

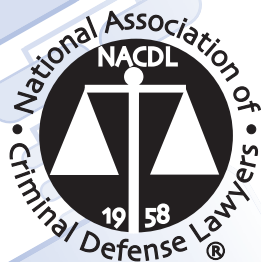
# FEDERAL INDIGENT DEFENSE 2015: THE INDEPENDENCE IMPERATIVE

A Report by the National Association  
of Criminal Defense Lawyers

**PUBLIC LAW 88-455**

AN ACT

**TO PROMOTE THE CAUSE OF  
CRIMINAL JUSTICE BY PROVIDING FOR  
THE REPRESENTATION OF DEFENDANTS  
WHO ARE FINANCIALLY UNABLE TO  
OBTAIN AN ADEQUATE DEFENSE IN  
CRIMINAL CASES IN THE COURTS  
OF THE UNITED STATES.**



**Supported by a grant from the Foundation for Criminal Justice.**

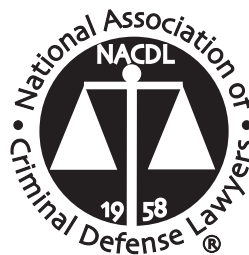
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# FEDERAL INDIGENT DEFENSE 2015: THE INDEPENDENCE IMPERATIVE

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of Criminal Defense Lawyers

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# FEDERAL INDIGENT DEFENSE 2015: THE INDEPENDENCE IMPERATIVE

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# ABOUT THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the goal of the criminal defense bar to ensure justice and due process for persons charged with a crime or wrongdoing. NACDL's core mission is to: *Ensure justice and due process for persons accused of crime . . . Foster the integrity, independence and expertise of the criminal defense profession . . . Promote the proper and fair administration of criminal justice.*

Founded in 1958, NACDL has a rich history of promoting education and reform through steadfast support of America's criminal defense bar, *amicus curiae* advocacy and myriad projects designed to safeguard due process rights and promote a rational and humane criminal justice system. NACDL's approximately 9,200 direct members — and 90 state, local and international affiliate organizations totalling up to 40,000 members — include private criminal defense lawyers, public defenders, active U.S. military defense counsel, and law professors committed to preserving fairness in America's criminal justice system. Representing thousands of criminal defense attorneys who know firsthand the inadequacies of the current system, NACDL is recognized domestically and internationally for its expertise on criminal justice policies and best practices.

The research and publication of this report was made possible through the support of individual donors and foundations to the Foundation for Criminal Justice, NACDL's supporting organization.

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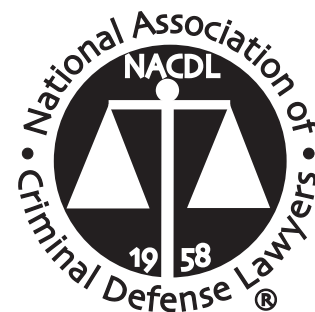
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# ABOUT THE FOUNDATION FOR CRIMINAL JUSTICE

The Foundation for Criminal Justice (FCJ) is organized to preserve and promote the core values of America's criminal justice system guaranteed by the Constitution — among them due process, freedom from unreasonable search and seizure, fair sentencing, and access to effective counsel. The FCJ pursues this goal by seeking grants and supporting programs to educate the public and the legal profession on the role of these rights and values in a free society and assist in their preservation throughout the United States and abroad.

The FCJ is incorporated in the District of Columbia as a non-profit, 501(c)(3) corporation. All contributions to the FCJ are tax-deductible. The affairs of the FCJ are managed by a Board of Trustees that possesses and exercises all powers granted to the Foundation under the DC Non-Profit Foundation Act, the FCJ's Articles of Incorporation, and its Bylaws.

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# PREFACE

Short of warfare, there is no more awesome use of governmental power than the power to prosecute. A criminal prosecution can result in life-altering consequences, including the loss of reputation, property, liberty, and even life itself. For this reason, the founders of this nation recognized that no person should stand alone against a criminal prosecution. The Sixth Amendment provides that in “all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”

Notwithstanding the plain language of this core provision in the Bill of Rights, the road to ensuring that meaningful and effective counsel is provided to all accused persons has been arduous. It was not until the *Gideon* case in 1963 that the United States Supreme Court conclusively held that counsel must be afforded to those too poor to hire a lawyer in all felony prosecutions. And even though that right has been extended to include many misdemeanors, it is well recognized that the nation’s indigent defense infrastructure remains wholly inadequate. Commentators, lawyers, and public officials, including the Attorney General of the United States, have described the nation’s indigent defense system as in crisis. Because the constitutional mandate to provide counsel never established a funding mechanism, each state approaches the responsibility differently, with very few providing statewide structure or adequate funding, and many foisting the responsibility onto its counties.

In contrast, the federal indigent defense system, which was put in place by the Criminal Justice Act of 1964, provides both structure and a reasonably dependable funding stream. It also provides for a healthy mix of both institutional defenders and private counsel. For this reason, those who labor to reform state indigent defense systems have often looked with envy at the federal model, and held it up as a gold standard. As a result, when a federal budget crisis erupted in Washington, D.C., which resulted in deep cuts in funding for federal indigent defense, the prospect of a decimated federal indigent defense infrastructure reverberated throughout the nation. If a shining light in the country’s indigent defense system was itself so vulnerable to shifting political winds, was there something fundamentally flawed with that model?

For 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 on October 19, 2013, then-NACDL President Jerry Cox, who has served with distinction as the Chair of the Kentucky Public Advocacy Commission overseeing statewide indigent defense services in Kentucky, empaneled NACDL’s Task Force on Federal Indigent Defense. The Task Force was directed to examine the effects that sequestration had on the federal indigent defense delivery system, and to more broadly evaluate the entire system. The mission included an assessment of the level of independence afforded to the Office of Defender Services and consideration of whether reforms are necessary to ensure adherence to the ABA’s Ten Principles of a Public Defense Delivery System (see Appendix B).

Responding to the challenge, the Task Force conducted an extensive review of federal indigent defense in the United States. Over a period of more than 18 months, the members interviewed more than 130 individuals, including judges, full-time defenders, Criminal Justice Act panel attorneys, Administrative Office of the United States Courts personnel, and others who interface with the federal indigent defense

system. Those interviewed included individuals in 49 states and encompassed all federal judicial circuits. The Task Force also reviewed hundreds of pages of reports and documents. Following this extensive data gathering, the Task Force spent many hours evaluating the information and engaging in discussion and analysis. The findings were ultimately distilled into this report that is intended to highlight the strengths and deficiencies in federal indigent defense and inform the profession and decision-makers as to how to improve the system. The core principles embodied in the report were approved by NACDL's Board of Directors in November 2014 and the final report was approved by NACDL's Executive Committee in August 2015.

The work of this Task Force was supported by NACDL's Board of Directors and has been funded by the Foundation for Criminal Justice, with crucial support provided by many generous donors, including general support from the Foundation to Promote Open Society. The Task Force was comprised of 13 outstanding criminal defense lawyers from across the country, reflecting an array of practice settings: Willis G. Coffey, Josh A. Cohen, Jerry J. Cox, Michael P. Heiskell, Bonnie Hoffman (Chair), Norman R. Mueller, David Patton, David M. Porter, Cynthia W. Roseberry, Ronald Tyler, Susan J. Walsh, Lisa Monet Wayne, and William P. Wolf (Vice Chair). Special kudos to Chair Bonnie Hoffman whose dedicated and skillful stewardship of the project embodies her career-long commitment to the defense function, the profession, and NACDL.

Professor Joel M. Schumm served without compensation as the Reporter for the project. Professor Schumm's thorough analysis and steadfast determination were critical to the preparation of this report. In this and other projects he has served as the quintessential example of how those in the legal academy can serve the practicing bar and society in general. This particular project presented unique challenges because so many sources would only speak on the condition of confidentiality, and Professor Schumm meticulously implemented protocols to honor those requests, while ensuring that all information was appropriately documented.

As is the case with many NACDL projects, this report is the result of an extraordinary volunteer effort that reflects the highest levels of professionalism and the commitment of a bar association to advance the cause of justice. The Task Force members and their reporter contributed their expertise and countless hours to this effort. NACDL, the legal profession, and the accused whose lives depend upon effective representation are indebted to all of them.

NACDL and the Foundation for Criminal Justice proudly offer this report and its conclusions and recommendations for consideration by all those who believe that the right to meaningful, effective and fully-resourced counsel in a criminal prosecution is a basic and sacred American right that must be universally respected.

A handwritten signature in black ink, appearing to read "Norman L. Reimer". The signature is fluid and cursive, with a long horizontal stroke at the end.

**Norman L. Reimer**  
Executive Director, NACDL



# ACKNOWLEDGMENTS

Fundamentally, the Task Force owes a debt of gratitude to the men and women of the federal indigent defense community. It is only because of their willingness to share their honest insights, opinions, experiences, and expertise that the Task Force was able to produce this report. From members of the judiciary to the staff of the Administrative Office of the United States Courts, and from the administrative personnel of the federal courts to the 115 criminal defense attorneys who spoke with the Task Force over the past 18 months, every person we spoke with, regardless of their affiliation or position, shared in the belief that we must assure every person charged with a criminal offense and brought before a federal court should have a strong, zealous, and effective advocate by his or her side.

This report was made possible through the generous support provided by the Foundation for Criminal Justice and NACDL's Board of Directors and Indigent Defense Committee. The Task Force received continuing support from several NACDL Presidents: Jerry Cox who created the Task Force, Theodore Simon who shepherded it through its initial drafts, and Gerry Morris who has carried it forward to publication.

Joel M. Schumm, Clinical Professor of Law and Director of Experiential Learning at Indiana University's Robert H. McKinney School of Law, served as the Reporter for the project. Professor Schumm worked tirelessly to bring together the historical background and hundreds of pages of documents, reports, memoranda, survey responses, and personal interviews to produce a clear and comprehensive report embodying the Task Force's research.

Thank you to NACDL's staff for their assistance throughout this process: Kyle O'Dowd, Colette Tvedt, and Quintin Chatman, with a special thank you to Ivan Dominguez, Director of Public Affairs and Communications, for his thoughtful editing and helpful suggestions in the completion of this report. We wish to also thank Art Director Cathy Zlomek and Freelance Graphic Designer Jason Rogers for their work on the design and layout.

A special thank you is owed to Steve Asin, former Deputy Assistant Director for the Office of Defender Services. Steve's contributions, from sharing his institutional knowledge to his attention to detail in the development of this report, are beyond measure.

We also wish to express our gratitude to the firm of Vladeck, Raskin & Clark, P.C. who generously made their offices available for the Task Force's use during its New York interviews.

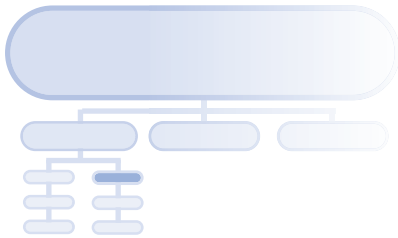
Finally, the Task Force would like to thank NACDL's Executive Director, Norman L. Reimer, for his dedication to this project. His input in every aspect of this effort, from the Task Force's meetings with various judicial, administrative, and individual attorneys, to the development of the survey instruments and insights into the Report's editing, was invaluable.

## EXECUTIVE SUMMARY

In the wake of the severe cuts to the provision of indigent defense services during sequestration in 2013, the National Association of Criminal Defense Lawyers (NACDL) created a Federal Indigent Defense Task Force to examine the federal indigent defense system. After more than 130 interviews with key stakeholders, the Task Force identified several significant, persistent deficiencies in the system. This report explores those concerns and offers seven recommendations to assure a robust federal indigent defense system.

### LACK OF INDEPENDENCE:

#### The Judiciary's Oversight of Indigent Defense



The role of a judge is like an umpire, “to call balls and strikes and not to pitch or bat.”

— *Judge John Roberts*

(at his Senate Judiciary confirmation hearing to become Chief Justice of the United States).

**In 2013 the Administrative Office of the United States Courts demoted the Defender Services Office from a “distinct high-level office” within the AO to one of many “Program Services,” like probation and pre-trial services.**

At the national, appellate, and trial court level, federal judges act not as umpires between prosecution and defense but as team owners with enormous control over significant aspects of defense representation. The first — and most important — of the ABA’s Ten Principles of a Public Defense Delivery System emphasizes the critical importance of independence in the selection, funding, and payment of defense counsel. Rather than vest defense lawyers or an independent governing board with authority over these critical areas, the federal indigent defense system gives the umpires (judges) the power to:

- ✦ Request and oversee the expenditure of funds appropriated by Congress
- ✦ Advocate to Congress any legislative initiative that affects indigent defendants
- ✦ Determine staffing levels for defender offices
- ✦ Select the heads of federal defender offices and decide whether to retain them every four years
- ✦ Choose private lawyers to represent indigent defendants
- ✦ Exercise unfettered discretion in approving the requests of those lawyers for payment of their time spent on cases or requests for critical expert assistance

In the past few years alone, the national judiciary had taken several actions that seriously undermine the independence of the defense function. These include:

- ✦ Demoting the Defender Services Office (DSO) from a “distinct high-level office” within the AO to one of many “Program Services,” like probation and pre-trial services
- ✦ Allocating budget cuts during sequestration in a manner that had unnecessarily disastrous consequences for defender offices and panel lawyers
- ✦ Proactively soliciting an opinion from the AO general counsel that concluded district judges could not appoint federal defenders or panel attorneys to represent clemency applicants because

clemency is an executive — not judicial — function, thereby preventing defenders from assisting former clients in seeking their release

In two other areas, the judiciary initially took action without adequate defender input or respect for the independence of the defense function: (1) ordering a work measurement study of all defender offices, and (2) assuming responsibility for the technological needs of defender offices in a manner that allowed the AO the ability to access confidential client and case information. The judiciary later sought defender involvement and input, which was crucial in resolving these issues.

To address these varied and significant concerns, the Task Force offers the following Seven Fundamentals of a Robust Federal Indigent Defense System:

## **1. Control over federal indigent defense services must be insulated from judicial interference.**

The defense function must be insulated from the pervasive involvement and control by the judiciary. Greater independence at the national level could take a number of forms. The 1993 Prado Report recommended a Center for Federal Criminal Defense Services to oversee the national administration of the CJA, which was opposed by most defenders at the time but enjoys considerably greater support today. At a minimum, DSO should be re-elevated to its prior position within the AO rather than be designated as a “program” of the judiciary. All funding and staffing decisions should be made by an entity focused on the interest of defenders and not concern about the overall judiciary budget.

At the trial level, the appointment, review, and re-appointment of CJA panel lawyers should be overseen by a committee of lawyers knowledgeable about and committed to indigent defense — not district court judges who often have a much different focus, interest, and background.

Finally, although the federal defenders selected by appellate judges have overall been of high skill and ability, the current structure leaves plenty of opportunity for influence and raises concerns about the selection and evaluation process.

## **2. The federal indigent defense system must be adequately funded.**

The judiciary must be adequately funded to provide essential personnel and facilities for the indigent defense system. Within that system, CJA panel lawyers must be compensated at a rate that ensures a high level of representation in every district. Moreover, panel lawyers must request and judges must provide experts and investigators that are often as vital to a case as the provision of counsel — but are currently used in less than 10% of CJA cases.

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

Indigent defendants are entitled to committed, engaged, and competent counsel. Forcing unwilling, uninterested, or inexperienced lawyers to provide defense services demonstrates a fundamental misapprehension of the specialized nature of federal criminal defense and suggests the accused deserve little more than a warm body beside them while they are prosecuted and convicted.

Steps must also be taken to retain a CJA panel that reflects a diversity of race, ethnicity, gender, and age. Mentoring programs or training panels should be encouraged and expanded.

#### **4. Training for indigent defense counsel must be comprehensive, ongoing, and readily available.**

The funding for providing training to those providing defense services is a small fraction of that spent on training by their courtroom adversaries from the Department of Justice. Adequate funding and quality training on issues related to representing criminal defendants in federal court must be widely available to all lawyers, regardless of the district where they practice.

#### **5. Decisions regarding vouchers must be made promptly by an entity outside of judicial control.**

Many panel lawyers are forced to endure long delays to receive payment for their services and 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.

#### **6. The federal indigent defense system must include greater transparency.**

In conducting interviews and collecting information for this report, the Task Force was struck by the lack of transparency in many areas. At the national level, decisions are made largely in secret and even descriptions of the committees charged with making the decisions are not publicly available. At the district level, the selection and review of panel lawyers in some districts is largely a mystery to lawyers who serve or want to serve on the panel. Data on such things as voucher cutting either does not exist or is shrouded in secrecy.

Information about key decisions, the persons making the decisions, and the criteria applied in decision-making should be readily available both to lawyers in the system and the general public.

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

Although an assessment of the federal indigent defense system is supposed to occur every seven years, none has been completed in more than two decades. The Task Force is pleased that a review committee was appointed in 2015. The comprehensive review will hopefully address the many areas of serious concern highlighted in this report, but the Task Force strongly believes that independence of the defense function should be the primary focus.

# INTRODUCTION/ SCOPE OF REPORT

Over the past 18 months, the Task Force on Federal Indigent Defense (Task Force) of the National Association of Criminal Defense Lawyers (NACDL) interviewed more than 130 individuals — judges, full-time defenders, panel attorneys, Administrative Office of the United States Courts (AO) personnel, and others whose work involves the federal indigent defense system. Specifically, the Task Force interviewed or otherwise received information from 73 private attorneys who were members of their district’s CJA Panel, 42 federal and community defenders, and 19 members of the AO staff, federal judges, or other court personnel or professionals involved with the criminal justice community. The persons interviewed included representatives of 49 of the 50 states and spanned all 12 of the federal regional judicial circuits.

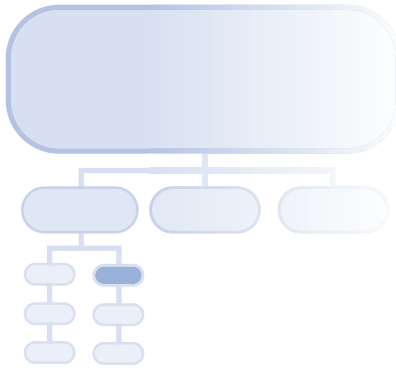
The Task Force also reviewed hundreds of pages of reports and other documents. Often, these interviews or documents led to further questions or requests for information — some of which the Task Force was able to obtain and some of which was unobtainable, even though it exists. The Task Force members, chair, and reporter spent countless hours investigating and detailing the concerns expressed.

Although this report describes several serious concerns, it is in no way comprehensive of the scope or depth of the issues facing the federal indigent defense system. A truly independent, well-funded, comprehensive review is long overdue. AO Director Judge John D. Bates’s announcement of a “comprehensive, impartial review” of the CJA program in December 2014, followed by Director James C. Duff’s April 2015 naming of the membership of the ad hoc committee appointed by the chief justice, means that a review will soon occur. The membership of the committee — only two defenders and one panel attorney compared with six judges and a seventh circuit court employee — highlights one of the primary concerns of this report: a lack of independence for the defense function, which is instead controlled by the judiciary.

Citations to reports and other documents are provided in the endnotes. The cited documents are available on the

## Seven FUNDAMENTALS OF A ROBUST FEDERAL INDIGENT DEFENSE SYSTEM:

1. Control over federal indigent defense services must be insulated from judicial interference.
2. The federal indigent defense system must be adequately funded.
3. Indigent defense counsel must have the requisite expertise to provide representation consistent with the best practices in the legal profession.
4. Training for indigent defense counsel must be comprehensive, ongoing, and readily available.
5. Decisions regarding vouchers must be made promptly by an entity outside of judicial control.
6. The federal indigent defense system must include greater transparency.
7. A comprehensive, independent review of the CJA program must address the serious concerns discussed in this report.



**Serious concerns exist about the effectiveness of the system today and its ability to ensure constitutionally required representation for litigants while preserving the independence essential to the defense function.**

Task Force web page: [www.nacdl.org/federalindigentdefense2015](http://www.nacdl.org/federalindigentdefense2015). Much of the content of the report, however, was drawn from interviews with individuals within the federal indigent defense system who were critical of the actions and motivations of the judges and administrators who have power over their job security and/or the payment of their fees. Some reasonably fear retribution based on what they have observed happen to others who have spoken up or raised concerns about the issues discussed in this report. Therefore, unless the identity of the person interviewed is critical to the attributed statement, this report will not include the names of those interviewed.

## **I. A Brief History of Providing Counsel for Indigent Defendants in Federal Court**

Fifty years ago, the Criminal Justice Act was designed to address a limited need in what was a small federal criminal justice system. Since that time, the federal criminal justice system, the Defender Services program, and the understanding of the essential elements of effective public defense systems have evolved. As detailed below, serious concerns exist about the effectiveness of the system today and its ability to ensure constitutionally required representation for litigants while preserving the independence essential to the defense function.

In 1932 in *Powell v. Alabama*,<sup>1</sup> the U.S. Supreme Court declared for the first time that effective, court-appointed counsel for those who cannot afford it is a constitutional right. Although the case involved capital sentences, the opinion explained, “Even the intelligent and educated layman requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”<sup>2</sup>

Six years later, in *Johnson v. Zerbst*,<sup>3</sup> the Court held defendants have the right to appointed counsel in all federal criminal cases.

For decades, however, the right to effective, appointed counsel was seldom a reality in the federal courts. In the absence of any funding, lawyers appointed by federal judges were not paid for time or expenses, and retaining experts or investigators was a cost few could afford.<sup>4</sup>

Between 1937 and 1949, every Judicial Conference of the United States and every U.S. Attorney General attempted to secure funding by urging Congress to appropriate money to pay/provide for lawyers appointed in federal criminal cases.<sup>5</sup> In 1952, the Judicial Conference called the lack of compensation for court appointments “a serious defect in the Federal judicial system.”<sup>6</sup>

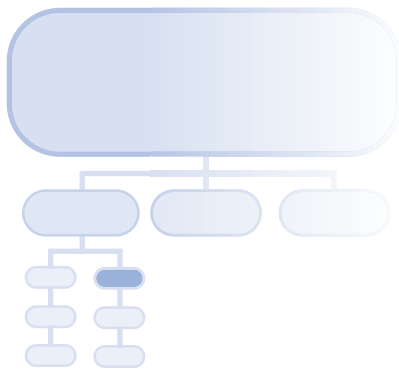


## The Criminal Justice Act

Support for the need of government to fund indigent defense, however, gradually built, with 1963 signaling a turning point. In his January State of the Union address, President John F. Kennedy told Congress, “The right to competent counsel must be assured to every man accused of crime in federal court, regardless of his means.”<sup>7</sup> In March, the *Report of the U.S. Attorney General’s Committee on Poverty and the Administration of Criminal Justice* (Allen Report) was submitted to Congress. The report detailed a plan that included financial eligibility for representation criteria, appointed counsel compensation and reimbursement of out-of-pocket expenses, provision of other necessary defense services such as experts, and the requirement that each federal district court and court of appeals devise its own plan for furnishing representation to eligible defendants, using representation by private attorneys, attorneys furnished by a bar association or legal aid agency, or through the creation of federal defender organizations (FDOs).

Attorney General Robert Kennedy testified before Congress in support of the Allen Report, and in a July 1963 op-ed he stated quite frankly and simply that the existing system “is unfair to defendants. It is a burden on private attorneys. It denies equal justice. It demands correction.”<sup>8</sup>

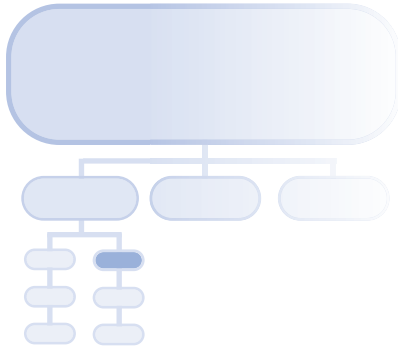
On Aug. 7, 1964, Congress passed the Criminal Justice Act (CJA). This monumental legislation recognized the government’s obligation to fulfill the Sixth Amendment by providing for the payment of hourly fees and expenses for court-appointed lawyers. Although the original CJA did not provide for the creation of FDOs, it did adopt most of the other recommendations of the Allen Report. The Act established a separate judiciary appropriation to cover the cost of the payments to these appointed attorneys and authorized federal judges to oversee these payments. By creating a separate appropriation from the one that funded court personnel and operations, the CJA was designed to allow judges to make decisions about compensating an appointed attorney regardless of the amount of resources available to the courts for salaries and expenses.



**Simply put, the Criminal Justice Act was not intended to establish a comprehensive public defense system — and must be viewed in the context of the times: an era of few federal criminal cases.**

Rather than reshaping the existing system, this initial CJA was grafted onto the existing system. It focused on easing, but not eliminating, the financial burden an attorney assumed when accepting a federal appointment by establishing panels of private attorneys from which judges could appoint counsel instead of soliciting assistance on a case-by-case basis. The Act gave judges the authority (and obligation) to pay attorneys they appointed a small fee (\$10 or \$15 per hour) and to reimburse them for their out-of-pocket expenses. The low fee was not expected to fully compensate assigned counsel for their time.<sup>9</sup>

Simply put, the Criminal Justice Act was not intended to establish a comprehensive public defense system — and must be viewed in the context of the times: an era of few federal criminal cases.



**No comprehensive study and analysis, as envisioned by the Prado Report, has been performed in the two decades since.**

## Federal Defender Offices

In 1967, the Department of Justice and the Judicial Conference commissioned Professor Dallin H. Oaks of the University of Chicago Law School to evaluate the prior initiatives and to recommend changes to the current version of the CJA. The *Oaks Report*<sup>10</sup> recommended statutory amendments to the Act and changes in its administration. The most significant of these recommendations was to allow the creation of federal public defender and community defender organizations within the district courts' CJA plans. Congress agreed, amending the Act in 1970 to provide for two types of federal defender offices (FDOs): public defender organizations (FPDOs) and community defender organizations (CDOs).<sup>11</sup>

### Federal Public Defender Organizations (FPDOs)

- ✦ Headed by a federal public defender (FPD) — a federal officer appointed by the court of appeals for the circuit in which the district is located.
- ✦ FPD appointed to a four-year term, with no limit on the number of terms.
- ✦ All employees are federal employees.
- ✦ Funded by an annual budget.

### Community Defender Offices (CDOs)

- ✦ A private, non-profit organization selected by the district court, subject to its circuit council's approval.
- ✦ Once selected, organizations retain their designation indefinitely, losing it only if the district and circuit court agreed to end the designation.
- ✦ None of the employees are government employees.
- ✦ Funded by an annual grant.

In making these amendments, Congress both recognized the need for a strong, independent federal defender program and the need for an office independent of the judiciary's control to administer it:

The committee recognizes the desirability of eventual creation of a strong, independent office to administer the federal defender program. It considered as a possibility the immediate establishment of a new, independent official — a "Defender General of the United States." It also considered establishing a special directorate for defender programs within the Administrative Office of the United States.

The committee, however, does not recommend founding an independent office *at this initial stage*. Such a step would be premature until Congress has had a[n] opportunity to re-



view the operations of the defender program over the course of a few years. *Nor does it recommend placing the overall direction of these programs in the Administrative Office. Clearly, the defense function must always be adversary in nature as well as high in quality. It would be just as inappropriate to place direction of the defender system in the judicial arm of the U.S. Government as it would be in the prosecutorial arm. Consequently, the committee recommends that the need for a strong independent administrative leadership be the subject of continuing congressional review until the time is ripe to take this next step.*<sup>12</sup>

## The Prado Report

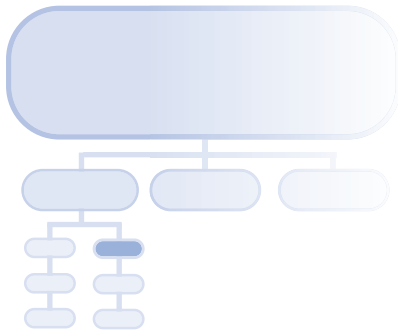
Despite this statement, the next review of the federal indigent defense system did not occur for nearly 20 years. The Judicial Improvements Act of 1990 directed the establishment of a Committee to Review the Criminal Justice Act. Created in 1991, this special Judicial Conference committee was established to conduct a comprehensive analysis of the CJA program and to recommend appropriate legislative, administrative, and procedural changes. The nine-member committee of federal judges, present and former federal and state defenders, law professors, and private attorneys familiar with criminal practice was appointed by Chief Justice Rehnquist and required to transmit its report to Congress within two years. Judge Edward C. Prado (then a district court judge in the Western District of Texas and a member of the Defender Services Committee (DSC)), was appointed chair of the Committee (Prado Committee).<sup>13</sup>

The *Report of the Committee to Review the Criminal Justice Act* (Prado Report) was issued on Jan. 29, 1993. The report included recommendations on such things as (a) the selection, training, evaluation, and compensation of panel attorneys; (b) standards and procedures for Federal Defender Organizations, including the creation of offices in all districts, compliance with EEOC laws, and procedures for removal of defenders; (c) the national and local structure and administration of indigent defense; and (d) funding. Most of the Prado Report's recommendations were adopted by the Judicial Conference. However, the "centerpiece" of the Committee's recommendations — to create within the judicial branch a new Center for Federal Criminal Defense Services — was not.

In its March 1993 *Report of the Judicial Conference of the United States on the Federal Defender Program* (Judicial Conference Report), written in response to the Prado Report, the Judicial Conference rejected the idea of a Center for Federal Criminal Defense Services, advising Congress that "National leadership and administration of the CJA program should remain with the Judicial Conference of the United States, assisted by its Committee on Defender Services and the Administrative Office of the United States."<sup>14</sup>

The Judicial Conference Report explained that the Prado Committee's recommendations for an independent Center for Defense Services "were justified on the assumption that there is a 'perceived' need for complete independence of defenders from the federal judiciary" but the Prado Committee had presented no "empirical data" to support its recommendation.<sup>15</sup> It asserted that (a) creation of the Center "would subject unnecessarily the entire CJA program to politicization and heightened vulnerability," (b) "criminal defense programs have no constituency, no power base, and no better champion than the judiciary," (c) creation of a new Center would result in "elimination of involvement by the judiciary in CJA issues and a diminution in the degree of judicial support for CJA appropriations requests and programs," and (d) the money required to establish the Center could be better spent funding new federal defender offices.<sup>16</sup>

The Judicial Conference did, however, adopt and support the final recommendation of the Prado Report — that "oversight, review and evaluation of the program should be conducted on an ongoing basis," and "a comprehensive global examination of the CJA program should be undertaken every seven years to en-



**When the CJA was proposed in 1963, only 30 percent of federal defendants qualified for appointed counsel; today the figure is nearly 90 percent.<sup>21</sup>**

sure continued viability and cost effectiveness.<sup>17</sup> The Prado Report had explained that the “comprehensive study and analysis” should be performed by “an impartial entity” and “include an evaluation of the current system and an assessment of long range needs.”<sup>18</sup>

## Twenty Years Without Evaluation or Assessment

No comprehensive study and analysis, as envisioned by the Prado Report, has been performed in the two decades since. In 2004, the Executive Committee of the Judicial Conference asked the DSC to evaluate whether the Defender Services Program should be placed outside of the judiciary. Chaired by Judge John Gleeson, the Subcommittee on Long-Range Planning and Budgeting drafted a report titled *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* (Gleeson Report).<sup>19</sup> This was not a public report. Some members of the Task Force first learned of it during a June 2014 meeting with Judge Bates, then Director of the AO. The Task Force requested a copy at the meeting, which was provided to the Task Force at a subsequent meeting with him in November 2014. The Gleeson Report is posted, along with other documents cited in this report, on the Task Force website.

In addition to the judicial members of the study committee, four federal defenders and two CJA panel attorneys participated in the Gleeson Report. As the second page of the 29-page report explains, the project was an outgrowth of a “cost-containment strategy for the judiciary” approved by the Judicial Conference in September 2004. The report included a seven-page section titled “Evaluation of Program Performance,” which highlights concerns expressed by both federal defenders and panel attorneys. The concerns identified were (1) the inherent tensions in the appropriation process; (2) federal defender “mega case” funding; (3) review of panel funding requests by judges; (4) voucher cutting; (5) the lack of meaningful review or reconsideration of voucher cutting; (6) appointment of counsel without regard for qualifications; and (7) compulsory continuation of representation by trial counsel on appeal.

The final section of the report drives home its primary purpose, which was not an “impartial entity” assessing federal indigent defense for the sake of those providing and receiving the services, but rather a cost-containment study for the sake of the judiciary. Its concluding section, “Recommendations for Responding to the Executive Committee” included the following:

QUESTION: Should the Defender Services program be placed outside the judiciary, as a judiciary cost-containment measure?

RECOMMENDED ANSWER: No.

First, it is the opinion of the Administrative Office’s Office of Finance and Budget that moving the Defender Services program out of the judiciary and its funding out of the judiciary’s appropriation would not make a material difference in the funding level appro-

riated for the Salaries and Expenses appropriation. Second, even if such a structural change were perceived as helpful to the judiciary in securing funding, those benefits would likely be offset, and perhaps outweighed, by the costs — both financial and institutional — associated with a significantly impaired defense function. There is ample reason to believe that funding for the Defender Services program would be jeopardized if any changes were made to the responsibility of the Judicial Conference for implementation of the Criminal Justice Act through its oversight and management of the program.

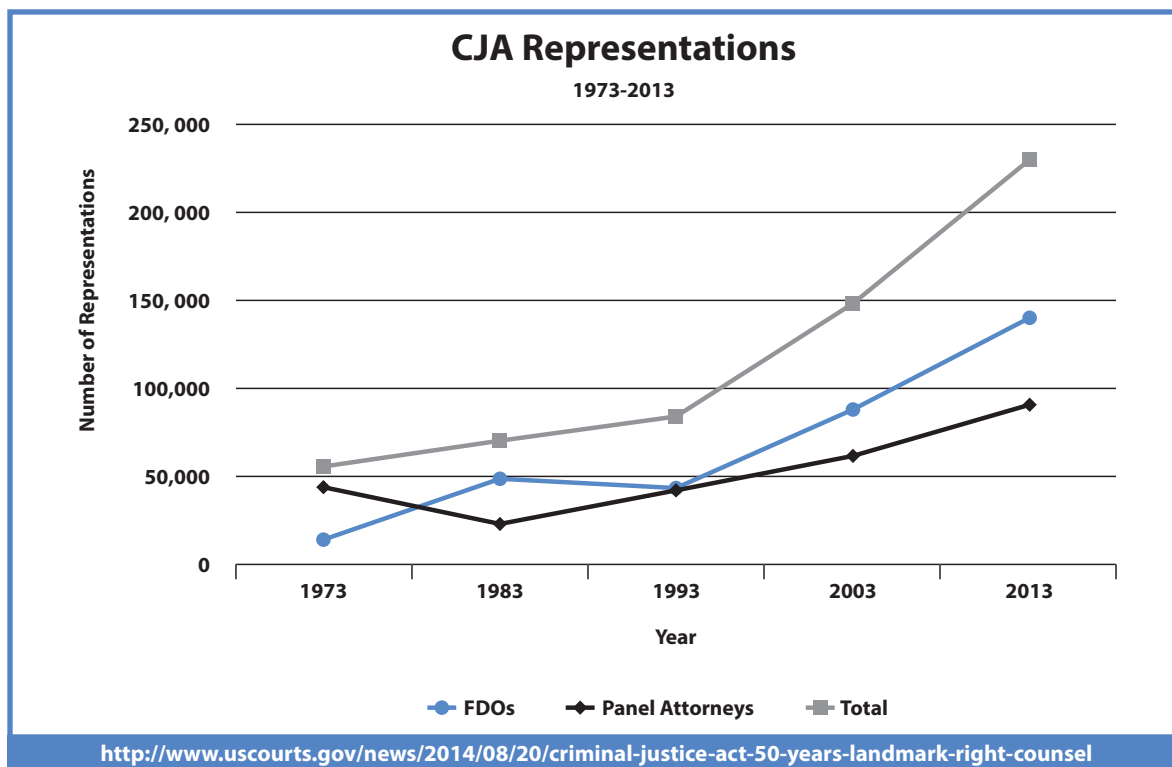
The follow-up question, “Should the Defender Services program be a separate program within the judiciary?” was likewise answered in the negative, because “establishing Defender Services as a separate program *within* the judiciary would not provide any advantage to the judiciary in terms of securing more funding for its other accounts.”<sup>20</sup>

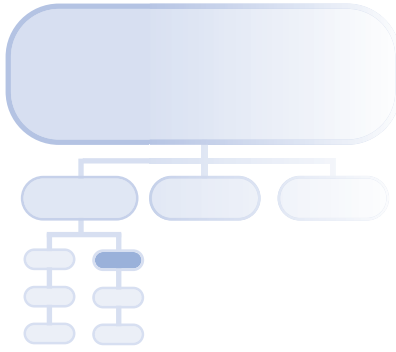
Other than this internal report, no examination of the CJA and the federal indigent defense system has been completed in well over 20 years.

## Funding and Caseloads Changes in the Past 50 Years

When the CJA was proposed in 1963, only 30 percent of federal defendants qualified for appointed counsel; today the figure is nearly 90 percent.<sup>21</sup> In 1963, the number of federal cases assigned to appointed counsel was approximately 10,000; by the early 1990s, when the Prado and Judicial Conference Reports were completed,<sup>22</sup> over 83,000 appointments were made in the nation’s federal courts,<sup>23</sup> and in recent years that number has been between 210,000 and 230,000 annually.<sup>24</sup> Over this same time period, the budget for federal indigent defense has grown from \$1 million dollars in 1964 to over \$1 billion today.

As explained below, the funding situation became dire in 2013 when sequestration imposed severe cuts on the federal judiciary, and especially upon those who represent federal indigent defendants.<sup>25</sup>





**Several entities and committees within the judiciary exercise significant control both over the indigent defense system generally and over federal defenders and panel lawyers specifically.**

### **ABA Ten Principles of a Public Defense Delivery System**

Adopted in 2002, the ABA Ten Principles serve as a “practical guide for governmental officials, policymakers, and other parties who are charged with creating and funding new, or improving existing, public defense delivery systems.”<sup>26</sup> Cited frequently by courts and legal journals, these principles “constitute 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.”<sup>27</sup>

1. The public defense function, including the selection, funding, and payment of defense counsel, is independent.
2. Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.
3. Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients’ arrest, detention, or request for counsel.
4. Defense counsel is provided sufficient time and a confidential space within which to meet with the client.
5. Defense counsel’s workload is controlled to permit the rendering of quality representation.
6. Defense counsel’s ability, training, and experience match the complexity of the case.
7. The same attorney continuously represents the client until completion of the case.
8. There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.
9. Defense counsel is provided with and required to attend continuing legal education.
10. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.

## II. The Judiciary's Oversight of Indigent Defense

Several entities and committees within the judiciary exercise significant control both over the indigent defense system generally and over federal defenders and panel lawyers specifically. The Committee responsibilities are generally not well known or understood outside of the federal judiciary or the AO. The following descriptions were compiled from the 2005 Gleeson Report, a 2009 Jurisdiction of Committees report previously available online,<sup>28</sup> and documents prepared for or requested by the Task Force. To gain a better understanding of the various entities and their roles relating to oversight of federal indigent defense, greater transparency is needed as discussed in Fundamental 6.

### At the National Level

The AO is the administrative component of the federal judiciary. Its Director is responsible for overseeing the expenditure of funds appropriated by Congress for the administration and operation of the federal appellate and district courts, and various programs and activities placed under the judiciary's supervision. This includes, therefore, direct oversight of the Defender Services Program. The Defender Services Office (DSO) is part of the Program Services of the AO and is responsible for providing support and training to those providing indigent defense services in federal courts.

*The Judicial Conference*, as the policy-making body for the federal judiciary, promulgates guidelines and policies for the administration of the CJA and related statutes.

*The Defender Services Committee* oversees the provision of representation for indigent defendants, including making recommendations to the Judicial Resources Committee on compensation and staffing issues and to the Judicial Conference on significant legislative or policy changes. The current jurisdictional statement of the DSC is not publically available but was provided upon request of the Task Force and approval by the Chair of the Executive Committee.<sup>29</sup> It is reprinted in Appendix C.

The Committee may not advocate directly to Congress regarding the indigent defense appropriation (funding) or other legislative initiatives that affect indigent defense services. Advocacy to Congress may only be performed by the Judicial Conference's Executive and Budget Committees.

A significant diminution of the responsibilities of the DSC occurred in 2012. Before 2012, the DSC determined the staffing levels for each FDO. Since 2012, as described below, that responsibility/role has been shifted to the Judicial Resources Committee.

*The Judicial Resources Committee* (JRC) has broad authority, including coordinating and making recommendations to the Judicial Conference "regarding all staffing formulae and requests for personnel not covered by established staffing formulae and methodologies . . ."<sup>30</sup> This includes oversight of "the operation of statistical systems and the development of methodologies for human resource needs assessment and allocation."<sup>31</sup> Allocating limited resources is ingrained within the Committee's charge: "When the budget is being formulated, propose adequate funding and resources to support the programs within the committee's jurisdiction, taking into account the overall fiscal situation of the judiciary."<sup>32</sup>

Since 2012, the JRC has been vested with the authority to determine the staffing levels for individual FDOs.

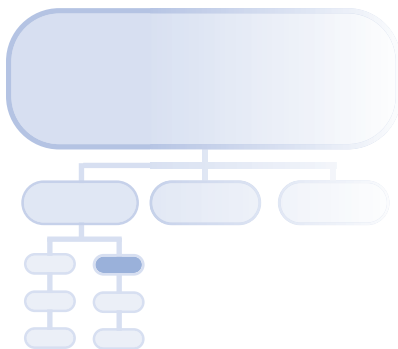
*The Executive Committee* is the senior executive arm of the Judicial Conference. Its defined responsibili-

ties include, among other things, making recommendations to the Judicial Conference and its committees of the judiciary's needs, coordinating legislative efforts while improving relationships between the branches of government, and developing spending plans for the federal judiciary's congressionally approved appropriations, a significant grant of authority that drove funding decisions for defenders during sequestration.<sup>33</sup>

*The Committee on the Budget* is responsible for assembling and presenting to Congress the budget for the judicial branch. It must also monitor expenditures and assist in the judiciary's efforts to improve fiscal responsibility and efficiency.<sup>34</sup>

This national organizational structure gives rise to several concerns about the independence of the defense function under the first ABA principle.

- ✧ The only individuals expressly focused on the defense function — the staff within the DSO — have virtually no power. They have no ability to advocate for funding or changes with Congress. They have no power within the national structure to make decisions about allocation of resources — all of which are made by judges.
- ✧ Some committees are expressly charged with weighing necessary resources for the defense function by “taking into account the overall fiscal situation of the judiciary.”
- ✧ Decisions about funding are made not by individuals committed to the defense function, but by members of a committee charged with developing formulas.



**Through more than 130 interviews of defenders, panel lawyers, judges, and other stakeholders, as well as review of written reports and related documents from a variety of sources, the Task Force offers this candid, and largely critical, assessment of several shortcomings of the federal defense system. But some aspects of the current system satisfy the ABA Ten Principles and should be maintained and fostered.**

## Appellate Court Level

*The United States Circuit Courts of Appeals* are authorized by the CJA to do the following:

- ✧ Appoint the federal defender for each district within the circuit, “after considering recommendations from the district court or courts to be served” and set salaries for each federal public defender within their circuits at a level not to exceed that of the U.S. Attorney for the district served;
- ✧ Approve the number of full-time attorneys the federal public defender may hire;
- ✧ Approve payment of counsel appointed to represent individuals on appeal; and

- \* Approve district court vouchers submitted in excess of CJA case compensation. Maximums that are approved by the district judge before whom the case is being litigated must also be approved by the chief judge or the chief judge's delegate.<sup>35</sup>

*The Judicial Councils of the Circuits.* Each federal judicial circuit has a judicial council, headed by the circuit's chief judge, which is charged with making orders for the effective and expeditious administration of justice within their respective circuits. The CJA requires that district court CJA plans be approved by the judicial council for the circuit, which must also supplement the district plan with provisions for representation on appeal.<sup>36</sup>

## Trial Level

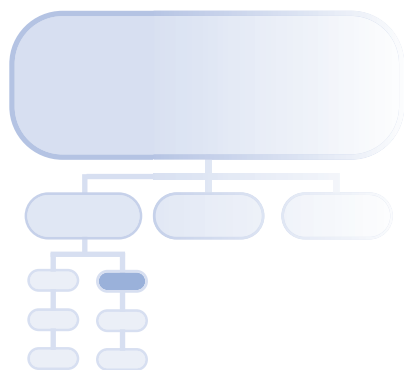
At the trial court level, the *district court judges* are responsible for establishing a plan for furnishing representation under the CJA. Subject to the approval of the circuit judicial council, district courts determine whether to rely exclusively upon the appointment of private panel attorneys or to seek the creation of a federal public or community defender organization. Most importantly, judges have authority over the appointment of counsel, and individual judges presiding over cases determine the payment of counsel and expert and other costs requested by appointed counsel, subject to the requirements for excess compensation claims by the appellate court.<sup>37</sup>

## III. Assessment of the Current State of the Federal Indigent Defense System

Through more than 130 interviews of defenders, panel lawyers, judges, and other stakeholders, as well as review of written reports and related documents from a variety of sources, the Task Force offers this candid, and largely critical, assessment of several shortcomings of the federal defense system. But some aspects of the current system satisfy the ABA Ten Principles and should be maintained and fostered.

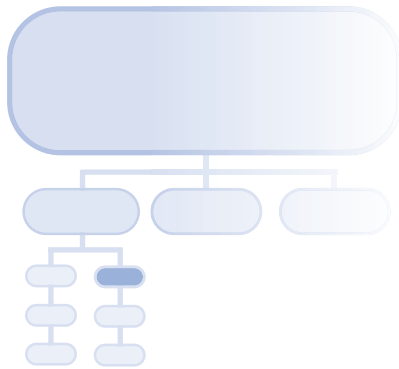
### Some Positive Aspects of the Federal Defender System

*High quality lawyers.* Despite the Task Force's concerns over the selection methods used, the lack of adequate pay rates for panel attorneys, and the absence of regular evaluations of the quality of services provided, the federal indigent defense system, overall, has attracted a strong cadre of federal defenders and panel lawyers. Although merely a snapshot of opinions not guided by an objective assessment, surveys of



**A robust, hybrid system combining a full-time defender office and a panel of private bar members is essential to providing a stable, effective, and independent defense presence.**

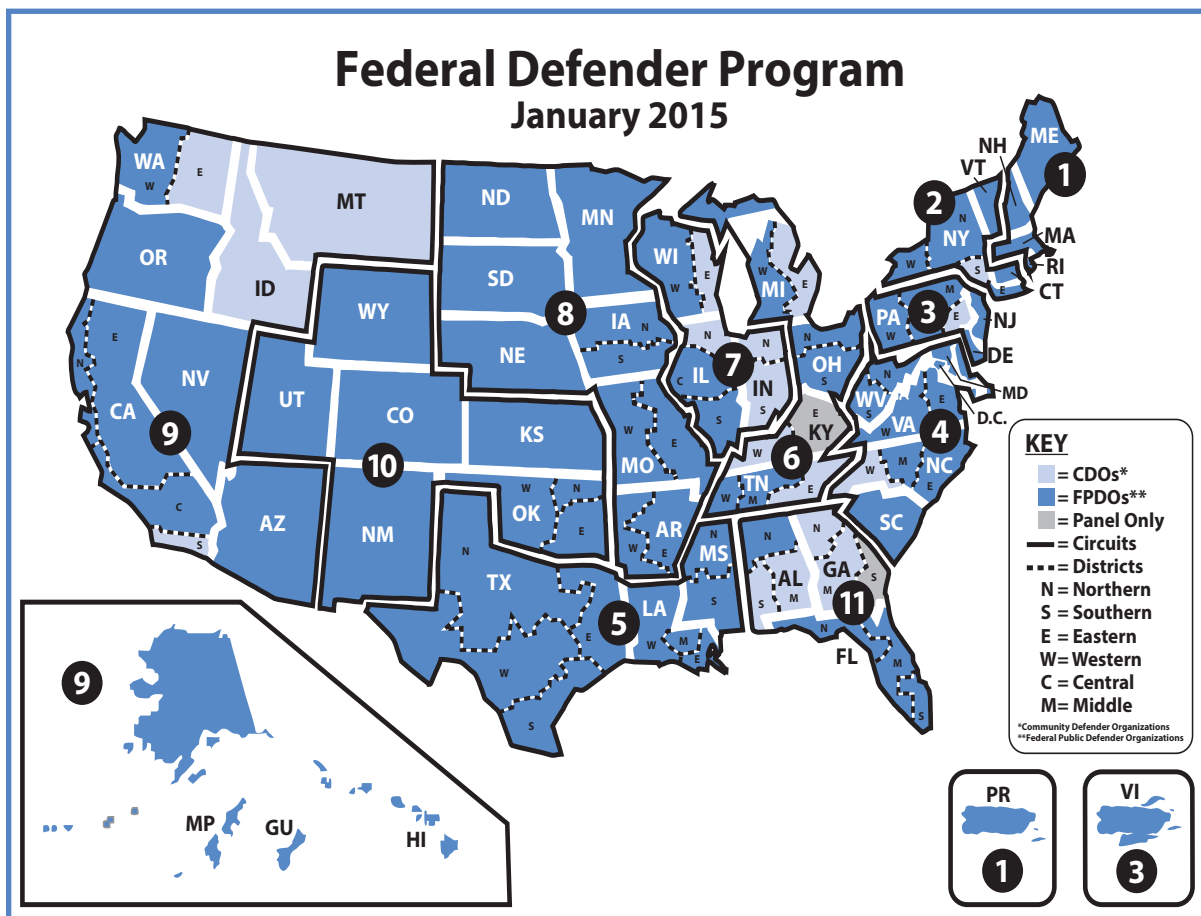




That the federal system is better in many respects, however, is not a reason to ignore its shortcomings.

federal judges, whose experience with and knowledge of the requirements of indigent defense representation is sometimes limited, have ranked the quality of representation by federal defenders as the highest among lawyers appearing before them — higher than both federal prosecutors and retained counsel.<sup>38</sup> In addition, many panel lawyers in districts across the country are among the best, most committed advocates for indigent clients found anywhere.

*Robust, hybrid system.* The second of the ABA Ten Principles calls for a system that “consists of both a defender office and the active participation of the private bar.” Since 1970, the CJA has authorized the creation of federal public defender and community defender organizations, led by a full-time defender and other lawyers and staff to provide representation in the district. The authorization extends to every district with at least 200 cases annually. Currently, all but three districts have elected to create a full-time defender office.



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A robust, hybrid system combining a full-time defender office and a panel of private bar members is essential to providing a stable, effective, and independent defense presence. Full-time defenders provide



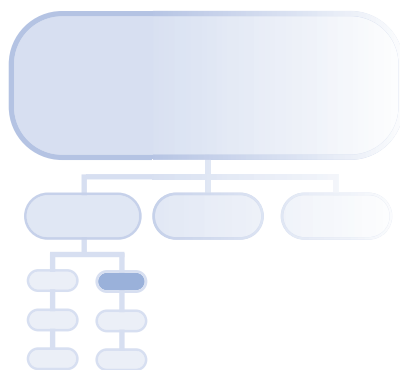
crucial institutional support, while panel lawyers are essential not only in handling conflict cases and in ensuring reasonable caseloads by providing a safety valve, but also often bring a different background and broadened perspective of experience.<sup>39</sup>

*Supportive judges and AO staff.* Although the judiciary's management of the Defender Services Program compromises the independence of the defense function, the Task Force recognizes the long-standing support of the defense function from many members of the federal judiciary. Although a complete list would be impossible, most of the judges who have served on the DSC, whether as volunteers or draftees, have developed an understanding and appreciation for the defense function and been supportive of defenders and panel lawyers. Many circuit judges have volunteered to be part of committees that thoroughly screen and select federal defenders. Despite the serious concerns about conflicts of interests and requisite expertise regarding provision of defense services, many district judges have devoted their time and experience to maintaining a high quality panel. Finally, during sequestration, numerous members of the federal judiciary stepped forward to advocate to Congress, the AO and the general public for defense funding. An Aug. 13, 2013, letter to Vice President Biden, the president of the Senate, from 87 chief judges of federal district courts, was especially noteworthy. After outlining the funding concerns of sequestration on many aspects of the federal judiciary, the judges made clear that defenders had endured "the most significant impact of budget cuts and sequestration" and that the judges were "deeply concerned that cuts in defender offices will severely undermine and weaken a program that has taken years to build."<sup>40</sup>

Defenders have also benefitted from the tireless work of DSO leadership and staff on behalf of defenders and their clients. Although the DSO has strongly supported an effective, high quality federal public defense system, as explored below, the broader AO has sometimes shown a lack of understanding or concern for the defense function and its independence, instead focusing upon the self-described mission of the AO: to serve the federal judiciary.

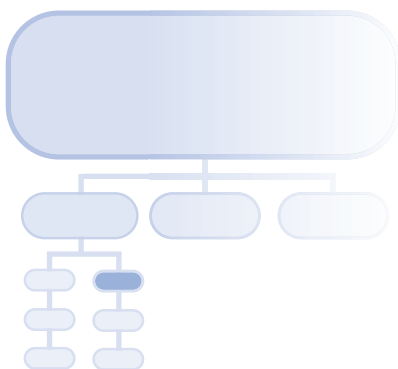
*Funding.* The federal public defense system is widely and historically regarded as better funded than state systems. Although, as explained below, devastating cuts occurred during sequestration, the past five decades have largely allowed for sufficient funding to render competent defense services.

NACDL has been actively involved in supporting additional resources for woefully underfunded and over-worked lawyers who represent indigent defendants in state systems. Several state and national reports



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have chronicled the grave problems in many states and communities across the United States.<sup>41</sup> The shortcomings and concerns of the federal system are serious but different from many experienced in state systems. NACDL remains committed to working to improve state indigent defense. That the federal system is better in many respects, however, is not a reason to ignore its shortcomings. Every indigent defendant, regardless of the court where his or her case happens to be filed, is entitled to competent representation under both the Sixth Amendment and the Rules of Professional Conduct.



**Treating the defense function similar to court clerks or probation ignores the unique role and obligation of defenders, who have an ethical obligation to carry out a client's wishes, to act as zealous advocates on their client's behalf, and to serve in the special role as counselor.**

## Areas of Concern: Pervasive Judicial Control Over the Defense Function

From the national level to the individual district courts across the nation, judges — not defense attorneys or others appointed to represent and protect the interests of defendants — manage the nation's federal indigent defense system. The operation of many of these entities within the judicial branch is not transparent and the administrators often lack the expertise (and sometimes seemingly an interest) in indigent defense issues. Perhaps most telling was the sentiment, expressed by numerous defenders and panel lawyers, of their willingness to speak with the Task Force only on the condition of anonymity. This section focuses on concerns at the national level; later sections address concerns at the circuit and district court level.

### Concerns at the National Level

Some judges and others within the judicial branch expressed concern about the judiciary's tendency to favor the interests of the courts over the interests of the Defender Services Program and the clients it serves. Although the defender appropriation is separate from the remainder of the judiciary's budget, the sentiment of at least some in the judiciary is that funding made available for Defender Services reduces the funding available for operations of the courts. Consequently, the Executive and Budget Committees, as well as policy and decision makers throughout the judiciary, may act based on a belief that there is a need to restrain, control, and reduce the defender budget in order to protect and grow the judiciary's budget.

- ✧ As a former chair of the DSC told the Task Force, the "judiciary acts in its own self-interest," viewing the budget process as "kind of a zero-sum game" in which "a dollar into defense services is a dollar not into the clerk's office" or other agencies.
- ✧ The Executive Committee wields a great deal of power and, critically, approves the judiciary's annual spending plans that specify how funds appropriated by Congress will be allocated among the judiciary's components, including federal defenders and panel attorneys. The Executive Committee, though, does not meet with the chairs of key committees on issues. Thus, even though it lacks public defender expertise, the Executive Committee is free to act, and has a pattern and practice of acting, in ways contrary to the recommendations of the DSC, advisory groups of defenders and panel attorneys, and the well-being of the Defender Services Program, as it did with budgetary issues in fiscal year 2013 and in refusing to recommend to Congress an increase of panel rates to the full statutory authorized levels in fiscal year 2016.

- \* Moreover, as some of those judges involved in the committee structure that makes key decisions affecting Defender Services told the Task Force, the judiciary sometimes acts in mysterious, if not arbitrary and uninformed, ways, allowing committees or individuals concerned primarily with budget or cost-cutting to make significant decisions about indigent defense with very little consultation of the program experts within DSO or the DSC. For example, a conference call held during the fiscal year 2013 sequestration crisis discussed delaying panel payments as an alternative to slashing FDO funding. Although the call included the chair of the Executive Committee, no one from the DSO was included in the call. As one federal judge put it, “The process is broken when the entity within the AO with the biggest stake is not part of a discussion about it.”

In addition, the Task Force learned of many other areas of concern regarding the lack of independence for the defense function, including:

### Transfer of Budgeting/Staffing Authority to the JRC

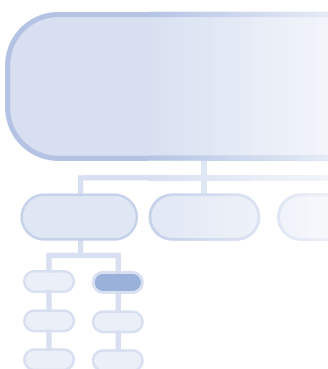
For decades, the DSC made the critical decisions regarding budget and staffing for defender offices. In 2012, the Executive Committee assumed control over staffing and salary levels (the largest part of each FDO’s budget), vesting it in the JRC, which was charged with developing formulas for defender staffing similar to the work done for other court functions, such as court clerks and probation offices.<sup>42</sup> Treating the defense function similar to court clerks or probation ignores the unique role and obligation of defenders, who have an ethical obligation to carry out a client’s wishes, to act as zealous advocates on their client’s behalf, and to serve in the special role as counselor.

### Work Measurement Study

During the early phase of the Task Force’s inquiry, the judiciary announced that it would conduct a work measurement study on all federal defender offices during a four-week period in the fall of 2014. The roll-out of the study and the initial lack of input from defenders as to its implementation raised concerns about the independence of the defense function. Those concerns were vigorously aired at the January 2014 Federal Defender Conference in Washington, D.C.<sup>43</sup> Nonetheless, following the meeting, defenders across the nation resolved to work collaboratively with those conducting the study to ensure the collection of all relevant data.

In April 2015, the Task Force was told that the work measurement study recommended a significant increase in defender staffing. It remains unclear whether that recommendation will receive support from

**As a cost-cutting measure in 2013, the AO assumed responsibility for the technological needs of defender offices, providing the AO with access to significant confidential client and case information by central office personnel outside of defender officers. . . . Consultation and an opportunity for input from defenders should have occurred much earlier in the process to ensure the unique needs and obligations of defenders were met, and the rights and privileges of their clients protected.**



the multiple layers of the judiciary necessary to secure congressional funding. The work measurement formulas were approved by the JRC in June 2015, and approval for the necessary budget increase is required by the Executive and Budget Committees and ultimately the Judicial Conference.

Although the Task Force had limited information available and did not reach consensus to comment on the manner in which the work measurement study was conducted, including its timing and methodology, the Task Force reaffirms and reiterates NACDL's long-standing support of evidence-based practices to accurately monitor workload and performance. It appears that the meticulous data collection that went into the study persuasively makes the case for additional resources. This underscores the importance of tracking time and tasks in order to empirically demonstrate need to funders. In a recent, successful BJA grant proposal, NACDL secured funding to help ensure defenders in state systems "record and evaluate the amount of time required to provide effective representation throughout all phases of a criminal case."<sup>44</sup> As a leading expert on reasonable caseloads for public defenders has emphasized, defenders "need a way to explain to their funding sources (with a reasonable degree of certainty) the financial support they require to provide representation consistent with the professional conduct rules and the Sixth Amendment."<sup>45</sup> The apparent results of the work measurement study confirm this point.

## Technology

As a cost-cutting measure in 2013, the AO assumed responsibility for the technological needs of defender offices, providing the AO with access to significant confidential client and case information by central office personnel outside of defender officers. Although assurances were offered that no such access would occur, concerns about the inherent conflict remained.

Despite a promise not to view confidential information, AO personnel would have unfettered access to the following information systems:

- ✱ defenderData, a client case management program that records information about individual cases, can store documents from individual cases, and has a section that functions as an electronic case log;
- ✱ the federal defender's e-mail system, Lotus Notes, which contains innumerable messages concerning clients and cases, including e-mails from clients to staff lawyers and support staff; and
- ✱ Defender Services Management Information Systems (DSMIS), a database which compiles and analyzes statistical data, including information that can be broken down to individual cases, revealing confidential matters relating to the representation of specific defender clients.

Formal Opinion 13-01 (December 2013) from NACDL's Ethics Advisory Committee concluded that 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." Only after considerable pushback from both this ethics opinion and federal defenders were two memoranda of understanding later entered into in order to limit the use of that data. Consultation and an opportunity for input from defenders should have occurred much earlier in the process to ensure the unique needs and obligations of defenders were met, and the rights and privileges of their clients protected.

## Demotion of the DSO Within the AO

As explained above, Congress has long emphasized the importance of an adversarial defense with "strong independent leadership."<sup>46</sup> In December 2005, the DSO was described as "the primary administrator of the

Defender Services program and provides policy, legal, management, and fiscal advice on related matters to the Director, the Committee on Defender Services, judicial officers and employees, private attorneys, and federal defenders and their staffs. The Office’s responsibilities include continuing education and training for persons providing representational services under the Act.”<sup>47</sup>

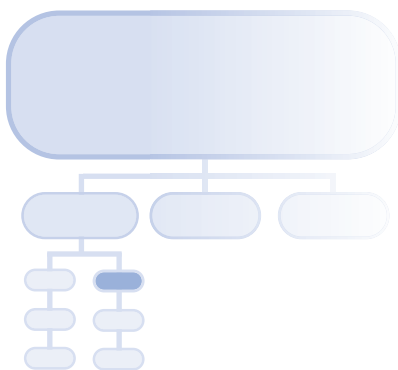
Just a year earlier, AO Director Leonidas Ralph Mecham had reorganized and elevated the Defender Services Division, a unit reporting to an “Assistant Director for Court Administration and Defender Services,” into a separate DSO, which meant its chief became part of the Executive Management Group of the AO.<sup>48</sup> He explained at the time that “[e]stablishing a distinct high-level office for the defender services program recognizes the unique nature of this program and the importance of its mission.”<sup>49</sup>

In the years that followed, the chief of DSO reported directly to the AO Director. However, in 2011 the AO’s cost-containment task force recommended there be an “assess[ment of] the AO’s structure across all directorates” to determine “how to organize to best support for the Third Branch.” Following a detailed assessment, a major AO reorganization was announced in June 2013.<sup>50</sup>

The restructuring plan was intended to reduce operating costs and the duplication of effort, enhance service to the courts and the Judicial Conference, and simplify the AO’s administrative structure. According to the AO’s annual report:

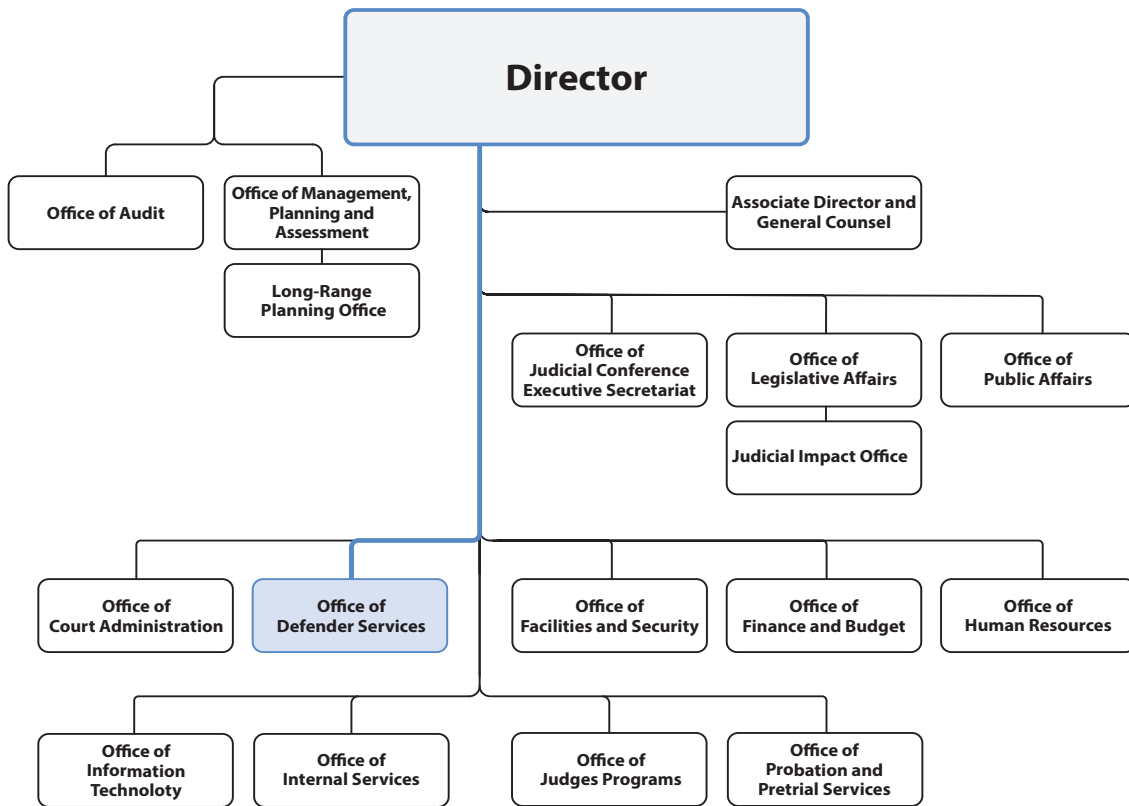
Several principles guide[d] the plan and are governing its implementation: (1) organize by function; (2) simplify organizational structures; (3) empower managers and streamline governance; (4) remove impediments to coordination; (5) create flexibility to respond to changing circumstances; (6) reduce managerial layers, organizational “top heaviness,” and associated costs; and (7) maintain critical working relationships with Conference committees, advisory councils, and peer advisory groups.<sup>51</sup>

The result was a reorganization of the AO into Executive Offices and three departments: Program Services, Administrative Services, and Technology Services. The AO’s annual report notes, “The simplified and streamlined organization will allow the AO to be more flexible and better positioned to meet changing needs. Further, the restructuring is the only way the AO can maintain a highly skilled and dedicated workforce, given the fiscal realities the agency currently faces and expects to encounter in coming years.”<sup>52</sup>



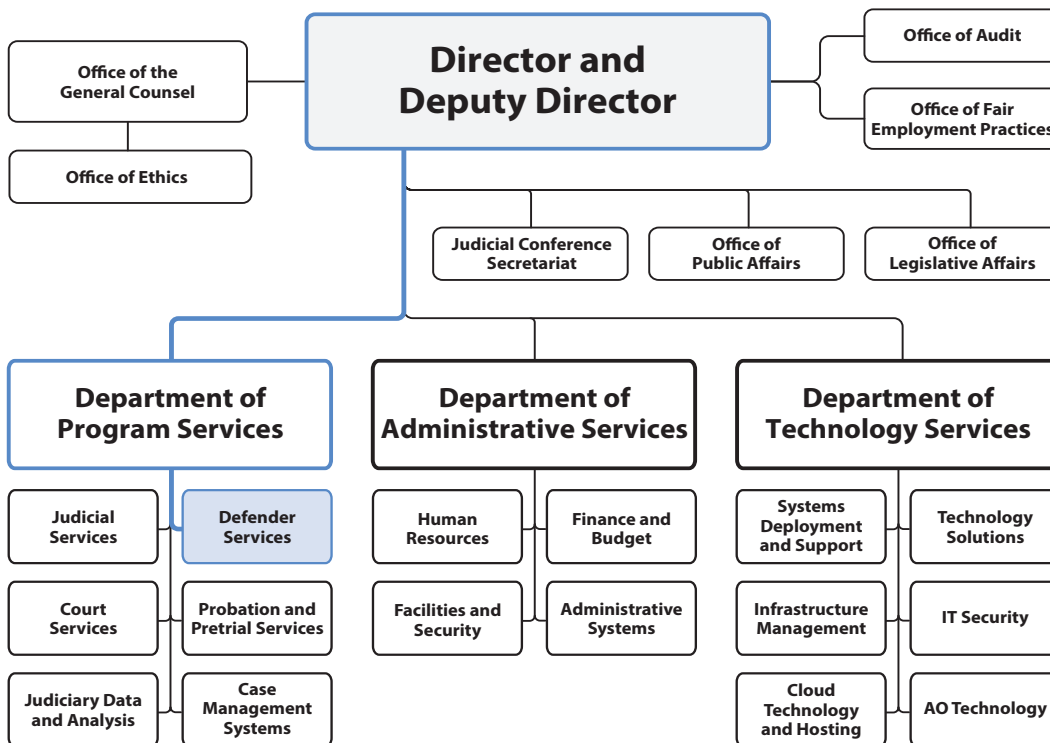
**In the June 2013 restructuring, the DSO was demoted from a “distinct high-level office” within the AO to one of six entities under the Department of Program Services. . . . the defense function, contrary to the views of some within the judiciary, does not exist to serve the courts. The reorganization’s stated goal of “enhanc[ing] service to the courts and the Judicial Conference,” suggests a lack of understanding of the unique and constitutionally mandated role of defense counsel and highlights the inherent and insurmountable conflict of judicial control over the defense function.**

### Administrative Office of the United States Courts



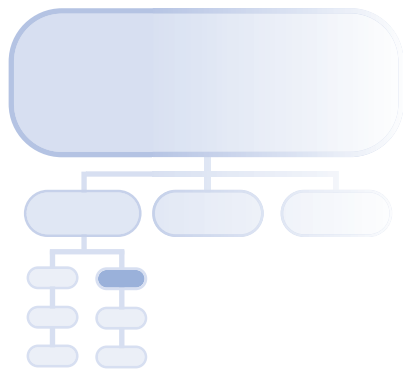
Provided by DSO and reformatted for this report.

### Administrative Office of the United States Courts



Provided by DSO and reformatted for this report.

In the June 2013 restructuring, the DSO was demoted from a “distinct high-level office” within the AO to one of six entities under the Department of Program Services. Lumped together with groups such as Probation and Pre-trial Services, Judiciary Data and Analysis, and Case Management Systems, the reorganization was designed, not to maintain a measure of independence of the defense function, but to allow the AO to fulfill its core mission of supporting the courts. But the defense function, contrary to the views of some within the judiciary, does not exist to serve the courts. The reorganization’s stated goal of “enhanc[ing] service to the courts and the Judicial Conference,” suggests a lack of understanding of the unique and constitutionally mandated role of defense counsel and highlights the inherent and insurmountable conflict of judicial control over the defense function.

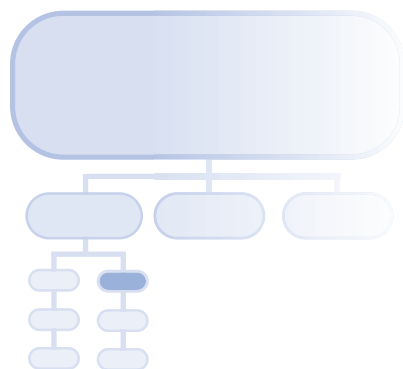


**Fiscal Year 2013’s sequestration highlighted many of the shortcomings of the judiciary’s management of and advocacy for the Defender Services program. . . . The actions of the Executive Committee had disastrous consequences both to defender offices and panel lawyers.**

### Judiciary’s Allocation of Cuts During Sequestration

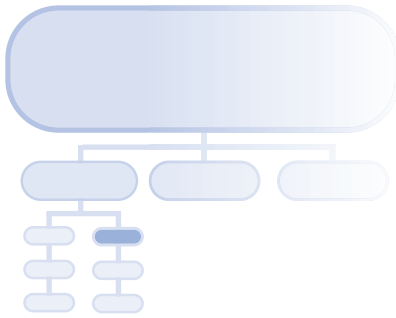
Fiscal Year 2013’s sequestration highlighted many of the shortcomings of the judiciary’s management of and advocacy for the Defender Services program. Rather than deferring to the expertise of the DSC, during sequestration the Judicial Conference’s Executive Committee made the decisions on how to allocate the significant cuts. These decisions evidenced a lack of understanding of both the operations of FDOs and the obligations of attorneys who represent those charged with federal crimes. The actions of the Executive Committee had disastrous consequences both to defender offices and panel lawyers.

Defenders’ offices lost approximately 400 positions, or 10 percent of their total staff, including 145 defense lawyers. Furloughs cost defenders staff about 20,000 workdays.<sup>53</sup> On Sept. 1, 2013, the hourly rate for court-appointed attorneys was cut \$15 an hour, an unprecedented move that was not reversed until March 1, 2014.<sup>54</sup> Although the rate was later restored, all services provided during the six-month period were compensated at the lower rate.



**James E. Felman, a member of the Steering Committee of Clemency Project 2014, described the AO’s decision as a “stunner.”**





## The judiciary made no effort to work with Congress and the DOJ to obtain such authority [to pursue clemency] as an independent defender agency might have done.

In speaking about the gravity of these cuts, Attorney General Holder stated: “These cuts threaten the integrity of our criminal justice system and impede the ability of our dedicated professionals to ensure due process, provide fair outcomes and guarantee the constitutionally protected rights of every criminal defendant.”<sup>55</sup>

As noted earlier, the chief judges of 87 of the nation’s 94 federal judicial districts wrote to Senate President Joe Biden that defenders have endured “the most significant impact of budget cuts and sequestration” and that they were “deeply concerned that cuts in defender offices will severely undermine and weaken a program that has taken years to build.”

Beyond the furloughs and staff cuts, defenders endured large cuts to every category of expense including experts, technology, training, and travel. Defenders told the Task Force of the severe impact of the cuts in the spending plan adopted by the Executive Committee:

- ✱ “I had a \$250,000 problem to solve for a six-month period. This forced me to think of employees as dollar signs.”
- ✱ In an office of only 11 lawyers, three lawyers were laid off in sequestration and not restored. “They’re not cutting us to the bone. They’ve cut the bone.”

On Jan. 17, 2014, the president signed into law the Consolidated Appropriations Act, funding the federal government for the fiscal year ending Sept. 30, 2014. The Act appropriated \$6.5 billion in discretionary funds for the judiciary, which is 5.1 percent above the \$6.2 billion appropriated to the judiciary in FY 2013 (post-sequestration), essentially equal to the level requested in the judiciary’s Dec. 5, 2013, appeal letter to Congress.<sup>56</sup> Nevertheless, uncertainty remains as FDOs await possible changes to their funding and staffing levels after completion of the work measurement study as well as an uncertain fiscal situation in the years ahead.

Addressing a budgetary shortfall is certainly challenging for those who must make difficult decisions, but the judiciary’s response raises a number of concerns. First, the decision to cut defender offices appears to have been done without careful consideration of a number of important factors, including whether the budgetary shortfall also affected the Department of Justice in such a way that would lead to fewer case filings that require representation by defenders. Moreover, a cut in defender staff could simply mean that lawyers have less time to work on more cases or that CJA panel lawyers would need to be paid to represent clients in more cases because fewer full-time defenders are available. These important decisions cannot be approached simply as a budget-cutting exercise; the effect on representation of clients whose liberty is at stake should be paramount. Finally, rather than the cut to the CJA panel rate, a mere delay of payments would have been a fairer solution.

### Clemency

On Jan. 30, 2014, in a speech to the New York State Bar Association, then-Deputy Attorney General James M. Cole announced a new clemency initiative focused on reducing sentences for federal inmates convicted of offenses that would result in substantially lower sentences under current law or policy and called for the bar to assist inmates. A few months later, the Department of Justice promulgated specific criteria. In response to

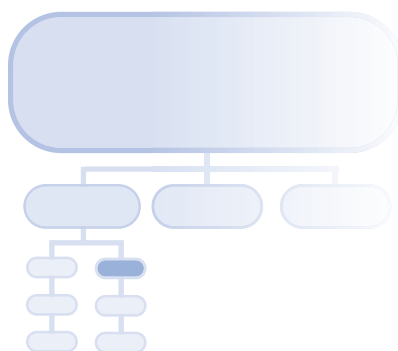


the administration's initiative and call for pro bono assistance, a number of bar groups collaborated with federal public and community defenders to develop an unprecedented pro bono initiative to answer this call. They established Clemency Project 2014<sup>57</sup> to offer pro bono representation to inmates to assist them in determining whether they met the announced criteria, and if they did, to assist in preparing a clemency petition. Some district judges appointed federal defenders or panel lawyers to represent former clients in filing petitions that could result in a significant sentence reduction. As this was occurring, then-AO Director Judge John Bates sought the opinion of the AO's general counsel regarding district judges appointing attorneys or allowing defenders to work on clemency cases. In a July 30, 2014, memo, the general counsel concluded district judges had no authority to appoint federal defenders or panel attorneys to represent non-capital clemency applicants because clemency was an executive and not a judicial function.<sup>58</sup>

James E. Felman, a member of the Steering Committee of Clemency Project 2014, described the AO's decision as a "stunner." 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. Steering Committee member Mary Price echoed the surprise and disappointment with the AO's decision, which has significantly slowed down the clemency effort. Defenders had originally planned to follow cases through to clemency but were instead forced to return cases. Although defender offices are offering varying degrees of assistance, even the most helpful defender efforts still require the project to assign a lawyer who must become familiar with the case, present it to the screening committee, and ultimately draft the clemency petition. Instead of representation by defenders and CJA panel attorneys with extensive federal criminal law experience and client familiarity, clemency cases must rely on volunteer lawyers from different practice backgrounds, which can further delay the clemency process.<sup>59</sup>

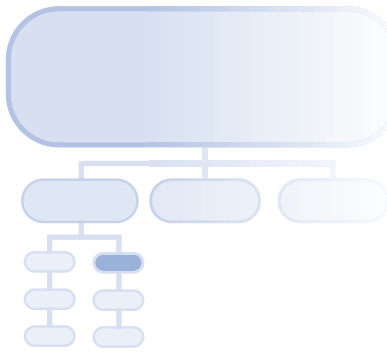
Consistent with the independence concerns highlighted throughout this report, one is left to wonder if a different governing body would have pushed back or fought for the right of lawyers to help their clients. The judiciary made no effort to work with Congress and the DOJ to obtain such authority as an independent defender agency might have done. The niceties of judicial/executive function should be irrelevant when a person's liberty is at stake, but the organizational structure and judicial control of the defense function ensured not only that lawyers could not represent clients to secure their freedom but also that no change of the statute at issue will occur. Because neither the DSO nor the DSC is allowed to directly propose legislation or lobby Congress to change a statute that directly affects criminal defendants, the only hope for change is by proposing such amendments to the Judicial Conference through the DSC.

Clemency is thus another example in which the position and interests of the defense function were not considered in the judiciary's actions and were ultimately placed at odds with the AO; once again, the position of the AO and the judiciary prevailed, as they retain the ultimate power in this relationship. Many judges do not understand or are indifferent to the complexities of representing clients in an adversarial



**“Poster child for what’s wrong with system — we have clients who may be eligible but we had judges ask for ethics opinion saying we were prevented from doing it.”**

**— Federal Defender**



**“While we take no position on the accuracy of [the AO General Counsel’s opinion on clemency], I believe that any system that would foreclose a lawyer from representing pending or former clients who have a chance to secure their freedom is a system that must change. It is simply unacceptable that a professional should be asked to remain on the sidelines when a client’s liberty may be within reach.”**

**— Theodore Simon, then-NACDL President**

system. Although the obligation of defenders is to put the interests of their clients first, the AO and the Judicial Conference share no similar obligation and have consistently put the interests of the judiciary first.

### **Denying Congress a Requested Detailee**

Early in 2015, AO Director James Duff made a decision that again highlights how the judiciary’s interests do not always align with the interests of defenders and can sometimes actively impair them. Director Duff denied a bipartisan request from members of the House Judiciary Committee to have a dedicated federal defender detailee help assist with the drafting of a report on the topic of “Overcriminalization.”

Federal employees from a variety of government agencies are routinely “detailed” to Congress to provide expertise in a particular area. At any given time, the DOJ and the Department of Homeland Security, including many federal law enforcement agencies, have dozens of detailees in Congress assisting individual members and committees.

Although the Federal Defenders have only three detailees, Director Duff denied the specific request from Congress for a fourth detailee for a limited 12-month period after the Office of Legislative Affairs within the AO recommended against it for unstated reasons. Lost, in the absence of a lawyer’s willingness to serve as a volunteer or intern, was an enormous opportunity for defenders to assist and provide input to Republican and Democratic leadership in crafting recommendations for an improved criminal justice system.

The AO’s unexplained and inexplicable decision undermines any possibility of viewing it as an independent agency, much less one concerned about the health and vitality of the defense function and the interests of defender clients.

## IV. Seven Fundamentals of a Robust Federal Indigent Defense System

### **Fundamental One: Control over federal indigent defense services must be insulated from judicial interference.**

As described on the AO's website, the heart of the mission of the DSO is protecting the right to counsel for individuals appointed counsel in federal courts:

#### Mission

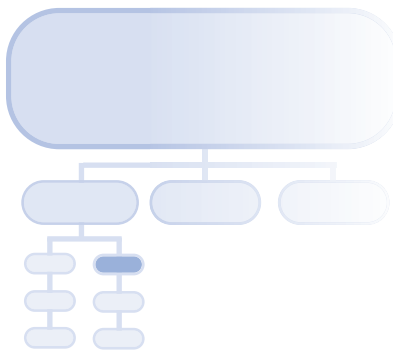
The mission of the Defender Services program is to ensure that the right to counsel guaranteed by the Sixth Amendment, the Criminal Justice Act (18 U.S.C. § 3006A), and other congressional mandates is enforced on behalf of those who cannot afford to retain counsel and other necessary defense services. By fulfilling its mission, the Defender Services program helps to:

- (a) maintain public confidence in the nation's commitment to equal justice under law and
- (b) ensure the successful operation of the constitutionally based adversary system of justice by which both federal criminal laws and federally guaranteed rights are enforced.

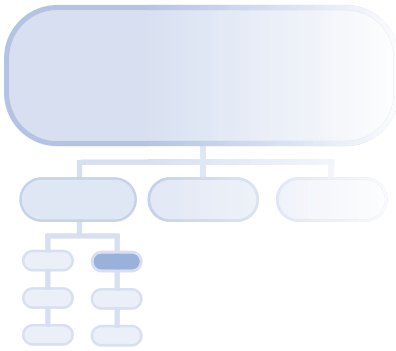
#### Goals

- \* Provide timely assigned counsel services to all eligible persons.
- \* Provide appointed counsel services that are consistent with the best practices of the legal profession.
- \* Provide cost-effective services.
- \* Protect the independence of the defense function performed by assigned counsel so that the rights of individual defendants are safeguarded and enforced.<sup>60</sup>

Although protection of the "independence of the defense function" is expressly included in the AO's description, the reality has proven to be something quite different — and quite disturbing.

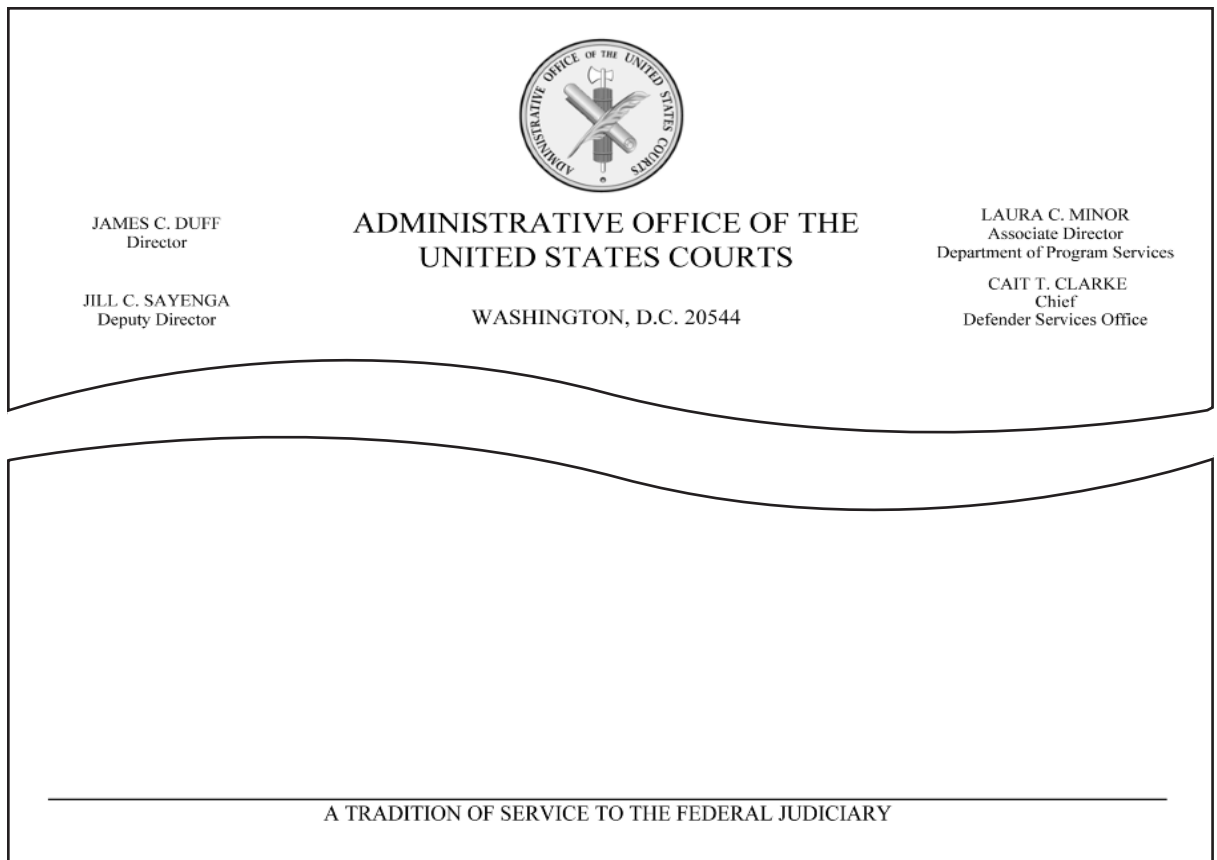


**A greater degree of independence than currently exists is crucial to ensure federal defenders and panel attorneys are able to provide effective assistance of counsel to clients.**



Concern for a lack of independence for those advocating for indigent defendants is underscored by the letterhead for Cait Clarke, the chief of the DSO. Not only is Ms. Clarke listed under the director, deputy director, and the associate director for program services, but there is no question for whom Ms. Clarke and everyone else in the DSO works by the motto at the bottom of the page: “A Tradition of Service to the Federal Judiciary.”

Beyond the organizational charts discussed above, concern for a lack of independence for those advocating for indigent defendants is underscored by the letterhead for Cait Clarke, the chief of the DSO. Not only is Ms. Clarke listed under the director, deputy director, and the associate director for program services, but there is no question for whom Ms. Clarke and everyone else in the DSO works by the motto at the bottom of the page: “A Tradition of Service to the Federal Judiciary.”



Defenders and panel lawyers expressed strong praise for Cait Clarke, who has decades of experience in and a deep commitment to indigent defense. But there is little Ms. Clarke can do three levels down within an organization committed to serving the federal judiciary. The primary focus of the job description given to Ms. Clarke when she was hired was the responsibility to “[l]ead the diverse elements of the Defender Services Program in carrying out their responsibilities for the program’s mission and goals.”<sup>61</sup>

However, Laura Minor, the associate director of the Department of Program Services (and thus Ms. Clarke's immediate supervisor), told the Task Force that judges are the "policymakers" and Ms. Minor's job — and that of her staff — is to "support" the judges in their work.<sup>62</sup> Her work is driven by "providing service to the courts" and "implementing the policies of the Judicial Conference," which means her own view of the Sixth Amendment right to counsel, for example, is "irrelevant."<sup>63</sup> Ms. Minor's statements are consistent with her job description, which emphasizes her role is to "clarify[] and explain[] to others the importance of the *judiciary's* programs and legislative needs . . . ."<sup>64</sup>

The defense function must be insulated from this pervasive involvement and control by the judiciary. At a minimum, the DSO should be re-elevated within the AO to its prior position, removing it from the position of being a "program" of the judiciary. Moreover, the Judicial Conference's DSC should be empowered to make funding and staffing decisions in the best interest of defenders, rather than being concerned with the overall judiciary budget. Many others believe far more sweeping reforms are needed.

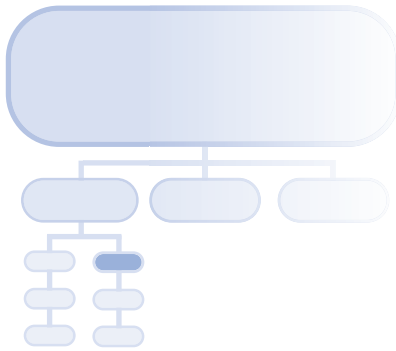
In 1993 the Prado Report called for creation of a new national agency, the Center for Federal Criminal Defense Services, to oversee national administration of the CJA.<sup>65</sup> This national agency would nominally be located in the judicial branch, but would operate outside the Judicial Conference. The report also proposed a network of regional or district boards and local administrators to oversee local administration of the CJA, handling such matters as appointment, compensation, and monitoring of defense attorneys, thus removing these responsibilities from the direct control of judges.<sup>66</sup>

A greater degree of independence than currently exists is crucial to ensure federal defenders and panel attorneys are able to provide effective assistance of counsel to clients. The Prado report discussed concerns of defenders and others at the time about the Committee's recommendation to transfer the national administration of the CJA program from the Judicial Conference and place it in an independent agency located within the judicial branch. Their primary reservation was that sufficient funding for the CJA may not be realized because defenders, on their own, might be less effective than the judiciary in dealing with the appropriations committees and their staffs in Congress.<sup>67</sup> In addition, some expressed concern that the defense function is generally an unpopular political cause, rendering it more vulnerable to attack than as part of the current CJA appropriation. The Prado Committee considered those concerns and concluded that the benefits flowing from creation of the Center would outweigh the risks.<sup>68</sup>

Defenders are extremely skilled and effective advocates, advocating for unpopular and challenging causes in courtrooms every day. They were especially effective in conveying to Congress and the media the gravity of the sequestration cuts. For example, after hearing testimony from a federal defender, Sen. Christopher Coons and Sen. Jeff Sessions, the chair and ranking member of the Senate Judiciary Committee Subcommittee on Bankruptcy and the Courts, wrote to Judge William Traxler, Jr., chair of the Executive Committee of the Judicial Conference, to emphasize that cuts "have disproportionately impacted those who are doing the work in the field."<sup>69</sup> Sens. Coons and Sessions' letter acknowledged that the role of defenders is "central to the government's obligation under the Sixth Amendment" and that high quality representation is not only necessary to ensure the "speedy, just resolution of criminal cases" but also to reduce pre-trial and post-trial incarceration costs.<sup>70</sup>

Greater independence now enjoys much wider and deeper support than it did two decades ago. The Prado Report acknowledged that "[w]hen the judiciary must make budgetary and other policy decisions affecting the appointed counsel program, the needs of the CJA program must continually be counterbalanced by other legitimate needs of the judiciary."<sup>71</sup>

A minority of those interviewed by the Task Force expressed concerns similar to those of the Judicial



**With regard to the selection and payment of panel lawyers, little has changed since the Prado Report was issued two decades ago. As Tenth Circuit Judge Stephanie Seymour noted then: “It is uncomfortable and a bit unseemly for the very judges before whom the criminal defense lawyer must try his or her cases to participate in the selection of that lawyer or to decide his or her compensation.”<sup>73</sup>**

Conference to the Prado Report. For example, defender comments included the following:

- ✧ “We’re safer in the tent than out of the tent.”
- ✧ “If not the judiciary, then who? As long as we are funded through a political process, we need an ‘umbrella’ for our funding, because we will never be politically popular.”

But most defender responses were in favor, to varying degrees, of independence:

- ✧ “Some members [of the judiciary] expressed hostility and outright ignorance of the Defender Services Program and budgets, which resulted in the near demise of the Defender program as we know it. We have sound reasons to distrust judicial oversight of Defender Service, office budgets and staffing of offices.”
- ✧ “We used to think that the judiciary would protect us, but recent events have shown that’s not true. We need a structure that will maintain our vitality but let us migrate away from the judiciary.”
- ✧ “I strongly support a revisiting of the Prado Report.”
- ✧ Believing “[v]ery strong[ly] that we should break away from judiciary and form [an] independent agency like the USSC. We need to lobby for our own funding.”
- ✧ “Would be more comfortable with the separate structure, but ideally a FJC or USSC model is preferable.”
- ✧ “If the CJA system survives as a model for indigent defense, it will be because we secure the independence of the defense function.”

It is no less true today than it was 22 years ago when the Prado Report declared that “the judiciary has become entangled in a web of matters that are more properly the province of separate entities devoted to criminal defense.”<sup>72</sup>

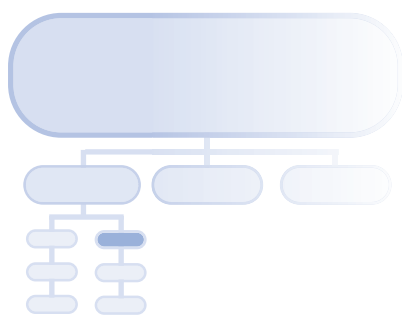
### Panel Attorneys

With regard to the selection and payment of panel lawyers, little has changed since the Prado Report was issued two decades ago. As Tenth Circuit Judge Stephanie Seymour noted then: “It is uncomfortable and a bit unseemly for the very judges before whom the criminal defense lawyer must try his or her cases to participate in the selection of that lawyer or to decide his or her compensation.”<sup>73</sup> A similar sentiment was

echoed by a magistrate judge, who, in discussing the inherent conflict of the judiciary exercising such significant control over the defense function, recognized: “I mean you only have to be in the middle of a trial sometime and then have to take [off] your trial hat and go approve an interim ex parte order for the hiring of an expert, to wonder who you are. You can only be so schizophrenic.”<sup>74</sup>

Those with whom the Task Force spoke were even more pointed. Giving judges the power to appoint or reappoint panel lawyers generates “built in conflicts,” which make it unlikely defense lawyers will “get in the face of a judge,” which is “their job,” explained one judge. One lawyer who no longer receives appointments was told by others on the panel that the reason she was not receiving appointments was because she advocated too strongly and needed “to kiss the judge’s ass more.” Even if there were other legitimate reasons for the attorney’s lack of further appointments, the fact that panel lawyers in her district believe they need to compromise their advocacy to continue to receive cases is wholly at odds with their primary function, the zealous representation of their clients, with the adversarial nature of the criminal justice system, and with the constitutional protections of an accused’s Sixth Amendment right to counsel.

Although the judiciary has adopted guidelines and best practices that attempt to protect the rights of defendants and assure the independence of panel lawyers, district courts are free to do as they wish in setting up and administering the CJA panel.<sup>75</sup>



**In no way should the appointment system be a means to reward lawyers who do the least or punish those who fight the hardest for their clients.**

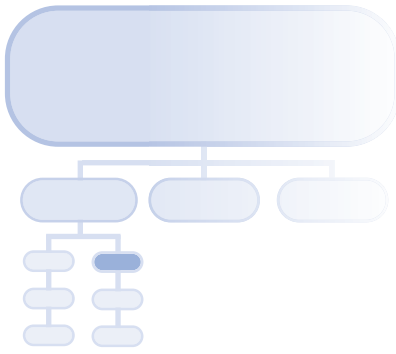
### ***Selection of Panel Members***

As noted in a Vera Institute study, consistent with the Model CJA Plan “most districts employ a panel selection committee to review applications for panel membership.”<sup>76</sup> Many of those interviewed for the report “stressed the importance of having the selection committee composed of defense lawyers, rather than judges, as they are in the best position to evaluate others in the same field.”<sup>77</sup> In many jurisdictions, however, judges are either part of the selection committee or solely responsible for selecting panel lawyers.

In some districts, “committee” is a misnomer, as selection is wholly controlled by the judiciary. A selection process operated by a district court judge and magistrate judge is not an independent committee, even if lawyers “may be consulted.”<sup>78</sup>

A broad range of plans are in place and greater independence can be found in some districts. For example, in the Northern District of Alabama the selection committee includes “an active United States District Judge of the Court, a United States Magistrate Judge of the Court, the Panel Representative/Resource Counsel for the District, and three (3) to five (5) attorneys admitted to the bar of the Court and selected and appointed by the Court. Although not required, it is preferred that such attorneys be members of the CJA Panel. Also, it is preferred that such attorneys be appointed from the different geographical areas covered by the Northern District.”<sup>79</sup> While this diversity is a welcome improvement from committees of only judges, even under this plan the lawyer members of the selection committee are chosen by the judges. In El Paso, Texas, judges are only





**Although the selected defenders have proven overall to be of high skill and ability, the current structure leaves plenty of opportunity for influence and raises concerns about the selection and evaluation processes.**

two of the eight members of the selection committee.<sup>80</sup>

As discussed separately below, the most serious concern of the Task Force as it relates to panel membership are those districts in which all lawyers admitted in a District Court are automatically placed on the CJA list and appointed cases. The Task Force agrees wholeheartedly with the Prado Report that “[c]onscription of all attorneys admitted to the federal bar for panel service should be forbidden,” noting “it is virtually impossible for an attorney who has had no exposure to the federal sentencing guidelines to be an effective advocate for his client. Defending a federal criminal case without knowledge of the sentencing guidelines is akin to practicing tax law without knowledge of the Internal Revenue Code.”<sup>81</sup> In some districts, while conscription may not be the practice, there are no or limited screening mechanisms or minimum standards to become part of the panel.

The Task Force does not question that many judges are concerned about the defense function. As more than one judge explained, good lawyers make the judge’s job easier, and bad lawyers make the judge’s job more difficult. Moreover, experienced lawyers may have a better understanding of the true issues of a case and be less inclined to waste time on non-issues.

The appointment, review, and reappointment of panel lawyers is most appropriately handled by a committee of lawyers knowledgeable about and committed to indigent defense. That said, judges offer an important perspective that should be considered by the independent panel that selects and reappoints panel lawyers as one of many sources of information and input.

### ***Assignment of Cases***

The Task Force heard many concerns about the current practice in numerous jurisdictions of allowing judges to select the individual lawyer to represent a defendant in each case. Although some judges may sparingly exercise this option in an exceptional case that requires the unique skill set of a lawyer well known to the court, allowing the practice as a matter of routine has many problems. First, it assumes that judges have the expertise and knowledge of lawyer backgrounds and skills to make these individualized assessments. Second, a serious appearance of a conflict exists when individual judges have the power to determine the quality of advocacy for a particular defendant. Third, such a process provides opportunities for favoritism, may inhibit the development of greater diversity of panel attorneys (as judges may select attorneys with whom they are familiar, making it difficult for younger attorneys to obtain appointments), and can create an air of mistrust between an attorney and his or her client even before the representation commences.

The Task Force found that many districts appoint lawyers on a rotational basis or use a duty day system. The Prado Report recommended that “[p]anel lists should be ‘tiered’ to qualify attorneys for appointment for different levels or types of cases, depending upon their experience and training.”<sup>82</sup> Such a system would allow the panel selection/review committee to assign panel lawyers to tiers, thus allowing a non-judicial employee to serve as an administrative clerk, assigning cases from the designated tier. A rotational system is



preferable except when a case requires specialized knowledge. According to the 2003 Vera Institute study, most practitioners and judges “suggested that, but for the occasional case that is unusually lengthy or poses difficult special needs, appointments should be made according to a rotational system.”<sup>83</sup>

In no way should the appointment system be a means to reward lawyers who do the least or punish those who fight the hardest for their clients.

### ***Review of Panel Attorney Performance***

No matter how refined the selection process, some panel attorneys will fall short of providing effective client representation and should be removed from the panel. Regular, thorough reviews of panel members’ performance by those knowledgeable of and committed to the defense function are required. Consistent with the 2003 Vera Institute’s study, the Task Force found “many districts conduct periodic reviews of all panel members. Many apply a three-year term . . . to assure that all members are reviewed regularly.”<sup>84</sup>

The use of terms may permit panel improvement because it is easier to decline to reappoint a panel member than to remove him or her. “Among the factors cited that may be considered in the review process are an attorney’s investigative and litigation skills, rapport with clients, strength in procedural and substantive legal knowledge and analysis, and administrative matters such as billing accuracy.”<sup>85</sup>

Panel lawyers expressed concerns, including the following, regarding the role of judges in the appointment and reappointment processes:

- ✱ Judges have recommended removal of lawyers from the panel when “no reasons are given.”
- ✱ “I worry that installing formal performance reviews . . . threatens the independence of the private bar and the very creative thinking we should be going to every length to preserve.”
- ✱ Judges removing lawyers from the panel who they think are high billers. One judge told panel lawyers that they are “like plumbers — why spend money on an expensive plumber if you can get a cheap one who will do the job?” As the experienced panel lawyer told the Task Force, judges should not put money before competence. Needless to say, cheap plumbers are often cheap because they do a second-rate job.

Finally, all appointments, reviews, and reappointment decisions must be transparent. As one defender who has served on a panel for more than three decades told the Task Force, the process was “all very mysterious.”

### **Federal Defender Organizations**

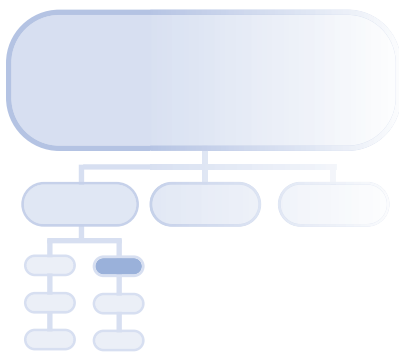
As discussed below, federal judges preside over “fiefdoms” and are largely free to do as they wish in their oversight and control of federal defender organizations. Although general guidelines and policies from the Judicial Committee or the AO may exist, few are binding and none of the practices described requires expertise, background, or even an interest in federal indigent defense.

### ***Selection of Chief Public Defenders***

In districts with a federal public defender office, federal appellate judges select the defender and decide whether to reappoint him or her every four years.<sup>86</sup> Although the selected defenders have proven overall to be of high skill and ability, the current structure leaves plenty of opportunity for influence and raises con-

cerns about the selection and evaluation processes. As with the panel selection process, each circuit is free to develop its own plan and process for selection. Some circuit plans provide for selection committees that include members with defender organization backgrounds, but others do not. Additionally, in selecting and deciding whether to reappoint a federal defender, circuits are not required to, and frequently do not, consider the full range of a federal defender's responsibilities beyond being a highly qualified federal criminal defense attorney, including such things as supervising personnel, managing a budget, administering the CJA panel, and providing training. Beyond occasional DSO reviews of a defender office, there is no formal process for reviewing chief federal defenders. Federal appellate judges generally have little or no experience, training, or knowledge in the operation of indigent defense organizations to fully evaluate a federal defender's performance. Notably, however, in at least some circuits, judges who choose to participate in the selection committee have shown an interest in and concern for the defense function.

One judge expressed surprise at the relatively small number of applicants for vacancies during his decades of appellate court service. Some lawyers may be less likely to apply for a job in which the selection is made by judges for a four-year term, after which their reappointment will be determined by judges with few or any established standards or guidelines for the process.



**Any agency that oversees a hybrid system must create and maintain an environment of mutual respect and support for all facets of the indigent defense bar.**

#### *Full-time Defenders — FDOs and CDOs*

Since 1970, the Criminal Justice Act has authorized the creation of federal public defender and community defender organizations, led by a full-time defender and other lawyers and staff to provide representation in the district.<sup>87</sup> The authorization extends to every district with at least 200 cases annually, and judges in every district except three have created a full-time defender office. Of great concern, however, is one district (Southern District of Georgia) that elected to dismantle its office.

More than two decades ago, NACDL's Board of Directors resolved that: "Every federal judicial district should be required by statute to have an institutional defender presence, whether that be a Federal Public Defender or a community defender organization, or in districts with low numbers of CJA appointments, a panel lawyer support organization."<sup>88</sup> Although the Judicial Conference also has a similar policy, it lacks the power or will to make the policy anything more than advisory. Without a binding policy or statutory change, the chilling prospect of a district court dismantling a defender office — for any or no reason — remains.

#### **Relations Between FDOs and Panel Lawyers**

As witnessed during sequestration, scarce resources unfortunately may cause groups who share important common interests to turn on one another in what is viewed as a zero-sum game.

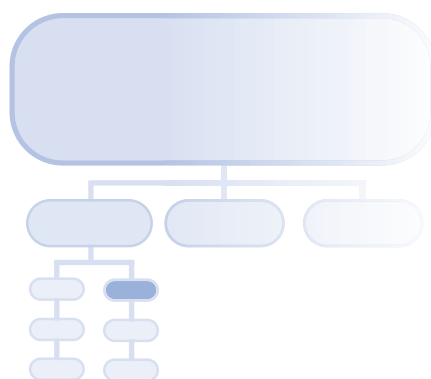
Although defenders and panel lawyers have very positive, long-standing relationships throughout the

country, the judiciary's actions during sequestration drove a wedge between the groups. When the Executive Committee imposed cuts heavily on defenders, which would have required hundreds of lost positions in addition to unpaid furloughs, defenders took every possible step — in the media, in the judiciary, in Congress — to alleviate the harm. However, turning on panel lawyers and making claims that federal defenders provide better representation and do so at a lower cost<sup>89</sup> were neither constructive nor reflective of the ABA's Second Principle that emphasizes the importance of a hybrid system.

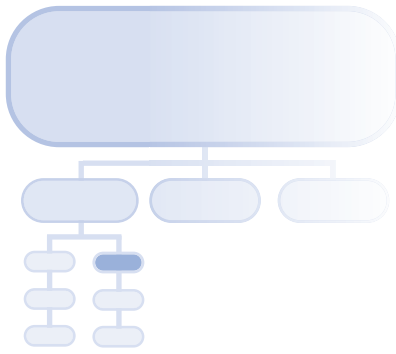
One of NACDL's priorities was to help ensure that sequestration did not drive a wedge between the Federal Defenders and the members of the CJA panel.<sup>90</sup> Rather than overseeing the operation of a federal indigent defense system that brought panel lawyers and defenders together in a difficult situation, the existing administrative structure pitted these groups against one another. More than a year later, some lingering wounds of sequestration still exist.

- ✧ As a federal defender explained, “[t]o the extent that the Panel and Defenders cannot coordinate their positions, there is a risk that we will be pitted against one another in an ugly, self-destructive fight for a bigger share of the limited funds.”
- ✧ As some panel lawyers told the Task Force, relations between the panel and federal defender in districts were harmed greatly by the “we are better” rhetoric during sequester, and some panel members question the validity of the defenders’ claim that they are cheaper.
- ✧ One panel representative referred to the “great damage” this “divisive and insulting and offensive messaging” has caused to the relationship between the federal defender office and panel lawyers.
- ✧ Sequestration resulted in “much resentment and morale problem when rates [were] restored but CJA did not get retroactive pay.”

This report highlights many areas in which defenders and panel lawyers work well together and support each other through things such as case assignments, voucher review, and training. Fortunately, most defenders and panel lawyers reported very strong working relationships. As one defender explained, “The panel is the best. We consider them our brothers and sisters.” Panel members similarly applauded the efforts of defenders because “the work by the Federal Defender makes this office function.” Any agency that oversees a hybrid system must create and maintain an environment of mutual respect and support for all facets of the indigent defense bar.



**The Judicial Conference should not be the agency deciding what rate should be “acceptable” for panel representation and it should not be the agency that decides whether or not to request additional funding to raise panel compensation rates. Panel compensation rates must be funded at levels that not only attract high quality defenders but also assure those accepting panel appointments are compensated at a level sufficient to cover overhead costs of operating a law practice.**



As the Supreme Court has recognized, the provision of necessary support services, such as experts and transcripts, is often as vital to a case as is the provision of counsel.<sup>98</sup>

**Fundamental Two: The federal indigent defense system must be adequately funded.**

As explained below, concerns for adequate funding of panel lawyers involves not only their hourly rate but also the approval of expert expenses and adequate funding for the broader criminal justice system. The importance of funding defender offices and related concerns about independence are discussed in Fundamental 1 above.

§ 230.16(a) Non-Capital Hourly Rates	
IF SERVICES WERE PERFORMED BETWEEN...	THE MAXIMUM HOURLY RATE IS ...
01/01/2015 to present	\$127
03/01/2014 through 12/31/2014	\$126
09/01/2013 through 02/28/2014	\$110
01/01/2010 through 08/31/2013	\$125
03/11/2009 through 12/31/2009	\$110
01/01/2008 through 03/10/2009	\$100
05/20/2007 through 12/31/2007	\$94
01/01/2006 through 05/19/2007	\$92
05/01/2002 through 12/31/2005	\$90

**CJA Panel Rate**

The hourly rate for panel lawyers is set by statute and the Judicial Conference decides whether to ask Congress each year if it wishes to pay the full rate. Thus, any request to seek an increase in the CJA panel rate is decided by the Judicial Conference, based upon recommendation of the Budget Committee, which receives input from the DSC.<sup>91</sup> The rates approved by Congress are set forth in this chart (left).

The Judicial Conference should not be the agency deciding what rate should be “acceptable” for panel representation and it should not be the agency that decides whether or not to request additional funding to raise panel compensation rates. Panel compensation rates must be funded at levels that not only attract high quality defenders but also assure those accepting panel appointments are compensated at a level sufficient to cover over-

head costs of operating a law practice. As highlighted by a September 2014 internal judicial squabble, a request from the judges best positioned to understand the need for an increase in the panel rate (the DSC) was easily squelched by judges concerned primarily or solely with the budget (the Budget and Executive Committees). Specifically, the DSC, which had not sought an increase for the past four years, sought an increase of \$8 for FY 2016 and \$8 for FY 2017, which would have raised the rate to the statutorily authorized rate of \$144. The Budget Committee, however, believed an increase of only \$6 was warranted because the larger request would “have a detrimental impact on the judiciary’s hard-won credibility with Congress, thus potentially negatively affecting all judiciary accounts.”<sup>92</sup> One of the stated goals of the Defender Services Program — protecting “the independence of the defense function performed by assigned counsel so that the rights of individual defendants are safeguarded and enforced”<sup>93</sup> — again took a backseat to the overall budgetary concerns of the judiciary.

The judiciary should not be permitted to make strategic choices about paying lawyers based on its other interests. Indigent defense is a crucial constitutional function — not a bargaining chip in a larger negotia-

tion. As one judge explained, the CJA rate is “truly embarrassing,” and providing a rate that is so low as to render it financially untenable for many high-quality attorneys to take assigned cases may lead to panel members who are “bottom feeders who can’t get any other work.” The higher the rate, the better the pool of lawyers from which lawyers may be chosen. Although the current panel rate of \$127/hour is higher than that authorized in state systems,<sup>94</sup> it still falls woefully short of the rate needed to assure a high level of zealous representation in every district.

Many of the issues in this report are interconnected. Arbitrary voucher cutting or lengthy delays may discourage many lawyers from panel membership, leaving those without retained cases or significant experience in the small pool of lawyers willing to accept appointments to generate income. As one judge told the Task Force, the panel is “not a very exclusive list in some parts of the country.”

The Task Force reaffirms the position set forth in the April 25, 1998, NACDL board resolution “urging full and fair compensation for lawyers appointed under the Criminal Justice Act.”<sup>95</sup>

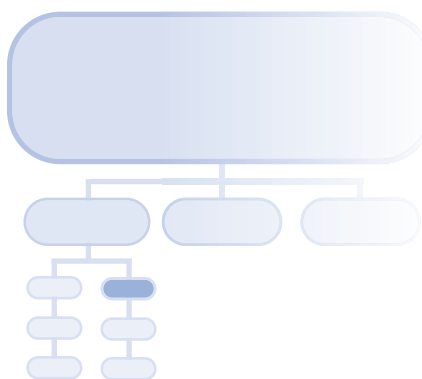
## Funding for Experts

Federal statutes provide that counsel for a person who is financially unable to obtain investigative, expert, or other services for an adequate defense in his or her case may request such services in an *ex parte* application before a judicial officer.<sup>96</sup> Upon finding that the services are appropriate and that the person is financially unable to obtain them, the judicial officer shall authorize counsel to obtain such services. Appointed counsel may obtain, subject to later judicial review, investigative, expert, or other services without prior authorization, pursuant to the dollar limitation set by statute.<sup>97</sup> As the Supreme Court has recognized, the provision of necessary support services, such as experts and transcripts, is often as vital to a case as is the provision of counsel.<sup>98</sup>

Importantly, the availability of expert and support resources for an individual case should not vary based on whether a defendant is represented by a federal defender, with investigators and other professionals on staff, or a panel lawyer who must seek funds from the court to secure such assistance. Despite this, the Task Force heard of many instances of judges denying or limiting panel attorney voucher requests for experts, investigators, and other support services.

- ✱ “The court is getting more and more strict in funding ancillary service providers, overly obsessed with cost-cutting, scrutinizing requests for reimbursements more heavily resulting in delays. Cutting sentencing mitigation experts.”
- ✱ “Two tiers of representation: FDO does everything; panel lawyer has to say I can’t do everything because I can’t get paid for it,” which is exacerbated by the “constant battle to keep coming back for money for experts needed or investigator right at the outset.”
- ✱ For example, a panel lawyer explained the problems with limiting interpreter expenses. He cannot reliably expect to have plea agreements, indictments, sentencing reports, memos, and so on, all translated so that non-English speaking clients may have a copy, which makes it impossible to meaningfully communicate with clients, leaving them in the dark about one or many important aspects of their case.
- ✱ As a panel lawyer explained, requests for investigators or expert services such as translators that used to be pro forma now require a motion. More troubling, such requests that were routinely granted in the past are now sometimes not granted.

- ✧ When a panel lawyer asked for a mitigation expert at sentencing, the trial court scheduled a call with counsel and probation and asked if probation could help with his mitigation. The judge would not approve funds for a mitigation expert.



## Whether funding for indigent defense remains part of the judiciary's budget, criminal defense lawyers should always remain advocates for adequate funding of the judiciary on which they and their clients rely for essential personnel and facilities.

More troubling, though, is that many panel lawyers seldom, if ever, ask for expert assistance.

DSO has a wealth of data on expert expenditures, and the Task Force requested district-level data to examine and consider the disparities among different districts. DSO, however, elected to provide only national (aggregate) data. The data provided shows an embarrassingly low usage of experts. Excluding the use of interpreters, which are essential to providing representation for clients who do not speak English, expert expenditures were authorized by the district court in less than 10 percent of cases (8,319 of the 87,403 cases) in which panel lawyers provided representation during fiscal year 2014.<sup>99</sup>

More troubling is the attitude among some within the judiciary regarding the need for defense resources. While one federal judge expressed shock that some defenders in the country had never used an investigator, another judge in the same state asked at a continuing education seminar, "Why would the defense need an investigator?"

It is virtually impossible for the Task Force to know the reasons for the paucity of expenditures for experts. It could be the product of courts repeatedly refusing such requests; it could be the product of attorneys cutting corners in an effort to keep their hours within the cap to increase the likelihood of full and timely payment; or it could be a lack of understanding and appreciation (either by the panel attorneys or the judges) for the vital services such experts may offer.

### Travel

The Task Force also heard from many panel lawyers who faced pressure or difficulty in securing reimbursement for travel associated with meeting with incarcerated clients.

- ✧ As a panel lawyer from a northeastern state explained, many prisoners are kept in Brooklyn or New Hampshire, which requires panel attorneys to travel great distances (5 -6 hours) to see their clients, but the judiciary is reluctant to pay attorneys for their time spent traveling to see these clients.
- ✧ Another panel lawyer expressed similar concern about "limits on travel prohibiting face to face visits with clients," because "the primary detention facility is 100 miles away from court."



- \* More generally, panel lawyers expressed concern about “the remote detentions in our district and the large amount of travel time to see our clients.”

The CJA Guidelines require approval of compensation for “time spent in necessary and reasonable travel.”<sup>100</sup> Client visits during the course of representation cannot be considered anything but necessary and reasonable. A panel attorney noted that judges were cutting time for travel and client meetings, “forcing attorneys to either see clients less or do without pay.” Although not always possible, costs can certainly be reduced when counsel visits more than one client when traveling to a distant detention facility. But visiting a client should never be viewed as optional or a pro bono activity.

Moreover, decisions about how many times an attorney should see the client are never decisions that should be made by a judge presiding over a case. Judges are far too removed from the direct representation process to determine whether the client should be seen three, five, or ten times. Requiring attorneys to provide the court with reasons why it was necessary to see a client more frequently raises serious conflicts concerns, as it can necessitate an attorney divulging privileged material in an effort to justify payment.

### Funding the Entire Criminal Justice System

A first-rate criminal justice system requires money — and not just for those representing indigent defendants. As a federal judge noted, those advocating both for a well-funded judicial system and for a well-funded public defense system should be arguing in tandem and not at the expense of each other.

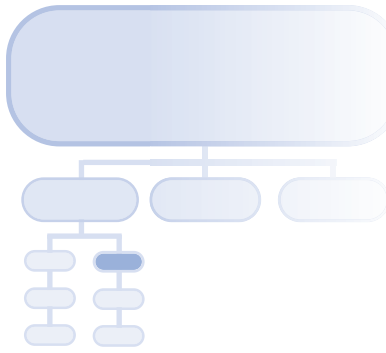
NACDL has long advocated for pay increases for federal judges, recognizing “that appropriate compensation is essential to maintaining an independent and capable federal judiciary.”<sup>101</sup> NACDL agrees wholeheartedly with the concerns expressed by the New York County Lawyers’ Association’s report titled “Courts in Crisis,” which detailed the many ways in which the sequester ravaged funding for court reporters, clerks, probation officers and others essential to a system that ensures the fair and efficient administration of justice.<sup>102</sup> Whether funding for indigent defense remains part of the judiciary’s budget, criminal defense lawyers should always remain advocates for adequate funding of the judiciary on which they and their clients rely for essential personnel and facilities.

### **Fundamental Three: Indigent defense counsel must have the requisite expertise to provide representation consistent with the best practices in the legal profession.**

As the Prado Report recommended in 1993, “[c]onscription of all attorneys admitted to the federal bar for panel service should be forbidden.”<sup>103</sup> This statement is even truer today than it was two decades ago. The ever-increasing complexity of federal criminal cases — from forensic science issues to sentencing guidelines, from collateral consequences to digesting and cataloguing terabytes of digital data — makes it virtually impossible for someone without specialized training and experience to properly represent an individual charged in a federal criminal matter.

Currently, at least two district courts rely on conscription of attorneys to represent defendants in criminal cases. In the McAllen division of the Southern District of Texas, which includes Hidalgo and Starr counties,<sup>104</sup> the CJA plan includes the following language: “The panel of private attorneys (CJA panel) shall consist of the members in good standing of the federal bar of the Southern District of Texas who maintain law offices within the geographical area of the McAllen Division.”<sup>105</sup> Thus every attorney admitted to the federal bar in that division, even those with absolutely no experience or even interest in criminal law, is placed upon the CJA panel and eligible to be assigned cases.





**It is imperative that steps be taken to attract and retain a CJA panel that reflects a diversity of race, ethnicity, gender, and age. Mentoring programs are one way to increase the diversity of a panel. Training panels, which help less experienced attorneys gain the skills necessary to begin practice in federal court, may also be a path for greater panel diversity.<sup>110</sup>**

In the Southern District of Georgia, which includes such cities as Augusta, Brunswick, and Savannah, a 2011 modification to its conscription-type plan “allow[ed] the District to identify lawyers who are interested in accepting multiple CJA appointments and enable the District to make multiple appointments to interested lawyers who are qualified to handle such cases.”<sup>106</sup> A letter outlining the changes notes, “Lawyers who are not qualified to try cases will not be considered for appointment in criminal *jury trial* matters.”<sup>107</sup> In order to be “qualified,” as sole or lead counsel in a criminal trial, an attorney is merely required to complete three hours of continuing legal education each year in the area of trial practice on any of a broad issues relevant to *state* practice.<sup>108</sup> District lawyers who have not completed three hours of general state court trial practice are not eligible for criminal jury trial appointments but may still be conscripted for service to non-jury cases such as removal hearing or revocation hearings.

Regardless of any other requirements of a CJA plan, a district plan should never require all attorneys practicing before that federal court to serve on the CJA Panel. Forcing unwilling, uninterested, and often inexperienced lawyers to provide defense services demonstrates a fundamental misapprehension of the specialized nature of federal criminal defense and suggests that those charged with criminal offenses who are unable to retain counsel deserve little more than a warm body to stand beside them while they are prosecuted and convicted.

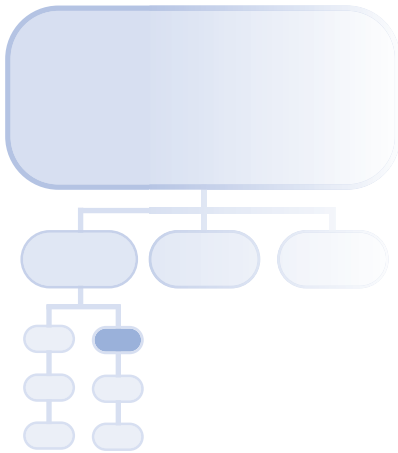
Nevertheless, prior federal criminal law experience alone should not dictate panel membership. Although some former assistant U.S. Attorneys have joined the panel shortly after leaving their positions, some would benefit from receiving mentoring or sitting second chair to become acclimated to the defense role before representing clients.

### **Increasing Panel Diversity**

Another significant concern is the lack of diversity on CJA panels. A federal appellate judge recounted a story from his days as a defense lawyer for an African American client who did not think he was getting a fair trial. The client looked around the courtroom and saw that every person involved in the case (the lawyers, the judges, the court personnel) were all white people. The judge emphasized the importance of diversity. Although clients are significantly members of minority communities, the diversity of panel lawyers representing them is sometimes scarce. Each district maintains its panel lists, and racial, ethnic, and gender diversity data appears not to be maintained or accessible.<sup>109</sup>

It is imperative that steps be taken to attract and retain a CJA panel that reflects a diversity of race, ethnicity, gender, and age. Mentoring programs are one way to increase the diversity of a panel. Training panels, which help less experienced attorneys gain the skills necessary to begin practice in federal court, may also be a path for greater panel diversity.<sup>110</sup> For example, a program created in the Southern District of

New York in 2008 offers lawyers with state court experience an opportunity to be trained and mentored by panel lawyers with extensive federal practice experience.<sup>111</sup> The program is designed to increase the diversity of the panel but open to all interested applicants. After providing fifteen hours of pro bono representation, the mentee bills at a reduced rate while serving as co-counsel with supervision from experienced counsel. Although participation does not guarantee appointment to the panel, each year at least a few of the mentees have been added to the panel, thereby increasing its diversity.<sup>112</sup>



**DOJ operates the National Advocacy Center,<sup>116</sup> a “business facility dedicated to professional training for federal, state, and local prosecutors.” Each year the NAC provides training to more than 20,000 prosecutors and support personnel. Federal defenders have no such training center.**

**Fundamental Four: Training for indigent defense counsel must be comprehensive, ongoing, and readily available.**

Training resources for those representing defendants in federal court lags far behind the resources made available to their opposing counsel in the U.S. Attorney’s Office. For example, in FY12, the DOJ, where 75 percent of their full-time equivalent attorneys (FTEs) are committed to criminal work, received an appropriation of nearly \$31,000,000 and employed 53 FTEs to provide legal education. These staggering numbers do not even include the training funds allocated for the staff at the FBI, DEA, ATF, or other federal law enforcement entities.<sup>113</sup> In contrast, the DSO Training Division had only 11 authorized FTEs<sup>114</sup> allocated for the training of full-time defenders and panel attorneys who provide representation in 90 percent of federal criminal cases.<sup>115</sup> Moreover, DOJ operates the National Advocacy Center,<sup>116</sup> a “business facility dedicated to professional training for federal, state, and local prosecutors.” Each year the NAC provides training to more than 20,000 prosecutors and support personnel. Federal defenders have no such training center.



The National Advocacy Center (NAC) (<http://www.justice.gov/usao/training>)



## No panel lawyer should be expected to wait months, much less years, for payment of a voucher.

DSO's Training Division offers nine different core training events for defenders only and several other events that panel attorneys may attend. As explained below, defender offices provide extensive training opportunities for panel lawyers in most districts — without the required travel costs associated with attending national programs. DSO's National Litigation Support Team has four professional staff available to assist lawyers with electronic discovery or software programs used to present information in the courtroom. Although panel attorneys are able to use this resource, many were not aware of it — and DSO is unable to communicate directly with panel attorneys. Additional DSO training resources include two websites, a limited number of webinars, and a hotline for questions about federal criminal practice.<sup>117</sup>

### Panel

The primary source of training for panel lawyers who spoke with the Task Force is training from their local defender office. Indeed, providing such training is a defender responsibility in many FDO position descriptions and funding for panel lawyer training is part of the defender's budget. Although national training is available, travel and lodging expenses must be borne by the individual panel attorney, which limits accessibility to many. According to the DSO, approximately 2,500 to 3,500 lawyers attend its national capital and non-capital training events, "most of them panel attorneys."<sup>118</sup> As well, more than 1,000 lawyers each year view DSO-sponsored webinars or recorded seminars.<sup>119</sup>

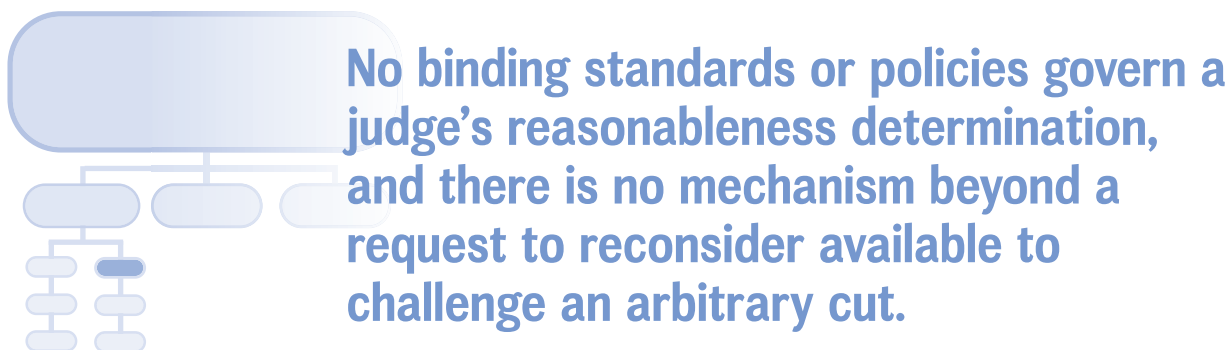
The availability of local training for panel lawyers varies widely among districts. At one extreme, the Task Force learned that training for panel lawyers had not occurred "in the past few years" in one district. In other districts, federal defenders were "trying" to offer training annually. However, many districts offer extensive training opportunities to their panel attorneys. Panel attorneys described the trainings:

- ✧ Four day-long trainings per year for CJA lawyers as well as monthly CLE "lunch and learn" meetings
- ✧ One full-day conference, approximately 100 emails with resources and developments, and approximately 30 brown bag training sessions throughout the year
- ✧ "Once a month, total of 18 hours per year. Plus we have a blog."
- ✧ "36 hours of CLE"
- ✧ "Answering panel members' questions, providing a brief-bank, doing trainings, and taking the lead in large multi-defendant cases"

Although many panel attorneys commented about excellent training in their district, training is not equally available nationwide. Some district plans do not address training or require non-specific training. Training on issues related to representing criminal defendants in federal court must be adequately funded for all those representing indigent defendants and widely available to all panel lawyers, regardless of the district where they practice. The Task Force therefore reiterates a 1992 NACDL resolution: "Panel lawyers should have access to periodic training, which should be mandatory for panel membership . . ."<sup>120</sup>

## **Fundamental Five: Decisions regarding vouchers must be made promptly by an entity outside of judicial control.**

The Criminal Justice Act vests judges with the responsibility of fixing compensation and reimbursement of panel attorneys for time spent in and reasonably expended out of court.<sup>121</sup> Of grave concern, the Task Force heard of widespread instances of long delays for payment and the arbitrary cutting of vouchers without any recourse.



### **Long Delays**

Although judges are supposed to “act upon panel attorney compensation claims within 30 days of submission,”<sup>122</sup> the Task Force heard from panel lawyers in various districts across the country about delays in processing payments ranging from several weeks to several months. The judiciary’s non-binding, 30-day guidelines exempt “extraordinary circumstances,”<sup>123</sup> but the delays reported to the Task Force are far too common and appear routine and often inexplicable.

Vouchers sometimes go unpaid for months or longer, unreviewed, unsigned and not submitted for payment. For example, a panel attorney noted delays of a year while vouchers sat on the judge’s desk before they were submitted. Unfortunately but understandably, many lawyers “are reluctant to speak up because they fear they will no longer get appointments.”

One judge candidly told the Task Force it is “a lot easier to have a client pay money than to get it from a judge.” No panel lawyer should be expected to wait months, much less years, for payment of a voucher.

### **Arbitrary Cuts**

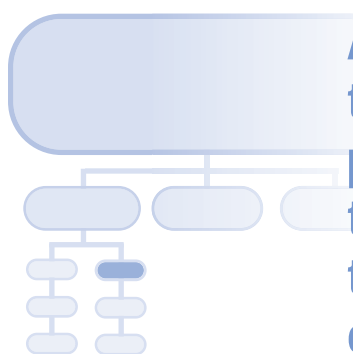
The Criminal Justice Act and Judicial Conference policy give judges unfettered discretion in processing vouchers. In addition to the unenforceable “guideline” on the promptness of processing and payment, judges are responsible for determining whether the time for which counsel claims compensation was “reasonably expended” and if expenses for which reimbursement is sought were “reasonably incurred.”<sup>124</sup> No binding standards or policies govern a judge’s reasonableness determination, and there is no mechanism beyond a request to reconsider available to challenge an arbitrary cut.

According to the 2003 Vera Institute study, “[s]omewhat 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 be-

cause of the ex parte nature of these contacts and the dangers inherent in the court intruding into the strategic planning of the defense.<sup>125</sup>

Judge Bates, former Director of the AO and a long-time District Court Judge, told the Task Force that the AO has emphasized educating the judiciary about “fairness” and “proper examination” of vouchers, but the AO could not impose upon district judges a national standard because “district courts are fiefdoms” — *i.e.*, they are independent of each other and have unique circumstances.<sup>126</sup>

As one panel lawyer explained, “There is a storm brewing in my district because my panel, myself included, is very concerned that some of our judges are taking advantage of this manufactured budget crisis to cut vouchers unfairly, re-allocating the economic risk associated with criminal prosecution onto the lawyers, investigators and other experts who are acting as mere assistants, interfering with counsel’s zealous representation of a defendant to manage the CJA budget, and challenging long-accepted billing/vouchering practices in ways that are calling into question the integrity of individuals and the panel collectively.”



**As highlighted throughout this report, the Judicial Conference can create policies but it has no authority to enforce them. There are no sanctions or methods to compel individual judges, districts, or circuits to comply.**

Judges well aware of the Judicial Conference’s guidelines candidly admitted that judges know “there is only so much money to go around.” Other judges expressed a more tempered view of determining reasonableness. “I don’t want to get involved in number of client visits, phone calls, etc.” Although the judge believed other judges do not penalize lawyers for being too zealous, she believed that judges should consider reducing a voucher if 20 motions were filed and 10 were “frivolous.”

As one federal judge explained, voucher cutting is seen by some as the only way they can limit spending: “Judges end up doing what they can to balance the budget, and cutting vouchers is the only thing they can do. . . . They can’t buy cheaper pencils.” But, as the judge conceded, reviewing vouchers and appointing or reappointing defenders are “built in conflicts,” which makes it unlikely defense lawyers will “get in the face of a judge,” which is “their job.”

No judge should ever ask a panel lawyer, who has taken a court appointment for a fraction of their usual rate and worked diligently to represent a client, questions such as this: “Do you want me to lay someone off from the clerk’s office to pay this bill?” But lawyers are asked these questions, and judges refuse to authorize payment. Simply put, as one judge told the Task Force, “if [CJA lawyers] are doing the work, they should be paid — and there’s no question about that.”

A Dec. 23, 2014, memo from then-AO Director Judge Bates and DSC Chair Judge Blake to all judges reiterated that “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.”<sup>127</sup> The memo also included, apparently for the first time in a FAQ format, the following:

**Q:** Does reduction of a CJA voucher result in additional funds for court operations?

**A:** No. Payments to CJA panel attorneys, their service providers, and for transcripts ordered by them are made from centrally held funds administered by the Defender Services program. Circuits or districts do not receive allocated funds for CJA panel attorney representations, so payments denied cannot be redirected for court operations.

**Q:** Should budget considerations influence a judge's decision about the timing or amount of an individual CJA voucher?

**A:** No. Judicial Conference policy, as set forth in the *Guide to Judiciary Policy*, Vol. 7A, § 230.33 (Impact of an Appropriation Shortfall on Voucher Review), provides that "[v]ouchers should not be delayed or reduced for the purpose of diminishing Defender Services program costs in response to adverse financial circumstances." The Judicial Conference has determined that "[a]bsent extraordinary circumstances, judges should act upon panel attorney compensation claims within 30 days of submission." *Guide to Judiciary Policy*, Vol. 7A, § 230.13(b).

It is the responsibility of the judicial officer to review each voucher for the reasonableness of the claim (other personnel review vouchers first for mathematical and technical accuracy). The AO, in coordination with the Judicial Conference, works with the Appropriations Committees of Congress to ensure that the Defender Services account is adequately funded. Judicial officers thus should not seek to address a perceived or actual shortfall in the Defender Services account, which is closely monitored by the AO, by reducing an individual voucher. Congress, which recognizes the critical importance of funding the appointment of counsel under the CJA, has provided supplemental funding when needed.

**Q:** Is there a specific process that should be followed to justify the reduction of a CJA voucher for unreasonableness?

**A:** Yes. The *Guide to Judiciary Policy* requires notice to counsel and an opportunity to respond. The text of the CJA guideline is as follows:

§ 230.36 Notification of Proposed Reduction of CJA Compensation Vouchers

(a) The CJA provides that the reviewing judge must fix the compensation and reimbursement to be paid to appointed counsel. 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.

(b) Notice need not be given to appointed counsel where the reduction is based on mathematical or technical errors.

(c) Nothing contained in this guideline should be construed as requiring a hearing or as discouraging the court from communicating informally with counsel about questions or concerns in person, telephonically, or electronically, as deemed appropriate or necessary.

Despite this, in the weeks after the December memo, the Task Force heard from panel lawyers still facing the same arbitrary voucher cuts. As highlighted throughout this report, the Judicial Conference can create policies but it has no authority to enforce them. There are no sanctions or methods to compel individual judges, districts, or circuits to comply.



## Waiving Case Compensation Maximums

The CJA Guidelines include case compensation maximums — \$9,800 in 2014. The maximums may only be exceeded in “extended or complex” cases when certified by the trial court and approved by the chief judge (or designee) of the circuit. The Guide to Judiciary Policy, Vol. 7A, section 230.23.40 provides as follows:

### (b) Extended or Complex Cases

The approving judicial officer should first make a threshold determination as to whether the case is either extended or complex.

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.”

If more time is reasonably required for total processing than the average case, including pre-trial and post-trial hearings, the case is “extended.”

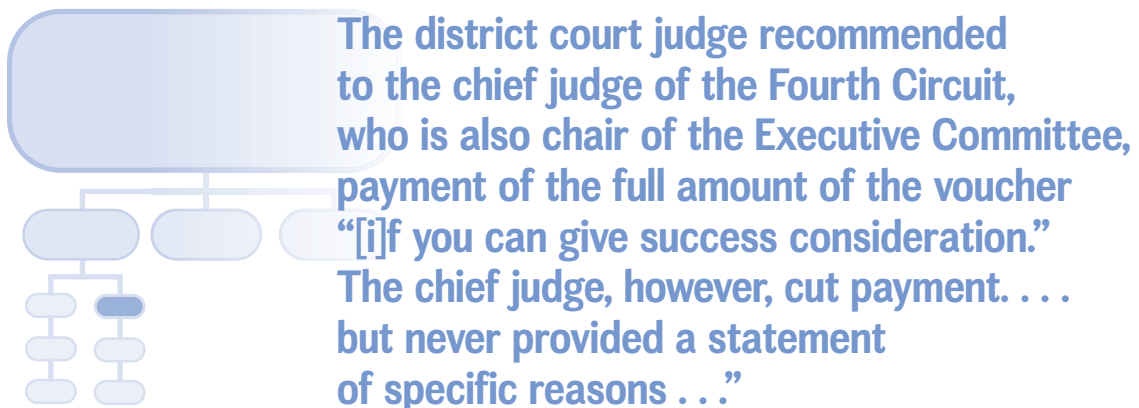
### (c) Determining Fair Compensation

After establishing that a case is extended or complex, the approving judicial officer should determine if excess payment is necessary to provide fair compensation. The following criteria, among others, may be useful in this regard:

- \* responsibilities involved measured by the magnitude and importance of the case;
- \* manner in which duties were performed;
- \* knowledge, skill, efficiency, professionalism, and judgment required of and used by counsel;
- \* nature of counsel’s practice and injury thereto;
- \* any extraordinary pressure of time or other factors under which services were rendered; and
- \* any other circumstances relevant and material to a determination of a fair and reasonable fee.

### *An Example of Arbitrary, Unexplained Voucher Cutting*

A recent case from South Carolina highlights many of the problems discussed above. A panel lawyer who was appointed after a federal defender withdrew due to personality conflicts with a challenging client submitted a voucher for \$28,000 after a four-day trial that included four ex parte hearings. The defendant, whom the District Judge described as “the meanest and most guilty defendant” that had appeared in his court in many years, was acquitted based on “the tremendous amount of work” by the panel lawyer.

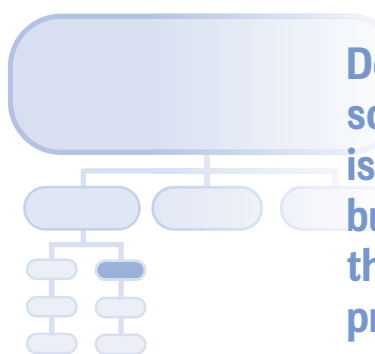




The district court judge recommended to the chief judge of the Fourth Circuit, who is also chair of the Executive Committee, payment of the full amount of the voucher “[i]f you can give success consideration.” The chief judge, however, cut payment to about \$20,500 with no explanation of reasons. The panel lawyer wrote the judge to request reconsideration, as well as the “brief statement of the reason(s)” for the proposed reduction that is required under the *Guide to Judiciary Policy* section 230.36(a).

The district judge wrote a second letter expressing its understanding of the chief judge’s decision, including that “the use of CJA funds is something that must be guarded.”

The chief judge ultimately approved payment of about \$22,500 but never provided a statement of specific reasons for the more than \$5,000 cut. His final letter, written a few weeks after the AO memo reiterating that judges should not reduce vouchers “in the interest of cost-containment,”<sup>128</sup> simply noted that compensation “depends on what is fair and reasonable for the representation of this particular client on these particular charges.” (See Appendix D for chain of correspondence.)



**Defense lawyer advocacy cannot be viewed solely from a judge’s perspective. Sometimes issues may not be well received by trial judges but are preserving a claim for appeal or laying the groundwork for a future challenge to a procedure that may ultimately be invalidated.**

### No Recourse When Vouchers Are Cut

Judges are encouraged, but not required, to provide attorneys with notice and an opportunity to be heard before or after deciding to reduce a voucher. Although non-binding Judicial Conference policy recommends that judges afford these basic due process elements,<sup>129</sup> lawyers told the Task Force about many instances in which judges did not follow this policy. Indeed, the Task Force heard from lawyers in many different districts where voucher cutting occurred without even a semblance of due process.

A district judge’s decision to pay less than the amount claimed is final and not subject to review. Moreover, statutory case limits identify compensation ceilings for types of cases. These limits may be exceeded only when the district judge determines that the case is “extended” or “complex” and the chief judge of the court of appeal for the district reviews and agrees. A chief judge can reduce, but not increase, the amounts approved by the district judge. The chief judge’s decision is not reviewable.

In explaining how cuts are made, one circuit judge acknowledged that some cuts are based on a “hunch,” but explained that a report of averages paid to lawyers handling similar types of charges from the circuit helps inform the decision-making.

The Task Force was unable to locate any records or even a suggestion of efforts by the AO to monitor voucher cutting at either the district or circuit court level or to measure/track the amount of time between voucher submission to the court and court submission for payment.

### ***Panel Lawyers Treated Differently Than Other Government Contractors***

In stark contrast to the due process rights of government contractors generally, judges are not required to provide attorneys with notice and an opportunity to be heard before or after reducing a voucher. The federal Prompt Payment Act ensures timely payment for nearly every person or business who does work for the government. The Treasury Department's website explains as follows<sup>130</sup>:

How soon must an agency return an improper invoice?

The agency must send the invoice back to the vendor as soon as practicable, but no later than 7 days after receiving the invoice.

The agency must

- ✱ give all reasons why the invoice is not proper and why it is being returned
- ✱ request a corrected invoice that is clearly marked as such

If the agency does not return the invoice within seven days with the information about the problems and request for a corrected invoice, the payment period is shortened by the number of days between the 7th day and the day the agency sends the invoice back to the vendor.

Even more concerning than the lack of due process in many jurisdictions was the troubling, informal process driven by judges or other court personnel that coerce panel lawyers into reducing their vouchers or submitting vouchers for an amount less than the actual work done. The following examples were among those shared with the Task Force:

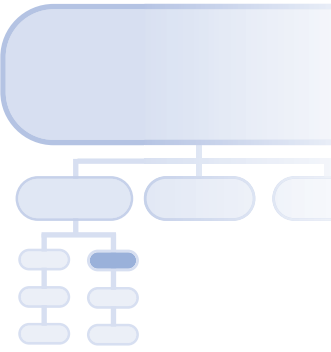
- ✱ A clerk called one panel lawyer to say the judge wanted to reduce the voucher by one-third, telling the lawyer, "[y]ou can agree to it now or let the judge do it and then appeal it and wait months for any money."
- ✱ A magistrate told a lawyer the judge wanted to cut his voucher and asked if he would take 10 percent off, which the lawyer agreed to do. The voucher had been "misplaced" for over a year.
- ✱ Some lawyers have given up the fight, routinely under billing their cases just to assure they get paid timely. As one explained, "I'm doing what they may do to me."

A common sentiment among panel attorneys was that it is "insulting" for a court to say panel attorneys are trustworthy enough for the court to entrust someone else's liberty to them but then not trust them to be honest in submitting their vouchers.

### **Consequences of Voucher Cutting**

What one judge referred to as "willy-nilly" voucher cutting has deep and enduring consequences on the federal indigent defense system.

In one district, 10 to 15 panel lawyers resigned in two years because of delays in payment and voucher cutting. A panel representative from a small district noted that two panel lawyers had resigned because of delays in payments and others may as well.



**Control over and arbitrary cutting of vouchers must be removed from unreviewable, unregulated judicial control and given to an independent administrator outside of the judiciary. Independence from judicial control in this matter is essential. Even judges acknowledged that administrators employed by judges could find their job in jeopardy if exercising too much independence in reviewing vouchers.**

Another panel lawyer noted that panel lawyers were reluctant to accept appointments on large cases because of delays in payments and cuts. “The reservoir of lawyers who can handle complex federal cases is reduced by a reduction in rates and delays in payments.” Many panel lawyers are solo practitioners or with small firms that lack resources to wait months for payment from the judiciary while they must continue to pay their staff, rent, and utilities.

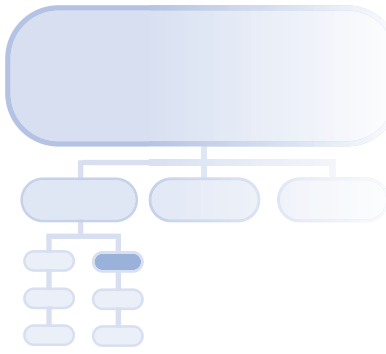
### **Undermining the Role of Defense Counsel**

Some voucher cuts appear predicated on a misunderstanding of the role of defense counsel and challenges defense lawyers face. The following two basic defense function standards from the ABA Criminal Justice Section help make this point:

- ✱ 4.1 Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused’s admissions or statements to defense counsel of facts constituting guilt or the accused’s stated desire to plead guilty.
  
- ✱ 6.1 Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial.<sup>131</sup>

Cutting a voucher simply because a judge “refuses to pay \$5000 for a plea” fails to consider all the necessary work that led to the plea. It does not assess whether this was \$5,000 to resolve a challenging case with a difficult or mentally impaired client; whether the attorney had to conduct extensive research into a new or novel theory of defense before reaching a resolution; or whether the attorney had engaged in significant pre-trial preparations before a plea was ultimately reached. Cutting vouchers in complex cases, or those involving difficult, time-consuming clients, without an opportunity for the lawyer to be heard unnecessarily penalizes lawyers for being thorough. Cutting vouchers because judges disagree with the amount of time, energy, and effort an attorney devotes to a case improperly puts a judge in the position of determining the amount of justice an indigent defendant is to receive and forces the private bar to subsidize the government’s obligation to provide zealous and meaningful representation guaranteed by the Sixth Amendment.

Defense lawyer advocacy cannot be viewed solely from a judge’s perspective. Sometimes issues may not be well received by trial judges but are preserving a claim for appeal or laying the groundwork for a future challenge to a procedure that may ultimately be invalidated.



**Information regarding the means by which key decisions impacting the federal indigent defense system are made, the persons making such decisions, and the criteria applied to such decisions should be readily available to both the attorneys who practice in the system and the general public.**

Nevertheless, advocacy is persuasion. If something is not persuasive to a judge (such as a 27-page sentencing memorandum that cites only cases from other circuits), lawyers should be made aware and consider other approaches to advocating for their clients in the future. Improving ineffectual arguments should be a topic for defense lawyer training — not a basis for slashing a voucher. The Task Force acknowledges, as one judge put it, a difference between a “forceful” advocate and an “unreasonable” one. Defense lawyers should have support for arguments and not wage wars or battles on every conceivable issue or “shout at the same decibel level for every argument.”

### **A Better Way**

The Prado Report recommended that “voucher administration and approval should be handled by a local administrator. This local administrator may be a part of a federal defender organization, local resource counsel . . . or an independent administrator in those districts where such an administrator would be cost-efficient.”<sup>132</sup>

The type of documentation and level of specificity required to support a claim for compensation were debated issues in drafting the CJA. The House of Representatives initially proposed that appointed counsel submit affidavits in support of their claims for compensation for expenses incurred. The Senate proposed requiring only written statements in support. The conferees decided that “[b]ecause attorneys are officers of the court and subject to the discipline of the courts in which they practice, . . . claims submitted by them need be supported only by written statements.”<sup>133</sup>

The Task Force recognizes the appropriateness of some level of review. The CJA Guidelines appropriately require panel lawyers to maintain “contemporaneous time and attendance records for all work performed,” which are “subject to audit” and must be retained for three years.<sup>134</sup>

However, any rules promulgated regarding voucher content should be clear and constant. Rules should not require attorneys to disclose confidential client information to judges in order to receive full and fair compensation for their work. In a recent letter to the judges of the Central District of California, panel attorneys referred to the “constantly evolving and ever-increasing demands regarding the level of detail in our billing materials,” referring specifically to recent requirements that counsel “explain the purpose of client meetings (*e.g.*, potential debriefing for cooperation), explain the strategy that justifies the funds requested for experts and investigators, and to identify by name the witnesses or individuals interviewed as well as the purpose of the interview.”<sup>135</sup>

Control over and arbitrary cutting of vouchers must be removed from unreviewable, unregulated judicial control and given to an independent administrator outside of the judiciary. Independence from judicial control in this matter is essential. Even judges acknowledged that administrators employed by judges could find their job in jeopardy if exercising too much independence in reviewing vouchers.

A truly independent voucher administrator should simply review vouchers for evidence of fraud or abuse.<sup>136</sup> Alternatively, even some judges expressed a preference for a “committee of defenders and local lawyers” to undertake this review as they would be “aware of the real world of work that lawyers do. Practicing lawyers can easily spot exaggerated vouchers. This would be more fair than an individual judge reviewing the voucher. Regularity in this respect is better.”

At a minimum, review by individuals other than judges should be part of the process. For example, in one district before a district judge makes a significant cut to a voucher, the judge sends the voucher to the Standing Committee (federal defender, panel representative, two active panel members, one emeritus panel member, and the CJA administrator). If the Standing Committee believes the cut is unjustified, it so notifies the judge. If the Standing Committee believes the cut is justified, it contacts the attorney, explains the issue, and attempts to work out a compromise. If no compromise can be achieved, the district judge makes the determination.<sup>137</sup>

Requiring attorneys to provide greater specificity or to explain or justify the work performed is especially concerning when the judge is the arbiter. Lawyers are put in the precarious position of being asked to reveal confidential information in order to support their payment, creating a conflict of interest for the attorneys. Conflicts aside, requiring the attorney to disclose information about a client may paint the client in a negative light — for example, if the client was difficult or unwilling to initially consider a plea offer — thus violating the attorney’s ethical obligations to be an advocate for the client.

Finally, implementation of an electronic voucher system offers the potential to address many of these concerns. However, after two different systems were considered, the AO chose the system favored by judges and not the one that was carefully designed with extensive panel lawyer input to address CJA programmatic requirements. Currently, the AO only collects data on the amount paid on voucher submissions. It does not collect any data on the amount submitted in an attorney’s initial voucher, the degree to which that voucher is cut, or the reason such cut occurs.

The new system will permit individual courts to modify the system to allow them to process vouchers without regard to CJA requirements or Judicial Conference policies and guidelines. The electronic vouchering process should and hopefully will ultimately provide a means from which data can be gathered regarding the judiciary’s cutting of vouchers, as further discussed in Fundamental Six below regarding transparency.

#### Case Budgeting

Many lawyers in the Second Circuit spoke favorably of case budgeting. Jerry Tritz has been the Second Circuit CJA Case Budgeting Attorney since 2007, when he began as one of three attorneys hired as part of a pilot project. Tritz works with lawyers who have capital cases or mega-cases that will involve at least 300 attorney hours per defendant or more than \$30,000 in total costs. He works with lawyers in developing a case budget, at times cutting those budgets and at times telling them their estimates are too low. Budgeting forces lawyers to think about their case and its direction early on; it does not constrain their ability to represent clients. Attorneys at DSO were “petrified” early on that case budgeting could interfere with the right to counsel. To the contrary, Case Budgeting Attorneys have been committed to protecting that right.

Case budgets are reviewed and approved by judges. Tritz has never had one rejected. Judges generally ask him if he is satisfied with the budget or if the defender is satisfied.

The availability of more data, however, must not be misused to blindly cut costs. The electronic voucher system allows easy creation of “benchmarks” that individual judges, districts, and/or circuits could use in reviewing and approving panel attorney vouchers. A panel lawyer in a district where judges recently started using electronic vouchers expressed concern that judges are “really into running reports.” But as other judges made clear, not every deported alien or felon in possession case is the same. Judges cannot simply figure out average cost of types of cases (e.g., deported aliens) and then consider the average in cutting vouchers without consideration of the many factors of the individual case or the work put into a case by a particular attorney.

**Coordinating Attorney Position**

As a report to the Judicial Conference in 2001 explained, “[a]ttorneys want to be paid promptly and reliably for their CJA work. They do not mind having their vouchers reviewed or, in many cases, even adjusted if the review is fair and consistent. Having one person review all vouchers for the district goes a long way in making the reviews consistent.”<sup>138</sup>

An independent supervising attorney may offer an alternative to judicial control of these decisions. Consider, for example, the Maryland procedure: Maryland panel attorneys seeking to hire experts or investigators present requests to the supervising attorney, rather than to the judge ex parte. The supervising attorney reviews the request in the light of the particular case and the practice in the district generally. If she finds the request reasonable, she forwards it to the presiding judge with a recommendation to approve it; if she does not, she will discuss her reservations with the attorney. If they cannot agree on a request to be submitted to the judge, the supervising attorney submits the request with a recommendation to disapprove any part she disagrees with. In all cases, however, the supervising attorney serves as a filter for potentially compromising communications to the judge regarding defense strategy, because she can have an in-depth discussion with the attorney but edit as necessary, with the attorney’s concurrence, the requests she forwards to the court. When a recommended request exceeds the statutory maximum the supervising attorney prepares a memorandum in support of the request for the presiding judge’s consideration for submission to the chief judge of the court of appeals (or designee).<sup>139</sup>

Although lauded in the Vera Institute report, the Task Force has some concerns about the CJA coordinating attorney positions. Having an individual with a defense lawyer background and practical understanding of the work of defense counsel is certainly preferable to review by a judicial officer with no such background. Coordinating attorneys employed by the judiciary may be placed regularly in the difficult position of simply making cuts, whether justified or not, more palatable to the panel attorney — unable to exercise a truly independent role in assessing vouchers. Depending on the employing judicial officer, the coordinating attorney may be forced to become part of a process of “assess[ing] vouchers realistically,” as one explained to the Task Force, in light of the “reality of the economic climate.”

**Fundamental Six: The federal indigent defense system must include greater transparency.**



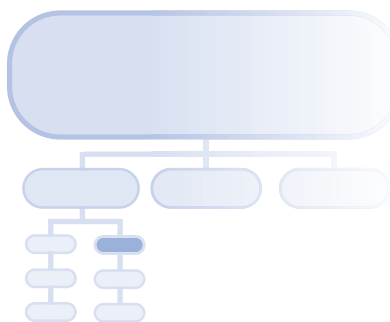
“Sunlight is . . . the best of disinfectants.”

— Justice Louis Brandeis

Confidence in any government-funded program requires transparency. The federal indigent defense system costs more than a billion dollars annually and is supposed to ensure some of the nation’s most cherished rights to effective counsel and due process.



Information regarding the means by which key decisions impacting the federal indigent defense system are made, the persons making such decisions, and the criteria applied to such decisions should be readily available to both the attorneys who practice in the system and the general public. Individuals should be able to know and understand the ways in which important and fundamental decisions are made at the district, circuit, and national levels. Information regarding voucher cutting; the selection, reappointment, and removal of panel attorneys; the criteria for the selection, review, and reappointment/removal of federal defenders; and the ways in which decisions relating to funding, funding allocation, and position allocations are made should be easily available to all interested individuals.



**No comprehensive, independent assessment of the CJA program has been completed in the 22 years since the Prado Report. Although long overdue, the Task Force is pleased that Judge Bates announced in December 2014 that an assessment would begin in 2015.**

Currently, at the national level, the AO and various committees of judges operate the system — largely in secret. No publicly accessible document explains these committees and their duties.<sup>140</sup> Upon request of the Task Force, the AO provided a short overview of the national structure, which is included as Appendix C. That overview made no mention of the JRC, a committee that now exercises the critical role of allocating funds to defender offices based on formulas being developed from the work measurement study discussed above. Seemingly small things, such as the jurisdictional statement for the DSC, was only attainable by the Task Force after a request to the DSC chair, who had to secure the approval of the chair of the Executive Committee before releasing it.<sup>141</sup> The work of these committees is hardly a matter of national security that would warrant such a level of secrecy. An understanding of their defined authority and duties is vital to even a cursory understanding of the federal indigent system.

The lack of transparency extends to the district level. Although some districts have plans that include broad participation in the selection and review of panel lawyers, in other districts the process is largely a mystery to lawyers who serve or want to serve on the panel and the broader public and clients who depend on these lawyers to provide constitutionally mandated representation. In a district where lawyers were only recently allowed an opportunity to offer input on the panel before the selections were approved in secret by judges, a lawyer aptly described the feeling of many lawyers in the district: “Judges are behind the curtain, like the Wizard of Oz.”

In response to Task Force questions about voucher cutting practices and procedures, several lawyers expressed that it was “impossible to know.” Some attorneys only learned of cuts to their vouchers after they received payment and then compared the payment to their submission. These attorneys are never told precisely what was cut, much less why it was cut. Although the claimed expenses in individual cases should not be open for public inspection, which could compromise the attorney-client privilege, aggregate data regarding the amounts submitted, the cuts made, the justification for such cuts, and the amounts ultimately paid should not be shrouded in secrecy.

An electronic voucher system with wide access of data has the potential to allow better tracking both of requests and rulings by judges. Ideally, a fully implemented voucher system will require judges who make cuts to document the specific reasons for those cuts — without any possibility of individual courts modifying this feature. Data regarding those cuts may then be regularly compiled and carefully monitored.



## **Fundamental Seven: A comprehensive, independent review of the CJA program must address the serious concerns discussed in this report.**

The 1993 Prado Report concluded by highlighting the need to assure “oversight, review and evaluation of the [CJA] program should be conducted on an ongoing basis,” and “a comprehensive global examination of the CJA program should be undertaken every seven years to ensure continued viability and cost effectiveness.”<sup>142</sup> This “comprehensive study and analysis,” according to Prado, should be performed by “an impartial entity” and “include an evaluation of the current system and an assessment of long-range needs.”<sup>143</sup> The Judicial Conference’s report concurred with this recommendation.<sup>144</sup>

Despite that universal support, no comprehensive, independent assessment of the CJA program has been completed in the 22 years since the Prado Report. Although long overdue, the Task Force is pleased that Judge Bates announced in December 2014 that an assessment would begin in 2015.

On April 13, 2015, Director Duff announced the formation of an ad hoc committee selected by Chief Justice Roberts. Although the committee includes two defenders and one panel attorney, six of the members are judges and a seventh is a circuit court employee. Although the memo casts this as a “periodic, comprehensive, and impartial review,” the membership of the committee raises serious questions about the promise of impartiality. Judge Prado told Task Force members that the Commission he chaired in the early 1990s benefitted from a variety of perspective and, unlike the DSC comprised entirely of judges, was “more independent” with “judges only a minority.”<sup>145</sup>

The scope of the ad hoc committee’s review will include the following issues:

- (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 the 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 in relation to the prosecution;
- (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, multidefendant 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



**The Task Force believes strongly that independence should be the primary focus of any review of the federal indigent defense system.**

attorneys.<sup>146</sup>

This list includes the important topics identified in this report, but it is unclear whether the ordering of topics relates to the priorities or emphasis of the review. The Task Force believes strongly that independence (point 13 and, to some extent, point 3) should be the primary focus of any review of the federal indigent defense system.

The memo from Director Duff does not address many important questions about the process through which each topic will be evaluated. For example, it is unclear whether public hearings similar to those during the Prado Commission will be held or how transparent generally the evaluation process will be. Moreover, the timetable for the review must be sufficient to allow time for every significant topic to be sufficiently assessed. For example, Judge Prado recounted to the Task Force that his committee did not have time to follow through on some anecdotes or concerns relayed to them, such as “war stories about voucher cutting.”<sup>147</sup> He would have liked a more extensive survey.<sup>148</sup>

The memo from Director Duff would appear to grant the ad hoc committee considerable latitude to include such things as stakeholder advisory groups, which would bring the perspective of defenders, panel lawyers, and those knowledgeable about, but not working within, the federal indigent defense system.

NACDL remains, as it was in 1992, eager to assist in this review. “NACDL, as the only national organization devoted solely to a professional and high quality of representation of persons accused of crime, seeks participation in naming qualified criminal defense lawyers to serve on the national policy-making body for federal indigent criminal defense on an ongoing basis. We believe that such a body should include representatives of the federal defenders, death penalty resource center directors, CJA panel attorneys, and the criminal defense bar. We express our willingness to be a continuing resource for the provision of members of such a body.”<sup>149</sup>

The report should not simply assess the many areas highlighted above, but make recommendations that will ensure the federal indigent defense system’s continued vitality and greater independence from judicial control.

# APPENDIX A

## *Definitions of Key Terms and Acronyms*

**Administrative Office of U.S. Courts (AO):** The administrative component of the federal judiciary, which is responsible for overseeing the expenditure of funds appropriated by Congress in the administering the nation's judiciary. The Defender Services Office (DSO) is part of the AO.

**Criminal Justice Act (CJA) Guidelines:** Policies and procedures of the Judicial Conference for the administration and operation of the Criminal Justice Act. There is no enforcement mechanism for the failure of individual judges to follow these non-binding guidelines.

**Coordinating attorney:** A lawyer employed in some districts to assess CJA panel attorney vouchers and make recommendations to the presiding judge regarding hours and payment, secure additional information when requested, or act as an intermediary between the judge and the panel attorney in voucher approval or reduction.

**Circuit Court of Appeals:** The federal appellate courts that hear appeals from trial (district) courts within their geographic region. Under the Criminal Justice Act, the judges of the circuit court of appeals select the federal defenders in their circuit and review requests for excess vouchers from district courts.

**Community Defender Organization (CDO):** Private, non-profit organizations selected by the district court, subject to its circuit council's approval, that provide indigent defense services funded by an annual grant. Unlike Federal Defender Offices, these private organizations are operated by a board, which is responsible for selecting its federal defender. CDOs receive funding through the annual grant from the Judicial Conference.

**Conscription:** The practice of requiring every lawyer who has entered an appearance in a federal district to be a member of the CJA panel and accept appointments to represent indigent defendants.

**Defender Services Committee (DSC):** A national committee of federal judges responsible for oversight of the provision of representation for indigent defendants, including making recommendations to other committees on staffing issues or legislative proposals relating to indigent defense.

**Defender Services Office (DSO):** The office within the AO responsible for providing support to federal defenders and panel attorneys as well as the Defender Services Committee.

**District Court:** A trial court in the federal judiciary that covers one state or part of a state and usually has multiple judges who hear criminal and civil cases. Under the Criminal Justice Act, these courts create a CJA plan for the district and approve vouchers. These courts also generally have a role in how panel attorneys are selected and retained.

**Experts:** Services such as investigators, translators, or psychologists necessary for lawyers to represent clients in many cases. If the service is appropriate and the defendant is financially unable to obtain an expert, panel attorney may file a petition with the judge for approval of payment

**Federal Public Defender Organization (FPDO):** Government offices headed by a federal public defender (FPD) — a federal officer appointed by the court of appeals for the circuit in which the district is located — to provide defense services in a district.

**Gleeson Report:** Chaired by Judge John Gleeson, in 2005 the Subcommittee on Long-Range Planning and Budgeting drafted an internal, non-public report titled *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*. The report recommended against placing the Defender Services program outside the judiciary as a judiciary cost-containment measure.

**Independence:** The ability of lawyers representing indigent defendants to do so without judicial or other interference or control. The first of the ABA's Ten Principles is that "the public defense function, including the selection, funding, and payment of defense counsel, is independent."

**Panel attorney:** Private attorneys selected under District Court CJA plans to accept appointments to represent indigent defendants. Attorneys submit a voucher to secure payment as an established hourly rate. Some panel lawyers take few cases while panel work forms the bulk of practice for others.

**Panel (or CJA panel):** The group of panel lawyers selected (or conscripted) to accept CJA appointments in a district. Selection methods vary, and most districts periodically review membership.

**Prado Report (Report of the Committee to Review the Criminal Justice Act):**

Chaired by Judge Edward Prado, this 1993 report to the Judicial Conference assessed the effectiveness of the Criminal Justice Act and made several recommendations, most of which were adopted. The recommendation for creation of a Center for Federal Indigent Defense Services, outside of and independent from the AO, was not adopted.

**Sequestration:** Automatic budget cuts to certain categories of outlays, which notably and severely struck those who provide representation to federal indigent defendants in 2013.

**Voucher:** A request for payment for the provision of services. Judges or their assigned surrogates must approve CJA panel attorney vouchers.

# APPENDIX B

## *Mission Statement*

### **NACDL Task Force On Federal Indigent Defense**

The year 2014 will mark the 50th anniversary of the passage by Congress of the Criminal Justice Act (hereinafter “CJA”). As we approach this milestone, it is appropriate for us to evaluate both the successes and the failures of our nation’s delivery system for federal indigent defense services.

When then-Attorney General Robert F. Kennedy appeared before the Senate Committee on the Judiciary and advocated for the passage of the CJA, 30 percent of federal defendants qualified for appointed counsel; today the figure is nearly 90 percent. In 1963 the number of federal cases assigned to appointed counsel was approximately 10,000; by 1993, when the last major reviews of the CJA were undertaken<sup>150</sup> over 83,000 appointments were made in our nation’s federal courts,<sup>151</sup> an eight-fold increase. Today that number exceeds 229,000.<sup>152</sup> Over this same time period, the budget for federal indigent defense has grown from \$1 million dollars in 1964 to over \$1 billion today.<sup>153</sup>

The exponential growth of the federal indigent defense system has mirrored the explosion in the number of criminal laws and regulations being prosecuted in our federal courts. During that same period, we have also seen the nature of criminal defense practice become increasingly complex both generally and in federal court in particular. These rising complexities are due in no small part to factors such as the increasing use of forensic evidence, the rise of mandatory minimum sentencing, developments in technology, the complexity of federal sentencing due to the advent of the Federal Sentencing Guidelines, and an ever-growing list of collateral consequences for clients as a result of criminal convictions.

The recent events surrounding sequestration and federal budget cuts have highlighted many of the current federal indigent defense system’s strengths and weaknesses. The impact of these events on institutional defenders, members of the private bar who participate in the CJA’s Panel program, the clients whom we represent and the criminal justice system as a whole has made clear the need to review and re-examine the current state of federal indigent defense.

Guided by the ABA’s Ten Principles of a Public Defense Delivery System, this Task Force will examine the current state of the Criminal Justice Act and the federal indigent defense system’s ability to adhere to these Principles.

With that in mind, the Task Force will research the historical development and evolution of the Criminal Justice Act and the federal indigent defense delivery system; document the short- and long-term effects of sequestration on federal indigent defense; consider the unique challenges that face the federal indigent defense system which must provide representation to a broad range of cases, communities and clients; and make recommendations as to how Congress, the federal judiciary, and the defenders themselves can best meet the ever-changing and increasing demands of the federal criminal justice system.

By so doing, it is hoped the federal system will return to its role of setting a standard of excellence to which states and nations alike can aspire; one in which those unable to afford counsel are assured of the high level of effective and zealous representation that the Sixth Amendment guarantees and justice demands.



# APPENDIX C

## Organizational Relationships and DSC Jurisdictional Statement

### Page 1 — Organizational Relationship

Enclosure 1

#### ORGANIZATIONAL RELATIONSHIPS UNDER THE CRIMINAL JUSTICE ACT WITH FOCUS ON THE ROLE OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS

Various entities provide control, oversight, guidance, or assistance with respect to program management or the delivery of representational services under the Criminal Justice Act (CJA) and related statutes.

The courts of appeals are authorized by the CJA to appoint federal public defenders (for each district within their respective circuit that has a CJA plan establishing a federal defender organization) to four-year terms, after considering recommendations of judges from the relevant district courts; fix each federal public defender's salary at a level not to exceed that of the U.S. Attorney for the district served; and approve the number of full-time attorneys the federal public defender may hire.

The judicial councils of the circuits make orders for the effective and expeditious administration of justice within their respective circuits. The CJA provides that district court CJA plans must be approved by the judicial council for the circuit, and that prior to doing so, the council shall supplement the district plan with provisions for representation on appeal.

The district courts are responsible for establishing a plan for furnishing representation under the CJA. Subject to the approval of the circuit judicial council, the district court determines whether to rely exclusively upon the appointment of private panel attorneys or to seek the creation of a federal public or community defender organization. The district court retains authority over the appointment of counsel and associated compensation and reimbursement of expenses of panel attorneys at that level, subject to the approval of the chief circuit judge (or circuit judge delegate) for payment of excess compensation claims.

As originally enacted, the CJA assigned significant policy, oversight, and administrative roles to the Judicial Conference and the Director of the Administrative Office of the U.S. Courts (AO).

The Judicial Conference, as the policy-making body for the federal judiciary, promulgates guidelines and polices for the administration of the CJA and related statutes. The Judicial Conference's Committee on Defender Services is the primary body charged with national policy formulation for and fiscal and administrative oversight of the program. It recommends policies and funding priorities and monitors the expenditure of CJA funds, advises the Judicial Conference of developments that require additional resources, and, when the budget is being prepared, proposes funding requests to support the program. The Defender Services Committee (DSC) makes legislative and policy recommendations to the Conference, including proposals to amend the CJA Guidelines. While the Conference has delegated to the DSC the authority to approve funding for individual Federal Defender Organizations (FDOs), it retains the ultimate authority to approve guidelines, policies, and funding for the Defender Services program.

1

### Page 2 — Organizational Relationship

The AO is the administrative component of the federal judiciary. The Director is responsible for overseeing the expenditure of funds appropriated by Congress for the administration and operation of the federal appellate and district courts, and various programs and activities placed under the judiciary's supervision, including the Defender Services program.

After the Act was passed, the Chief Justice appointed a nine-member ad hoc Committee to implement the CJA. Initially, the administrative, statistical, and financial services for the CJA program, as well as staff support for the implementation committee, were principally furnished by staff from the AO's Financial Management, Personnel, Administrative Services, and Space and Facilities Divisions, and its Office of General Counsel. To enhance coordination of CJA activities within the AO, and to provide better service to the courts and defender offices, the Criminal Justice Act Division was created in November of 1975. The Criminal Justice Act Division was renamed, in 1987, to the Defender Services Division. In recognition of the unique nature of the Defender Services program and the importance of its mission, in 2004, the Defender Services Division was elevated to the Office of Defender Services. As a consequence of a broad restructuring of the AO in 2013 impacting most parts of the AO, the Defender Services Office (DSO) became part of the Department of Program Services.

Under the supervision of the Director of the AO, and with direction from the Defender Services Committee, DSO is responsible for administering the federal defender and appointed counsel program. DSO provides policy, legal, management, and fiscal advice on related matters to the Director, the DSC, judicial officers and employees, private attorneys, and federal defenders and their staffs. The DSO's responsibilities include training for persons providing representational services under the CJA.

Funds to implement the CJA are provided to the Judiciary by specific appropriation for Defender Services, which is separate from the three other primary judiciary accounts (i.e., salary and expenses, security, and fees for jurors). Once approved by Congress, the appropriation provides for compensation, expense reimbursement, and training of persons furnishing representational services under the CJA and for operation of FDOs. The budget request for Defender Services is submitted by the DSC to the Judicial Conference Committee on the Budget for consideration and then to the Judicial Conference. The annual financial plan is likewise submitted to the Executive Committee of the Judicial Conference for consideration. The AO's Budget, Accounting, and Procurement Office coordinates budget formulation and execution of the Defender Services and other judiciary accounts.

There are three components in the "mixed" Defender Services system that have different needs: 1) federal public defender organizations (FDOs), 2) community defender organizations (CDOs), and 3) CJA panel attorneys.

1. Since FDOs are entities of the federal judiciary and all personnel are federal employees, DSO provides support in concert with other AO offices which also support the courts. As such, DSO relies upon various other entities to support and maintain its services to the

2

### Page 3 — Organizational Relationship

FDOs. Several AO offices provide services directly to federal defenders and their staffs. Through an interagency agreement, and working closely with the training staff in DSO, the Federal Judicial Center (FJC) assists DSO by delivering training programs for federal defenders and their staffs. This list is not exhaustive and generally these services are not provided to CDOs. Within the AO's Department of Administrative Services, the Human Resources Office performs personnel processing and payroll services; the Budget, Accounting, and Procurement Office makes voucher and other payments through its accounting and other systems to federal defenders and their staffs, and provides acquisition and contract administration services; and the Facilities and Security Office provides services for acquisition and leasing of space. The Office of the General Counsel secures representation for FDO employees being sued.

2. CDOs are nonprofit legal services organizations incorporated under the laws of the state. DSO provides support to CDOs but relies on the assistance of other AO offices to a lesser degree.
3. Because the program relies on a large network of CJA panel attorneys, DSO provides support and training to these private citizens to meet their needs. The AO's Defender Services Office provides funding to support over 12,000 panel attorneys nationwide whose vouchers account for their time on an hourly basis. Defender Services tracks these voucher payments, provides case budgeting support and also offers panel attorneys in-person training, webinars, a telephone hotline, technical litigation support and a regularly updated website designed for defenders and their staff. The AO's Department of Administrative Services, Budget, Accounting, and Procurement Office processes the voucher payments.

The Office of Audit, using national contract auditors, performs financial audits of FDOs and CJA payment systems that complement DSO's program of regular on-site management and operational reviews of federal defender organizations.

Under the recent AO reorganization, the Defender Services information technology (IT) portfolio, which had been managed by DSO, is now the responsibility of another unit within the Department of Program Services, the Case Management Systems Office (CMSO). CMSO also manages a number of court applications. CMSO works closely with the Department of Technology, which provides support for the courts, and also manages many key applications in use throughout the Judiciary. CMSO's work is assisted by national FDO personnel located in San Antonio, in addition to a DSO liaison. Computer System Administrators in local offices are an important part of the overall IT support structure. Their primary duties are local IT management, including responsibility for individual office IT infrastructure and assisting end users, and for litigation support.

3

### DSC Jurisdictional Statement

#### COMMITTEE ON DEFENDER SERVICES

To oversee the provision of legal representation to defendants in criminal cases who cannot afford an adequate defense.

Provide general policy guidance in interpretation and application of the Criminal Justice Act and related statutes, including approving non-controversial revisions to the Guidelines for the Administration of the Criminal Justice Act and Related Statutes, recommending approval to the Judicial Conference for other amendments to these guidelines, and reviewing and modifying forms used by the courts in administering the Act and related statutes.

Review and make recommendations to the Committee on Judicial Resources on policy concerning compensation and staffing for federal public and community defender organizations.

Review budget and grant requests (including staffing) of federal public and community defender organizations, and approve appropriate amounts, subject to applicable Conference-approved formulae, policies, or standards.

Review the Administrative Office's fiscal reports concerning appointments and payments under the Criminal Justice Act.

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.

Ensure, to the extent possible, adequate and appropriate substantive training of all persons providing representational services under the Criminal Justice Act.

Monitor the expenditure of Criminal Justice Act funds, advise the Judicial Conference (or other Conference committees, as appropriate) of developments in the defender services program which require additional resources, and, when the budget is being formulated, propose adequate funding and resources to support the defender services program taking into account the overall fiscal situation of the judiciary.

# APPENDIX D

## Voucher Cutting Correspondence

October 23, 2014

October 23, 2014

The Honorable William B. Traxler, Jr., Chief Judge  
Fourth Circuit Court of Appeals  
300 East Washington Street, Suite 222  
Greenville, SC 29601

 COPY

Re: CJA 20 Voucher No. 14073000097  
USA v. Joseph Williamson, Cr. 9:12-410,  
Attorney Christopher Adams

Dear Chief Judge Traxler:

I enclose herewith CJA 20 voucher and request for excess payment in the above case. I have been over this voucher on numerous occasions since it was submitted, and I recall the case as though it happened just last week. Mr. Adams took over the case from the Public Defender and he represented, in my opinion, the meanest and most guilty defendant I have had in my court for many years. Everybody connected with the court was shocked when the jury returned a not guilty verdict, and I believe the not guilty verdict was due to the tremendous amount of work Mr. Adams did on the case. Frankly, I really could not believe that the jury could acquit the defendant as he beat another inmate almost to death. Only the defendant's testimony gave him any hope, and I was truly amazed that the jury accepted it.

This is the largest deviation from the normal compensation with which I have ever been confronted as I recall. If you can give success consideration, and I believe the success was due to the time that Mr. Adams spent on the case, then I recommend it for payment. On the other hand, if success alone due to hard work is not sufficient for this kind of variance, then I recommend that the total amount be reduced to \$17,500.00, and I certainly leave to your good judgment which figure we should use. I am recommending the larger, but I certainly will understand the need to reduce it.

I send my very best wishes.

Sincerely,

  
Sol Blatt, Jr.

SBjr:rp  
enclosures  
cc: Claire Woodward O'Donnell, Panel Administrator

Page 1 — December 4, 2014

THE LAW OFFICE OF  
*Christopher W. Adams*  
A PROFESSIONAL CORPORATION

December 4, 2014

Chief Judge William B. Traxler, Jr.  
United States Court of Appeals for the Fourth Circuit  
300 East Washington Street  
Suite 222  
Greenville, SC 29601

RE: CJA voucher in USA v. Williamson, 9:12-cr-410-SB  
Voucher number 1407000097

Dear Chief Judge Traxler:

I was notified today that you have proposed reducing my CJA voucher for the defense of Mr. Williamson from \$28,132.54 to \$20,541.24. I ask that you reconsider and authorize the full payment for the following reasons.

First, the voucher is accurate and reasonable in this challenging case that resulted in the dismissal of one count and an acquittal on the remaining count. Judge Blatt, who is in the best position to know if my bill is accurate and reasonable, told me that he would be recommending the full payment of the voucher. He presided over the four-day trial. In this prison assault with intent to murder and assault with serious bodily injury prosecution, the defendant was acquitted despite the testimony of five cooperating witnesses. The case was further complicated by the fact that the client has a well-documented history of multiple mental illnesses, suffered from paranoia, and was not properly medicated by the county jail. (I was appointed after the federal defender withdrew due to [REDACTED].) The [REDACTED] issues led to four ex parte hearings in the first two days of trial, [REDACTED]. After the acquittal, Judge Blatt said,

I've got to note, Mr. Adams, I always thank court-appointed counsel for their services. So I was going to thank you. And I am going to add to that, I don't know if I've ever seen a better tried case than you did in this instance, and I congratulate you on it.

102 BROAD STREET • SUITE C • CHARLESTON, S.C. 29401-2276  
phone: 843.577.2153 • fax: 877.883.9114 • [chris@chrisadamslaw.com](mailto:chris@chrisadamslaw.com) • [www.chrisadamslaw.com](http://www.chrisadamslaw.com)

Page 2 — December 4, 2014

(Attachment, Transcript p. 26, lines 5-10.) I certainly appreciate Judge Blatt's considerate words. I trust that they were an honest statement that reflected the amount of work that went into and was demanded by this case.

Second, while you have an independent role in reviewing vouchers above \$9,800, it is appropriate to afford deference to Judge Blatt's careful consideration of the voucher and his approval of \$28,132.54. Judge Blatt did not rubber stamp my voucher. We met in his chambers to review the case and the bill before he told me that he would approve the full amount. It was clear to me that Judge Blatt carefully considered the voucher before finding it to be accurate and reasonable. I ask that you defer to Judge Blatt's judgment as to the accuracy and reasonableness of this voucher.

Third, this voucher has already been adversely impacted by the sequestration rate reduction. Much of the 230 hours in this case was billed during the period of the sequestration rate reduction. Thus, this bill is lower than it would have otherwise been but for the funding issues that seriously impacted the federal defender and CJA counsel communities.

Fourth, restoring this voucher to the amount approved by Judge Blatt sends the right message to CJA counsel. CJA counsel should accept appointment to tough cases and then do the work that is required. CJA counsel should not be encouraged to screen potential appointments so that we may avoid appointments to cases that run the risk of exceeding the presumptive maximum or refuse to do the work that is required out of fear that the vouchers will be reduced. For what it is worth, the magistrate appointed me to this tough case; I did not seek it out.

Fifth, and finally, since I have not been provided "a brief statement of the reason(s)" for the proposed reduction,<sup>1</sup> I hope this letter addresses the court's concerns by shedding light on why this voucher is accurate and the work rendered was reasonable and necessary. It is my further hope that the proposed reduction to this voucher was not contemplated as a means to save CJA funds. There is no doubt that the past two years have been tough for the judiciary and CJA counsel. CJA panel representatives recently informed me

<sup>1</sup> The Guide to Judiciary Policy, Vol. 7, Part A, Chapter 2, § 230.36(a) provides that "prior notice of the proposed reduction with a brief statement of the reason(s) for it" shall be provided to appointed counsel. If the court is not inclined to approve the amount approved by Judge Blatt, I respectfully request to be provided a brief statement of reasons so that I may address the court's specific concerns.

2

Page 3 — December 4, 2014

that there are a handful of places around the country where pervasive voucher cutting has been used as a cost saving measure. I was also told that the Judicial Conference discourages voucher cutting as a cost saving measure. Frankly, this was news to me. However, upon looking, the Judicial Conference policy states, "(v)ouchers should not be...reduced for the purpose of diminishing Defender Services program costs in response to adverse financial circumstances. (Guide to Judiciary Policy, Vol. 7, Part A, Chapter 2, § 230.33 Impact of an Appropriation Shortfall on Voucher Review.)"

Chief Judge Traxler, I am honored to serve on the CJA panel. I do my best to work hard, to work smart, and to effectively represent my indigent clients. I also bill honestly. Since my voucher is accurate and reasonable, and since reducing the voucher to save CJA funds is contrary to policy, I ask that you please approve the voucher of \$28,132.54, which is the amount approved by Judge Blatt. If you have any questions, I would be honored to discuss the matter with you at your convenience, which is specifically permitted by the Guide to Judiciary Policy.<sup>2</sup> Thank you for your consideration of this matter.

Sincerely,



Christopher W. Adams

Att: Transcript p. 26

CC: Sol Blatt Jr., USDC  
Claire Woodward, CJA Clerk

<sup>2</sup> The Guide to Judiciary Policy, Vol. 7, Part A, Chapter 2, § 230.36(c) provides, "Nothing contained in this guideline should be construed as requiring a hearing or as discouraging the court from communicating informally with counsel about questions or concerns in person, telephonically, or electronically, as deemed appropriate or necessary."

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# APPENDIX D, CONTINUED

Page 4 — December 4, 2014 (Attachment Transcript p. 26)

26

1 (WHEREUPON, the closing argument of Mr. Adams is  
 2 completed.)  
 3 (WHEREUPON, the requested remarks of Judge Blatt  
 4 follow.)  
 5 THE COURT: You can be seated, please. I've got to  
 6 note, Mr. Adams, I always thank court-appointed counsel for  
 7 their services. So I was going to thank you. And I am going  
 8 to add to that, I don't know if I've ever seen a better tried  
 9 case than you did in this instance, and I congratulate you on  
 10 it.  
 11 (WHEREUPON, the requested portions are concluded.)  
 12 \*\*\*  
 13 I certify that the foregoing is a correct transcript from the  
 14 record of proceedings in the above-entitled matter.  
 15  
 16 s/Jennifer H. Williams  
 17 ----- August 18, 2014  
 18 Jennifer H. Williams, RPR  
 19  
 20  
 21  
 22  
 23  
 24  
 25

December 5, 2014

UNITED STATES DISTRICT COURT  
 DISTRICT OF SOUTH CAROLINA

Post Office Box 811  
 CHARLESTON, SOUTH CAROLINA 29402

December 5, 2014

TELEPHONE (843) 579-1470  
 Fax (843) 579-1479

SOL BLATT, JR.  
 SENIOR UNITED STATES DISTRICT JUDGE


The Honorable William B. Traxler, Jr., Chief Judge  
 Fourth Circuit Court of Appeals  
 300 East Washington Street, Suite 222  
 Greenville, SC 29601

Re: CJA 20 Voucher No. 140730000097  
USA v. Joseph Williamson, Cr. 9-12-410,  
 Attorney Christopher Adams

Dear Chief Judge Traxler:

I have a copy of the letter Chris Adams sent to you in the above matter asking that the full amount of his fee request be approved. He quotes me several times as saying that I told him that I would recommend full payment of the voucher. As you will note from my recommendation in my letter of October 23, 2014, I made a dual recommendation which is exactly what I told Mr. Adams, and my feeling about his fee has not changed. I understand the use of CJA funds is something that must be guarded, and I understand, too, the need for the recommendation that you made.

I send my very best wishes.

Sincerely,  
  
 Sol Blatt, Jr.

SBjr:jrp  
 cc:  
 Ms. Claire Woodward O'Donnell  
 Christopher W. Adams, Esquire

December 19, 2014

UNITED STATES COURT OF APPEALS  
 FOR THE FOURTH CIRCUIT  
 300 East Washington Street  
 Greenville, South Carolina 29601

William B. Traxler, Jr.  
 Chief Judge

Telephone (864) 241-2730  
 Fax (864) 241-2732

December 19, 2014

Mr. Christopher W. Adams  
 102 Broad Street, Suite C  
 Charleston, SC 29401-2276

Re: United States v. Williamson  
 9-12-cr-410-SB; CJA Voucher

Dear Mr. Adams:

I have your letter of December 4, 2014, requesting a reexamination of your CJA voucher. The district judge who handled your case recommended that you be paid in full if success at trial was a consideration. Frankly, whether a verdict is guilty or not guilty is not a factor for me in determining whether a particular fee is fair and reasonable.

If success was not a consideration, the district judge recommended that you be paid a substantially smaller amount. I decided that you should be paid more than the district judge recommended.

Nevertheless, by copy of this letter to Ms. Claire Woodward, I am requesting that she return your timesheets to me for further review and a determination of whether the amount authorized should be changed in light of the facts sets forth in your letter. I will try to resolve this matter as quickly as I can.

Best wishes for the holidays.

Sincerely,  
 William B. Traxler, Jr.

cc: Judge Sol Blatt  
 Ms. Claire Woodward

January 13, 2015

UNITED STATES COURT OF APPEALS  
 FOR THE FOURTH CIRCUIT  
 300 East Washington Street  
 Greenville, South Carolina 29601

William B. Traxler, Jr.  
 Chief Judge

Telephone (864) 241-2730  
 Fax (864) 241-2732

January 13, 2015

Mr. Christopher W. Adams  
 102 Broad Street, Suite C  
 Charleston, SC 29401-2276

Re: CJA Voucher in United States v. Williamson - 9-12-cr-410-SB

Dear Mr. Adams:

At your request I have reviewed my prior decision to pay you \$20,541.24 as compensation for representing Mr. Williamson. In doing so, I have examined the time records you submitted in your request for \$28,132.64. These records reflect a great deal of work on this case, and I have no reason to challenge the time you represent as spent in the various aspects of case preparation. Nevertheless, what is paid CJA attorneys does not depend exclusively on the time they spent working on the case, although this is a very important factor. What is paid instead depends on what is fair and reasonable for the representation of this particular client on these particular charges.

In determining what is fair and reasonable for a particular case, I give great weight to the opinion of the district court as to what a fair and reasonable fee would be. Here, the judge who handled the case is one of the longest serving and most distinguished judges on the federal bench. His view, not exactly as you represent it, is that the cost of representation here should be much less than you request.

All the relevant factors being considered, I will give you the benefit of every doubt and increase my approval, though slightly, up to \$22,541.24.

I admire your ability and persistence.

Sincerely,  
 William B. Traxler, Jr.

cc: Judge Blatt  
 Claire Woodward

Appendix D

# ENDNOTES

1. 287 U.S. 45 (1932).
2. *Id.* at 68-69.
3. 304 U.S. 458 (1938).
4. UNITED STATES COURTS, CRIMINAL JUSTICE ACT: AT 50 YEARS, A LANDMARK IN THE RIGHT TO COUNSEL, Aug. 20, 2014 [hereinafter CJA at 50], available at <http://www.uscourts.gov/news/2014/08/20/criminal-justice-act-50-years-landmark-right-counsel>.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. REPORT OF THE COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT 9-10 (1993) [hereinafter Prado Report].
10. THE CRIMINAL JUSTICE ACT IN THE FEDERAL COURTS (1967) (last visited July 17, 2015).
11. CJA at 50, *supra* note 4.
12. Prado Report, *supra* note 9, at 9-10, quoting Senate Report No. 91-790, 91st Cong. 2d Sess. April 23, 1970, at 18 (emphasis added).
13. *Id.* at 1. Prado Report, *supra* note 9, at vii.
14. REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE FEDERAL DEFENDER PROGRAM 39, submitted by the federal judiciary to Congress pursuant to Section 318 of the Judicial Improvements Act of 1990 (1993) [hereinafter Judicial Conference Report of 1993].
15. *Id.* at 16.
16. *Id.* at 17. Although the original source documents are cited, some of the content and structure of this section comes from a summary dated Dec. 2005, which was provided to the Task Force by DSO. The document, entitled *Compilation of Background History and Information, U.S. Defender Program*, is posted on the Task Force website.
17. *Id.* at 37; Prado Report, *supra* note 9, at 92.
18. Prado Report, *supra* note 9, at 91.
19. SUBCOMMITTEE ON LONG-RANGE PLANNING AND BUDGETING, 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 (2005).
20. *Id.* at 28.
21. CJA at 50, *supra* note 4.
22. Judicial Conference Report of 1993.
23. *Id.* at 7.
24. Judicial Business of the U.S. Courts, 2012 Annual Report of the Director, [www.uscourts.gov/Statistics/JudicialBusiness/2012.aspx](http://www.uscourts.gov/Statistics/JudicialBusiness/2012.aspx) (229,188 CJA appointments); Judicial Business of the U.S. Courts, 2014 Annual Report of the Director <http://www.uscourts.gov/statistics-reports/criminal-justice-act-judicial-business-2014> (210, 205 CJA appointments) (last visited July 17, 2015).
25. The timing and details of sequestration are explained in the AO's 2013 Annual Report, available at <http://www.uscourts.gov/statistics-reports/fiscal-year-2013-budget-sequestration-and-judiciary-annual-report-2013> (last visited July 17, 2015).
26. 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/l\\_s\\_claid\\_def\\_ten\\_principlesbooklet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/l_s_claid_def_ten_principlesbooklet.authcheckdam.pdf) (last visited July 30, 2015).
27. *Id.*

28. The Task Force had difficulty finding a publicly accessible description of the responsibilities for various committees. The descriptions of the Budget and Executive Committees were taken from a 2009 report provided by DSO: Judicial Conference of the United States, *Jurisdiction of Committees* (2009), previously available at [http://www.uscourts.gov/judconf/09\\_Sep\\_Juris\\_Statements\\_Final.pdf](http://www.uscourts.gov/judconf/09_Sep_Juris_Statements_Final.pdf). See also Email from Pamela Hamrin to Joel Schumm, Oct. 17, 2014. Sometime during the drafting of this report, the provided link was removed from the AO's website. A scanned printout is posted on the Task Force's website.

29. Email from Cait Clarke to Bonnie Hoffman (Nov. 12, 2014).

30. *Jurisdiction of Committees*, *supra* note 28, at 13.

31. *Id.*

32. *Id.*

33. See *supra* notes 25 & 28.

34. See *supra* note 28.

35. 18 U.S.C. § 3006A(g).

36. 18 U.S.C. § 3006A(a)(3).

37. 18 U.S.C. § 3006A(a)(3), (d)(3), (g)(1).

38. Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317, 325 (2011).

39. NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 231 (2011).

40. Letter from Chief Judge Loretta A. Preska et al. to Honorable Joseph R. Biden, Jr. (Aug. 13, 2013).

41. See, e.g., JOHN P. GROSS, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, RATIONING JUSTICE: THE UNDERFUNDING OF ASSIGNED COUNSEL SYSTEMS (2013), available at <http://www.nacdl.org/gideonat50/>; NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, AMERICA'S PROBLEM-SOLVING COURTS: THE CRIMINAL COSTS OF TREATMENT AND THE CASE FOR REFORM (2009), available at <http://www.nacdl.org/criminal-defense/problem-solving-courts/>; ROBERT C. BORUCHOWITZ, MALIA N. BRINK & MAUREEN DIMINO, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS, available at <http://www.nacdl.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=20808>.

42. See generally *supra* note 28 (summarizing committee duties).

43. The conference included presentations by AO staff and a representative of the Budget Committee. Members of the Task Force attended that meeting and also met with many defenders individually at the time.

44. The solicitation for grant proposals is available at <https://www.bja.gov/Funding/13AnsweringGideonsCallSol.pdf>. The grant award is summarized at <http://grants.ojp.usdoj.gov:85/selector/office?po=BJA&fiscalYear=2013&defaultYear=Y> (click on "BJA FY 13 Answering Gideon's Call: National Assistance To Improve the Effectiveness of Right to Counsel Services").

45. Lefstein, *supra* note 39, at 140. For example, all lawyers in the Lancaster County Public Defender in Lincoln, Neb., have kept track of the time for more than three decades. As one lawyer from that office explained, maintaining time records provides "evidence that formed the basis of [their] standards and has positively impacted [their] workload and allowed [them] to better equalize the distribution of work within the office." *Id.* at 159.

46. See *supra* note 12.

47. See *supra* note 19, at 8.

48. Memorandum to chief judges from Leonidas Ralph Mecham, July 1, 2004.

49. *Id.*

50. United States Courts, *Judiciary's Cost-Containment Efforts — Annual Report 2013*, available at <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/AdministrativeOffice/DirectorAnnualReport/annual-report-2013/judiciary-funding/judiciarys-cost-containment-efforts.aspx> (last visited July 17, 2015).

51. *Id.*

52. *Id.*

53. Sam Stein & Ryan J. Reilly, *Sequestration's Biggest Victim: The Public Defender System*, Aug. 19, 2013, available at [http://www.huffingtonpost.com/2013/07/22/sequestration-public-defender\\_n\\_3624111.html](http://www.huffingtonpost.com/2013/07/22/sequestration-public-defender_n_3624111.html) (last visited July 17, 2015). Judge Traxler, chair of the Executive Committee, later acknowledged the defender budget was "hit particularly hard" under sequestration when defender offices lost approximately 400 employees and attorneys and staff were furloughed approximately 150,000 hours. Zoe Tillman, *Federal Defenders Set to Fill Jobs Lost Under Sequestration*, National Law Journal, Mar. 11, 2014.

54. CJA at 50, *supra* note 4.

55. Eric H. Holder, Jr., *Defendants' Legal Rights Undermined by Budget Cuts*, WASH. POST, Aug. 22, 2013, available at [http://www.washingtonpost.com/opinions/eric-holder-defendants-legal-rights-undermined-by-budget-cuts/2013/08/22/efccbec8-06bc-11e3-9259-e2aaf5a5f84\\_story.html](http://www.washingtonpost.com/opinions/eric-holder-defendants-legal-rights-undermined-by-budget-cuts/2013/08/22/efccbec8-06bc-11e3-9259-e2aaf5a5f84_story.html) (last visited July 17, 2015).

56. Fiscal Year 2014: No Budget and a Government Shutdown - Annual Report 2013, available at <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/AdministrativeOffice/DirectorAnnualReport/annual-report-2013/judiciary-funding/fy2014-no-budget-and-a-government-shutdown.aspx> (last visited July 17, 2015).

57. Further information is available at the Project's website: <https://www.clemencyproject2014.org> (last visited Aug. 4, 2015).

58. Memo to Judge John D. Bates, director, from Robert K. Loesche, general counsel, July 30, 2014.

59. Although the AO opinion forecloses CJA panel attorneys from obtaining compensation for clemency work, many panel attorneys have volunteered to assist the project on a pro bono basis.

60. U.S. Courts, *Mission - Defender Services*, available at <http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/Mission.aspx> (last visited July 17, 2015).

61. Assistant Director, Office of Defender Services, Position Description (posted on Task Force website).

62. Interview of Laura Minor on Nov. 21, 2014.

63. *Id.*

64. Position Description for Laura Minor (emphasis added). The description, which is posted on the Task Force website, is more than a page in length and not entirely bureaucratic in tone. For example, the following language is included in the description: "Develop and implement an organizational vision...balance change and continuity" but all "with the basic government framework," which Ms. Minor views as serving the judges.

65. Prado Report, *supra* note 9, at 75.

66. *Id.* at 80.

67. *Id.* at 79.

68. *Id.*

69. Letter from Sen. Christopher A. Coons, chairman, and Sen. Jeff Sessions, ranking member, of the Senate Judiciary Committee on Bankruptcy and the Courts, to the Honorable William B. Traxler, Jr. (Aug. 5, 2013).

70. *Id.*

71. Prado Report, *supra* note 9, at 47.

72. *Id.* at 45.

73. *Id.* at 44.

74. *Id.* at 45.

75. *See generally infra* note 126, citing Interview with AO Director Judge John D. Bates (June 16, 2014).

76. VERA INSTITUTE OF JUSTICE, *IMPROVING PUBLIC DEFENSE SYSTEMS: GOOD PRACTICES FOR FEDERAL PANEL ATTORNEY PROGRAMS* (2003).

77. *Id.* at 21.

78. Standard Order Adopting CJA Plan, Western District of Texas, Midland/Odessa and Pecos Divisions, May 3, 2010, available at [http://www.txwd.uscourts.gov/CJA/Documents/MOP\\_CJA\\_Plan.pdf](http://www.txwd.uscourts.gov/CJA/Documents/MOP_CJA_Plan.pdf).

79. The committee has broad authority, including:

- a. Reviewing and determining applications by attorneys for admission to the CJA Panel, and assigning the Tier of the CJA Panel (see Section V.C. below) to which the attorney is admitted.
- b. Determining whether attorneys admitted to the CJA Panel should be removed for any reason, including, but not limited to, poor service, misconduct, incompetence, mental or physical disability, or failure to comply with training and continuing legal education requirements.
- c. Planning and providing educational and professional training opportunities to members of the CJA Panel.
- d. Reviewing, at the request of a judicial officer or CJA panel attorney, submitted payment vouchers for reasonableness and compliance with appropriate Administrative Office guidelines.
- e. Investigating complaints against or involving members of the CJA Panel, and imposing appropriate disciplinary sanctions, including admonishment, reprimand, suspension from the CJA Panel, and/or removal from the CJA Panel.
- f. Identifying and defining any operating difficulties encountered in the administration of the CJA Panel and making recommendations to the court for appropriate changes.

Criminal Justice Act Plan, United States District Court For the Northern District of Alabama, at 5-6, *available at* <http://www.alnd.uscourts.gov/sites/alnd/files/CJA%20Plan.pdf>.

80. Order Adopting Amended CJA Plan, U.S. District Court for the Western District of Texas El Paso Division, July 22, 2013, *available at* [http://www.txwd.uscourts.gov/CJA/Documents/ep\\_cja\\_plan.pdf](http://www.txwd.uscourts.gov/CJA/Documents/ep_cja_plan.pdf).

81. Prado Report, *supra* note 9, at 34.

82. Prado Report, *supra* note 9, at 53. As the Prado Report noted, “assignments are reportedly totally random in some districts, based merely on a rotation through the list of attorneys or picking a name at random from a file box of cards.” *Id.* at 35. Such a process, without some other mechanism to tier or otherwise divide the panel based upon experience/expertise, can result in cases being assigned to attorneys who are not fully capable of effectively representing their particular clients.

83. Vera, *supra* note 76, at 27.

84. *Id.* at 22.

85. *Id.*

86. 18 U.S.C. § 3006A(g).

87. *See supra* note 11 and accompanying text.

88. Resolution of the Board of Directors of the National Association of Criminal Defense Lawyers, Mar. 7, 1992, *available at* <http://webcache.googleusercontent.com/search?q=cache:0PNH-BihQmwJ:www.nacdl.org/WorkArea/DownloadAsset.aspx%3Fid%3D19337+%&cd=1&hl=en&ct=clnk&gl=us>.

89. *See, e.g.*, Federal Defender Fact Sheet (distributed during sequestration and posted on the Task Force website); Sequestering Justice — How the Budget Crisis is Undermining Our Courts: Hearing Before the Judiciary Committee Subcommittee on Bankruptcy and the Courts (July 23, 2013) (statement of Michael S. Nachmanoff, Federal Public Defender for the Eastern District of Virginia, on Behalf of the Federal Public and Community Defenders) (“My own office handles more than 2,000 criminal cases a year and we do so better, and more cost effectively, than any other alternative.”).

90. Norman R. Reimer, *Defending the Indigent*, N.Y. TIMES, Apr. 24, 2013, *available at* [http://www.nytimes.com/2013/04/25/opinion/defending-the-indigent.html?\\_r=0](http://www.nytimes.com/2013/04/25/opinion/defending-the-indigent.html?_r=0) (last visited July 17, 2015).

91. Guide to Judiciary Policy, Vol. 7A, § 230.20; *see also* 18 U.S.C. § 3006A(d)(1).

92. Email from Judge Julia Gibbons, chair of the Budget Committee, to members of the Judicial Conference (Sept. 8, 2014).

93. U.S. Courts, Mission - Defender Services, *available at* <http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/Mission.aspx> (last visited July 17, 2015).

94. *See Rationing Justice, supra* note 41.

95. Resolution of the Board of Directors of the National Association of Criminal Defense Lawyers Urging Congress to Fully Fund the Criminal Justice Act, April 25, 1998, *available at* <https://www.nacdl.org/About.aspx?id=19900> (last visited July 17, 2015).

96. 18 U.S.C. § 3006A(e)(1).

97. 18 U.S.C. § 3006A(e)(2). See *United States v. Goodwin*, 770 F.2d 631, 635 (7th Cir.1985) (the appropriate test for deciding whether investigative services are necessary for an adequate defense under § 3006A(e) is whether a reasonable attorney would engage such services for a client having the independent financial means to pay for them).

98. See, e.g., *Melendez-Diaz v. Massachusetts*, 557 U. S. 305, 319 (2009) (citing Garrett & Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. REV. 1, 14 (2009) (“one study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60 percent of the cases”).

99. Email from Andy Archuleta, Defender Services Office (Feb. 2, 2015). Excluding translators, the remaining categories of experts include investigator, psychologist, psychiatrist, polygraph, documents examiner, fingerprint analyst, accountant, CALR (Westlaw/Lexis, etc.), chemist/toxicologist, ballistics, other (e.g., blood splatter expert, military historian, cultural expert, DNA analyst), weapons/firearms/explosive expert, pathologist/medical examiner, other medical, voice/audio analyst, hair/fiber expert, computer (hardware/software/systems), paralegal services, legal analyst/consultant, jury consultant, mitigation specialist, duplication services, litigation support services, computer forensics expert, transcript(s).

100. Guide to Judiciary Policy, Vol. 7A, § 230.60.

101. Resolution of the Board of Directors of the National Association of Criminal Defense Lawyers, Jan. 7, 2009, available at <http://www.nacdl.org/About.aspx?id=19684>.

102. New York County Lawyers Association, *Courts in Crisis* (Jan. 2014), available at [http://www.nycla.org/siteFiles/Publications/Publications1666\\_0.pdf](http://www.nycla.org/siteFiles/Publications/Publications1666_0.pdf).

103. Prado Report, *supra* note 9, at 53.

104. Southern District of Texas, Address, Hours, Phone Information, available at <http://www.txs.uscourts.gov/address-hours-phone-information> (last visited July 17, 2015).

105. United States District Court for the Southern District of Texas, McAllen Division, Criminal Justice Act Plan 2011, available at <http://www.txs.uscourts.gov/sites/txs/files/McAllenCJAPlanwithAppendicies.pdf>.

106. Letter to Members of the Southern District of Georgia Bar from Chief Judge Lisa Godbey Wood, Apr. 21, 2011, available at <http://www.gasd.uscourts.gov/pdf/CJA%20LETTER3.pdf>.

107. *Id.* (emphasis added).

108. *Id.* (citing State Bar of Georgia Rule 8-104(D)(2)). Lawyers admitted after 2005 face additional requirements under Rule 8-104 (D) (1) (“any participant in the Transition Into Law Practice Program admitted to practice after June 30, 2005, shall complete the mandatory Advocacy Experiences of the Transition Into Law Practice Program . . .”), available at <http://www.gabar.org/barrules/handbookdetail.cfm?what=rule&id=227> (last visited Aug. 4, 2015).

109. The Defender Services Office maintains data on the gender and ethnicity of employees of Federal Defender Offices. That data, from FY 2013, was as follows:

#### Appendix 5: Bi-weekly Workforce by Court Type, Gender, and Ethnicity, FY 2013

	Total	Male	Female	Caucasian	African American	Hispanic	Asian American	Native American	Pacific Islander	Not Reported	Disability
PPDO	2,497	1,058	1,439	1,592	259	539	76	10	8	13	36
	100.0%	42.4%	57.6%	63.8%	10.4%	21.6%	3.0%	0.4%	0.3%	0.5%	1.4%

The data is not broken into attorney and support staff categories. Although diverse in some respects, the 10.4 percent of African Americans, for example, is less than the 13.4 percent of African Americans in the United States. <http://quickfacts.census.gov/qfd/states/00000.html> (last visited July 17, 2015).

110. Vera, *supra* note 76, at 12, 26.

111. Press Release: Criminal Justice Act Mentoring Program Approved for the Southern District of New York (Oct. 23, 2008), available at [http://www.nysd.uscourts.gov/cases/show.php?db=notice\\_cja&id=18](http://www.nysd.uscourts.gov/cases/show.php?db=notice_cja&id=18) (last visited July 17, 2015).

112. *Id.*

113. Email from Bob Burke to Joel Schumm (Jan. 5, 2015).



114. *Id.*

115. CJA at 50, *supra* note 4.

116. U.S. Department of Justice, U.S. Attorneys — Training, *available at* <http://www.justice.gov/usao/training/> (last visited Aug. 4, 2015).

117. Interview with Bob Burke (June 17, 2014).

118. Jan. 6, 2015, response from DSO to Task Force inquiries.

119. *Id.*

120. The Task Force understands the prevailing view that training is regarded as part of General Office Overhead under Section 230.66.10 of the CJA Guidelines, which is therefore a non-reimbursable expense. That panel lawyers are precluded from billing to recoup the cost of training suggests that it should be made even more freely and readily accessible to panel lawyers.

121. 18 U.S.C. § 3006A(d)(1).

122. Guide to Judiciary Policy, Vol. 7A, § 230.13.

123. *Id.*

124. 18 U.S.C. § 3006A(d)(1).

125. Vera, *supra* note 76, at 30. As one judge told the Task Force, however, many vouchers are not reviewed until the end of a case — after sentencing. Any confidential information that might reflect poorly on the defendant, such as leading counsel on a wild goose chase of an alibi, may not be known to the judge. In other cases, however, interim vouchers may be approved or a defendant could appear again in court on a violation of supervised release.

126. Interview with AO Director John D. Bates (June 16, 2014).

127. The memo is available on the Task Force website. The language is consistent with Section 230.33 of the CJA Guidelines: “Vouchers should not be delayed or reduced for the purpose of diminishing Defender Services program costs in response to adverse financial circumstances.”

128. *See Id.* (quoting the memo from Director Bates and Judge Blake).

129. Guide to Judiciary Policy, Vol. 7A, § 230.36.

130. Bureau of the Fiscal Service, U.S. Treasury Department, Prompt Payment, *available at* <https://www.fiscal.treasury.gov/fsservices/gov/pmt/promptPayment/payments.htm> (last visited July 17, 2015).

131. ABA Criminal Justice Section Standards, Defense Function, *available at* [http://www.americanbar.org/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_dfunc\\_blk.html](http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_dfunc_blk.html) (last visited July 17, 2015).

132. Prado Report, *supra* note 9, at 83.

133. Martha K. Harrison, *Claims for Compensation: The Implications of Getting Paid When Appointed Under the Criminal Justice Act*, 79 B.U. L. REV. 553, 558 (1999).

134. Guide to Judiciary Policy, Vol. 7A, § 230.76. Defenders should also maintain similar records to provide metrics to justify funding, whether or not a caseload study is ongoing at the time.

135. Letter from Yolanda Barrera et al. to Hon. Dale Fischer et al. (March 28, 2014).

136. Prado Report, *supra* note 9, at 83. The Prado Report recommended that “voucher administration and approval should be handled by a local administrator. This local administrator may be a part of . . . an independent administrator in those districts where such an administrator would be cost-efficient.”

137. Although only advisory, other districts similarly allow considerable input from lawyers in challenges to voucher cuts. In the Northern District of California, a review committee fields appeals from a CJA supervising attorney or from a panel lawyer. The committee meets with the panel lawyer and the CJA supervising attorney and issues recommendation to the judge, who accepts or rejects.

138. Federal Judicial Center, *The CJA Supervising Attorney: A Possible Tool in Criminal Justice Act Administration (Report to the Judicial Conference Committees on Defender Services, Judicial Resources, and Court Administration and Case Management)* 83 (Apr. 2001), *available at* [http://www.fjc.gov/public/pdf.nsf/lookup/cjareport.pdf/\\$file/cjareport.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/cjareport.pdf/$file/cjareport.pdf).



139. Vera, *supra* note 76, at 31.

140. See *supra* note 28 and accompanying text.

141. See *supra* note 29.

142. Prado Report, *supra* note 9, at 92.

143. *Id.* at 91.

144. See *supra* notes 17-18.

145. Interview with Judge Edward Prado (Nov. 10, 2014).

146. A document with these 14 items is linked on the AO's webpage, *available at* <http://www.uscourts.gov/news/2015/06/08/cja-study-committee-begins-accepting-comments> (last visited July 17, 2015).

147. Interview with Judge Edward Prado (Nov. 10, 2014).

148. *Id.*

149. Resolution of the Board of Directors of the National Association of Criminal Defense Lawyers, March 7, 1992, *available at* <https://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=19337> (last visited July 17, 2015).

150. The year 1993 marked the issuance of the Report of the Committee to Review the Criminal Justice Act (known as the Prado Report in recognition of the Committee's Chair, Edward C. Prado) and the Report of the Judicial Conference of the United States on the Federal Defender Program, submitted by the federal judiciary to Congress pursuant to Section 318 of the Judicial Improvements Act of 1990.

151. Judicial Conference Report of 1993 at 7; Fiscal Year 1992 federal appointments totaled 83,059.

152. Data for Fiscal Year 2012 (229,188 total CJA appointments) Judicial Business of the U.S. Courts, 2012 Annual Report of the Director, *available at* [www.uscourts.gov/Statistics/JudicialBusiness/2012.aspx](http://www.uscourts.gov/Statistics/JudicialBusiness/2012.aspx).

153. The Fiscal Year 2013 budget for federal indigent defense was \$1.031 billion. \*





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