like there ought to be a better system for helping" those defendants without resources to travel between their homes and the court where their charges are pending.[1107] Another federal defender described some of the experiences of clients and their counsel in her district:

> We had a judge who issued an opinion saying that subsistence was our client staying at the local homeless shelter for a week-long trial. We have a CJA [attorney] who fronted a thousand dollars to put a client up for five nights. I think the judge helped work that out eventually with the CJA. We had a client coming in for a seven-week trial. We were at the point of saying, we'll each take him home for a week. Eventually probation

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1103 *Id.* at 32–33.

1104 Neil Fulton, FPD, D.N.D. & D.S.D., Public Hearing, Minneapolis, Minn., Panel 2, Tr., at 23.

1105 *Id.*

1106 *See, e.g.*, United States v. Gundersen, 978 F.2d 580, 584 (10th Cir. 1992); United States v. Dyer, No. 15–CR–115, 2016 WL 7027177, at *2 (E.D. Wis. Dec. 1, 2016); United States v. Alexander, No. 3:13–CR–146, 2015 WL 1457975, at *2 (E.D. Tenn. Mar. 30, 2015); United States v. Ibarra, 2014 WL 4352063, at *2 (S.D. Cal. Sept. 2, 2014); United States v. Mouzon, No. 1:12–CR–301–04, 2014 WL 1303708, at *2 (M.D. Pa. Mar. 31, 2014); United States v. Stone, No. 10–20123, 2012 WL 345267, at *1 (E.D. Mich. Feb. 1, 2012); Mendoza, 734 F. Supp. 2d at 284; United States v. Centeno, No. 09–CR–3120, 2009 WL 3334144, at *1 (S.D. Cal. Oct. 15, 2009); United States v. Headden, No. 09–6406M, 2009 WL 2960382, at *1 (D. Ariz. Sept. 10, 2009); United States v. Birdhorse, No. 2:07–CR–65, 2007 WL 2358634, at *2 (D.N.D. Aug. 17, 2007); United States v. Sandoval, 812 F. Supp. 1156, 1157 (D. Kan. 1993); United States v. James, 762 F. Supp. 1, 2 (D.D.C. 1991); United States v. Nave, 733 F. Supp. 1002, 1002–03 (D. Md. 1990); United States v. Haley, 504 F. Supp. 1124, 1128–29 (E.D. Pa. 1981).

1107 Thomas Patton, FPD, C.D. Ill., Public Hearing—Minneapolis, Minn., Panel 2, Tr., at 23.

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> helped find him some housing but we were the ones going to feed and transport him for those seven weeks. Lawyers, investigators in our office take money out of their pockets to buy bus tickets and hotel rooms for clients because . . . the law isn't particularly clear in this area. It seems like it comes down against our clients routinely. That needs to change, staying in a homeless shelter and being fed by what we buy at lunch is not the way it should happen.[1108]

Finally, the Committee heard from witnesses who said that because of the lack of funding, some indigent clients were actually being detained needlessly. A panel attorney told the Committee that in one case:

> My very, very poor client came from Missouri; this was in the dead of winter. We were able to obtain release for him. There was no way to get him home. He had no clothes, appropriate clothes. We had to address all of those problems. Then, when it came time for him to come back to court . . . there's no provision on our system for it. In order to get him back to Montana without a cost to him or his family, the only way to do it through our Federal System was to have his pretrial release revoked so he could be transported in con air, essentially.[1109]

12.3 A Need for a Congressional Fix

The Committee finds that the failure to provide costs for indigent defendants during and after their criminal proceedings is a long-standing problem that must be resolved. It is causing substantial hardships for many defendants—defendants who have not been convicted of anything—and it is, in some circumstances, creating an unfair and unnecessary burden on defense counsel. This Committee concludes that the current statute should be amended by Congress to permit courts to order payment of costs in the limited circumstances where the defendant is unable to bear the costs *and* the court finds that the interests of justice would be served by paying necessary expenses.

The statute, 18 U.S.C. § 4285, states in full:

> Any judge or magistrate judge of the United States, when ordering a person released under chapter 207 on a condition of his subsequent appearance before that court, any division of that court, or any court of the United States in another judicial district in which criminal proceedings are pending, may, when the interests of justice would be served

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1108 Melody Brannon, FPD, D. Kan., Public Hearing—Minneapolis, Minn., Panel 2, Tr., at 24.

1109 Wendy Holton, CJA Panel Atty., D. Mont., Public Hearing—Portland, Or., Panel 4, Tr., at 14.

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thereby and the United States judge or magistrate judge is satisfied, after appropriate inquiry, that the defendant is financially unable to provide the necessary transportation to appear before the required court on his own, direct the United States marshal to arrange for that person's means of noncustodial transportation or furnish the fare for such transportation to the place where his appearance is required, and in addition may direct the United States marshal to furnish that person with an amount of money for subsistence expenses to his destination, not to exceed the amount authorized as a per diem allowance for travel under section 5702(a) of title 5, United States Code. When so ordered, such expenses shall be paid by the marshal out of funds authorized by the Attorney General for such expenses.[1110]

It is important that Congress act to amend the statute very simply as follows:

…direct the United States marshal to arrange for that person's means of noncustodial transportation or furnish the fare for such transportation to, **subsistence during the proceedings, and transportation returning from** the place where his appearance is required… ●

[1110] 18 U.S.C. § 4285 (2012).

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Options for Restructuring the Administration of the Criminal Justice Act

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Section 13: The Committee's Proposal: An Independent Entity Within the Judicial Branch

The testimony, written comments, survey data and private discussions, all carefully studied by the committee over the course of a two-year review compel the conclusion that the CJA's primary flaw is the program's lack of independence.

The Committee considered several models that would provide the CJA program with the greater independence it needs to function more effectively and efficiently. These options are: 1) creating an independent commission within the judicial branch but outside of the control of the Judicial Conference and Administrative Office; 2) placing the program under the executive branch 3) creating an entirely independent, stand-alone agency outside of the three branches of government; and 4) leaving the program where it is but re-elevating DSO to a directorate.[1111]

None of these models is perfect; the Committee recognizes that there are advantages and disadvantages to each one. And while there is a risk in creating a new structure it is a risk the program must bear given the absolute necessity of greater independence for the public defense function.

13.1 National Structure

Consistent with the recommendations made by the Prado Committee in 1993, this Committee unanimously recommends that Congress create an independent defender commission within the judicial branch, but outside the jurisdiction of the Judicial Conference and AO. Although there was not universal support for the Prado Committee's similar recommendations, in the 24 years since the issuance of the Prado Report the nature of federal criminal defense practice has dramatically

[1111] On July 12, 2016 the Ad Hoc Committee requested from DSO a calculation and estimation of the budget under various models. Both the letter and response are attached as Appendix L.

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changed; the number of cases brought by the government, and the complexity of those cases, has increased dramatically. And the record before this Committee supporting independence is stronger and significantly more compelling. Today, most critical stakeholders have endorsed greater independence for the program.

This independent defender commission proposed by our committee above would have powers to:

1. Establish general policies and rules as necessary to carry out the purposes of the CJA;
2. Appoint and fix the salaries and duties of a director and senior staff;
3. Select and appoint federal defenders and determine the length of term;
4. Issue instruction to, monitor the performance of, and ensure payment of defense counsel;
5. Determine, submit, and support annual appropriations requests to Congress;
6. Enter into and perform contracts;
7. Procure as necessary temporary and intermittent services;
8. Compile, collect and analyze data to measure and ensure high quality defense representation throughout the nation;
9. Rely upon other federal agencies to make their services, equipment, personnel, facilities and information available to the greatest practicable extent to the commission in execution of its functions;[1112] and
10. Perform such other functions as required to carry out the purposes of and meet responsibilities under the CJA.

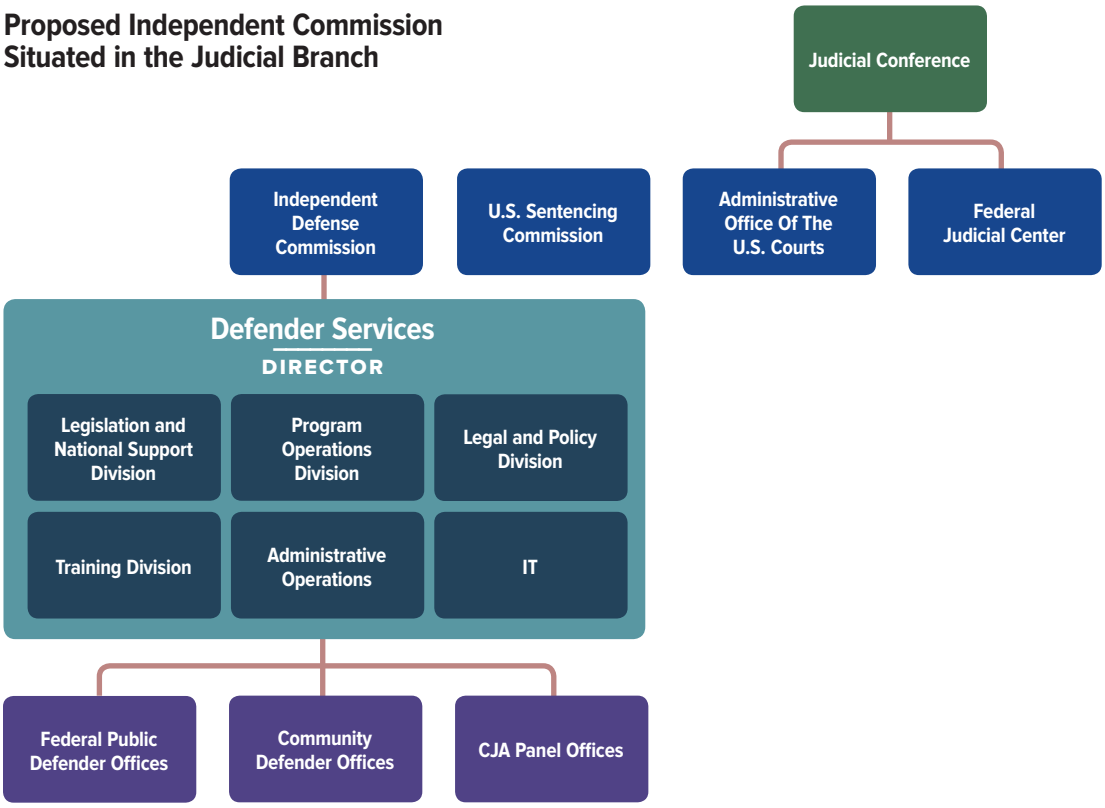
In essence, the independent defender commission would centralize authority that is presently shared among JCUS, the Administrative Office, the Defender Services Office, and the circuit courts. Decisions about the provision of defense services would be made independently and implemented by those having experience with and responsibility for the defense function. Importantly, the defense program would not have to compete with organizational or other judicial agency interests in securing and expending funds to ensure best practices. The following chart generally illustrates this proposed structure.

[1112] The Committee bases this recommendation upon the enabling statute for the U.S. Sentencing Commission, which is housed within the same building as the AO and uses services provided by the AO but is not within AO governance. The statute for the Sentencing Commission reads, "Upon the request of the Commission, each Federal agency is authorized and directed to make its services, equipment, personnel, facilities, and information available to the greatest practicable extent to the Commission in the execution of its functions." 28 U.S.C. § 995(c). Any statute creating a defender commission should provide the same assistance for the new commission to execute its duties.

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Proposed Independent Commission Situated in the Judicial Branch



The Committee unanimously recommends that, much like the Sentencing Commission, the independent defender commission consist of voting members appointed by the President and confirmed by the Senate. To ensure full representation of the federal defense function before the commission, three non-voting members should be selected by the commission, respectively, from an FPDO, a CDO, and a CJA panel.

With the exception of one member, the Committee urges that federal judges must not constitute a majority of the voting members. Additionally, no more than four board members may be of the same political party. For the initial board, the Committee recommends that the Chief Justice of the United States, as well as the Defender Services Advisory Group, which currently represents defenders and advises the Defender Services Committee, prepare a slate of candidates from which the President may select. For subsequent boards, a slate of candidates should be prepared by the Chief Justice and the equivalent of the Defender Services Advisory Group to the new commission. Voting members should have had a minimum five years of experience with, as well as a demonstrated interest in, high quality indigent criminal defense.

To prevent conflicts of interest, no voting member should be employed by the Department of Justice, work as a state or federal prosecutor, or serve as a chief or assistant federal defender or as an active member of a CJA panel.

The Committee recommends that members of the commission be appointed

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for staggered three-year terms and, to provide continuity of leadership, remain in office until their vacancy is filled. To insure fresh perspectives, members should be limited to two full terms. Compensation for members of the commission should not exceed the daily rate at which judges of the U.S. Courts of Appeals are compensated.

13.2 Local Structure

To ensure institutional support for any local defense delivery plan, in every district in which at least 200 persons annually require the appointment of counsel, the commission shall establish a defender organization and a CJA Panel Attorney Administrator. This administrator may reside within the defender office, with appropriate firewalls to prevent conflicts, or in a separate office, but must not be under the auspices of the courts.

The types of defender organizations that may be created:

1. Federal Defender Organizations; as set forth in 18 USC §3006A(g)(2)(A); or
2. Community Defender Organizations; as set forth in 18 USC§3006A(g)(2)(B); and
3. CJA Panel Attorney administrator with necessary support staff responsible for the oversight and the supervision of the CJA panel attorneys.

The Committee recognizes that federal and community defender offices are integral to raising the quality of representation and establishing best practices for all defense attorneys in a district, as well as providing training and other resources for private CJA panel attorneys, all while being cost-effective.

In addition to defender offices, federal districts require a local management structure to administer the provision of defense, taking over the duties currently shouldered by district court judges with busy dockets. The Committee agrees that as different districts have different needs, there should not be a one-size-fits-all solution for federal defense. Therefore these recommendations leave considerable room for local decision-making, while still removing the defense function from judicial control.

Defender offices and panel administration should be overseen by a local board consisting of a minimum of three and a maximum of seven board members. Initial boards shall be appointed by the local district courts, the community or federal defender, and CJA panel attorney district representative in consultation with the commission outlined above.[1113] Local bar organizations or other interested stakeholders are welcome to provide input into the appointment process; each

[1113] This is not to say that districts must wait for Congress to create a national structure before taking these steps; indeed, many of these recommendations can be implemented now.

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district is encouraged to create boards that are representative of and responsive to local needs. While judges will be involved in initial appointment, boards should be self-perpetuating, and judges may not serve as board members. As is the case now with some defender offices, multiple districts may be served by a single board. Each board will be composed of an uneven number of members of the legal community with a demonstrated knowledge of and commitment to public defense.

Board members, who should serve without compensation, may be asked to serve for five-year staggered terms and remain on the board until their vacancy is filled.

Each local board must appoint the CJA panel attorney administrator(s) with the authority to hire any necessary staff to manage the panel and review vouchers.

Local boards should collaborate with leadership of the defender office to develop a district plan to be approved by the independent national defense commission. Like the current CJA plans, these plans would address the recruitment, selection, retention, and removal of panel attorneys, and would incorporate best practices as outlined in the current CJA Model Plan. Panel administrators would implement a system for voucher review and create an appeal process for those attorneys whose vouchers are cut for non-mathematical reasons.

Case budgeting attorneys will be employed by the commission and will be accessible to local panel administrators.

13.3 Benefits of the Recommended Structure

Creating a new agency outside the governing structure of the JCUS and the AO that can continue to utilize resources through the AO would control costs and would be least likely to disrupt the ongoing provision of public defense counsel. Our proposed structure would still, however, give the new entity the independence necessary to carry out its mission. As detailed in this report the benefits would be myriad. The recommended structure also incorporates the recommendations of the Defender Services Committee,[1114] federal and community defenders,[1115] and panel attorneys.[1116]

1114 Letter from Chief Judge Catherine C. Blake, Chair of Defender Services Committee, to Judge Kathleen Cardone, July 22, 2016. Please see Appendix I.: Position Letter from Defender Services Committee.

1115 Letter from Jon M. Sands, FPD, D. Ariz., and Leigh Skipper, Exec. Dir., CDO, E.D. Pa., "Re: Reformation of the CJA Program," March 25, 2016. Please see Appendix J: Position Letter from Federal Defenders.

1116 Letter from Gilbert A. Schaffnit, Melanie S. Morgan, Victoria Bonilla-Argudo, Lisa S. Costner, and Chip S. Frensley, CJA Panel Atty. Dist. Reps., to Judge Kathleen Cardone, "Re: PADRs' Consensus View on Issues Facing CJA Panel Attorneys," Letter from Panel Attorney District Representatives, July 6, 2016. Appendix K: Position letter from Defender Services Advisory Group.

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While the proposed defender commission would still be within the judicial branch, it would be free to pursue its own mission, create its own budget and determine national policy free from conflict of interest. The Committee believes that this independent program would continue to be supported by both individual judges and the judiciary as an institution, that defenders would prove to be able advocates for the program, and that Congress will continue to understand the importance and constitutional necessity of an effective defense and ensure the integrity of the criminal justice system.[1117] ●

[1117] The Committee recommends that the new federal defense commission undertake to study its own structure and functioning every seven years to determine the strengths and benefits of that system, and whether additional changes or increased independence is still required. The Committee recognizes that even if its recommendations are adopted, a future review may conclude that absolute independence from all three branches is needed for the federal public defense function.

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Section 14: Alternative Models Considered

14.1 Stand-Alone Agency Outside the Three Branches of Government

This model would create an independent agency outside of the judicial, legislative, and executive branches to administer an indigent defense delivery system. This model was recommended by David E. Patton, the Executive Director of the Federal Defenders of New York in his article *The Structure of Federal Public Defense: A Call for Independence*.[1118] The question Mr. Patton asked is one the Committee has also grappled with: "So, if defense lawyers have a mission explicitly contrary to the Executive, and the Judiciary is meant to be a neutral arbiter, whither the placement of public defense?"[1119]

Mr. Patton's model envisions an agency dedicated to an independent, vigorous defense, without any actual or apparent conflict of interest. It would, in comparison to other models, create less work for and obligate fewer resources from the judiciary and the AO. And there is such a model that has been successful—the Public Defender Service of Washington, D.C.

A primary reason this Committee is not recommending this model is the cost. The defender program currently relies on various AO services and resources, such as human resources and office space. Continuing to share these resources would not threaten the independence of a new defender system and would provide for cost containment. Conversely, if an entirely new agency was created, it could not avail itself of these shared resources. Moreover, creating a new agency could also create a

[1118] David E. Patton, *The Structure of Federal Public Defense: A Call for Independence*, 102 Cornell L. Rev. 335, 339–40 (2017).

[1119] *Id.* at 151

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considerable disruption in the current delivery of public defense services.

And while the Committee acknowledges the success of the Public Defender Service of D.C., the District of Columbia itself already occupies a unique space within the nation at large; it is less of an aberration that such an office for the District exists outside the traditional three branches of the national government. Additionally, the office is smaller and can focus on local issues and needs, and does not require a nationwide network or the greater support necessary to run a national program.

14.2 Within the Executive Branch

Some witnesses have suggested, as exemplified in a bill proposed by Representative Ted Deutsch in June of 2016,[1120] that the Committee recommend placing the federal defender program within the Executive Branch. Congressman Deutsch recommended this agency be run by a commission of twelve members appointed by the president.[1121] None of these commissioners could be prosecutors or judges, and a majority would be former public defenders.[1122]

Such a model would resolve the conflict that has emerged between defenders and the judiciary due to the program's poor fit in the current structure. Additionally, it would allow for the creation of a mechanism whereby funding for the defenders could be tied to funding for prosecutions by the Department of Justice.

However, as this Committee has learned, a host of questions and conflicts would remain. Per the Deutsch bill specifically, local judicial control of CJA panel attorneys would seemingly remain in place. The bill creates independence at a national level but not at the local level, where the lack of independence affects individual defendants, their attorneys, and the integrity of our adversarial criminal justice system the most. While the Deutsch bill champions independence, the recommended structure could allow for continued or even greater judicial control outside of the national agency.

Placing defenders in the same branch that also prosecutes could create an actual or perceived conflict of interest. The Committee heard about such models currently in use from representatives of the military defender offices. The military branches have a similar structure, with both prosecution and defense offices reporting to the same higher office, but the control exercised over independent judgment and a lack of resources is a continuing problem for the defense.[1123]

Finally, this model could be equally as costly and as disruptive to defense delivery as the previous model.

1120 Independent and Effective Federal Defenders Act of 2016, H.R. 5449, 114th Cong. (2016).

1121 *Id.* at § 2(a)(5)(B).

1122 *Id.* at § 2(a)(5)(B).

1123 *See* Public Hearing—Philadelphia, Pa., Panel 5: Views from the Military.

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14.3 Re-elevating DSO to a Directorate in the AO

While this model was suggested, the Committee doesn't believe that it would resolve any of the issues that currently plague the CJA. Re-elevating DSO would not address the inherent conflicts of interest outlined in this report. No matter where DSO is located within the AO, the CJA budget will still be competing for resources with the judiciary; it will still be determined by JCUS committees without any defender input; and it will continue to be brought to appropriators in Congress without any defender ability to answer questions, explain the program, or advocate for the funds necessary to fulfill the program's mission.

The placement of the CJA program within the judiciary is fundamentally flawed, something that Congress acknowledged at the time of the creation of the CJA and assumed would be addressed at some later date. That time is now long-past due.

14.4 Defender Commission Comprised Entirely of Judges

As mentioned above, all members of the Committee, with one exception, agreed on the above mechanism for nominating and confirming Commissioners. The exception, Professor Kerr, believes that the commission should consist entirely of federal district court judges selected by the judges of each circuit. His view is set out in a separate statement.[1124] The proposal to have only judges lead the new federal defense agency is based on Professor Kerr's assumption that judicial commissioners would insulate a new agency from any political pressure or control.

But such a model underestimates the bipartisan support the federal defender program historically has had from Congress. Many federal defender offices would have been even more compromised if not for the assistance and support provided from both sides of the aisle in Congress during sequestration.[1125] Certainly the concept of being "tough on crime" raises the specter that a commission dedicated to the defense of individuals accused of crime might be subject to additional scrutiny. However, this is not about being "tough on crime," it is about providing the representation guaranteed under the Sixth Amendment to those individuals who have been accused of a crime. And, as documented in this report, Congress has historically understood that distinction.

The current defense services budget is visible to potential political opponents

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1124 See Appendix M: Statement from Committee Member Professor Orin Kerr.

1125 Please see Section 3.2.

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in Congress, who can cut the budget or not as appropriators see fit. Indeed, there have been years when judiciary funding has been cut when defender budgets have not, and vice versa. For example, when Congress was determined to defund an aspect of the defender program, the Death Penalty Resource Centers, the full-throated defense of the program from the judiciary did nothing to save those Centers.[1126] There is nothing currently preventing Congress from taking similar action today. Furthermore, one could argue Congress's previous decision to defund was not based on an intent to intrude directly upon the provision of representation to an accused but rather because certain members of Congress became convinced that these Death Penalty Resource Centers were focused not on representation but on abolition of the death penalty. We recognize this concern and the Committee believes that any commission overseeing the defense function would be prudent to impose limits on its advocacy to instead focus on its Constitutional mandate.

Having spent the last two-hundred-fifty pages discussing the need for independence from the judiciary, a commission comprised entirely of judges would leave the program under the direction of a commission with significant ties with the judiciary. The new defender program should not be set up, again, with a fundamental conflict of interest between its needs and those of the judiciary. Due to a combination of factors, when these conflicts have arisen, the defender program has suffered. The judgment of those judicial commissioners would be affected by both their perspective and their knowledge of the needs, resources, and best interests of the judiciary. These interests may at times be at odds with the best interests of an institution dedicated to supporting defenders.

While individual judges have long supported and advocated for the defender program, and judicial input will be important to any future commission, the Committee cannot endorse a commission comprised solely of judicial members.

[1126] George Kendall, Director, Public Service Initiative, Squire Patton Boggs, Public Hearing--Minneapolis, Minn., Panel 3, Tr., at 25.; Patricia L. Ragone and J. Michael Williams, *Conference: The Death Penalty In The Twenty-First Century*, 45 Am. U.L. Rev. 239, 346–347, December 1995 (From one participant, Ronald Tabak: "[I]t is important to realize that one very likely part of any crime bill that comes out of the new Congress that has just been elected would be an effort to eliminate the existing death penalty resource centers that deal with post-conviction representation. There have been a lot of political attacks made on these resource centers.")

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Conclusion

The entire Committee agrees that greater independence from the judiciary is a minimum requirement. An independent entity outside of JCUS and AO control is essential. The Committee urges that Congress adopt legislation to give the defense program the independence that it needs—and that Congress originally intended—to function more effectively, more efficiently, and continue to protect the integrity of the criminal justice program. •

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Appendices



Appendix A: Committee Member Biographies

HON. KATHLEEN CARDONE is a United States District Judge for the Western District of Texas. She was appointed to the federal bench in 2003 by President George W. Bush. In 2015, Judge Cardone was appointed by Chief Justice John G. Roberts, Jr. to Chair the Committee to Review the Criminal Justice Act Program. Prior to taking the federal bench, Judge Cardone had over sixteen years of judicial experience. She served as Visiting Judge for the State of Texas (2001-2003), first Judge of the 388th Judicial District Court of the State of Texas (1999–2000), first Judge of the 383rd Judicial District Court of the State of Texas (1995–1996), Associate Judge for the Family Court of El Paso County, Texas (1990-1995) and Municipal Court Judge for the City of El Paso, Texas (1983–1990). Judge Cardone served on the United States Judicial Conference Defender Services Committee (2010–2017) and has been appointed to the Administrative Office's Legal and Policy Task Force for the eVoucher system. Judge Cardone graduated from Binghamton University with a B.A. in Spanish Language and Literature and Latin American Studies, and received a J.D. from Saint Mary's University School of Law in San Antonio, Texas. Judge Cardone is the first woman to be appointed to the federal bench in El Paso, Texas.

REUBEN CAMPER CAHN has been the Executive Director of Federal Defenders of San Diego, Inc. since 2005. He began his career in public defense in 1988 with the Office of the Public Defender for the 17th Judicial Circuit (Broward County) Florida. In 1993, Mr. Cahn became an Assistant Federal Public Defender for the Southern District of Florida and, in 1995, the Chief Assistant of that office. He has served as learned counsel in a number of federal capital prosecutions. As Executive Director, Mr. Cahn continues to try cases and represent clients not only in the trial court but also before the Ninth Circuit Court of Appeals and the Supreme Court. Mr. Cahn received his A.B. from Stanford University in 1981 and his J.D. from Yale Law School in 1984 where he was an editor of the Yale Law Journal. Following graduation, Mr. Cahn served as law clerk to the Hon. Lawrence W. Pierce, United States Court of Appeals for the Second Circuit, before working as a litigation associate at Wachtell Lipton and then Paul Weiss. Mr. Cahn has served as co-chair of the Defender Services Advisory Group and the Community Defender Offices' representative to the Defender Services Committee of the Judicial Conference, chair of the Defender Death Penalty Working Group, and a member of the Community Defender Organization, Performance Measurement, and Death Penalty Working Groups, as well as the Capital Trials Expert Panel.

HON. DALE S. FISCHER is a United States District Judge for the Central District of California. She was appointed to the federal bench in 2003 by President George W. Bush. In 2015, Judge Fischer was appointed by Chief Justice John G. Roberts to the Committee to Review the Criminal Justice Act Program. She has served as a member of the Ninth Circuit's CJA Oversight and Pro Se Litigation Committees, and presently chairs the Central District's Criminal Justice Act Committee. Prior to her appointment to the federal bench, Judge Fischer served on the Los Angeles Superior Court, where she presided over a felony trial court and chaired the Court's Bail, Probation, and Temporary Judge Committees. She has been actively involved in educating young lawyers as a faculty member for the National Institute of Trial Advocacy Trial Program, and taught courses on arraignment and bail, voir dire, calendar management, and criminal trials to California judges at the B.E. Witkin Judicial College and Continuing Judicial Studies Program. She has also edited "bench guides" for California judges prepared by the California Center for Judicial Education and Research on the subjects of bail and own-recognizance release, misdemeanor arraignments, felony arraignments and pleas, and jury management. Judge Fischer graduated from the University of South Florida with a B.A. in English and received a J.D. from Harvard Law School in 1980.

HON. JEFFERY S. CHIP FRENSLEY was appointed as a Magistrate Judge for the Middle District of Tennessee in October 2016. Prior to his appointment to the bench, Judge Frensley served for over twenty years as both a criminal and civil defense attorney. From 2009 to 2016, Judge Frensley served as the National CJA Representative to the Defender Services Committee of the United States Judicial Conference representing over 10,000 private attorneys nationwide who represent indigent defendants in federal court. He was a member of the Criminal Justice Act (CJA) Panel for the Middle District of Tennessee from 1997 to 2016. He has

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been recognized as the panel lawyer of the year as well as being listed in Best Lawyers in America for criminal defense. Judge Frensley graduated from the University of Mississippi with a Bachelor of Arts degree in 1992 and earned his Juris Doctor degree from Vanderbilt University in 1995.

HON. JOHN M. GERRARD is a United States District Judge for the District of Nebraska. He was appointed to the federal bench in 2012 by President Barack Obama. Judge Gerrard moved to the federal bench after serving for 16½ years on Nebraska's Supreme Court. He was appointed to this position in 1995 by then Governor E. Benjamin Nelson. During his time on Nebraska's high court, Judge Gerrard helped lead court initiatives that promoted racial and ethnic fairness in the state court system. Prior to his appointment to Nebraska's Supreme Court, Judge Gerrard worked in private practice for 14 years. His practice focused on both civil and criminal litigation. Judge Gerrard began his professional career as a state probation officer in Norfolk, Nebraska, where he worked with both juvenile and adult offenders. Judge Gerrard earned a Bachelor of Science degree from Nebraska Wesleyan University (1976); a Masters in Public Administration degree from the University of Arizona (1977); and, a Juris Doctorate degree from Pacific McGeorge School of Law in Sacramento, California (1981). He is an elected member of the American Board of Trial Advocates, and he was board certified as a civil trial specialist by the National Board of Trial Advocacy.

HON. MITCHELL S. GOLDBERG is a United States District Judge for the Eastern District of Pennsylvania. He was appointed to the federal bench in 2008 by President George W. Bush. Prior to his elevation to the federal bench, Judge Goldberg served on the Bucks County Court of Common Pleas. Judge Goldberg's career as a practicing attorney started at the Philadelphia District Attorney's Office where he worked in both the trial and appellate divisions. He later joined the law firm of Cozen O'Connor, where his practice focused on commercial litigation. Judge Goldberg was eventually promoted to senior partner, and also served as the manager of Cozen's Arson and Fraud Unit. Judge Goldberg returned to the public sector in 1997, serving as an Assistant United States Attorney for the Eastern District of Pennsylvania where he handled mostly white collar crime cases, both before the District Court and the United Stated Court of Appeals for the Third Circuit. Judge Goldberg is a graduate of Temple University Beasley School of Law (1986) where he was a member of Temple's first ever trial team. He presently serves as an Adjunct Professor at Temple Law teaching both civil and criminal advanced trial advocacy.

PROF. ORIN S. KERR is the Fred C. Stevenson Research Professor of Law at George Washington University Law School, and as of January 2018 he will be a Professor of Law at the University of Southern California Gould School of Law. Professor Kerr is a former trial attorney in the Computer Crime and Intellectual Property Section at the U.S. Department of Justice, as well as a Special Assistant U.S. Attorney in the Eastern District of Virginia. He clerked for Judge Leonard I. Garth of the U.S. Court of Appeals for the Third Circuit and Justice Anthony M. Kennedy of the United States Supreme Court. Professor Kerr earned a BSE from Princeton University, an MS from Stanford University, and a JD from Harvard University.

NEIL H. MACBRIDE is a partner in Davis Polk's Litigation Department and co-chair of the firm's White Collar Criminal Defense and Government Investigations Group. His practice focuses on government enforcement actions, internal investigations, congressional investigations, and complex civil litigation. Before joining Davis Polk in 2014, Mr. MacBride served as the U.S. Attorney for the Eastern District of Virginia. Nominated by President Barack Obama and unanimously confirmed by the U.S. Senate, Mr. MacBride was appointed by Attorney General Eric Holder to the Attorney General's Advisory Committee and also chaired its Terrorism and National Security Subcommittee. Before his appointment as U.S. Attorney, Mr. MacBride served as the Associate Deputy Attorney General at the Department of Justice. He earlier served as Vice President and General Counsel of the Business Software Alliance, an international trade association for the software and hardware industry, where he oversaw global anti-piracy enforcement programs in 75 countries to combat unlicensed and counterfeit software. He also served as Chief Counsel and Staff Director for then-Senator Joseph R. Biden Jr. on the Senate Judiciary Committee and as an Assistant U.S. Attorney in the District of Columbia. Mr. MacBride is earned his B.A. from Houghton College (*magna cum laude)*, and his J.D. from the University of Virginia School of Law.

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HON. EDWARD C. PRADO was appointed to the United States Court of Appeals for the Fifth Circuit by President George W. Bush in February 2003. In 1984, President Ronald Reagan appointed Judge Prado to the United States District Court for the Western District of Texas. During his tenure on the District Court, Judge Prado was appointed by Chief Justice William Rehnquist to Chair the Criminal Justice Act Review Committee (1991-1993). Judge Prado's committee was the last time the Criminal Justice Act was comprehensively studied. Prior to his judicial career, Judge Prado served as an Assistant District Attorney in the Bexar County District Attorney's Office. Thereafter, in 1976 he served in the Federal Public Defender's Office in the Western District of Texas as an Assistant Public Defender. In 1980, Judge Prado was appointed to serve as a Texas state District Judge in Bexar County. In 1981, President Ronald Reagan appointed Judge Prado to serve as the United States Attorney for the Western District of Texas. Judge Prado received an Associate of Arts degree from San Antonio College. He received a Bachelor of Arts degree from the University of Texas at Austin in May 1969 and received his Juris Doctor (J.D.) in 1972 from University of Texas School of Law.

KATHERIAN ROE is the Federal Defender for the District of Minnesota. She has been the Defender since 2006. Prior to that she served as a Minnesota state court judge (2002–2006), an Assistant Federal Defender (1989–2002), a Georgetown University Law School Prettyman/Stiller Fellow (1987–1989) and an Indian Legal Services attorney and Reginald Heber Smith Fellow (1984–1987). Ms. Roe has practiced before federal, state and tribal courts. She is a Fellow of the American College of Trial Lawyers and the American Board of Criminal Lawyers. She also served on the Defender Services Advisory Group and currently serves on the FBA Board of Directors, MN and the MSBA Certification Board for Criminal Law Specialists. She is a Minnesota board certified Criminal Law Specialist. Ms. Roe is a graduate of Georgetown Law School (LL.M Trial Advocacy), Albany Law School (J.D.) and the State University of New York, Albany (B.A.).

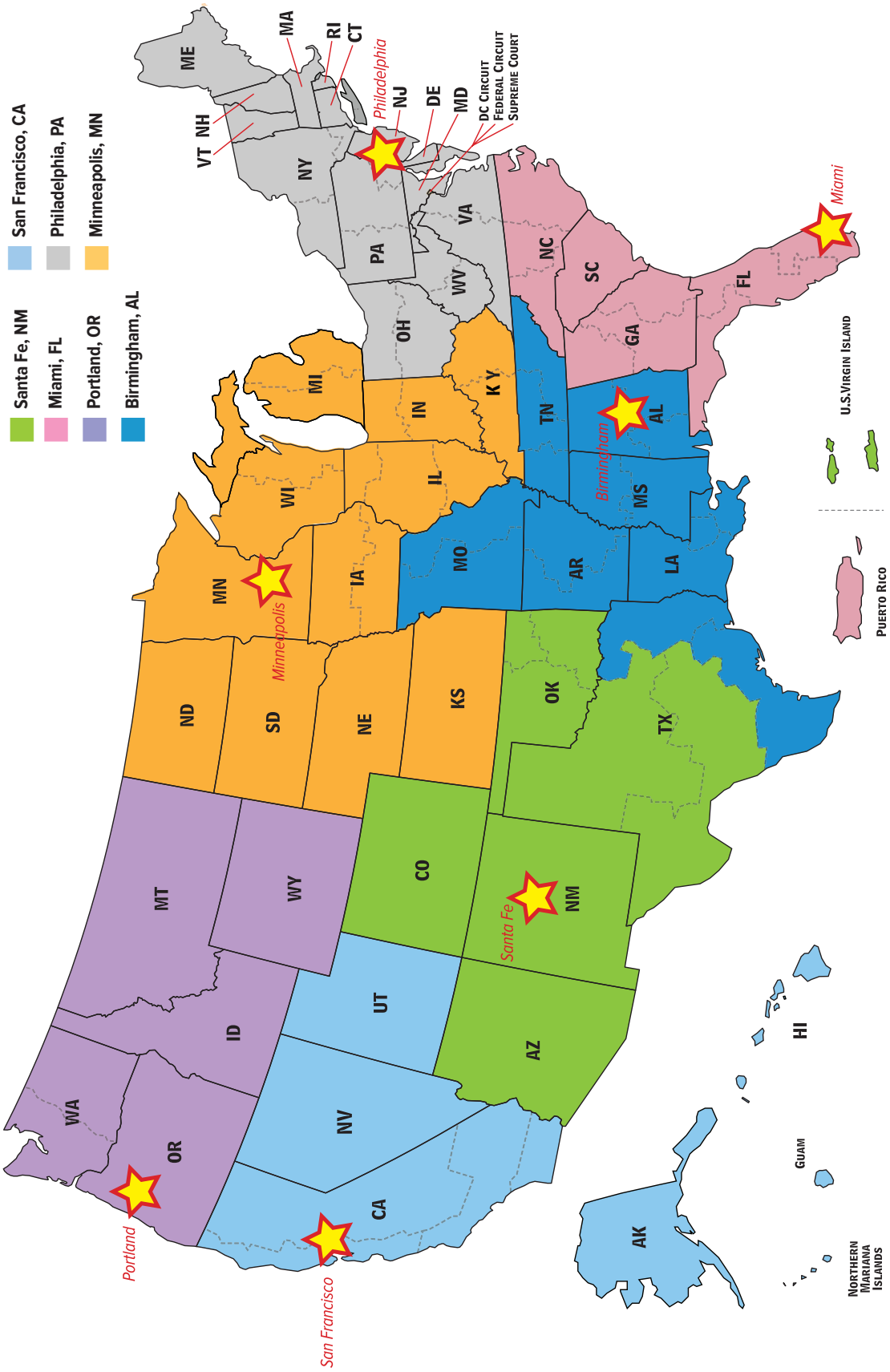
DR. ROBERT E. RUCKER has been the Assistant Circuit Executive for Court Management and Research in the Ninth Circuit's Office of the Circuit Executive since 1996. In 2017, he was appointed Acting Circuit Executive for four months. He has been a member of the national Legal Policy Committee for eVoucher. He staffs the Judicial Council of the Ninth Circuit and numerous Ninth Circuit committees, including the Capital Case Committee. Dr. Rucker helped lead the conceptualization and implementation of the case management and budgeting system for the Ninth Circuit's capital habeas corpus cases. He was part of the national pilot program that created the circuit case budgeting attorney positions for capital cases and mega-criminal cases that has been approved and funded by the Judicial Conference of the United States and the Defender Services Office. He joined the federal courts in 1991, working for District of Nevada as the Reporter for the Civil Justice Reform Act. Prior to that he was a professor at four state universities, teaching graduate students, and conducting research on perceptions of risk, potential impacts of high level nuclear waste disposal, social inequality and demographics.

HON. REGGIE B. WALTON is a Senior United States District Judge for the District of Columbia. He was appointed to the federal bench in 2001 by President George W. Bush. Judge Walton has served on and chaired numerous Committees, including: Chair of the National Prison Rape Elimination Commission (2004); the federal judiciary's Criminal Law Committee (2005-2011); and the federal judiciary's Committee on Court Administration and Case Management (2014-2017). In May 2007, Chief Justice John G. Roberts, Jr. appointed Judge Walton to serve as a judge of the United States Foreign Intelligence Surveillance Court, and in February 2013 he was elevated to the position of Presiding Judge. Before serving in these capacities, Judge Walton was appointed by President Ronald Reagan as Associate Judge of the Superior Court of the District of Columbia, where he served as Deputy Presiding Judge of the Criminal Division. Judge Walton left this judgeship to become Associate Director of the Office of National Drug Control Policy in the Executive Office of the President when asked by President George H.W. Bush. Later, Judge Walton served as Senior White House Advisor for Crime. President George H.W. Bush thereafter reappointed Judge Walton to the Superior Court of the District of Columbia, where he served as Presiding Judge of the Family Division and Presiding Judge of the Domestic Violence Unit. Judge Walton earned his Bachelor of Arts degree from West Virginia State College in 1971 and his Juris Doctor from The American University, Washington College of Law, in 1974.

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Appendix B: Map of Hearing Invitations

The 94 judicial districts were divided geographically based on their proximity to the cities in which the seven hearings were held. For each hearing, judges, defenders, CJA panel attorneys and others were invited from each of the targeted districts. This map illustrates which districts were targeted for each hearing.



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Appendix C: Survey Data Considered

The Committee reviewed considerable data in its evaluation. In addition to the testimony and submissions received as part of its seven public hearings held across the country, the Committee relied on three national surveys conducted by the Westat research group, reviewed data compiled by the Defender Services Management Information System ("DSMIS"), and created and fielded two surveys of its own.

The Westat Surveys

In 2014, the Administrative Office of the U.S. Courts awarded a contract to Westat to revise and administer surveys to three broad groups of respondents, i) federal judges, ii) federal defenders and resource counsel and iii) panel representatives and individual panel attorneys, about the quality of representation provided under the CJA and related statutes, and about the administration of the Defender Services program. The surveys elicited information to assist in evaluating program performance, including data to measure whether, and to what extent, changes may have occurred since baseline and subsequent surveys were completed earlier. Westat is a national research corporation consulting in statistical design, data collection and management, and research analysis.

Westat developed the surveys with input from a variety of sources, including the Defender Services Committee and its Subcommittee on Long Range Planning and Education, DSO staff, members of AO advisory and working groups, the AO Office of the Deputy Director, and Westat's own staff.

Judge Survey

In the first quarter of 2015, Westat emailed a survey to all 106 chief appeals and chief district court judges and to a randomly selected sample of an additional 582 other circuit, district, and magistrate judges drawn from the 1,222 judges appointed to their positions as full-time circuit, district, or magistrate judges in the 15 months prior to survey administration. Seventy-four percent of all judges who received the survey responded, although district (76%) and magistrate (80%) judges were much more likely to respond than were circuit (49%) judges.

The judge survey consisted of 123 questions, consisting of a background section and seven parts, including: Part I: Timeliness of Non-Capital CJA Representations; Part II: Quality of CJA Representations (Non-Capital Cases); Part III: Selection and Retention of Qualified CJA Panel Attorneys (Non-Capital Cases); Part IV: Voucher Administration (Non-Capital Cases); Part V: Case Budgeting for Non-Capital and Capital Representations; Part VI: Capital Representations (Capital Trials and Appeals and Capital Habeas Corpus); and Part VII: Final Comments. Part VI has two subparts: Part VI-A: Availability of Qualified Counsel for CJA Representations (Capital Trials and Appeals); and Part VI-B: Availability of Qualified Counsel for CJA Representations (Capital Habeas Corpus).

Panel Attorney Survey

The 2015 survey of panel attorneys was based on a similar 2009 survey of the same population to investigate program changes that had occurred in the intervening six years and to evaluate attorney strategies and performance measures set forth in the "Defender Services Program Strategic Plan." The survey of CJA panel representatives consisted of nine parts and 142 questions, whereas the survey of individual CJA panel attorneys had eight parts and 144 questions. Much of the individual panel attorney survey paralleled the district representative survey, with both containing background questions and survey items asking about the timeliness of CJA appointments, availability of qualified counsel, panel attorney rates, CJA panel management and administration, vouchers, training needs, national training program resources provided by DSO's Training Division, and panel attorney resources and support.

Surveys were administered over five months to a census of all 94 district representatives, and to a sample of 1,528 eligible individual panel attorneys. Since a nationwide list of panel attorneys did not exist, to develop a panel attorney population from which to draw a sample, DSO generated a list of attorneys from the CJA payment system. This list was made up of more than 8,500 attorneys who had received at least two voucher payments in the two years preceding the survey. Attorneys were contacted multiple times to achieve a response rate of 95 percent for the district representatives and 72 percent for individual CJA lawyers. Panel attorneys were given the option of taking the survey on paper or on the web.

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Defender Survey

The defender survey incorporated most of the questions from a companion survey conducted in 2009 to evaluate program changes that had occurred since the earlier survey and to assess attorney strategies and performance measures set forth in the Defender Services Program Strategic Plan. The 2015 Survey consisted of four parts and 85 questions, including a background section, Part I: Timeliness of CJA Appointments, Part II: Availability of Qualified Counsel for CJA Representations (for federal defenders only), Part III: FDO Management and Resources (federal defenders only), and Part IV: Training.

Westat emailed instructions for completing the web-based survey to all 81 heads of FDOs and one local CJA resource counsel from each of the three districts not served by an FDO. Subsequent follow-up took place via email and telephone to achieve an overall response rate of 94 percent.

CJA Review Committee Surveys

Given testimony it received, the Committee was especially interested in investigating the circumstances under which panel attorneys' vouchers are reduced by the court and the rate at which panel attorneys utilize service providers in CJA representations. No such data were available to answer the first question, for so-called voucher cutting is not tracked by the Defender Services Management Information System ("DSMIS"). In addressing the latter issue, the Committee reviewed reports from DSMIS that indicated the number and percentage of panel representations in which service providers were used, as well as the average payment per service provider, in each federal district for the 2013, 2014, and 2015 fiscal years.

To supplement the data from DSMIS on service providers, and to collect firsthand information on voucher review, the Committee conducted its own survey of panel attorneys about their experience in the approval of vouchers and service providers. The first challenge with collecting this information was to create a comprehensive list, as there is no national database of CJA panel attorneys. To compile the list, the Committee chair and staff reached out to all 94 districts requesting email addresses for all members of their CJA panel. Because panel management varies across the districts, this outreach was made to federal and community defenders, CJA administrators and clerks of court, some of whom were resistant to sharing their lists. When we did receive the information, it was delivered in a variety of formats: Word documents, PDFs, email listservs, and Excel files. Ultimately, we successfully located contact information for approximately 10,000 panel attorneys nationwide.

The list from each district was split in two—if we received lists for divisions within a district, those were also split in two—the Committee then sent an electronic survey to half inquiring about voucher review and a separate electronic survey to the other half asking about the use of service providers. Attorneys were contacted multiple times by email over several months to encourage them to respond and were offered the opportunity to respond electronically or through a paper survey. Of the more than 5,000 panel attorneys who received the survey on vouchers, 2660 lawyers responded, for a response rate of 54 percent. Among those queried about service providers, 2599 panel attorneys participated, reflecting a response rate of 53 percent. It is worth noting that, unlike the Westat survey, the Committee queried the universe of panel attorneys, not a sample, and had a limited number of staff to devote to follow-up. Still, the impressive response rates are more than twice the rate of most national polls and adequately reflect attorneys' views and experiences from across the country.

The Committee developed the surveys in collaboration with its members, the DSO's statistician, the Committee's reporter and staff, and a collection of panel representatives, defenders, and individual attorneys who provided feedback. The voucher survey included 20 questions, asking about the nature of attorneys' CJA practice, their billing procedures, and their experience with voucher review by the court. The service provider survey encompassed 28 questions and distinguished between non-capital and capital representations. It asked about the nature of attorneys' CJA practice, their inclination to use service providers, and their dealings with the court in making such requests. Both surveys sought demographic information from respondents and were designed to be short so that attorneys could complete them in ten minutes.

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Appendix D: Acronyms

ABA American Bar Association

AO Administrative Office [of the United States Courts]

ATF Alcohol Tobacco and Firearms

BAPO Budget, Accounting, and Procurement Office

CBA Case-Budgeting Attorney

CDA Coordinating Discovery Attorney

CDO Community Defender Office

CHU Capital Habeas Unit

CJA Criminal Justice Act

CMSO Case Management Systems Office

COL Cost of Living

DAWG Defender Services Automation Working Group

DSAG Defender Services Advisory Group

DSMIS Defender Services Management Information System

DOJ Department of Justice

DSC Defender Services Committee

DSO Defender Services Office

ESI Electronically Stored Information

FDO Federal Defender Office

FJC Federal Judicial Center

FPD Federal Public Defender

FPDO Federal Public Defender Office

FTE Full-Time Equivalent (describes amount of time a position is filled during a FY)

FY Fiscal Year

GB Gigabyte (1000 Megabytes)

HAT Habeas Assistance and Training

IT Information Technology

JETWG Joint Working Group on Electronic Technology

JCUS Judicial Conference of the United States

JRC Judicial Resources Committee

LLP Limited Liability Partnership

MB Megabyte

MOU Memorandum of Understanding

NACDL National Association of Criminal Defense Lawyers

NITOAD National IT Operations and Applications Development

NLST National Litigation Support Team

OGC Office of General Counsel

ODS Office of Defender Services

OLA Office of Legislative Affairs

PADR Panel Attorney District Representative

PCDO Post-Conviction Defender Organization

S&E Salaries and Expenses

TB Terabyte (1000 Gigabytes)

US United States

USC United States Code

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Appendix E: Patton-Sands Letter, March 30, 2017

Federal Defenders
OF NEW YORK, INC.

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David Patton
Executive Director and Attorney-in-Chief

March 30, 2017

Honorable Bob Goodlatte
Chair, House Judiciary Committee
2309 Rayburn House Office Building
Washington, D.C. 20515

Honorable Trey Gowdy
Chair, House Subcommittee on Crime, Terrorism, Homeland Security, and Investigations
2418 Rayburn House Office Building
Washington, DC 20515

Honorable John Conyers, Jr.
Ranking Member, House Judiciary Committee
2426 Rayburn House Office Building
Washington, D.C. 20515

Honorable Sheila Jackson Lee
Ranking Member, House Subcommittee on Crime, Terrorism, Homeland Security, and Investigations
187 Rayburn House Office Building
Washington, DC 20515

Re: Probation Officer Protection Act of 2017 (H.R. 1039)

Dear Mr. Goodlatte, Mr. Conyers, Mr. Gowdy and Ms. Jackson Lee:

We write on behalf of the Federal Public and Community Defenders in response to inquiries for our views on H.R. 1039, which would amend 18 U.S.C. § 3606 to give probation officers the authority to arrest, without a warrant, persons not subject to court supervision if there is probable cause to believe that the person has impeded or interfered with a probation officer in violation of 18 U.S.C. § 111. The bill was introduced last Congress, and we understand that there has been discussion of it being introduced again.

We oppose the bill because it would violate the Separation of Powers, would invite Fourth Amendment violations, is unnecessary for purposes of supervision or safety, and would instead escalate the risk of harm to all concerned and undermine effective supervision. The arrest or detention (to any degree) of persons not subject to court supervision should be left to law enforcement officers.

Summary

The bill would violate the Separation of Powers. Probation officers serve as administrative units employed by Article III courts. Congress may not assign to them the executive function of enforcing a criminal statute against private citizens not subject to court

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supervision. The bill would also undermine the integrity of the Judicial Branch by putting courts in the position of ruling on the constitutionality of arrests by their own agents, who are also interested arresting officers and alleged victims of an offense.

The bill would create serious Fourth Amendment problems. Assuming probation officers would use the bill's arrest authority only to formally arrest persons believed to have violated § 111, the bill would result in Fourth Amendment violations. Because § 111 is notoriously unclear, probation officers would inevitably arrest persons who are merely "uncooperative" but have not actually violated the statute. To allay concerns about giving probation officers the equivalent of police power over private citizens, the Judicial Conference assures Congress that probation officers would rarely make formal arrests but would instead exercise a "lesser included" power to control or temporarily restrain third parties short of formal arrest. But the Fourth Amendment would not permit probation officers to exercise such "lesser included" power. In holding that the Fourth Amendment allows police officers to temporarily restrain third parties during a search, the Supreme Court deemed it "of prime importance" that the officer had a warrant based on probable cause to search the premises. The bill would not change the fact that probation officers conduct searches without a warrant based on probable cause. Thus, any restraint of a third party by a probation officer absent probable cause to arrest would violate the Fourth Amendment.

The bill is unnecessary. Probation officers have authority under current law to search the homes of people they supervise (without a warrant or probable cause) and to arrest them for violating conditions of supervision (with probable cause). Pursuant to Judiciary Policy, probation officers have long relied on trained law enforcement officers to provide support during searches, including by managing third parties not under probation officers' supervision. No evidence has been presented, and we have found none, of any instance in which law enforcement officers have not assisted when asked, or in which anyone has been hurt by a third party during a search. Allowing probation officers to restrain and arrest third parties would likely increase, not diminish, any risk of harm.

The bill would undermine effective supervision. The bill represents a retreat from the current constructive role of probation officers in reintegrating offenders into society. If probation officers assumed the role of police, directing and restraining, or arresting, family and friends, progress in individual cases and the system as a whole would be undermined.

Background

Under current law, probation officers have limited special authority to conduct searches and seizures of persons on probation or supervised release for the sole purpose of assisting the district courts in supervising those persons. They are permitted, with or without a warrant, to conduct a search of a supervisee's home based only on "reasonable suspicion" that there is evidence on the premises that the supervisee has violated a condition of his or her supervision,

and to arrest a supervisee whom they have "probable cause to believe has violated a condition" of his or her supervision.[1]

Judiciary Policy directs probation officers, in planning a search, to "strongly consider requesting assistance from law enforcement officers for protection, instruction, and taking possession of contraband during a search,"[2] and to terminate any search "if it is unsafe for the [probation] officer to continue."[3]

Probation officers are further directed that they "may not restrain third parties during a search."[4] This is so because there is no authority for probation officers to detain third parties. The Supreme Court's decisions holding that the Fourth Amendment allows police officers to detain third parties during a search do not apply to probation officers, who both lack general law enforcement authority, and conduct searches in the absence of a finding by a neutral magistrate of probable cause to search the premises.[5] Instead, probation officers rely on law enforcement officers to manage third parties if needed, thereby avoiding Fourth Amendment violations and reducing any risk of harm.

A. The bill would violate the Separation of Powers.

H.R. 1039 would authorize probation officers to arrest, without a warrant, a person not subject to supervision if there is probable cause to believe the person has interfered with or

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[1] *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) (upholding, under "special needs" doctrine, warrantless search by probation officer based on reasonable suspicion); 18 U.S.C. § 3606 (authorizing probation officers to arrest those under supervision).

[2] Guide to Judiciary Policy, Vol. 8, Pt. E: *Supervision of Federal Offenders* (Monograph 109), § 450.40.10(e).

[3] *Id.*, Appx. 4A: Search & Seizure Guidelines II.C.1.

[4] *Id.*, Monograph 109 § 450.40.10(e).

[5] *See Michigan v. Summers*, 452 U.S. 692, 701 (1981) (fact that police obtained a warrant to search the home for contraband was "of prime importance" in allowing restraint of third party); *Muehler v. Mena*, 544 U.S. 93, 98-100 & n.2 (2005) (reaffirming that detention of third party justified when police obtained warrant based on probable cause); *see* Memorandum from John M. Hughes, Asst. Dir., Admin. Office of the U.S. Courts, to Chief Probation Officers, *Officers' Limited Law Enforcement Authority When Conducting Searches and Seizures* (Jan. 26, 2007) (probation officers "may not restrain third parties," and while they may be questioned, are "under no obligation to cooperate and must be free to leave"); Memorandum from Joe Gergits, Ass't Gen. Counsel, Admin. Office of the U.S. Courts Re: Questions Presented by Search and Seizure Working Group 5 (Jan. 17, 2007) (concluding that there is "no authority" under the Fourth Amendment for probation officers to detain third parties); *see also* David N. Adair, Jr., Ass't Gen. Counsel, Admin. Office of the U.S. Courts, *Probation Officer Searches*, 62 Fed. Probation J. 68-69 (1998) (policy was implemented after extensive study and stemmed in part from probation officers' lack of law enforcement authority).

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impeded a probation officer "while in the performance of his or her official duties" in violation of 18 U.S.C. § 111. By its terms, the statute would authorize probation officers to make such arrests at any time or place—during a search of a supervisee's home, on the street or at a place of business, or during a meeting at the probation officer's office.

By authorizing probation officers to enforce § 111 against private citizens not subject to court supervision, H.R. 1039 would violate the Separation of Powers. Probation officers are employed by the Judicial Branch to serve as administrative units of the district court, appointed by the court and removable by the court.[6] A probation officer performs no Article III function, but serves a statutory duty to assist the court in supervising offenders.[7]

Detecting crimes and enforcing criminal laws, in contrast, are "quintessential law enforcement functions vested in the Executive Branch."[8] Just as Congress may not confer executive duties "of a nonjudicial nature" on Article III judges,[9] Congress may not enlist an administrative arm of the Judicial Branch to perform an executive function.[10]

This is not only a formalistic concern. A probation officer who has arrested a private citizen for impeding the probation officer in his duties would naturally have a direct, personal interest in both the legality of the arrest and the outcome of any resulting criminal case. The court, in turn, is the probation officer's employer. When ruling on a challenge to the constitutionality of an arrest by a probation officer, the court would thus review the actions of its own agent, who is also the interested arresting officer and alleged victim of an offense. By putting the court in the triple position of judge, vicarious victim, and arresting agent of ordinary citizens, H.R. 1039 would undermine the integrity of the Judicial Branch.[11]

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[6] 18 U.S.C. § 3602; *United States v. Bernardine*, 237 F.3d 1279, 1282-83 (11th Cir. 2001) (the probation officer "is appointed by the district court and acts . . . under the discretion of the appointing court," and is an "arm of the court").

[7] 18 U.S.C. § 3603; *Bernadine*, 237 F.3d at 1283 (court may not delegate Article III function to a probation officer).

[8] *United States v. Lujan*, 504 F.3d 1003, 1007 (9th Cir. 2007); *see Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982) (the Executive "is entrusted with . . . the enforcement of federal law"); *United States v. Nixon*, 418 U.S. 683, 693 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . . .").

[9] *Mistretta v. United States*, 488 U.S. 361, 385 (1989) (quoting *Morrison v. Olson*, 487 U.S. 654, 677 (1988)).

[10] *See, e.g., id.* at 382 (Congress may not "reassign powers vested by the Constitution in either the Judicial Branch or the Executive Branch" to another branch); *Bowsher v. Synar*, 478 U.S. 714, 721-27 (1986) (separation of powers violated by assigning an executive function to an officer controlled by Congress); *Nixon*, 418 U.S. at 704 (power vested in the Executive "can no more be shared" with the Judiciary than Article III judicial power can be shared with the Executive Branch).

[11] *Mistretta*, 488 U.S. at 404 (Constitution "forbids [judges] to wear [two] hats at the same time").

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B. The bill would create serious Fourth Amendment problems.

Subject to "only a few specifically established and well delineated exceptions," the Fourth Amendment prohibits police officers from detaining persons (to any degree) absent probable cause or "prior approval by judge or magistrate."[12] Even assuming probation officers used the bill's arrest authority for no other purpose but to make formal arrests based on probable cause that a person has violated § 111, the bill would result in unconstitutional detentions.

Section 111 prohibits "forcibly" assaulting, resisting, opposing, impeding, intimidating, or interfering with an officer "while engaged in" the performance of official duties. While one would think that "forcible" conduct is easy to recognize in this context, the term is notoriously ambiguous, involving a "troublesome question of degree."[13] No physical contact is required even for assault,[14] and "forcibly" has been held to cover such conduct as a "fighting stance" with an "uncooperative attitude,"[15] but not to cover running away and struggling when tackled by police.[16] The statute is "not a model of clarity,"[17] "inartfully drafted," and leaving "major ambiguities,"[18] often requiring many pages of legal analysis to decipher.[19]

If even the courts find the statute unclear, a probation officer surely cannot be expected to make an accurate on-the-scene assessment of probable cause that a person has violated it. Some probation officers would inevitably use their new authority to arrest persons who are merely "uncooperative"—such as by refusing to identify themselves, declining to open a door, or attempting to leave the scene of a search—but who have not violated § 111. The bill would thus invite Fourth Amendment violations.

To allay potential concerns about giving probation officers the equivalent of police power over private citizens, the Judicial Conference assures Congress that probation officers would

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[12] *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993).

[13] *United States v. Cunningham*, 509 F.2d 961, 963 (D.C. Cir. 1975) (per curiam).

[14] *E.g.*, *United States v. Fallen*, 256 F.3d 1082, 1090 (11th Cir. 2001).

[15] *United States v. Waweru*, 628 F. App'x 608, 612 (10th Cir. 2015).

[16] *United States v. Davis*, 690 F.3d 127, 137 (2d Cir. 2012).

[17] *United States v. Hernandez-Hernandez*, 817 F.3d 207, 215 (5th Cir. 2016).

[18] *United States v. Chapman*, 528 F.3d 1215, 1218 (9th Cir. 2008).

[19] *See, e.g.*, *United States v. Marquez*, 2016 U.S. Dist. LEXIS 126014 (taking 28 pages to decide whether conduct is or is not "forcible").

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rarely make formal arrests for violations of § 111.[20] Instead, they would use a purported "lesser included" authority, during "searches and other work-related contacts (e.g., home visits)," to "verbally or if necessary by temporarily restraining" (i.e., with handcuffs) "uncooperative or hostile" third parties short of arrest.[21] Probation officers would not need probable cause to believe that a third party had violated § 111 in order to exercise this "lesser-included" authority; instead, they would direct, control and temporarily detain third parties whom they merely suspect have violated or will violate § 111, or believe to present a "potential safety risk."[22]

But the Fourth Amendment does not permit probation officers to exercise this "lesser included" power. Under an exception to the Fourth Amendment's probable cause requirement, police officers, *when executing a search warrant*, are permitted to temporarily restrain third parties absent probable cause for arrest, including by using handcuffs.[23] In holding such detentions to be "reasonable," the Supreme Court emphasized the fact—"of prime importance"—that the search was authorized by a neutral magistrate's finding of probable cause to search the premises.[24]

Probation officers, however, conduct searches without a warrant based on a finding of probable cause by a neutral magistrate,[25] and they conduct home visits with no suspicion at all.[26] For these reasons, the Administrative Office of the U.S. Courts in 2007 reaffirmed its policy that probation officers "may not restrain" or "restrict[] the movement of third parties" present during a search.[27] Under established Fourth Amendment law, third parties are "under no obligation to cooperate and must be free to leave."[28] The AO's General Counsel correctly noted that "increas[ing] [probation] officers' statutory arrest authority under § 3606" would not solve the

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[20] Letter from Hon. Ricardo S. Martinez, Chair, Jud. Conf. to Senator Orrin Hatch, at 2 (Feb. 13, 2017); Judicial Conference Proposal, *Criminal Judicial Procedure, Administration, and Technical Amendments Act of 2015*, at 26.

[21] *Ibid.*

[22] Judicial Conference Proposal, *Criminal Judicial Procedure, Administration, and Technical Amendments Act of 2015*, at 25-26.

[23] *See Muehler v. Mena*, 544 U.S. 93, 100 (2005); *Michigan v. Summers*, 452 U.S. 692, 705 (1981).

[24] *Summers*, 452 U.S. at 702; *Mena*, 544 U.S. at 99-100 & n.2.

[25] *See* Judicial Conference Proposal, *Criminal Judicial Procedure, Administration, and Technical Amendments Act of 2015*, at 25-26; Guide to Judiciary Policy, Appx. 4A: Search & Seizure Guidelines III.

[26] Guide to Judiciary Policy, Appx. 4A: Search & Seizure Guidelines VI.A.2.

[27] *See* AO, *Officers' Limited Law Enforcement Authority*, supra note 5, at 1; AO, *Search and Seizure Questions*, supra note 5, at 4-6.

[28] AO, *Officers' Limited Law Enforcement Authority*, supra note 5, at 1; AO, *Search and Seizure Questions*, *supra* note 5, at 5-6.

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Fourth Amendment problem because probation officers would still conduct searches without a warrant based on probable cause.[29]

Likewise, H.R. 1039 would not change the fact that probation officers conduct searches without a warrant based on a finding of probable cause, the factor "of prime importance" to the constitutionality of police officers restraining third parties during a search. As a result, any restraint or control of third parties by probation officers absent grounds for arrest would be an unconstitutional detention. The bill does not obviate this fundamental Fourth Amendment problem.

C. The bill is unnecessary.

U.S. Probation and Pretrial Services reported that in both 2014 and 2015, probation officers encountered third parties described as "uncooperative" (defined to include refusal to identify themselves, to come out of a closed room, or to remain in a designated area) in only 3 percent of reported searches.[30] Only two incidents of any significance were reported. In one, the supervisee's mother drove her car toward two officers "in an apparent attempt to hit them," but law enforcement officers were present and able to take any action needed.[31] In the other, a third party "refused to come out" of a closed room, but law enforcement officers were present, forced the door open, and found the person swallowing marijuana cigarettes.[32]

Nonetheless, the Federal Law Enforcement Officers Association ("FLEOA") claims that there is a new "heightened danger in field and office contacts" and that giving probation officers third-party arrest authority is the "only [] solution."[33] It claims that probation officers' ability to enlist law enforcement officers "provides little, if any, help" because sometimes only one police officer is available. It gives three anecdotal examples, but they do not support the FLEOA's argument, and in fact demonstrate that the bill is not the "only solution," much less a safe solution.

In the Northern District of Alabama, probation officers came to see their supervisee, but he was not at home. They were leaving the premises when they encountered his father, who was intoxicated, made threats, and threw an empty liquor bottle at their car. The probation officers drew their weapons, called 911, got behind their vehicle, then drove away. The FLEOA states

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[29] AO, *Search and Seizure Questions*, *supra* note 5, at 5.

[30] *See* Carrie Kent, Probation & Pretrial Services Office, *PPSO Releases 2015 Search-and-Seizure Data Report* (June 6, 2016) (30 of 987 searches); Carrie E. Kent, Probation & Pretrial Services Office, *PPSO Releases 2014 Search and Seizure Data Report* (Mar. 30, 2015) (27 of 909 searches).

[31] 2015 Search-and-Seizure Data Report, *supra* note 29.

[32] 2014 Search and Seizure Data Report, *supra* note 29.

[33] *See* FLEOA Proposal to Enhance the Safety of Probation Officers During the Performance of Their Official Duties.

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that with arrest authority, the probation officers "would have taken the third party into custody for assaulting them and for damaging government property." But the FLEOA does not explain why this would have been necessary for the purpose of supervising the son, who was not there, or to ensure anyone's safety. The police were fully capable of subduing or arresting the father, and most likely did, though that detail is omitted. Had the probation officers confronted the father, with guns drawn, they, the father, or innocent bystanders, including the offender's cooperative mother, may well have been hurt.

In the District of Utah, probation officers knocked on the door of their supervisee's residence and were told by his girlfriend that he was not at home and that no one else was there. The probation officers "ultimately encountered two third party felons hiding in separate locations," one of whom was suspected of homicide. The officers "issued their verbal commands," and the man became confrontational and challenged the officers to "shoot him." The officers retreated, and "local police ultimately subdued the third party and took him into custody." Again, the FLEOA does not explain how arrest authority would have increased the probation officers' or public safety any better than the police in fact accomplished.

In the Southern District of New York, probation officers looking to confirm that their supervisee did not live at his reported residence were "confronted" outside the residence, where the supervisee apparently did not live, with "a belligerent, unknown, third party." A physical altercation ensued, when "another third party charged forward swinging a pipe wrench." The officers used pepper spray and left. The FLEOA asserts that the probation officers "did not have the option to control the third parties," but instead were "forced to retreat." But the FLEOA does not explain how controlling the third parties, which would likely have escalated a potentially dangerous confrontation, was safer than retreat, much less the "only solution." The probation officers' mission was not urgent, and they were free to return with police support.

The Judicial Conference provides no empirical evidence or even anecdotal examples illustrating the purported need for H.R. 1039. It says that, "in the absence of other law enforcement officers acting in a supporting role," a supervisee can work with a "hostile or uncooperative" third party "to conceal violations of the terms of supervision, or even new criminal activity."[34] But the solution is the very one suggested and that has been directed by Judiciary Policy and followed by probation officers all along: obtain support from law enforcement officers.

There is not a single instance cited in the U.S. Probation Search-and-Seizure reports, in the FLEOA's proposal or recent letter,[35] or in the Judicial Conference's proposal or recent letter, in which probation officers requested law enforcement assistance in advance, or called for assistance from the scene, and law enforcement declined to assist or failed to show up. One of the dangers of the bill is that probation officers would not request law enforcement support, thinking they can handle any problems with their arrest authority. But potential problems are

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[34] Letter from Judge Martinez, *supra* note 19, at 1-2.

[35] Letter from Nathan R. Catura, Nat'l Pres., FLEOA, to Senator Orrin Hatch & Senator Dianne Feinstein (Jan. 6, 2017).

best averted by law enforcement officers, who not only have arrest authority, but "provide perimeter security, manage third parties, provide special services such as K9 support, and conduct initial security sweeps."[36]

D. The bill would undermine effective supervision.

H.R. 1039 represents an unfortunate retreat from the current role of probation officers, which has evolved from an oppositional focus on enforcement and punishment to a constructive collaboration aimed at addressing clients' criminogenic needs, reducing their risk of recidivism, and reintegrating them into society.[37] These "concerted efforts to bring to life state-of-the-art evidence-based supervision practices into the federal system" coincide with "[m]easurable decreases in federal recidivism." [38] As the Judicial Conference has recognized, supporting the offender "in efforts to turn away from criminal conduct . . . will necessarily . . . promote public safety."[39] And it has cautioned that searches "may undermine the rapport that an officer has developed with an offender and may hinder the progress that an offender has made."[40] We fear that the progress that has been made in individual cases and in the system as a whole would be undermined if probation officers assumed the role of police, directing, restraining and arresting family and friends, and potentially escalating the risk of confrontation and danger to all concerned.

Thank you for considering our views, and please do not hesitate to contact us if you have any questions.

Very Truly Yours,

/s
David Patton
Executive Director, Federal Defenders of New York
Co-Chair, Federal Defender Legislative Committee

/s
Jon Sands
Federal Defender, District of Arizona
Co-Chair, Federal Defender Legislative Committee

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[36] 2015 Search-and-Seizure Data Report, *supra* note 29.

[37] *See* Melissa Alexander & Scott VanBenschoten, *The Evolution of Supervision in the Federal Probation System*, 72 Fed. Probation 15-16 (2008); *see also* Monograph 109 § 140 (Philosophy), § 150 (Desired Outcomes and Goals of Supervision).

[38] Laura Baber, Chief, Nat'l Program Dev. Div., Prob. & Pretrial Services, Admin. Office of the U.S. Courts, *Inroads to Reducing Federal Recidivism*, 79 Fed. Probation J. 3, 3 (Dec. 2015).

[39] Guide to Judiciary Policy, Appx. 4A: Search & Seizure Guidelines II.B.2.

[40] *Id.*, II.B.6.

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Appendix F: Chart of Eighth Circuit Voucher Cuts

Date	Voucher #	Atty/Judge	Total Requested	Cut By	$ Amount Cut	% Cut	Comments
12/26/2012	130102-57	Eaton/RGK	$3,275.00				no cut
12/26/2012	130102-140	Lonowski/ JMG	$3,600.00				no cut
12/26/2012	130103-4	Primmer/LES	$18,087.50	WJR	$2,525.00	13.9	See In re Caryle 644F.3d 694, 699-700 (8th Cir. 2011) 186% of stat max
12/27/2012	130103-92	Thielen/LSC	$2,525.00				no cut
12/27/2012	130103.98	Wilson/LSC	$2,437.50				no cut
1/9/2013	130111-54	Lamb/RGK	$1,800.00				no cut
1/9/2013	130111-63	Lamb/RGK	$2,187.50	RGK	$475.00	21.70%	Cut by RGK for time spent with friend & family
1/9/2013	130111-51	Damman/RGK	$8,712.50				no cut
1/6/2013	130111-65	Stoler/LES	$12,962.50				no cut
1/25/2013	130205-34	Castrejon/TDT	$2,500.00	TDT	$100.00	4.00%	TDT adjusted total down to statutory maximum
2/11/2013	130213-197	Martinez/LES	$9,412.50	WJR	$1,887.00	20.00%	Withdrew, requiring some duplication See In re Caryle 644F.3d 694 not warrant
2/11/2013	130213-214	Bianco/LSC	$30,675.00	WJR	$1,575.00	5.13%	See In re Caryle 644F.3d 694, 699-700 (8th Cir. 2011) not warrant 3X of stat ma
2/11/2013	130213-198	Douglas/LES	$10,087.50				no cut
2/17/2013	130225-331	Bradford/JFB	$7,800.00				no cut
2/17/2013	130225-333	Lehan/JFB	$5,512.50	WJR	$1,412.50	25.60%	See In re Caryle 644F.3d 694 not warrant 137% of stat max
2/17/2013	130227-6	Schense/LES	$3,562.50				no cut
2/17/2013	130227-165	Nelsen/LES	$8,325.00				no cut
2/17/2013	130227-177	Gross/LES	$3,122.50				no cut
2/28/2013	130313-166	Thielen/JFB	$11,962.50				no cut
2/28/2013	130313-186	Berry/RGK	$4,687.50	WJR	$712.50	15.20%	No Trial; not very complex or extended; duplicative legal effort & fees
2/28/2013	130313-201	Murphree /RGK	$5,659.20				no cut
2/28/2013	130313-219	Lonowski/RGK	$6,012.50	WJR	$800.00	13.30%	No Trial; not very complex or extended, duplicative legal effort & fees
3/7/2013	130313-239	Bloom/ TDT	$2,457.50	TDT	$357.50	14.52%	TDT adjusted total down to statutory maximum
4/1/2013	130403-133	Eichmann/LES	$3,650.00	WJR	$1,500.00	61.05%	Withdrew - little value and caused duplication of time & effort
4/1/2013	130403-134	Bartling/LES	$4,737.50	WJR	$1,550.00	32.72%	Withdrew - reduced value and caused duplication of time & effort
4/1/2013	130403-135	Frost/LES	$10,762.50				no cut
4/4/2013	130408-99	Dornan/LES	$16,790.50				no cut
4/17/2013	130418-22	Dornan/JMG	$20,425.00				no cut
4/17/2013	130418-26	Gross/JMG	$11,550.00				no cut
4/17/2013	130418-30	Primmer/JMG	$21,425.00				no cut
4/17/2013	130426-115	Primmer/JMG	$9,960.00	WJR	$2,440.00	24.50%	complex, extened, long jury trial ,not warrant 2.5X's statutory maximum
4/17/2013	130426-129	Gross/LSC	$13,937.50				no cut
4/17/2013	130426-147	Aman/RGK	$16,075.00	RGK	$6,375.00	39.65%	Voucher very tardy and excessive time spent
4/18/2013	130430-44	Moore/WKU	$2,262.50				no cut
4/18/2013	130430-42	Frost/WKU	$1,112.50	WJR	$362.50	32.55%	Withdrew, See In re Caryle 644F.3d 694, 699-700 (8th Cir. 2011)
5/15/2013	130521-157	Heffron/JFB	$42,170.00	WJR	$3,182.50	7.54%	See In re Caryle 644F.3d 694, 699-700 (8th Cir. 2011)
5/16/2013	130521-171	Munnelly/LSC	$23,762.50	WJR	$3,012.50	12.67%	See In re Caryle 644F.3d 694, 699-700 (8th Cir. 2011)
6/14/2013	130618-3	Lonowski/RGK	$2,987.50				no cut
6/19/2013	130622-2	Damman/RGK	$28,825.00				no cut
6/19/2013	130622-3	Bianchi/RGK	$3,950.00				no cut
6/27/2013	130628-22	Aman/RGK	$5,100.00				no cut
7/17/2013	130719-86	Gooch/ RGK	$4,050.00				no cut
8/1/2013	130813-183	Milburn/RGK	$17,787.50				no cut
8/1/2013	130813-186	Lonowski/RGK	$2,687.50				no cut
9/6/2013	130912-49	Gooch/JMG	$10,575.00				no cut
9/11/2013	130917-32	Gross/LES	$10,400.00				no cut
9/19/2013	131007-57	Damman/JMG	$10,800.00				no cut



10/9/2013	131016-114	Munderloh/RGK	$1,050.00				no cut
10/29/2013	131031-21	Frost/LSC	$11,775.00				no cut
10/29/2013	131031-23	Weber/LSC	$14,762.50	WJR	$2,137.50	14.47%	No trial; large discovery Not warrant 152% of stat max. See In re Caryle
11/1/2013	131108-149	Nelson/JFB	$3,226.00				no cut
11/13/2013	131115-18	Milburn/JMG	$912.50	WJR	$275.00	30.15%	See In re Caryle 644F.3d 694, 699-700 (8th Cir. 2011)
11/13/2013	131115-22	Weber/JMG	$12,475.00	WJR	$1,287.50	10.31%	176% of stat max. See In re Caryle 644F.3d 694, 699-700 (8th Cir. 2011)
11/13/2013	131115-24	Stoler/JMG	$3,762.50				no cut
11/14/2013	131119-49	Weber/RGK	$2,887.50				no cut
11/25/2013	131203-9	Barber/RGK	$2,850.00				no cut
1/24/2014	140203-11	Eichmann/JFB	$2,975.50				no cut
1/24/2014	140203-14	Soucie/JFB	$11,065.00				no cut
2/4/2014	140207-56	Bubak/LSC	$56,297.50	WJR	$5,000.00	8.88	See In re Caryle 644F.3d 694 not warrant 580% of stat max
2/16/2014	140224-131	Risko/ JFB	$17,764.50				no cut
2/16/2014	140224-140	Damman /LES	$11,606.00				no cut
2/19/2014	140224-150	Damman/RGK	$13,841.50				no cut
3/3/2014	140305.27	Wheelock/RGK	$27,647.50	WJR	$2,228.70	8.05	See In re Caryle 644F.3d 694, 699-700 (8th Cir. 2011) 285% of stat max
3/14/2014	140320-53	Thielen/JFB	$12,292.50				no cut
3/14/2014	140320-48	Bianchi / LSC	$13,830.50	WJR	$1,173.00	8.48	See In re Caryle 644F.3d 694, 699-700 (8th Cir. 2011) 142% of stat max
3/25/2014	140401-19	Sipple/JFB	$10,705.50	JFB	$120.00	1.12	Math error ?
3/27/2014	140401.27	Gooch/JFB	$10,991.00	WJR	$589.00	5.35	See In re Caryle 644F.3d 694, 699-700 (8th Cir. 2011) 113% of stat max
4/11/2014	140415-168	McGowan/FG3	$2,387.00				NO CUT
4/22/2014	140424-42	Gross/LES	$13,843.80				no cut
5/8/2014	140514-45	Nelson/RGK	$20,722.80				no cut
7/3/2014	140708-175	Barber/RGK	$13,362.00				no cut
8/10/2014	140812-23	London/LSC	$11,210.10	WJR	$543.90	4.85	See In re Caryle 644F.3d 694, 699-700 (8th Cir. 2011)
8/10/2014	140812-39	Soucie/JMG	$11,267.80				no cut
8/10/2014	140812-47	Nelson/JMG	$10,788.70				no cut
8/11/2014	140819-95	Frost/ LES	$5,136.00	WJR	$914.00	17.79	See In re Caryle 644F.3d 694, 699-700 (8th Cir. 2011) 244% of stat max
9/2/2014	140905-18	Gooch/JFB	$26,671.80				no cut
9/2/2014	140905-14	Thielen/JFB	$905.00	WJR	$500.00	55.24	See In re Caryle 644F.3d 694, 699-700 (8th Cir. 2011) withdrew
9/27/2014	141003-33	Schense/LSC	$13,718.00				no cut
9/27/2014	141003-26	Heffron/LSC	$14,223.10				no cut
10/31/2014	141105.45	Milburn / JMG	$12,054.40	WJR	$1,029.40	8.53	See In re Caryle 644F.3d 694, 699-700 (8th Cir. 2011)
10/31/2014	141105-64	Milburn/ JMG	$3,189.20				no cut
10/31/2014	141105-68	Aman/JMG	$7,990.00	WJR	$739.00	9.24	See In re Caryle 644F.3d 694, 699-700 (8th Cir. 2011) withdrew
11/10/2014	141113-66	Stoler / RGK	$13,964.40				no cut
11/10/2014	141113-61	Sullivan/RGK	$627.00	WJR	$239.00	38.11	See In re Caryle 644F.3d 694, 699-700 (8th Cir. 2011) withdrew
11/14/2014	141120-5	Berry/TDT	$4,462.51				no cut
11/26/2014	141203-16	Berry/LSC	$23,950.00				no cut
12/19/2014	141229-127	McGough/JMG	$13,327.60				no cut
12/12/2014	141229-134	Lunn/RGK	$10,760.40				no cut
12/17/2014	141229-137	Cunningham/JFB	$12,036.70				no cut
12/12/2014	141229-129	Wheelock/JFB	$18,131.40	WJR	$2,599.50	14.33	See In re Caryle 644F.3d 694, 699-700 (8th Cir. 2011) 185% of stat max
1/8/2015	150113-19	Frank/ JFB	$10,301.70				no cut
2/5/2015	150209-190	Lunn/JMG	$2,255.40				no cut
2/5/2015	150209-198	Beeder/JMG	$12,625.60	WJR	$676.00	5.35	See In re Caryle 644F.3d 694 not warrant 128% of stat max
2/17/2015	150220-11	Gross/JFB	$4,605.73				no cut
2/27/2015	150303-20	Cunningham/JFB	$14,259.40				no cut

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2/27/2015	150303-20	Cunningham/JFB	$14,259.40				no cut
2/27/2015	150303-22	Primmer/JFB	$13,886.30				no cut
2/27/2015	150303-42	Dornan/JFB	$11,138.90				no cut
2/27/2015	150303-51	Nelson /JFB	$18,930.30				no cut
3/5/2015	150312-48	Dornan/RTD	$2,696.40				no cut
4/24/2015	150430-5	Hug/JFB	$14,700.00				no cut
4/24/2015	150429-65	Gross/JFB	$14,700.00				no cut
5/18/2015	150518-43	Dodge/JFB	$5,676.00				no cut
5/26/2015	150601-144	Waite/LSC	$11,234.00				no cut
6/17/2015	150619-21	Schense/JFB	$45,646.30				no cut
6/17/2015	150619-24	Weber/JFB	$7,020.00				no cut
7/9/2015	867-84	Regan/JFB	$14,730.50				no cut
7/9/2015	867-154	Tasset/ LSC	$12,167.80	WJR	$886.50	7.28	See In re Carlyle, 644 F3d 694, 699-700 (8th Cir.)
7/27/2015	150803-76	Lunn/JMG	$10,639.40	JMG	$739.00	6.94	Cut by Gerrard to avoid having to send to Circuit
8/17/2015	150821-91	Kelly/ TDT	$1,989.10				no cut
8/17/2015	150821-95	Dornan/ JMG	$19,998.05				no cut
8/17/2015	150821-93	Braaten / JMG	$14,456.60				no cut
8/21/2015	867-66	Heffron/LSC	$17,659.90				no cut
10/6/2015	867-145	Primmer/JFB	$5,000.00				no cut
10/15/2015	867-120	Dodge/JFB	$30,463.54				no cut
10/25/2015	867-214	Thielen/LSC	$31,286.70				no cut
11/10/2015	867-320	Bradford/JFB	$23,628.10	WJR	$2,213.90	9.36	not justify 238% of max See In re Carlyle, 644 F3d 694, 699-700 (
11/16/2015	151112-7	Hug/JFB	$3,500.00				no cut
12/15/2015	867-351	Howard/JFB	$4,992.30				no cut
12/15/2015	867-426	Howard/JFB	$5,017.49				no cut
1/10/2016	867-13	Hug/JFB	$22,280.55				no cut
1/10/2016	867-157	Barber/JMG	$16,833.93				no cut
1/11/2016	867-429	Howard/JFB	$34,650.00	WJR	$2,650.00	7.64	No prior approval and unusually high
1/28/2016	867-358	Troia/TDT	$26,055.30	TDT	$3,908.00	15	TDT suggested a 15% reduction, attorney agreed . Interim pay
2/4/2016	867-266	Howard/JFB	$14,147.60				no cut
2/26/2016	867-262	Kaplan/JFB	$4,500.00				no cut
3/24/2016	867-169	Bradford/ JFB	$12,372.30				no cut
4/1/2016	867-9	Hug/JMG	$11,906.80	WJR	$1,081.50	9.07	See In re Carlyle, 644 F.3d 694, 699-700 (8th Cir. 2011).
4/1/2016	867-564	Thielen/ JMG	$10,947.40				no cut
5/11/2016	867-78	Eaton/LSC	$9,610.70				no cut
5/11/2016	867-686	Gnabasik / LSC	$3,897.70	WJR	$221.90	5.67%	Some duplication with withdrawal.
5/11/2016	867-735	Sleister/LSC	$11,391.90				no cut
			$1,534,394.60		$60,019.30		

Key to Abbreviations

JFB Joseph F. Bataillon, Senior United States District Judge
JMG John M. Gerrard, United States District Judge
RGK Richard G. Kopf, Senior United States District Judge
TDT Thomas D. Thalken, United States Magistrate Judge
WJR William Jay Riley, Chief Judge United States Court of Appeals for the Eighth District



Appendix G: Service Provider Usage and Payments, by Circuit

Non-Capital Service Provider Payments

(Excludes capital and immigraton representations and payments made to interpreters.)

Because representations may be active over multiple fiscal years, aggregate costs and number of service providers paid may vary when reported by representations across fiscal years.

Data Source: DSMIS CJA data from CJA 6X and eVoucher data feed.

		FY 2014				FY 2015			
Circuit	District	Attorney Representations	Representations In Which Service Providers Were Used	Percentage of Representations In Which Service Providers Were Used	Average Service Provider Payments Per Attorney Representation In This Fiscal Year	Attorney Representations	Representations In Which Service Providers Were Used	Percentage of Representations In Which Service Providers Were Used	Average Service Provider Payments Per Attorney Representation In This Fiscal Year
01	MAX	442	106	24%	$870	517	90	17%	$607
01	MEX	246	46	19%	$373	269	36	13%	$383
01	NHX	108	24	22%	$515	144	22	15%	$446
01	PRX	1,056	52	5%	$94	916	101	11%	$188
01	RIX	55	4	7%	$80	54	4	7%	$332
Circuit 01		1,907	232	12%	$333	1,900	253	13%	$353
02	CTX	425	86	20%	$552	390	61	16%	$559
02	NYE	671	152	23%	$789	569	114	20%	$1,276
02	NYN	247	9	4%	$88	221	7	3%	$68
02	NYS	1,228	284	23%	$2,301	1,438	327	23%	$1,309
02	NYW	239	33	14%	$244	223	29	13%	$360
02	VTX	194	40	21%	$624	177	40	23%	$519
Circuit 02		3,004	604	20%	$1,262	3,018	578	19%	$998
03	DEX	57	10	18%	$805	39	8	21%	$1,684
03	NJX	449	83	18%	$4,346	412	92	22%	$1,851
03	PAE	529	64	12%	$757	414	57	14%	$542
03	PAM	292	18	6%	$206	284	11	4%	$90
03	PAW	312	27	9%	$177	448	47	10%	$297
03	VIX	70	2	3%	$65	47	2	4%	$235
Circuit 03		1,709	204	12%	$1,473	1,644	217	13%	$743
04	MDX	845	182	22%	$263	653	102	16%	$238
04	NCE	436	140	32%	$338	319	129	40%	$413
04	NCM	458	17	4%	$52	353	5	1%	$19
04	NCW	539	12	2%	$49	723	18	2%	$54
04	SCX	392	36	9%	$173	306	20	7%	$80
04	VAE	578	27	5%	$174	445	28	6%	$295
04	VAW	329	15	5%	$90	284	7	2%	$56
04	WVN	205	15	7%	$113	273	10	4%	$71
04	WVS	255	34	13%	$250	204	23	11%	$160
Circuit 04		4,037	478	12%	$175	3,560	342	10%	$157
05	LAE	152	16	11%	$260	160	15	9%	$225
05	LAM	52	2	4%	$80	44	5	11%	$206
05	LAW	199	15	8%	$497	146	11	8%	$798
05	MSN	90	4	4%	$299	85	1	1%	$28
05	MSS	127	5	4%	$43	113	4	4%	$57
05	TXE	423	13	3%	$43	558	17	3%	$83
05	TXN	656	29	4%	$251	669	28	4%	$327
05	TXS	1,947	37	2%	$60	1,811	22	1%	$26
05	TXW	2,613	51	2%	$34	2,372	25	1%	$16
Circuit 05		6,259	172	3%	$90	5,958	128	2%	$87
06	KYE	738	17	2%	$65	685	28	4%	$129
06	KYW	88	3	3%	$72	77	1	1%	$6
06	MIE	552	83	15%	$553	597	80	13%	$976
06	MIW	265	38	14%	$1,355	232	27	12%	$168
06	OHN	522	27	5%	$261	505	23	5%	$143
06	OHS	265	18	7%	$228	275	16	6%	$199
06	TNE	503	129	26%	$427	438	105	24%	$537
06	TNM	261	107	41%	$1,562	236	85	36%	$1,290
06	TNW	278	21	8%	$142	239	12	5%	$144
Circuit 06		3,472	443	13%	$454	3,284	377	11%	$430

No recommendation presented herein represents the policy of the Judicial Conference of the United States unless approved by the Conference itself.



		FY 2014				FY 2015			
Circuit	District	Attorney Representations	Representations In Which Service Providers Were Used	Percentage of Representations In Which Service Providers Were Used	Average Service Provider Payments Per Attorney Representation In This Fiscal Year	Attorney Representations	Representations In Which Service Providers Were Used	Percentage of Representations In Which Service Providers Were Used	Average Service Provider Payments Per Attorney Representation In This Fiscal Year
07	ILS	222	6	3%	$28	213	3	1%	$16
07	INN	240	12	5%	$76	234	18	8%	$115
07	INS	235	17	7%	$61	233	18	8%	$140
07	WIE	333	21	6%	$66	289	19	7%	$86
07	WIW	85	12	14%	$160	82	10	12%	$201
Circuit 07		1,979	156	8%	$232	1,930	142	7%	$178
08	ARE	196	6	3%	$131	170	1	1%	$14
08	ARW	249	5	2%	$35	220	-	0%	$0
08	IAN	390	14	4%	$62	464	9	2%	$25
08	IAS	222	16	7%	$132	228	17	7%	$82
08	MNX	211	53	25%	$886	283	66	23%	$932
08	MOE	331	17	5%	$72	401	27	7%	$180
08	MOW	455	79	17%	$125	429	31	7%	$43
08	NDX	200	33	17%	$232	240	49	20%	$264
08	NEX	281	32	11%	$118	255	36	14%	$249
08	SDX	338	79	23%	$693	247	69	28%	$804
Circuit 08		2,873	334	12%	$233	2,937	305	10%	$243
09	AKX	149	32	21%	$637	114	28	25%	$1,369
09	AZX	5,040	261	5%	$163	4,876	272	6%	$157
09	CAC	1,723	736	43%	$2,148	1,453	581	40%	$2,058
09	CAE	843	263	31%	$825	813	330	41%	$1,390
09	CAN	542	143	26%	$1,410	534	142	27%	$1,112
09	CAS	3,505	745	21%	$285	3,120	711	23%	$352
09	GUX	23	2	9%	$138	33	1	3%	$35
09	HIX	206	5	2%	$104	204	8	4%	$100
09	IDX	166	21	13%	$558	150	12	8%	$1,056
09	MPX	30	5	17%	$274	20	4	20%	$1,389
09	MTX	162	48	30%	$603	269	61	23%	$669
09	NVX	374	127	34%	$3,835	334	112	34%	$3,404
09	ORX	680	312	46%	$3,084	528	283	54%	$3,591
09	WAE	346	78	23%	$2,800	313	73	23%	$1,382
09	WAW	557	103	18%	$459	479	78	16%	$477
Circuit 09		14,346	2,881	20%	$840	13,240	2,696	20%	$817
10	COX	422	167	40%	$1,620	384	151	39%	$1,694
10	KSX	581	41	7%	$252	578	43	7%	$675
10	NMX	996	150	15%	$451	989	152	15%	$582
10	OKE	46	6	13%	$180	49	2	4%	$10
10	OKN	125	7	6%	$154	108	12	11%	$282
10	OKW	181	5	3%	$44	179	15	8%	$140
10	UTX	317	102	32%	$2,601	260	78	30%	$2,942
10	WYX	218	33	15%	$730	200	35	18%	$520
Circuit 10		2,886	511	18%	$796	2,747	488	18%	$925
11	ALM	141	18	13%	$378	91	10	11%	$339
11	ALN	235	6	3%	$94	163	6	4%	$80
11	ALS	231	12	5%	$53	127	4	3%	$46
11	FLM	535	113	21%	$382	545	103	19%	$240
11	FLN	149	7	5%	$68	130	8	6%	$121
11	FLS	721	278	39%	$1,025	703	258	37%	$1,024
11	GAM	277	4	1%	$34	203	11	5%	$183
11	GAN	309	94	30%	$451	275	51	19%	$393
11	GAS	611	16	3%	$23	544	7	1%	$13
Circuit 11		3,209	548	17%	$375	2,781	458	16%	$384
DC	DCX	357	91	25%	$936	279	65	23%	$687
National		46,038	6,654	14%	$582	43,278	6,049	14%	$533

Notes:
FY 2014 = From 10/01/2013 through 09/30/2014 FY 2015 = From 10/01/2014 through 09/30/2015
Percentage of Representations In Which Service Providers Were Used = (Representations In Which Service Providers Were Used/ Attorney Representations) * 100 Average Service Provider Payments Per Attorney Representation In This Fiscal Year = Service Provider Payments in this Fiscal Year /Attorney Representations

Service Provider and Attorney Reps

(Expert Services Workload—District Courts, Non Capital, No Immigration Cases, No Interpreters)
(Attorney Workload—District Courts, Non Capital, No Immigration Cases)

		FY 2013				FY 2014			
Circuit	District	Atty Reps	Service Provider Reps	% of Service Provider Reps	Average Service Provider Payments Per Atty Rep	Atty Reps	Service Provider Reps	% of Service Provider Reps	Average Service Provider Payments Per Atty Rep
01	MAX	445	109	24%	$ 1,068	442	106	24%	$ 870
01	MEX	250	36	14%	$ 305	246	46	19%	$ 373
01	NHX	129	19	15%	$ 490	108	24	22%	$ 515
01	PRX	874	43	5%	$ 120	1,056	52	5%	$ 94
01	RIX	78	6	8%	$ 113	55	4	7%	$ 80
Circuit 01		1,776	213	12%	$ 410	1,907	232	12%	$ 333
02	CTX	482	83	17%	$ 1,446	425	86	20%	$ 552
02	NYE	581	114	20%	$ 961	671	152	23%	$ 789
02	NYN	289	7	2%	$ 49	247	9	4%	$ 88
02	NYS	1,371	390	28%	$ 1,126	1,228	284	23%	$ 2,301
02	NYW	232	35	15%	$ 339	239	33	14%	$ 244
02	VTX	201	43	21%	$ 645	194	40	21%	$ 624
Circuit 02					3,156 672 21% $ 957				3,004 604 20% $ 1,262
03	DEX	29	3	10%	$ 540	57	10	18%	$ 805
03	NJX	380	65	17%	$ 1,615	449	83	18%	$ 4,346
03	PAE	564	81	14%	$ 677	529	64	12%	$ 757
03	PAM	288	15	5%	$ 240	292	18	6%	$ 206
03	PAW	306	41	13%	$ 455	312	27	9%	$ 177
03	VIX	55	5	9%	$ 167	70	2	3%	$ 65
Circuit 03		1,622	210	13%	$ 757	1,709	204	12%	$ 1,473
04	MDX	868	173	20%	$ 262	845	182	22%	$ 263
04	NCE	581	118	20%	$ 473	436	140	32%	$ 338
04	NCM	304	16	5%	$ 73	458	17	4%	$ 52
04	NCW	483	22	5%	$ 174	539	12	2%	$ 49
04	SCX	521	34	7%	$ 304	392	36	9%	$ 173
04	VAE	572	24	4%	$ 173	578	27	5%	$ 174
04	VAW	230	10	4%	$ 78	329	15	5%	$ 90
04	WVN	192	22	11%	$ 336	205	15	7%	$ 113
04	WVS	180	19	11%	$ 154	255	34	13%	$ 250
Circuit 04		3,931	438	11%	$ 248	4,037	478	12%	$ 175
05	LAE	126	10	8%	$ 132	152	16	11%	$ 260
05	LAM	56	9	16%	$ 223	52	2	4%	$ 80
05	LAW	210	13	6%	$ 148	199	15	8%	$ 497
05	MSN	63	1	2%	$ 12	90	4	4%	$ 299
05	MSS	192	4	2%	$ 27	127	5	4%	$ 43
05	TXE	519	11	2%	$ 30	423	13	3%	$ 43
05	TXN	446	20	4%	$ 90	656	29	4%	$ 251
05	TXS	1,801	47	3%	$ 175	1,947	37	2%	$ 60
05	TXW	2,690	43	2%	$ 36	2,613	51	2%	$ 34
Circuit 05		6,103	158	3%	$ 87	6,259	172	3%	$ 90
06	KYE	589	9	2%	$ 27	738	17	2%	$ 65
06	KYW	122	6	5%	$ 80	88	3	3%	$ 72
06	MIE	540	65	12%	$ 843	552	83	15%	$ 553
06	MIW	284	41	14%	$ 706	265	38	14%	$ 1,355
06	OHN	531	24	5%	$ 194	522	27	5%	$ 261
06	OHS	237	14	6%	$ 156	265	18	7%	$ 228
06	TNE	487	123	25%	$ 302	503	129	26%	$ 427
06	TNM	288	128	44%	$ 1,597	261	107	41%	$ 1,562
06	TNW	341	36	11%	$ 266	278	21	8%	$ 142
Circuit 06		3,419	446	13%	$ 444	3,472	443	13%	$ 454

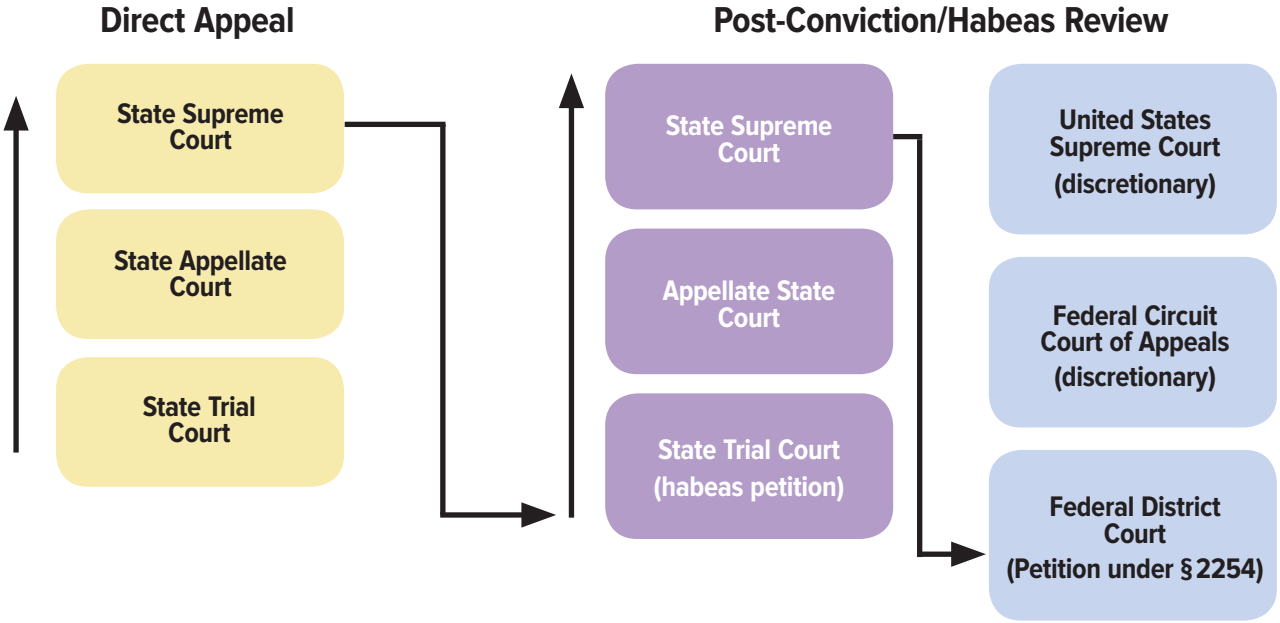
No recommendation presented herein represents the policy of the Judicial Conference of the United States unless approved by the Conference itself.



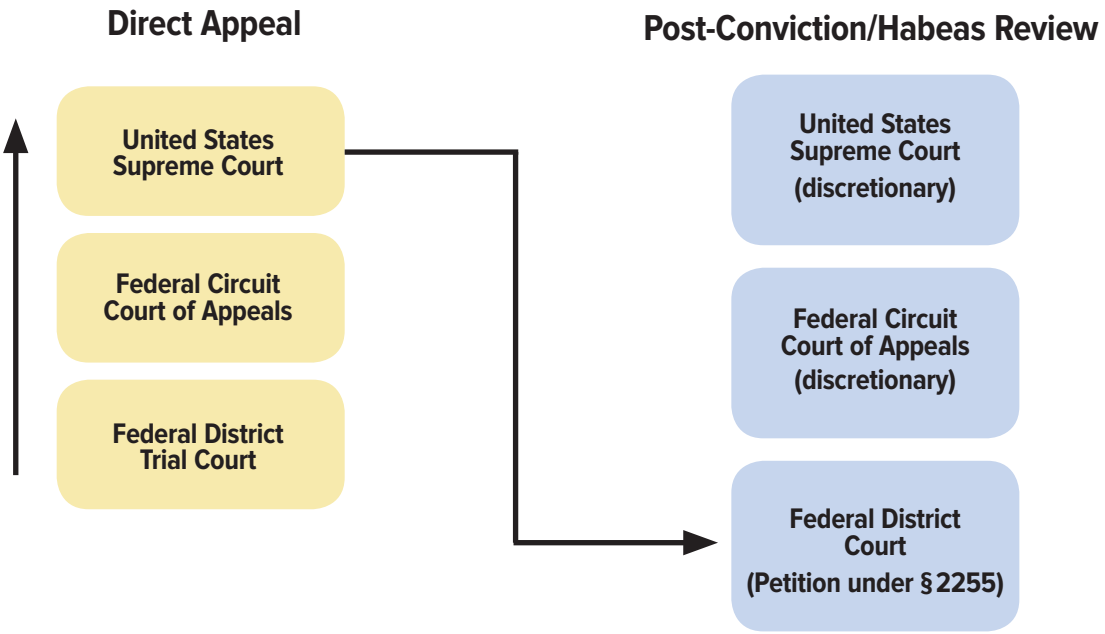
		FY 2013				FY 2014			
Circuit	District	Atty Reps	Service Provider Reps	% of Service Provider Reps	Average Service Provider Payments Per Atty Rep	Atty Reps	Service Provider Reps	% of Service Provider Reps	Average Service Provider Payments Per Atty Rep
07	ILC	162	17	10%	$ 162	212	12	6%	$ 56
07	ILN	696	77	11%	$ 539	652	76	12%	$ 573
07	ILS	201	8	4%	$ 69	222	6	3%	$ 28
07	INN	223	13	6%	$ 177	240	12	5%	$ 76
07	INS	228	19	8%	$ 72	235	17	7%	$ 61
07	WIE	363	14	4%	$ 25	333	21	6%	$ 66
07	WIW	81	16	20%	$ 659	85	12	14%	$ 160
Circuit 07		1,954	164	8%	$ 273	1,979	156	8%	$ 232
08	ARE	230	6	3%	$ 50	196	6	3%	$ 131
08	ARW	199	5	3%	$ 20	249	5	2%	$ 35
08	IAN	302	12	4%	$ 94	390	14	4%	$ 62
08	IAS	311	13	4%	$ 54	222	16	7%	$ 132
08	MNX	213	52	24%	$ 817	211	53	25%	$ 886
08	MOE	339	23	7%	$ 131	331	17	5%	$ 72
08	MOW	333	177	53%	$ 479	455	79	17%	$ 125
08	NDX	150	23	15%	$ 273	200	33	17%	$ 232
08	NEX	337	29	9%	$ 50	281	32	11%	$ 118
08	SDX	234	35	15%	$ 332	338	79	23%	$ 693
Circuit 08		2,648	375	14%	$ 217	2,873	334	12%	$ 233
09	AKX	132	22	17%	$ 348	149	32	21%	$ 637
09	AZX	5,239	394	8%	$ 223	5,040	261	5%	$ 163
09	CAC	1,789	684	38%	$ 1,966	1,723	736	43%	$ 2,148
09	CAE	825	339	41%	$ 882	843	263	31%	$ 825
09	CAN	552	162	29%	$ 1,619	542	143	26%	$ 1,410
09	CAS	3,428	724	21%	$ 301	3,505	745	21%	$ 285
09	GUX	37	1	3%	$ 30	23	2	9%	$ 138
09	HIX	130	3	2%	$ 50	206	5	2%	$ 104
09	IDX	179	27	15%	$ 425	166	21	13%	$ 558
09	MPX	35	6	17%	$ 388	30	5	17%	$ 274
09	MTX	175	37	21%	$ 454	162	48	30%	$ 603
09	NVX	387	133	34%	$ 6,916	374	127	34%	$ 3,835
09	ORX	484	250	52%	$ 3,683	680	312	46%	$ 3,084
09	WAE	262	61	23%	$ 1,698	346	78	23%	$ 2,800
09	WAW	604	99	16%	$ 524	557	103	18%	$ 459
Circuit 09		14,258	2,942	21%	$ 896	14,346	2,881	20%	$ 840
10	COX	507	198	39%	$ 1,727	422	167	40%	$ 1,620
10	KSX	411	37	9%	$ 293	581	41	7%	$ 252
10	NMX	805	154	19%	$ 1,122	996	150	15%	$ 451
10	OKE	56	2	4%	$ 26	46	6	13%	$ 180
10	OKN	119	7	6%	$ 272	125	7	6%	$ 154
10	OKW	196	5	3%	$ 40	181	5	3%	$ 44
10	UTX	400	140	35%	$ 1,649	317	102	32%	$ 2,601
10	WYX	181	19	10%	$ 484	218	33	15%	$ 730
Circuit 10		2,675	562	21%	$ 1,005	2,886	511	18%	$ 796
11	ALM	110	11	10%	$ 214	141	18	13%	$ 378
11	ALN	327	7	2%	$ 61	235	6	3%	$ 94
11	ALS	255	5	2%	$ 12	231	12	5%	$ 53
11	FLM	706	121	17%	$ 194	535	113	21%	$ 382
11	FLN	143	11	8%	$ 161	149	7	5%	$ 68
11	FLS	870	295	34%	$ 1,214	721	278	39%	$ 1,025
11	GAM	172	5	3%	$ 50	277	4	1%	$ 34
11	GAN	253	77	30%	$ 249	309	94	30%	$ 451
11	GAS	505	12	2%	$ 19	611	16	3%	$ 23
Circuit 11		3,341	544	16%	$ 402	3,209	548	17%	$ 375
DC	DCX	280	113	40%	$ 1,934	357	91	25%	$ 936
National		45,163	6,837	15%	$ 586	46,038	6,654	14%	$ 582

Appendix H: Flowchart of the Path of Capital Cases in State and Federal Courts

State Capital Cases Under 28 U.S.C. § 2254



Federal Capital Cases Under 28 U.S.C. § 2255



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Appendix I: Position Letter from Defender Services Committee

Judicial Conference of the United States
Committee on Defender Services
United States Courthouse
101 West Lombard Street, Room 7310
Baltimore, Maryland 21201-2605

Chair
Catherine C. Blake

Members
Sharon Lovelace Blackburn
Kathleen Cardone
Raner C. Collins
Jonathan W. Feldman
Katharine Sweeney Hayden
Gladys Kessler
Raymond J. Lohier, Jr.
Jane E. Magnus-Stinson
Harry S. Mattice, Jr.
Landya McCafferty
Eric F. Melgren
John A. Ross

Telephone:
(410) 962-3220
Fax:
(410) 962-6836

July 22, 2016

Honorable Kathleen Cardone
United States District Court
Albert Armendariz, Sr.
United States Courthouse
525 Magoffin Avenue, Room 561
El Paso, TX 79901

Dear Judge Cardone,

Thank you for your service as Chair of the Ad Hoc Committee to Review the CJA. The Defender Services Committee appreciated the opportunity to meet with your committee in June, and this letter is to formally submit the Defender Services Committee's positions discussed with you at that time.

The Defender Services Committee (DSC) unanimously recommends the following changes to the Defender Services program as a minimum threshold:

1. The Defender Services Office (DSO) should be restored to a position of greater independence within the Administrative Office (AO). Specifically, DSO should report directly to the Director of the AO and should not be within any other Department.
2. The Defender IT functions should be returned to DSO and DSO should receive the staff and funding adequate to support those functions.
3. Jurisdiction over federal defender office compensation, staffing, and training should be restored to the DSC.
4. The DSC should have a panel attorney and at least one federal defender as voting members.
5. Judicial involvement in voucher review and approval of expert services should be eliminated or significantly reduced. Possible models already in place that could be expanded as an interim step include the use of CJA supervising attorneys or case budgeting attorneys; voucher review managed through the federal defender's office; or local CJA

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panel committees to review voucher disputes.

6. To ensure fair compensation and quality of representation, there should be no "pro bono" component to the panel attorney hourly rate or the voucher review process. The hourly rate should be increased to the statutorily authorized maximum. Case compensation maximums should be increased for both panel attorneys and expert service providers.
7. The DSC, DSO, federal defenders, and panel attorneys should have a greater role in advocating with Congress both on issues of funding and other issues relevant to the program. This should include:
    a. Permitting the DSC chair to sit with the Budget Committee chair at hearings before the appropriations subcommittees to directly advocate for the Defender Services program budget;
    b. Giving DSC and DSO more control over the development of and advocacy for the program's budget within the current system;
    c. Giving DSO independent ability to track and comment on substantive legislation relevant to the program.

Please let me know if you would like to discuss these recommendations further or if you have any questions. Thank you again for your hard work to review the implementation of the CJA.

Sincerely,



Catherine C. Blake

cc: Members of the Defender Services Committee

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Appendix J: Position Letter from Federal Defenders

FEDERAL PUBLIC DEFENDER
District of Arizona
850 W. Adams, Suite 201
Phoenix, Arizona 85007

JON M. SANDS
Federal Public Defender

602-382-2700
(Fax) 602-382-2800
1-800-758-7053

March 25, 2016

Honorable Kathleen Cardone
United States District Judge
Western District of Texas
525 Magoffin Avenue
El Paso, TX 79901

Re: Reformation of the CJA Program

Dear Judge Cardone:

We write to provide the CJA Study Committee with the views of the Federal and Community Defender Offices regarding necessary reforms for the CJA Program. We are grateful for the extraordinary amount of time and energy you and your colleagues have devoted to studying our system of federal public defense. We know that you have heard from many individual federal public defenders in private and in public hearings about our views on the system. Although we all have our own perspectives about what problems exist and how they might best be solved, a significant majority agree on a number of fundamental principles that we believe are necessary to maintain the integrity of the defense function and to build upon a high quality program deserving of public confidence. We hope that the views we share will be useful to your committee in completing its work.

We will not go into great detail here. You have already received voluminous submissions on all of these topics. The point of this letter to share those broad principles upon which there is broad agreement. After several meetings in person and after taking an online poll of defenders in which 94 percent of the heads of all FDOs and CDOs responded,[1] we can report that 84 percent who responded believe that regardless of what form the structure of federal public defense takes, at a minimum, it must contain the following features:

- Direct Federal Defender and CJA Panel representation on any national governing body;
- Direct Federal Defender and CJA Panel representation in the preparation and presentation of the Defender Services budget to Congress;

[1] *See* Exhibit A (containing survey results)

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- A national administrative governing body that has a mission solely devoted to criminal defense with jurisdiction over all key management decisions, including budget, staffing, resource allocation, data management, and policies and procedures generally;
- An information technology system that is strictly separated from any personnel not employed by a distinct defender organization;
- A system for CJA Panel attorneys to receive payment and authorization for payment for outside services that does not involve approval by judges;
- A system for the selection of CJA Panel members and the heads of Federal and Community Defender Offices that does not involve judicial approval, with the obvious understanding that the Court always retains the ultimate authority regarding the admission of any attorney to practice before the Court.[2]

These features may be achieved by any number of different structures, but based on the same poll noted above, 79 percent of the heads of FDOs and CDOs believe the most straightforward and viable means for doing so requires the separation of the CJA program from the direct oversight of the Administrative Office of the U.S. Courts.[3] Possible alternative structures include an independent agency within the Judiciary or a congressionally chartered independent organization with its own board of directors entirely outside of the Judiciary. Whether your committee recommends one of these options or some other structure, the vast majority of us agree that fundamental change is necessary.

We believe much good has come from our long affiliation with the Judiciary, and we are grateful to the many individual judges who have devoted a substantial portion of their professional lives to the improvement of the CJA program. We hope whatever structural change comes from this study will be one that fosters a mutual interest in a defense function that has the resources and independence to fulfill its Sixth Amendment responsibilities with integrity.

Sincerely,

Jon M. Sands
Federal Public Defender
District of Arizona, and
Chair, Defender Services Advisory Group

s/ Leigh Skipper
Leigh Skipper
Chief Federal Defender
Eastern District of Pennsylvania, and
President of the National Assoc. of
Federal Defenders

[2] *Id.*
[3] *Id.*

No recommendation presented herein represents the policy of the Judicial Conference of the United States unless approved by the Conference itself.



Appendix K: Position Letter from Defender Services Advisory Group

Law Offices of
GILBERT A. SCHAFFNIT
719 Northeast First Street
Gainesville, Florida 32601

CRIMINAL DEFENSE
PERSONAL INJURY
TRIAL PRACTICE

TELEPHONE: (352) 378-6593
FACSIMILE: (352) 374-4998
EMAIL: gaslaw@gmail.com

July 6, 2016

VIA REGULAR MAIL
Honorable Kathleen Cardone
United States District Judge
Western District of Texas
525 Magoffin Avenue
El Paso, TX 79901

RE: PADRs' CONSENSUS VIEW ON ISSUES FACING CJA PANEL ATTORNEYS

Dear Judge Cardone:

We are the CJA Panel Attorney District Representatives who serve on the AO's Defender Services Advisory Group (DSAG). We write on behalf of the 94 CJA Panel Attorney District Representatives (PADRs) and the thousands of Panel attorneys they represent.

Thank you for the tremendous amount of time and energy you and the other Committee members have devoted to this study. In particular, thank you for participating in our 21st National Conference of CJA Panel Attorney District Representatives held on March 4-5, 2016, in San Francisco, California. We found the discussion between the PADRs in attendance at the conference and the Committee members to be very useful, and hope that you did as well. Following that plenary session, we held break-out sessions where the PADRs continued to discuss issues and potential solutions, including alternative structures and policies that would improve the Panel attorney aspect of the CJA program. This letter seeks to convey to the Committee the consensus views that emerged from those discussions.[1]

To focus our discussions, we obtained feedback for your Committee, including proposed solutions, on five components of the current federal indigent defense system:

1. Judicial involvement in voucher review, including Panel attorney fear of retaliation for zealous advocacy or questioning a Judge's ruling;
2. Voucher review procedures and the impact of unwarranted voucher reductions

[1] The Committee has heard from several PADRs and individual Panel attorneys about positive and negative aspects of the current system. We do not attempt here to summarize that testimony or those viewpoints, of which there are many. Instead, as the DSAG Panel Attorney Representatives, we express the views of the Panel attorney community generally, as developed through organized discussions among the PADRs.

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on quality of CJA representation;
3. Expert services requests and approval process;
4. Panel administration; and
5. Perception of Panel attorney quality.

We address each topic below. Before discussing the substantive topics, however, we provide background information on the Panel Attorney District Representative program, including a description of how the Panel attorney community functions at a national level and the important role that PADRs play in representing the Panel attorneys in their districts.

Background on Panel Attorney District Representative Program

Panel attorneys are a critical component of the federal indigent defense system. The CJA program, which requires a hybrid system, could not function without the participation of experienced and highly-skilled private Panel attorneys. Although Panel attorneys have been a critical part of the CJA program since its founding in 1964, Panel attorneys were not organized on a national scale until the 1990s, when the Defender Services Office developed the Panel Attorney District Representative program.

There are 94 PADRs, one for each federal judicial District. Each PADR is selected from among the members of the CJA Panel to represent the Panel attorneys in their District. Of the 94 PADRs, eight (8) are elected to serve on DSAG. Seven (7) represent specific circuits; the eighth Panel attorney on DSAG is the National Panel Attorney Representative. The seven (7) Circuit-based DSAG Panel attorney representatives are selected by and serve the Panel attorneys in their Circuits.[2]

The PADR program promotes open dialogue regarding issues and policies that affect the Defender Services program. As liaisons between the Panel attorneys in their Districts and their DSAG Panel representatives, the PADRs facilitate communication between DSAG and the Defender Services Committee, on the one hand, and the thousands of individual Panel attorneys, on the other hand. With more than 10,000 Panel attorneys across the country accepting CJA appointments at any given time, the program provides some means of allowing Panel attorneys to discuss issues and share ideas that improve the quality of representation being provided to CJA clients. It also allows the Administrative Office of the U.S. Courts to communicate more effectively with the Panel attorney community.

Consensus Views from Panel Attorney District Representatives

1. Judicial Involvement

Position: Judges should be removed from the voucher review process.

Consistent with the first of the ABA Ten Principles of a Public Defense Delivery System, control over federal indigent defense services must be insulated from judicial interference. To further this important

[2] The seven (7) Circuit-based DSAG Panel attorney representatives represent specific Circuits as follows: one (1) representative for the First and Second Circuits; one (1) representative for the Third, Fourth, and D.C. Circuits; one (1) representative for the Fifth Circuit; one (1) representative for the Sixth and Seventh Circuits; one (1) representative for the Eighth and Tenth Circuits; one (1) representative for the Ninth Circuit; and one (1) representative for the Eleventh Circuit.

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goal of independence of the defense function, it is the consensus view that Judges should be removed from the voucher review process.

The PADRs recognize that many Judges appreciate and respect the defense function, and believe the reason some Districts work well, while others do not, is because of the benevolence of the Court. Under the current structure, even the most supportive Districts are just one Judge away from becoming a hostile work environment for CJA Panel attorneys.

Fear of retaliation for zealous advocacy is recognized as an occupational hazard, but most PADRs believe this does not have a measurable effect on the quality of representation. CJA Panel lawyers, especially those in Districts with rigorous application and vetting procedures, are dedicated and experienced criminal practitioners who provide highly effective representation despite risks of removal from the Panel or receipt of fewer CJA appointments. Nonetheless, even the risk of retaliation or the appearance of impropriety is sufficient to warrant reform.

2. Review of Panel Attorney and Expert Services Compensation Vouchers

Position: Panel attorney and expert services vouchers should be reviewed and approved by a non-judicial, independent professional with a significant history of criminal defense practice and experience billing under the CJA.

It is the consensus view that CJA Panel attorney and expert services compensation vouchers should not be reviewed or approved by a Judge or Judicial Officer. Instead, CJA payment vouchers should be reviewed by an independent professional with an established working knowledge and demonstrated aptitude for federal criminal law and significant experience practicing and billing under the CJA. This person should be selected by a committee of criminal defense practitioners in consultation with the Defender Services Office and funded by the Defender Services appropriation. The selection committee should include the District's PADR and Federal Defender or Community Defender.

3. Unwarranted Voucher Reductions

Position: A voucher reduction appeal process should be created to provide Panel attorneys with an opportunity to challenge an unwarranted reduction before a voucher review committee or independent reviewer.

Unwarranted voucher reductions conflict with Judicial Conference policy and undermine the Sixth Amendment by making it difficult to attract and retain qualified, competent Panel attorneys and discouraging appointed CJA counsel from requesting funds needed for investigators, experts, and other service providers. The Defender Services Office should create guidance on voucher review, based on the presumption that work performed by Panel attorneys is reasonable. A voucher reduction appeal process should be created to provide Panel attorneys with an opportunity to challenge an unwarranted voucher reduction before a voucher review committee or independent reviewer. In the event of a disagreement with the committee or independent reviewer's determination, the attorney should be able to appeal to a Circuit case-budgeting attorney, who would no longer be housed in the Courts, and would be an employee of the Defender Services program.

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4. Requests for Expert and Other Services

Position: Judges should not be involved in the procurement of, or the setting of compensation rates for, expert and other services in CJA cases. Instead, expert service requests should be considered by someone who has no role in deciding the merits of the case, such as a CJA Administrator, Panel Manager or Attorney Supervisor.

At a minimum, presiding Judges should not be involved in the procurement of, or the setting of compensation rates for, expert and other services in CJA cases. The present system conflicts with the role of Judges as detached and neutral arbiters of fact and law, requiring otherwise confidential defense theories and strategies to be prematurely disclosed by Panel attorneys in order to obtain support services needed for an effective defense or mitigation. This judicial intrusion into the attorney-client privilege is not experienced by federal prosecutors or Federal and Community Defender attorneys, placing defendants represented by CJA Panel attorneys at a distinct disadvantage.

The mechanism for requesting the appointment of experts should be revised, and the artificially low case compensation maximums for expert and other service providers should be abolished. A simplified procedure should be implemented that uses a standardized CJA form. The CJA form should have fields for Panel counsel to identify the type of expert needed, the name and hourly rate of the expert, the reason the services are needed, and the projected number of hours to complete the task.

Further, expert service requests should be considered by someone who has no role in deciding the merits of the case, such as a CJA Administrator, Panel Manager or Attorney Supervisor. If the reviewing party has any questions, he or she should contact the requesting attorney for clarification. If the request for services is denied, appointed Panel attorney could then appeal to the CJA Advisory Committee or a Circuit case-budgeting attorney for further review. The Circuit case-budgeting attorney would no longer be housed in the Courts, and would be an employee of the Defender Services program.

5. Panel Administration

Position: Management of the CJA Panel, including the assignment of cases, should be done by an independent CJA Administrator.

Each district's CJA Panel should be administered by an independent CJA Administrator responsible for managing the Panel, and assigning cases to the CJA Panel attorneys. The CJA Administrator should be responsible for reviewing Panel attorney claims for reimbursement and other services for mathematical and technical accuracy, reasonableness under the CJA, and for conformity with CJA policies and procedures. The Administrator should also be expected to develop and administer a Continuing Legal Education training program for the CJA Panel, and provide substantive legal analysis, advice, and assistance on all CJA Panel matters. The CJA Administrator should be selected by a committee of criminal defense practitioners in consultation with the Defender Services Office and funded by the Defender Services appropriation. The selection committee should include the District's PADR and Federal or Community Defender.

6. Perception of Panel Attorney Quality

Position: An experienced and dedicated Panel of criminal defense practitioners should be the standard for all CJA Panels across the nation, and there should be a presumption that work performed by Panel attorneys is reasonable and necessary for Constitutionally-adequate representation.

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A carefully vetted CJA Panel, consisting of experienced and dedicated criminal practitioners should be the norm, and work performed by Panel attorneys presumed reasonable and necessary for quality representation. In evaluating claims of ineffective assistance of counsel under Strickland, the U.S. Supreme Court requires a "strong presumption" that defense counsel's performance was reasonable and that defense counsel exercised sound professional judgment.[3] We can think of no reason why CJA Panel attorneys should not enjoy the same presumption when seeking compensation for work performed for their clients.

Most Panel attorneys are highly skilled and experienced criminal defense practitioners that provide high quality representation. The recent NACDL report on the state of the federal indigent defense system found that "many Panel lawyers in districts across the country are among the best, most committed advocates for indigent clients found anywhere."[4] In addition, we have been informed that national surveys administered by Westat in 2015 show an improvement in the quality of Panel attorney performance, with more Judges ranking Panel attorneys as providing high quality representation as compared to prior survey years, and as compared to retained criminal defense counsel. To sustain this level of representation, however, Panel attorneys should be provided with necessary resources, including fair and competitive hourly rates, access to investigators and other service providers, and training, to remain proficient in the increasingly complex area of federal criminal law.

Again, the DSAG panel attorneys extend our appreciation for the Committee's hard work and dedication to this important and historic study. We hope the views we share will be helpful to your Committee as it completes its work and improves the Sixth Amendment right to counsel for the benefit of CJA clients, panel members, and the entire Defender Services program.

Sincerely,

Gilbert A. Schaffnit, Esquire
GAS/jw

/s/Melanie S. Morgan
Melanie S. Morgan, Esquire

/s/ Victoria Bonilla-Argudo
Victoria Bonilla-Argudo, Esquire

/s/ Lisa S. Costner
Lisa S. Costner, Esquire

/s/ Jeffrey S. "Chip" Frensley
Jeffrey S. "Chip" Frensley, Esquire

/s/ John A. Convery
John A. Covery, Esquire

/s/ Peter S. Schweda
Peter S. Schweda, Esquire

/s/ Robert G. LeBell
Robert G. LeBell, Esquire

CC: CJA Study Committee
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building, Suite 4-250
One Columbus Circle, N.E.
Washington, D.C. 20544

3 Strickland v. Washington, 466 U.S. 668, 689-90 (1984).
4 NACDL, Federal Indigent Defense 2015: The Independence Imperative, at 22 (2015).

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Appendix L: Budget Implications

Judicial Conference of the United States
Ad Hoc Committee to Review the Criminal Justice Act Program
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Chair
Judge Kathleen Cardone

Chair Emeritus
Judge Edward C. Prado

Reporter
Jon Gould

Members
Reuben Cahn
Judge Dale S. Fischer
Chip Frensley
Judge John M. Gerrard
Judge Mitchell S. Goldberg
Orin S. Kerr
Neil H. MacBride
Katherian Roe
Robert E. Rucker
Judge Reggie B. Walton

July 12, 2016

TO: Defender Services Office

RE: Request for Budget Calculations on Independent Agency

The Ad Hoc Committee to Review the Criminal Justice Act respectfully requests from the Defender Services Office a calculation and estimation of the budget necessary to support an independent agency charged with providing criminal defense services to indigent defendants in federal court.

If possible, there are three different scenarios in which an estimation would be helpful:

1. A defender services program inside the judiciary with shared services

For the purposes of this budget and cost estimation, such an agency would remain within the judicial branch, housed within the Administrative Office of the U.S. Courts. The Committee seeks to find out the costs of the administrative support and services that such an agency would need to function, including such costs as salaries and overhead for budget and appropriations, training, the maintenance of defender information technology, the providing for resource offices and litigation support initiatives, and oversight of a voucher payment system, to name a few of the more specialized functions of such an agency. This estimation of costs should assume the situation where the Administrative Office could continue to provide services to this independent defense agency, much like those provided to the United States Sentencing Commission, as set out in its enabling statute.

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2. A defender services program inside the judiciary with no shared services

For the purposes of this budget and cost estimation, such an agency would remain within the judicial branch, housed within the Administrative Office of the U.S. Courts. The Committee seeks to find out the costs of the administrative support and services that such an agency would need to function, including such costs as salaries and overhead for budget and appropriations, training, the maintenance of defender information technology, the providing for resource offices and litigation support initiatives, and oversight of a voucher payment system, to name a few of the more specialized functions of such an agency. This estimation of costs should assume the situation where the Administrative Office would provide NO services to this independent defense agency.

3. A defender services program outside the Administrative Offices

For the purposes of this budget and cost estimation, such an agency would be totally outside of the judicial branch, probably not even housed within the Administrative Office of the U.S. Courts. The Committee seeks to find out the costs of the administrative support and services that such an agency would need to function, including such costs as salaries and overhead for budget and appropriations, training, the maintenance of defender information technology, the providing for resource offices and litigation support initiatives, and oversight of a voucher payment system, to name a few of the more specialized functions of such an agency. This estimation of costs should assume the situation where the Administrative Office would provide NO services to this independent defense agency.

Finally, one further request, the Committee is interested in obtaining a list of areas where other branches of the AO supply services on which DSO relies. Perhaps this will be covered in your cost estimate. However, if not, if you could supply this information separately, it would be very helpful.

If you would like to discuss this in more detail, please do not hesitate to contact me.

The Committee thanks you in advance for your assistance.

Sincerely,

Kathleen Cardone

Kathleen Cardone, Chair

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CJA REVIEW COMMITTEE
DEFENDER SERVICES FUNDING IMPLICATION SCENARIOS

A check indicates a cost that is currently paid by the judiciary in support of the Defender Services program. A horizontal double arrow (↔) indicates that implementation of a scenario is presumed to have the same/similar costs as the status quo baseline. An up arrow (↑) indicates that additional costs above the status quo baseline would be incurred as a result of implementing that scenario.		Incremental cost to Defender Services program for each scenario relative to status quo		
	Status Quo	Inside the Judiciary with Shared Services	Inside the Judiciary with NO Shared Services	Outside the Judiciary
FDO/Panel Attorney Representations (incl. salaries)	✓	↔	↔	↔
AO DSO Operations (incl. salaries)	✓	↔	↔	↔
Rent - FDOs	✓	↔	↔	↔
Rent - DSO (assumes location in TMFJB if within the judiciary)	✓	↔	↔	↑
Information Technology				
Enterprise communication services (Email, webmail, etc.)	✓	↔	↑	↑
Telephone System	✓	↔	↑	↑
Case Management Systems (dData)	✓	↔	↑	↑
DS Information Management System (DSMIS)	✓	↔	↑	↑
Emergency Preparedness Service (COOP), communication services	✓	↔	↑	↑
Network Infrastructure (Local Area Network, Defender Wide Area Network)	✓	↔	↑	↑
Hosting services/IT Hosting Contracts	✓	↑	↑	↑
IT Security Services (cybersecurity)	✓	↔	↑	↑
Remote Access	✓	↔	↑	↑
Conferencing Services	✓	↔	↑	↑
Data Warehouse/Data Storage	✓	↔	↑	↑
Cellular and Wireless devices	✓	↑	↑	↑
Computers/iPads/printers/IT equipment	✓	↑	↑	↑
IT support/help desk	✓	↔	↑	↑
IT development	✓	↑	↑	↑
Web support	✓	↔	↑	↑
Security Operations Center/Network Operations Center	✓	↑	↑	↑
Human Resources				
Human Resources Information System - Timekeeping, Leave Tracking (sick & annual), HR actions (awards, employee records), Remote Data Entry (RDE)	✓	↔	↑	↑
Payroll System	✓	↔	↑	↑
OPM - retirements	✓	↑	↑	↑
Benefits Administration - e.g., transit, medical, dental, life, long term care	✓	↑	↑	↑
Position/hires listing & screening	✓	↑	↑	↑
Security clearances	✓	↑	↑	↑

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CJA REVIEW COMMITTEE
DEFENDER SERVICES FUNDING IMPLICATION SCENARIOS

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	Status Quo	Inside the Judiciary with Shared Services	Inside the Judiciary with NO Shared Services	Outside the Judiciary
New employee orientation	✓	↑	↑	↑
Contractor management for temporary help	✓	↔	↑	↑
Fair employment practices	✓	↑	↑	↑
Employee evaluations & awards	✓	↑	↑	↑
Severance/VERA/VSIP/unemployment	✓	↑	↑	↑
ePal	✓	↔	↑	↑
Physical Plant				
Facilities	✓	↑	↑	↑
Maintenance	✓	↔	↑	↑
Security - e.g., guards, access system	✓	↔	↑	↑
Safety - e.g., building façade, snow removal	✓	↔	↑	↑
Custodial service	✓	↔	↑	↑
Occupational health	✓	↔	↑	↑
Printing office	✓	↑	↑	↑
GSA liaison	✓	↑	↑	↑
Furniture and equipment - property accounting inventory & disposal	✓	↑	↑	↑
Fitness center	✓	↔	↑	↑
Library	✓	↔	↑	↑
Copier support	✓	↑	↑	↑
Utilities	✓	↔	↑	↑
Budget/Finance/Procurement				
Accounting system - JIFMS (includes CDOs/FPDOs/DSO/feed from Evoucher) controller, systems accountants, staff to support the systems	✓	↔	↑	↑
Infoweb - e.g., Electronic Status of Funds Reports (ESFRs), Pay tracking and projection system (iPPS), national directories, allotment management, financial plan	✓	↔	↑	↑
Judiciary Electronic Travel System (JETS) and staff to support system and to set policy	✓	↔	↑	↑
Electronic Data Warehouse (EDW) for Accounting reporting and staff to support	✓	↔	↑	↑
Credit card management - e.g., staff credit cards for travel and procurement credit cards	✓	↔	↑	↑
Contract management - e.g., FPD and CDO Audits, OPM security clearance contracts, National Travel System (NTS)	✓	↔	↑	↑

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CJA REVIEW COMMITTEE
DEFENDER SERVICES FUNDING IMPLICATION SCENARIOS

A check indicates a cost that is currently paid by the judiciary in support of the Defender Services program. A horizontal double arrow (↔) indicates that implementation of a scenario is presumed to have the same/similar costs as the status quo baseline. An up arrow (↑) indicates that additional costs above the status quo baseline would be incurred as a result of implementing that scenario.		Incremental cost to Defender Services program for each scenario relative to status quo		
	Status Quo	Inside the Judiciary with Shared Services	Inside the Judiciary with NO Shared Services	Outside the Judiciary
IT help desk/phone management/hardware management	✓	↑	↑	↑
Department of Labor interface - Workers compensation/unemployment	✓	↔	↑	↑
Financial Disclosure	✓	↔	↑	↑
Federal Technology Services (FTS) - e.g., phone contracts, Voice over Internet Protocol (VOIP) products and contracts	✓	↔	↑	↑
Audit Management and External Audit Control	✓	↔	↑	↑
Internal Controls and Financial Policies	✓	↔	↑	↑
Evoucher System	✓	↔	↑	↑
Procurement processes - e.g., contracts, policies and procedures	✓	↑	↑	↑
Acquisition Plan	✓	↑	↑	↑
Legal & other services				
Office of General Counsel (OGC)	✓	↑	↑	↑
Office of Legislative Affairs (OLA)/Congressional affairs	✓	↑	↑	↑
Office of Public Affairs and Strategic Communications	✓	↑	↑	↑
Policy and procedures office	✓	↑	↑	↑
AO Academy/employee training	✓	↑	↑	↑
Records management	✓	↑	↑	↑
Executive Branch liaison (OMB, DOJ, Treasury, etc.)	✓	↑	↑	↑
Ethics counseling	✓	↑	↑	↑

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Appendix M: Statement from Committee Member Professor Orin Kerr

I disagree with my colleagues on the Committee about one important recommendation in our report. This statement explains my different view.

My colleagues recommend that Congress should create a national defender commission modeled on the United States Sentencing Commission. Under their proposal, the national commission would be led by commissioners nominated by the President and confirmed by the Senate. No more than four of the seven commissioners could be from any one political party. No more than three could be judges.

None of us on the Committee are experts in the design of new federal agencies. Our expertise is in identifying the existing problems with the Criminal Justice Act rather than recommending new government structures. With that said, I don't think my colleagues have identified the best way for national commissioners to be selected and who should be eligible to serve on it.

In my view, it would be better for the commissioners to consist entirely of federal district court judges selected by other judges. Here's one way to do it: The district judges of each regional circuit could vote for a representative among them to serve a term as one of the commissioners. To ensure an odd number of commissioners, you could require two of the smaller circuits to join together and elect a single commissioner. The enacting statute could also impose some requirements on the judges elected, such as past experience as a criminal defense attorney and a commitment to the criminal defense function. The result would be an eleven-member commission of federal trial judges that would serve the function described in our report

I think this approach is better than the Sentencing Commission model proposed by my colleagues because I am more pessimistic than they are about the politics of crime. My colleagues present the defense function as largely free from political influence. In their view, the defense function enjoys bipartisan support and is unlikely to become a political target. Under that assumption, they see little risk in giving the elected branches the power to nominate and confirm commissioners.

My sense is different. I see it as unfortunate but inevitable that the criminal defense function will be subject to intense political winds. Voters don't like crime, and they tend to favor politicians who will be tough on those who commit it. Politicians respond to that voter preference by often demanding tough laws that will fight criminals aggressively. This dynamic was less pronounced in the 2012 to 2016 window, when an unusual amount of bipartisan consensus seemed ready to emerge on criminal justice reform after years of violent crime dropping precipitously. But I suspect that was a temporary state of affairs rather than a permanent change.

That's a problem, I think, because it means that a federal defender agency will inevitably end up making some unpopular decisions that upset a lot of voters. Maybe the commissioners will decide to devote extra resources to the defense of a notorious terrorist charged in a heinous terrorist attack. Perhaps they'll decide to appoint a particularly controversial lawyer as the Federal Defender for a particular district. Because its function will be serving the needs of often-unpopular clients instead of the voters — and properly so — a federal defense agency would need to take some controversial public positions.

If I am right about that, elected politicians will at times target the defender agency. What we may see as upholding the Sixth Amendment, others may see as trying to help murderers and terrorists. And because those decisions would be centralized in a single agency with a known list of commissioners and their public votes, there will be specific group of people to criticize. The agency won't be targeted all the time, of course. And not by every politician. But I fear it will be a target for enough politicians enough of the time to matter.

If I am right about the politics of crime, my colleagues' adoption of a Sentencing Commission model is problematic. Under their proposal, one politician, the President, will pick nominees. One hundred more politicians, the Senators, will decide whether to confirm the nominees. A President who wants to damage the agency could decline to make appointments, or else nominate candidates who lack a commitment to the defense function. Senators with the same wishes could refuse to confirm nominees unless they held particular views, or even refuse to act on any nominees at all. By controlling appointments to the commission, the elected branches will control the commission itself.

The Senate's refusal to confirm nominees to the United

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States Sentencing Commission in the late 1990s is a useful example. The Sentencing Commission issued an amendment to the Guidelines in 1995 that would have equalized penalties for powder and crack cocaine offenses.[1] The Commission's proposal was highly controversial with the public. As William K. Sessions has explained, the Senate retaliated by declining to confirm any new nominees to the Sentencing Commission for several years.[2] Sessions writes: "By 1998, the Commission had no commissioners. For a year thereafter, the Commission operated solely with staff members — none of whom were presidentially-appointed — and could not promulgate guidelines amendments."[3] According to Professor Michael O'Hear, the experience left the Sentencing Commission "more timid for many years after."[4]

I fear that something similar could happen to a federal defender commission. A partisan division among commissioners won't help matters. If the commission votes on a controversial proposal 4-3 along party lines, the public may draw the lesson that the commission is playing politics. The best answer, I think, is to ensure that the Commissioners are not subject to political control by the elected branches. Placing the defender agency in the judiciary — in fact, not just in theory — seems to me the best way to do that.

A commission consisting only of district court judges selected by other district court judges would not rely on the elected branches for new members. Article III district judges would themselves vote on which of their colleagues in their circuit should serve as commissioners. This collective action would likely lead to the selection of respected judges with a commitment to the defense function to serve as commissioners. Dysfunction in the elected branches would not change who would serve, as the judges themselves would select and replace Commissioners without outside influence or control.

I also worry that a Sentencing Commission model could lead to mission creep. As representatives of criminal defense interests — and ones approved by the political branches — commissioners may have incentives to take agency positions on matters beyond the narrow function of providing criminal defense services. For example, they may have positions on whether Congress should enact new criminal laws, or whether Congress should amend the collateral review statutes, or about the budget of the United States Department of Justice. If so, that could further drag the defender agency into the political thicket.

A commission consisting entirely of judges would be much less likely to take that path. The voting commissioners would be assisted in their task by non-voting members ex officio drawn from the federal defender community. But the budget requests and decisions of the defender commission would be the work of judges. As judges elected by other judges, bound by codes of judicial conduct, they would be seen as trustees of the defense function rather than as advocates for it. In my view, this makes it more likely that the commission would be insulated from political attack.

None of this questions the core thesis of our report. I agree that the defense function needs greater independence from the judiciary. Judges should not be making decisions about the defense in cases that they preside over as judges. They should not be selecting public defenders in their own districts. The Judicial Conference should not control lobbying for the criminal defense budget. The conflicts of interests raised by these arrangements are made abundantly clear in our report, and I agree with those conclusions.

Where I part with my colleagues is in how best to navigate between the Scylla and Charybdis of judicial and political control in deciding who becomes a commissioner and how. No system is perfect. As our report details, too much and too direct judicial control is harmful. But too much and too direct political control is harmful, too. As I see it, the best prospects for a defense commission that avoids the conflicts of interest identified in our report — and yet avoids political control by the elected branches — is through the new agency structure proposed in our report but with judges serving as the commissioners.

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1 See generally United States Sentencing Commission, Special Report to the Congress: Cocaine and Federal Sentencing Policy (1995), available at https://www.ussc.gov/research/congressional-reports/1995-report-congress-cocaine-and-federal-sentencing-policy.

2 William K. Sessions, At The Crossroads Of The Three Branches: The U.S. Sentencing Commission's Attempts To Achieve Sentencing Reform In The Midst Of Inter-Branch Power Struggles, 26 J.L. & Pol. 305, 319 (2011).

3 *Id.*

4 Michael O'Hear, The Failed Promise of Sentencing Reform 121 (2017).

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2017 REPORT OF THE AD HOC COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT