

DT: Committee Report

CN: Federal Defender Program (DEFREP)

DA: March 1993

REPORT OF THE JUDICIAL CONFERENCE  
 OF THE UNITED STATES  
 ON THE  
 FEDERAL DEFENDER PROGRAM  
 March 1993

Submitted to the Judiciary Committees of the Congress pursuant to section 318 of the Judicial Improvements Act of 1990 (Pub.L.No. 101-650)

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REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

ON THE

## FEDERAL DEFENDER PROGRAM

March 1993

## I. BACKGROUND

## A. Statutory Requirement

Section 318 of the Judicial Improvements Act of 1990 (Pub.L.No. 101-650) requires the Judicial Conference of the United States to conduct a comprehensive study of the federal defender program under the Criminal Justice Act (CJA), to assess the effectiveness of the program, and to report the results of the study to the Judiciary Committees of the Senate and House of Representatives by March 31, 1993.

## B. Committee Recommendations

In August 1991 the Chief Justice appointed the ad hoc, nine-member Committee to Review the Criminal Justice Act to undertake the study required by the statute. The committee solicited and received extensive comments on the CJA program from interested parties and conducted five public hearings. It filed an interim report with the Judicial Conference in July 1992, in which it made 28 recommendations regarding the CJA program, including proposals to increase the level of Congressional funding for the program, to increase the training and compensation provided to panel attorneys appointed under the CJA, and to make substantial changes in the structure and administration of the CJA program.

The Judicial Conference at its September 1992 meeting directed its Committee on Defender Services to analyze the interim report of the Review Committee. The Defender Services Committee proceeded to endorse many of the recommendations of the Review Committee, including those calling for full funding of the CJA appropriation, fair and reasonable compensation of appointed counsel, expeditious processing of their requests for compensation, and additional training for CJA lawyers. The Defender Services Committee, however, opposed the Review Committee's central recommendation for the creation of a new, independent national defender services agency and a system of regional and district boards and administrators to oversee local administration of the Criminal Justice Act. The Defender Services Committee was joined in this opposition by most of the federal public defenders.

The Review Committee filed its final report with the Judicial Conference on January 29, 1993, in which it reaffirmed many of the recommendations contained in its interim report and modified other recommendations.

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The Judicial Conference at its March 1993 session considered the final report and recommendations of the Review Committee and those of the Defender Services Committee. The Conference debated several of the principal policy issues raised in the two reports and appointed a special committee to consider and report back on the remaining issues raised by the committees.

This report sets forth the policy decisions adopted by the Judicial Conference and constitute its recommendations to the Congress, as required by section 318 of the Judicial Improvements Act of 1990.

## II. APPOINTMENT OF COUNSEL UNDER THE CRIMINAL JUSTICE ACT

### A. Constitutional and Statutory Background

The Sixth Amendment to the United States Constitution guarantees an accused the right to representation by an attorney in criminal prosecutions. Historically, authority for the appointment of counsel in federal criminal proceedings has rested in the federal judiciary. Before enactment of the Criminal Justice Act, however, there was no statutory provision for compensation of appointed counsel. Federal judges had to rely on the professional obligation of lawyers to provide pro bono publico services, often at considerable personal sacrifice.

The Criminal Justice Act, which was enacted in 1964 and took effect in 1965, authorized payment of hourly compensation rates and out-of-pocket expenses for lawyers appointed by the courts to represent federal criminal defendants. It also authorized payment of expert and investigative services for defendants. The Act requires each United States district court to promulgate a local plan, with the approval of the judicial council of the circuit, for furnishing representation to eligible defendants, either by private attorneys or by attorneys furnished by a bar association or legal aid agency, or both. The local plans also provide for representation on appeal.

The Criminal Justice Act was amended significantly in 1970 to authorize Federal Public Defender Organizations and Community Defender Organizations as additional options for providing defense counsel in those districts (or combinations of adjacent districts) where at least 200 CJA appointments are made annually. Accordingly, the Act presently authorizes three methods for a court to provide counsel to criminal defendants who are financially unable to retain their own attorney.

1. Federal Public Defender Organization
2. Community Defender Organization
3. Private panel attorneys

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### B. Federal Public Defender Organizations

Forty-two Federal Public Defender Organizations have been established to serve 47 of the 94 judicial districts. Federal public defenders are full-time federal employees appointed by the respective courts of appeal for renewable four-year terms of office. Guidelines of the Judicial Conference urge that federal public defenders meet certain personal qualifications, that the court of appeals advertise nationally for positions consistent with equal employment opportunity standards, and that a merit selection committee be used to assist the appointing court in appointing and reappointing federal public defenders. Compensation for the federal public defender is fixed by the court

of appeals at a rate not greater than that of the United States attorney for the same district.

Federal public defenders are authorized to hire attorneys, investigators and other support staff to the extent authorized by the judiciary's approval and budget processes. Each Federal Public Defender Organization submits reports of its activities and presents its budget requests to the Administrative Office of the United States Courts.

#### C. Community Defender Organizations

Nine Community Defender Organizations (CDOs) have been established to serve 10 judicial districts. CDOs are not federal entities. They are non-profit legal services organizations incorporated under state laws. They operate under the supervision of a board of directors and may be a branch of a parent state legal services organization. CDOs are funded by grants approved by the Judicial Conference. As an alternative, CDOs may elect to submit vouchers and receive payment on a case-by-case basis in the same manner as private panel attorneys.

The size, compensation, and salaries of CDO staff are determined by the CDO itself, subject to review by the Administrative Office and the Judicial Conference through the grant process.

#### D. Private panel attorneys

Even in districts where a Federal Public Defender office or Community Defender Organization has been established, appointments of panel attorneys are made under the CJA in a "substantial portion" of the cases -- commonly 25%. Where conflicts among multiple defendants may arise, as often occurs in drug cases, a defender organization is appointed to represent one defendant, and panel attorneys are appointed to represent the other defendants.

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Private attorneys are appointed on a case-by-case basis by a district court or court of appeals from a panel of attorneys approved by the court as qualified to handle federal criminal cases. In most districts, they are compensated at rates of up to \$60 per hour for time spent in court on a case and up to \$40 per hour for time spent out of court. The average compensation is about \$45 per hour, since one in-court hour is reported for every three out-of-court hours.

Panel attorneys are authorized reimbursement of out-of-pocket expenses, such as travel, but their rates of compensation are intended to cover general office overhead. Provision is also made in the CJA to compensate providers of expert, investigative, and other services and to pay the defendant's cost of needed transcripts.

The Judicial Conference is authorized by the CJA to designate higher rates of up to \$75 per hour for designated districts or circuits where the higher rates are justified by such factors as the prevailing local hourly rates for qualified attorneys and the ability of the courts to recruit and retain competent CJA attorneys. In addition, the Conference is authorized to adjust these hourly compensation rates annually by the same

percentage increase authorized for the salaries of federal civil servants generally.

The Conference has authorized higher rates for 88 districts. Because of insufficient funds within the defender services appropriation, however, the higher rates have been implemented in all or parts of only 16 districts. Moreover, the annual percentage adjustments in the rates, which now aggregate about 23%, have not been implemented even with regard to the lower \$40 and \$60 rates.

Panel attorneys obtain payment for their services by submitting a voucher to the clerk of the appointing court, claiming the hours they have spent on a case and their authorized expenses. The judge who has presided in the case must evaluate and approve the claim before it is paid by the clerk. The judge is authorized to approve vouchers for services performed in an amount up to a ceiling of \$3,500 for felony cases, \$2,500 for appeals, \$1,000 for misdemeanor cases, and \$750 for other representations and for expenses. These ceilings may be exceeded only in complex or extended cases and only through special certification by the appointing judge, plus the approval of the chief judge of the court of appeals, or the chief judge's designee.

#### E. Death Penalty Resource Centers

Death Penalty Resource Centers are specialized Community Defender Organizations that provide direct representation in some death penalty cases and assist the courts in finding private attorneys for assignments in others by offering them training, expert advice, and other support. By helping to collect and review records and by identifying pertinent legal issues, these organizations reduce the time and resources that private attorneys must devote to death penalty cases, thereby lowering the time and cost of litigation.

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The first resource centers were established in 1988, and there are currently 19 state-wide centers serving 47 districts. Some of the centers are affiliated with law schools or state public defender or appellate defender organizations, while others are separate private non-profit organizations. In addition to grants from the Judicial Conference, all the resource centers receive non-federal funding, either directly from their respective state legislatures, from private foundations, or from Interest on Lawyer's Trust Account (IOLTA) programs. Many also receive in-kind contributions, resources, or services, including office space, law student assistance, and other volunteer services.

### III. ADMINISTRATION OF THE CRIMINAL JUSTICE ACT

#### A. The Judicial Conference of the United States

The Judicial Conference of the United States is the policy-making body for the federal judiciary. It is chaired by the Chief Justice of the United States and is composed of the chief judges of the 13 courts of appeals, one district judge from each of the 12 geographic circuits, and the chief judge of the Court of International Trade.

The Conference promulgates guidelines and policies for administration of the Criminal Justice Act, formulates legislative recommendations to the Congress, and approves the

budgets for the defender program as a whole and for each defender organization. The Conference is assisted in its CJA responsibilities by its standing Committee on Defender Services.

B. Guidelines for the Administration of the Criminal Justice Act

The policies and procedures of the Judicial Conference for the operation of the Criminal Justice Act are set forth in its Guidelines for the Administration of the Criminal Justice Act.

C. Administrative Office of the United States Courts

Acting under the supervision and direction of the Judicial Conference, the Administrative Office of the United States Courts supervises the expenditure of funds appropriated by the Congress, administers the federal defender and panel attorney program on a national basis, is responsible for training attorneys, and provides policy, legal, management, and fiscal advice to the Conference and its committees, to judges, defenders and their staffs, and panel attorneys. Program support for the CJA is provided by the Defender Services Division of the Administrative Office.

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D. Local Courts and Judicial Councils

It is the responsibility of each district court to promulgate a local Criminal Justice Act plan, with the approval of the judicial council of the circuit, and to appoint and compensate counsel for each eligible criminal defendant in accordance with the plan. The court establishes and maintains a panel of qualified attorneys to accept appointments.

The individual judges of the district courts and courts of appeal review and approve the vouchers submitted to them on a case-by-case basis by private panel attorneys and providers of expert and investigative services. Following approval by a judge, payment is made to the provider of services by the clerk of court. The chief judge of the court of appeals, or another judge of the court designated by the chief judge, must approve compensation vouchers above the previously referenced statutory dollar amounts.

Each district (or combination of adjacent districts) having at least 200 CJA appointments annually may establish a Federal Public Defender organization or a Community Defender Organization under its CJA plan.

The federal public defender is appointed and reappointed by the court of appeals in which the district is located. The CJA Guidelines recommend that the court of appeals use a committee of persons knowledgeable in federal criminal defense issues to assist in making appointments and reappointments of the federal public defender. In considering appointment or reappointment of the defender, the committee solicits the views of those in a position to evaluate the performance of the defender and the defender organization, including local district judges and magistrate judges.

E. Federal Defender Organizations

Federal public defenders appoint and supervise their own staff, subject to personnel and compensation policies established by the Judicial Conference. Their office budgets are submitted to the Administrative Office of the United States Courts and are approved by the Judicial Conference.

Community defender organizations are private organizations that receive grants from the Judicial Conference in furtherance of a federal policy. They are responsible to their own boards of directors.

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Federal Public Defender Organizations and Community Defender Organizations in some districts assist the local courts in administering the CJA by providing resource support to the panel attorneys, recommending appointments to the court, reviewing compensation and expense vouchers, offering training programs, and providing legal and administrative advice to panel attorneys to assist them in their representations.

#### IV. CASE LOAD OF THE CRIMINAL JUSTICE ACT PROGRAM

The Supreme Court has held that the Sixth Amendment to the United States Constitution entitles defendants to the assistance of counsel at every "critical stage" of a criminal proceeding and that counsel must be appointed by the court if the defendant requests representation and is financially unable to retain an attorney. Appointment of counsel is generally made at or following the defendant's initial appearance before the court. The Judicial Conference encourages the courts to appoint counsel for defendants before the initial appearance, at the time they are interviewed by a pretrial services officer or probation officer.

During the fiscal year 1992, 83,059 appointments were made under the CJA (including criminal cases, appeals, and habeas corpus proceedings). Private panel attorneys and federal defender organizations (Federal Public Defender Organizations and Community Defender Organizations) received approximately the same number of appointments, with 41,588 and 41,471 respectively. Appointments for the last several years are shown in the following table.

Fiscal Year Attorneys Organizations Total

Fiscal Year	Panel Attorneys	Defender Organizations	Total
1988	30,822	34,685	65,507
1989	33,952	36,002	69,954
1990	33,552	36,608	70,160
1991	40,031	38,563	78,594
1992	41,588	41,471	83,059
1993 (projected)	44,659	46,896	91,555
1994 (projected)	46,374	48,413	94,787

The growth in the number of appointments reflects generally an expansion of federal

criminal jurisdiction and increases in the number of federal criminal prosecutions in the last several years. In particular, it reflects a substantial migration of drug and weapons prosecutions to the federal courts. In 1992 drug cases accounted for 29% of the total criminal workload of defender organizations. These cases tend to involve multiple defendants and complicated issues. Accordingly, they require greater attorney time and expenses than other categories of criminal cases.

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#### V. FUNDING OF THE CRIMINAL JUSTICE ACT PROGRAM

Funds for operation of the Criminal Justice Act are provided by the Congress through a separate appropriation within the budget of the federal judiciary. The fiscal year 1993 appropriation for defender services is \$215 million. The total is \$71 million less than the amount needed to operate the CJA program in 1993 and nearly \$7 million less than the amount appropriated for fiscal year 1992. As a result, the judiciary has requested supplemental funding to support projected increased costs resulting from panel attorney representations.

Necessary funding for the fiscal year 1993 is \$286 million, including the pending supplemental appropriations request. The breakdown of funding by component of the CJA program is as follows:

	Cost (\$ millions)	Percent of total
	-----	-----
Panel attorneys	\$149.5	52.3%
Federal Public Defender Organizations	\$ 85.0	29.7%
Community Defender Organizations	\$ 22.3	7.8%
Death Penalty Resource Centers	\$ 20.1	7.0%
Transcripts	\$ 7.9	2.8%
General administration expenses	\$ 1.1	0.4%
	-----	-----
Total F.Y. 1993 funding needs	\$285.9	100%

Representation by Federal Public Defender Organizations and traditional Community Defender Organizations (not including Death Penalty Resource Centers) costs approximately 30% less than representation by panel attorneys. Federal defender organizations, moreover, also save money because they do not require the administrative costs to the judiciary associated with the appointment of panel attorneys on a case-by-case basis, the review of their compensation and expense vouchers by judges, and the processing and payment of the vouchers.

The costs associated with operation of the CJA have risen sharply in the last several years because of increased criminal case loads, particularly drug prosecutions, a substantial expansion of resources made available to prosecutors and law enforcement agencies, and the impact of guideline sentencing and mandatory minimum sentences.

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The criminal case loads of the courts and defenders have increased as the Department of Justice has emphasized the prosecution of large-scale drug cases, bringing multiple defendant indictments against drug smuggling operations. As a result, the ratio of defendants to cases in drug prosecutions is 1.95 defendants per case, considerably above the national average of 1.4 defendants per criminal case. The greater number of defendants in drug cases has increased the costs of the CJA program because federal defender organizations generally are precluded by ethical constraints and by conflicts among co-defendants from representing more than one defendant in a given multiple defendant case. Therefore, panel attorneys must be appointed for the remaining defendants at a significantly greater cost per case.

The Department of Justice has received substantial numbers of additional assistant United States attorneys and law enforcement agents in the last few years. These additional resources have directly impacted the work of federal courts and defense counsel because they have facilitated several new prosecution initiatives.

Project Triggerlock, a major federal program initiated in 1991, targets dangerous criminals for prosecution and sentencing to substantial terms in federal prisons. In its first year of operation (April 1991 to April 1992), Project Triggerlock produced over 6,450 arrests.

Violent Crime Task Forces, also initiated in 1991, involve a massive effort by federal, state, and local law enforcement agencies to remove violent individuals and drug dealers from a target area.

The Organized Crime Drug Enforcement Task Force Program is a multi-agency drug investigation and prosecution program aimed at identifying and prosecuting members of high-level drug trafficking organizations, many of which are international in scope. During the first nine months of the fiscal year 1991, 501 task forces were initiated throughout the country, resulting in 1,262 indictments against 3,630 defendants.

These defendants may be charged under the Racketeer Influenced and Corrupt Organizations Act (RICO) and the Continuing Criminal Enterprise Act (CCE). Prosecutions under RICO and CCE often involve lengthy multiple-defendant trials and appeals in which an attorney representing one defendant may have to devote substantial time to reviewing evidence, attending proceedings, and reviewing records related to another defendant's case that could impact on the case against the attorney's client.

Operation Alliance is a special drug seizure program that coordinates the operations, resources, and technology of federal, state, and local law enforcement agencies in California, Arizona, New Mexico, and Texas. From the fiscal year 1986 to the fiscal year 1991 the federal defender organizations in the border areas experienced a 245% increase in the number of drug-related appointments in their offices, a substantial proportion of which is attributable to Operation Alliance.

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The Comprehensive Forfeiture Act has increased the costs of the CJA. As the Department of Justice seizes the assets of criminal defendants at the outset of a case, the defendants

are left without funds to retain a lawyer. Accordingly, they become eligible for CJA representation and are assigned a federal public defender or panel attorney at taxpayers' expense, drawing funds from the CJA appropriation. Asset forfeiture, moreover, is most common in multi-defendant drug or bank fraud prosecutions that are typically complex and require significant additional preparation, trial time, and resource commitments. In short, the net effect of the Comprehensive Forfeiture Act is an indirect transfer of funds from the judiciary to the Department of Justice, as the asset forfeiture fund is increased partly at the expense of CJA appropriations.

The sentencing guidelines promulgated under the Sentencing Reform Act of 1984 have increased significantly the time required to provide representation in most criminal cases. The effect of the sentencing guidelines must be considered by defense counsel at each stage of proceedings, beginning with the initial review of the indictment and continuing through pretrial services interviews, investigations, plea negotiations, and the filing of the sentencing report. The sentencing process as a whole is much more time consuming for counsel than before the guidelines. Attorneys must ensure the accuracy of every fact relevant under the guideline scheme, investigate defendants' relevant unadjudicated conduct, make assessments of defendants' criminal histories, draft written memoranda and prepare for evidentiary hearings that address sentencing disputes.

The Sentencing Reform Act also, for the first time, provides defendants with a right to appeal a district judge's sentence to the court of appeals, creating additional appeals and CJA costs for representation at the appellate level.

As the costs of operating the CJA program have increased due to rising criminal case loads, sentencing guidelines, and new prosecution resources and initiatives, it has become more difficult for the judiciary to obtain full funding from the Congress for the program. A budget shortfall in fiscal year 1991 resulted in a two-week suspension of payments to panel attorneys. A five-week suspension of payments occurred in fiscal year 1992, requiring a temporary reallocation of resources within the judiciary's budget to cover the shortfall. In the absence of supplemental funding, the CJA appropriation for the fiscal year 1993 is sufficient to cover payments to panel attorneys only to April 1993.

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## VI. FINDINGS AND RECOMMENDATIONS

### A. IN GENERAL

The Criminal Justice Act has been a major success in carrying out the mandate of the Sixth Amendment of the United States Constitution and the policy of the Congress to provide effective assistance of counsel to all criminal defendants in the federal courts who are financially unable to retain their own attorney.

The 28 years of experience under the Criminal Justice Act have shown a program that has grown and evolved and consistently has fulfilled its obligation to protect the Sixth Amendment rights of financially qualified persons. It is expected that the program will continue to grow and evolve to meet increasing demands and changing circumstances.

Administration of the Act by the Judicial Conference, the Administrative Office of

the United States Courts, the federal defender organizations, and the individual courts has been responsible, efficient, and economical. In this respect, the Committee to Review the Criminal Justice Act made the following finding:

In its 28 years, the CJA program has developed into an effective program for implementation of the Sixth Amendment right to counsel. The Committee has been impressed with the commitment, diligence, and innovation with which the federal judiciary has administered the CJA program. Under the guidance of the Judicial Conference and its Committee on Defender Services, attorneys in more than 50 federal defender organizations in over one half of the federal districts have provided a consistently high level of representation to their clients in the federal courts. The defender offices have also provided training and support to many private "panel" attorneys who represent qualified persons as an essential part of the CJA program.

#### B. FUNDING

##### 1. Adequate funding for the CJA program.

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

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The quality of representation provided to defendants, particularly by federal defender organizations, has been remarkably high. The quality of representation by panel attorneys, however, has varied from district to district and within districts. While many courts find the quality of panel attorneys to be very high, serious funding difficulties and inadequate compensation hamper many courts in their ability to recruit and retain experienced attorneys as members of their CJA panel. Accordingly, the lack of adequate funding for the CJA poses a potential threat to the effective assistance of counsel.

The CJA program experienced budget crises in fiscal years 1991 and 1992 that led to suspensions of payments to panel attorneys. For fiscal year 1993, the fiscal crisis is more severe, as funding for panel attorneys will be exhausted by mid- April unless the Congress provides promptly the supplemental funding that the Judicial Conference has requested to meet the essential needs of the CJA program in the current year.

Obviously, since not enough money has been appropriated to cover even the very basic elements of the defender program, the Judicial Conference has not been able to implement long- delayed increases in panel attorney rates, to expand training programs for panel attorneys, or to establish needed quality review and monitoring programs.

#### Recommendation

It is essential that the Congress provide full funding of the Criminal Justice Act to ensure that the protection guaranteed by the Sixth Amendment of the United States Constitution continues to be provided to the people of the United States into the 21st

Century. Funding should be provided at a level sufficient to:

- ensure adequate funding of the existing federal defender organizations and death penalty resource programs,
- pay fair and reasonable compensation to panel attorneys,
- establish a federal defender organization in each district where such organization is feasible,
- provide adequate administrative support for the CJA program,
- enable the Administrative Office to provide low cost training programs for all CJA panel attorneys, in conjunction with the Federal Judicial Center, the Sentencing Commission, and others, and
- implement procedures to ensure that counsel is provided to eligible persons as early in the initiation of proceedings as possible.

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2. Separate budget for the CJA program.

The Review Committee recommended that the defender services budget be submitted directly to the Congress without approval by the Judicial Conference. This recommendation is a component of the committee's recommendation calling for creation of a new, independent national agency to oversee defender services.

Since its inception 28 years ago, funding for the CJA program has been in a separate appropriation within the judiciary's budget. The Review Committee expressed concern that this arrangement did not adequately ensure that funds appropriated expressly for the CJA program would remain sufficiently independent from other judiciary funds and budget activities.

Maintaining the integrity of the CJA appropriation is a laudable goal. In the last three years, however, the CJA appropriation has suffered shortfalls that led to program curtailments. The judiciary took emergency action to divert funds from other court programs to address the shortages in the CJA appropriations. This action in support of CJA activities resulted in serious damage to other programs, particularly in the area of probation and pretrial services. Until the CJA appropriation is assured of full funding from the Congress on a long-term basis, the creation of barriers to the judiciary's ability to redress CJA funding problems would damage the very programs the Review Committee wishes to protect.

The Review Committee stated that independent access by the defender program to the Congress and its appropriations committees would ensure the viability of the Act and public confidence in the CJA program. There is no evidence, however, that the current appropriations process has damaged public confidence in the program. Moreover, considering the political vulnerability of legal defense programs generally, it is hard to believe that an independent defender agency would be more successful in obtaining

funds than the judiciary. The most effective means of procuring adequate funding for the CJA program is through the Judicial Conference and its committees, with the assistance of the Administrative Office.

#### Recommendation

The CJA appropriation should remain as a separate account within the judiciary's budget and should continue to be presented to the Congress through the Judicial Conference of the United States.

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#### 3. Better statistics and budget information.

Because of the enormous increases in the costs of the CJA program, it is essential that the Judicial Conference and the Congress be provided with extensive and reliable information to support fully the annual appropriations requests for defender services. There is also a need for effective, periodic evaluations by the judiciary of all aspects of CJA operations. Although the CJA program, clearly, is soundly administered and cost effective, additional reliable statistical and financial data are needed to document and guarantee the efficiency and effectiveness of the program in each judicial district in the country.

It would be extremely beneficial, for example, for decision makers to receive more complete and refined data on such matters as the total hours spent by federal defender organization attorneys on cases, time comparisons between federal defender organizations and panel attorneys, the amounts of compensation and expenses claimed by panel attorneys compared to that approved by the courts, the time taken by the courts to process and pay vouchers, and various sorts of information on the quality of representation provided by CJA attorneys.

#### Recommendation

Congress should provide sufficient funds in the CJA appropriation to enable the Administrative Office to develop additional statistical and financial information to document and evaluate fully the cost, quality, and effectiveness of the CJA program.

#### 4. Percentage of appointments made to defender organizations.

In view of the insufficiency of funds in the CJA appropriations and the greater cost effectiveness of representation by federal defender organizations vis a vis panel attorneys, it is essential that the judiciary increase nationally the proportion of CJA appointments made to federal defender organizations.

First, the CJA should be amended to eliminate the requirement of a minimum of 200 CJA appointments annually to establish a federal defender organization in a district. This would facilitate the creation of additional federal defender organizations. See Section D-1, *infra*, at pages 20-21.

Second, the staff of existing defender organizations should be increased to enable

them to assume more cases, thereby providing representation in cases that are presently handled by panel attorneys at greater cost.

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Third, modifications should be made in district plans and procedures to require the assignment of a greater proportion of CJA cases to defender organizations, rather than panel attorneys.

#### Recommendations

Recognizing that federal defender organizations consistently furnish high quality representation to CJA defendants and provide a cost-efficient alternative to representation by CJA panel attorneys, the courts should take steps to increase the number of cases assigned to federal defender organizations.

In districts currently served by a defender organization, these steps should include:

- (1) approval of additional assistant federal defender staff in appropriate circumstances; and
  - (2) review and adjustment of district appointment procedures.
5. Study of reimbursement of CJA by certain defendants.

The CJA defines "any person financially unable to obtain adequate representation" as eligible for the appointment of counsel under the CJA. Eligibility determinations are made by a judge following review of a person's income and financial resources, as supported by sworn statements made under penalty of perjury.

The CJA authorizes the court to make a finding of partial eligibility for representation and require the person to pay part of the costs of representation. Further, the CJA Guidelines provide that before sentencing the court should review the defendant's financial condition anew and make a final determination concerning whether he or she then has funds available to reimburse the CJA appropriation for some or all of the costs of representation.

There is little evidence to suggest that CJA funds have been provided to defendants who are financially able to retain private counsel. Nonetheless, in light of the CJA's purpose and the limited financial resources available, any instances of abuse should be pursued in order to obtain reimbursement to the CJA appropriation.

#### Recommendation

The Administrative Office should conduct a study to determine: (1) the measures currently in place to obtain reimbursement of funds expended on behalf of defendants who are financially able to retain private counsel, and (2) what additional efforts should be employed to ensure that CJA funds remain available to intended beneficiaries.

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6. Use of asset forfeiture funds to help pay the costs of the CJA.

When the Department of Justice seizes the assets of a defendant, that person is generally left without funds to pay a retained attorney. Consequently, the CJA appropriation must bear the cost of legal representation. In addition, administrative costs are incurred by the judiciary through the processing of forfeiture actions in the courts. Unlike other parts of the federal government, the courts are not reimbursed for their roles in the seizure and forfeiture of assets.

It is entirely appropriate that the CJA appropriation, and the appropriations of the judiciary generally, share in the funds that accrue to the federal government through the seizure of assets of criminal defendants. At the very minimum, the judiciary should be authorized to recover the direct additional costs incurred by the CJA appropriation when a defendant's assets are seized and legal counsel is provided at CJA expense.

Recommendation

The Congress should authorize the judiciary to receive a fair share of the total assets forfeited to the government by criminal defendants. At a minimum, the CJA appropriation should be reimbursed from the Department of Justice's assets forfeiture fund for those costs associated with providing CJA representation for defendants whose assets have been seized by the Department.

C. ADMINISTRATIVE STRUCTURE

1. New National Center for Defender Services.

The Review Committee called for creation of a new national agency, the Center for Federal Criminal Defense Services, to oversee national administration of the CJA. The national agency would nominally be located in the judicial branch, but would operate outside the Judicial Conference. In addition, the Review Committee would establish 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.

These recommendations were justified on the assumption that there is a "perceived" need for complete independence of defenders from the federal judiciary. No empirical data were developed, however, in support of the recommendations, other than anecdotal statements of a lack of independence and the potential of occasional abuse.

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Federal defenders and panel attorneys in fact enjoy both professional and administrative autonomy from the courts before whom they appear. There is little evidence that they "pull their punches" or are otherwise impeded from delivering the best advocacy and representation on behalf of their clients.

It is particularly noteworthy that the people most directly involved in the provision of services under the CJA -- the Federal Public Defenders, the Community Defenders, and

the Death Penalty Resource Center directors -- are overwhelmingly opposed to the creation of a new national administrative apparatus to oversee the CJA program.

Creation of a Center for Federal Criminal Defense Services, as proposed by the Review Committee, would subject unnecessarily the entire CJA program to politicization and heightened vulnerability at the national level. Notwithstanding the importance of the Sixth Amendment and the other principles protected by the CJA programs, the stark reality is that criminal defense programs tend to be unpopular with legislators and the public. The history of legal services programs in recent years is sobering in this regard. Essentially, criminal defense programs have no constituency, no power base, and no better champion than the judiciary. Judges are dedicated to the principles underlying the Sixth Amendment and the CJA, and they are personally interested in seeing competent counsel appear in the cases before them.

At the very least, creation of a new, isolated bureaucracy 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.

Moreover, at a time when the CJA program is in the midst of a devastating financial crisis, it would be anomalous to consider a costly new bureaucracy. The Government as a whole is searching for ways to reduce administrative costs and eliminate personnel.

The same amount of money required to fund the proposed new national and local administrative apparatus to oversee and deliver federal defender services could better be used to fund 15 new federal defender offices. It could also pay for thousands of additional representations by panel lawyers or fund long delayed, badly needed raises in the compensation rate for panel attorneys. To add another perspective, the additional amount needed to pay for the proposed new structure is several million dollars more than the total national funding currently appropriated for all 19 death penalty resource centers.

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In short, as long as there are districts without defender offices, panel attorneys being compensated at inadequate rates, and annual CJA financial crises and suspensions of payments to panel attorneys, it is difficult to justify the expenditure of millions of additional dollars to establish a new bureaucracy just to address "perception" problems.

Administration of the CJA program to date, using cost-effective, in-place judiciary institutions and personnel, has been very effective, innovative, and economical. The additional cost of the proposed new national agency, together with the proposed new network of local boards and local administrators, would be substantial. The judicial impact statement prepared by the Administrative Office of the United States Courts has projected that the new structure would result in additional administrative costs, following an initial start-up cost of \$4.7 million, of \$21.5 million per year.

There are no data to indicate that the CJA program has failed to deliver appropriate services, i.e., effective assistance of counsel, to the hundreds of thousands of defendants who have been provided representation under the CJA. There is likewise no evidence that the proposed new bureaucracy would result in any improvement in

representation and other services provided under the CJA.

Over its 28 years, the CJA program has grown and evolved. It consistently has fulfilled its obligation to protect the Sixth Amendment rights of financially qualified persons. It is expected that the program will continue to grow and evolve to meet increasing demands and changing circumstances.

#### Recommendations

The proposal for creation of a new Center for Federal Criminal Defense Services should be rejected. 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 Courts.

#### 2. New regional and local boards.

The Review Committee recommended that the CJA be amended to require creation of local boards, on a district or regional basis, to oversee local administration of the CJA. The boards would be similar to the private, uncompensated local boards that presently oversee the Community Defender Organizations. The boards would be responsible for implementing in their respective districts the policies promulgated by the proposed new national agency. They would take over from the courts the promulgation and implementation of a local plan for CJA representation, oversee the federal public defender's office and the local attorney panel, and employ a local administrator for the panel program. The review committee stated that this recommendation could be implemented even if the proposed new national Center for Federal Criminal Defense Services were not created.

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No compelling need has been established for the boards, beyond the "perception" problem of independence. Nor is there any clear identification of the benefits to be provided by the boards. Before such a change is mandated, the request should be supported by objectively obtained data and critically defensible studies showing that the Sixth Amendment would be better served by the change.

Mandated, uniform national solutions to cover local situations are not in the best interests of the CJA program. Community boards may work very well in some districts and not in others. The courts are presently free under the CJA to establish Community Defender Organizations, with independent community boards, which have functioned effectively in ten districts. There is no reason, however, to abolish Federal Public Defender Organizations in favor of Community Defender Organizations and to mandate local boards in every judicial district without regard to the diversity of the districts.

On the other hand, the courts should encourage local committees of volunteer lawyers to help administer the CJA. Committees of volunteer lawyers knowledgeable in federal criminal defense can provide great service to the district and circuit courts in administration of the CJA. Working in conjunction with the federal defender offices, these volunteer committees may be able to assume many of the panel management responsibilities now handled by the courts and clerks. These committees, moreover, should be allowed to participate in the selection or reappointment of the federal public defender, as the CJA Guidelines presently provide.

### Recommendation

The judicial districts should be left free to choose either a Federal Public Defender Organization or a Community Defender Organization to provide defense services in the district, as the CJA now provides. The circuits should be encouraged to involve volunteer lawyer committees in the selection or reappointment of the federal public defender, as the CJA Guidelines now provide.

### 3. Voucher approval by local administrators.

The Review Committee recommended that the CJA be amended to vest local panel attorney administration and voucher review in a local administrator in each judicial district. The administrator would be appointed by the local or regional board and would assume all day-to-day activities of the local panel program under the supervision of the local and regional boards and the national entity responsible for national administration of the CJA. The administrator would recruit, appoint, and train panel attorneys and approve their compensation and expense vouchers. The administrator could be an independent officer, a part of a federal defender organization, or a local resource counsel.

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The reasons cited by the Review Committee to support a local administrator are concerns over delays currently encountered by panel attorneys in voucher processing and a possible conflict of interest, or appearance of a conflict of interest, created when judges approve the compensation of attorneys who appear before them.

The creation of the position of local administrator in every district of the United States would be extremely costly, adding millions of dollars of additional administrative expenses to the CJA program, and would not produce improvement in the quality of representation afforded under the CJA. At a time when costs, particularly administrative costs, must be kept to a minimum, this simply is not a prudent recommendation.

### Recommendation

There is no need to vest voucher approval authority and other panel attorney responsibilities in a new local administrator to be appointed in every judicial district.

### D. FEDERAL DEFENDER ORGANIZATIONS

#### 1. Creation of a federal defender organization in every district.

Federal defender organizations generally provide a higher quality of representation than panel attorneys because they employ attorneys who specialize full-time in federal criminal law, know the intricacies of the sentencing process, receive regular training by the Administrative Office and the Federal Judicial Center, and are used to dealing with the other components of the criminal justice system, i.e. United States attorneys' offices, law enforcement agencies, probation and pretrial offices, and the courts. They also have trained investigators on their staff and are familiar with the procedures for obtaining expert services and other advantages for their clients. The defender

organizations, moreover, "network" with each other to provide legal and administrative assistance. They are also available to provide training, legal advice, and administrative support to panel attorneys in their districts.

In addition to providing consistently high quality representation, federal defender organizations, as shown earlier, provide CJA services at less cost than private panel attorneys. Moreover, they do not incur the expenses normally attributable to the panel attorney program by the administrative processing of compensation and expense vouchers. In light of the increasing costs associated with the CJA program, the establishment of a federal defender organization -- either a Federal Public Defender Organization or a Community Defender Organization -- should be established in every judicial district where feasible.

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The CJA requires that a district (or combination of adjacent districts) have a minimum of 200 CJA appointments annually before a federal defender organization may be established. Currently, 57 of the 94 districts are served by 51 federal defender organizations (42 Federal Public Defender Organizations and 9 Community Defender Organizations). There are 19 districts meeting the statutory threshold of 200 appointments that have not yet established defender organizations and 18 districts that do not meet the threshold.

More federal defender organizations could be established if the CJA were amended to: (a) eliminate the statutory threshold of 200 appointments, and (b) mandate a defender organization in every district where feasible. The statutory change would promote higher quality representation and lower costs for the CJA program.

#### Recommendations

The CJA should be amended to eliminate the requirement in 18 U.S.C. § 3006A(g)(1) that a district have at least 200 CJA appointments annually in order to qualify for a Federal Public Defender Organization or a Community Defender Organization.

The CJA should be amended to require that a Federal Public Defender Organization or Community Defender Organization be established in all judicial districts, or combination of districts, where such an organization would be cost effective, where more than a specified number of appointments is made each year, or where the interests of effective representation otherwise require establishment of such an office.

#### 2. EEO policies.

In September 1966, the Judicial Conference endorsed a national policy of a positive program for equal employment opportunity, six years before enactment of the Equal Employment Opportunity Act of 1972. The judiciary is firmly committed to equal employment opportunity in the courts and requires each court to develop and adopt a local EEO plan. This policy is consistent with the mission of the courts to uphold the Constitution and to ensure and enforce equal opportunity in employment in both the private and public sectors.

Employment practices of federal public defender organizations are governed by the provisions of the plan adopted by their respective circuits. Each public defender organization must submit to the Administrative Office on an annual basis a summary report of its EEO program.

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Community Defender Organizations, including the Death Penalty Resource Centers, are not federal entities and therefore are not covered by court EEO plans. As part of the grant process, however, they are required to establish an EEO program unless they are otherwise obligated to submit reports to the Equal Employment Opportunity Commission pursuant to Title VII of the Civil Rights Act of 1964.

No program is in place to monitor employment opportunities within the panel attorney system.

The Judicial Conference recognizes the importance of ethnic and gender diversity in defender offices. It believes that national recruiting and affirmative action should be encouraged and facilitated. The Defender Services Division of the Administrative Office prepared a status report in 1992 on EEO compliance by federal defender organizations. After reviewing the report, the Defender Services Committee of the Judicial Conference concluded that progress had been made in broadening employment opportunities, with women and minorities represented in greater percentages than the general labor market for attorneys. The Committee noted, however, that very few women or minority attorneys have been appointed as Federal Public Defenders or employed as Directors of Community Defender Organizations.

#### Recommendations

National recruiting and equal employment opportunity programs for the defender system should continue to be encouraged and facilitated. The Defender Services Committee should continue to review employment policies and make appropriate recommendations to the Judicial Conference regarding EEO program development, implementation, and compliance.

The Defender Services Committee should develop an EEO program for the panel attorney program.

3. Evaluation procedures to monitor federal defender organization attorney and staff performance.

Modern management practice calls for a method of evaluating attorney and staff performance in federal defender organizations. Evaluation procedures should be developed to ensure effective representation and high productivity within each federal defender organization.

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#### Recommendation

The Administrative Office, working with representatives of federal defender

organizations, should develop evaluation procedures to monitor attorney and staff performance in these organizations.

4. Standards for managing defender organizations.

Comments from defenders and Administrative Office officials to the Review Committee disclosed that only minimal steps are being taken to monitor management procedures in each federal defender office. There is a need for the Administrative Office of the United States Courts, working in cooperation with federal defenders and panel attorneys, to review periodically the operation of the CJA in individual districts. The reviews should be both to assure the quality of representation provided by counsel and to examine the efficiency of defender organizations and local administration of the Act.

Because of the lack of appropriated funds and personnel, the Administrative Office has suspended its efforts to visit districts and conduct formal efficiency reviews. Working with federal defenders, however, the Administrative Office has been able to arrange a number of reviews, using defenders to evaluate their colleagues.

The federal defenders are developing a peer review program. The Administrative Office, working with the defenders and panel attorneys, should expand this project and provide for periodic review of all defender offices. National standards should be developed for managing federal defender offices, including management, employment, and grievance procedures. Creation of the standards would assist the peer review process and facilitate management improvements.

Since federal public defenders are appointed for four- year terms, it would be beneficial for the court of appeals to have the benefit of a program review of a defender's organization before considering reappointment.

Likewise, standards should be developed and a review program initiated for the management of panel attorney programs in each district.

Recommendation

The Administrative Office, working with representatives of federal defender organizations should develop standards and evaluation procedures regarding the management of defender organizations. Standards and procedures should also be developed for the management of panel attorney operations.

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5. Specific standards for reappointing and removing federal defenders.

The Review Committee stated that it had learned of instances in which public defenders were removed from office, or federal defender offices closed, under circumstances raising questions about the role of the courts in supervising or influencing federal defender offices. It recommended that formal procedural safeguards and clearly defined standards be required by statute for the removal of a federal defender.

The CJA Guidelines urge the courts of appeal to use citizen committees to assist in

the appointment and reappointment of federal public defenders. They provide, upon reappointment, for the defender to be given an opportunity to respond to adverse comments about his or her performance and that of the defender organization. The Guidelines, however, do not prescribe specific procedures or standards for the reappointment or removal of a defender.

There is no need for a statutory change. It would be appropriate, however, for the judiciary to study the concerns expressed by the review committee, with a view towards developing clearly defined procedures and standards for reappointment and removal of federal public defenders.

#### Recommendation

The Defender Services Committee should study whether specific procedures and clearly defined standards should be developed regarding the reappointment and removal of federal public defenders.

6. Parity of salaries for federal defenders and staff with those of U.S. attorneys and staff.

The Review Committee recommended that the CJA be amended to ensure that the salary structure for the federal defenders and their staffs is equal to that of the United States attorneys and their staffs. The CJA authorizes the respective courts of appeal to set the salaries of each federal public defender at a rate "not to exceed" that of the United States attorney for the same district. Four of the circuits have set the salaries of the defenders in their circuits at the same amount as that of United States attorneys. Eight circuits have set the salaries at an amount between 90% and 100% of the salary of the United States attorneys.

With regard to attorneys and other supporting personnel in federal public defenders' offices, the CJA contemplates equal pay with the United States attorneys' offices for persons with comparable qualifications and experience. Parity in salary and benefits generally for federal defender staff will reflect the importance of the work performed in defender offices and, more importantly, will assist in recruiting and retaining qualified and diversified personnel.

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There is no need to amend the CJA, since the statute permits the courts of appeal to equalize the salaries of federal public defenders with those of the United States attorneys in each district. The courts of appeal, in the exercise of their discretion, should review the conditions within each district to determine whether the two positions are fully equivalent in functionality and management responsibilities.

#### Recommendation

There is no need to amend the CJA with regard to the salaries of federal public defenders and their staffs. The Congress, however, should fund the CJA appropriation at a level sufficient to adjust the salaries of the personnel of federal defender offices to a level equal to comparable positions in the United States attorneys' offices.

## E. DEATH PENALTY RESOURCE CENTERS

## 1. Death Penalty Resource Center program support and funding.

Death Penalty Resource Centers increase the efficiency with which death penalty habeas corpus cases are resolved and assure effective assistance of counsel in this highly specialized and difficult field of representation. They perform many functions, the three most important of which are: (1) direct representation of defendants in some death penalty cases when adequate counsel cannot be recruited, (2) recruitment of private attorneys to accept death penalty case assignments, and (3) legal and administrative support to private attorneys in death penalty cases.

The training and consultation services provided by the resource centers to private attorneys in capital cases have helped to assure that all significant constitutional issues are raised appropriately and are adjudicated on their merits in one federal habeas corpus petition. This avoids the cost and delays associated with litigation of procedural issues.

Court administrators can contact resource centers to determine the status of a case when an execution is pending, thus assisting courts in preparing for death penalty litigation and avoiding unnecessary delay.

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Where resource centers are not available, pro se petitions are often filed that present incomplete and incoherent renditions of issues, facts, and the procedural history of the case. Under this circumstance, a judge must appoint counsel to represent the petitioner, and appointed counsel must become familiar with the record of the case, including all pertinent facts, and ascertain relevant law. This process is time consuming and inefficient. Even where counsel is appointed, they are likely to be untrained in the intricacies of Eighth Amendment and habeas corpus jurisprudence and may fail to address all constitutional issues present in a case. This necessitates an additional round of habeas corpus litigation focused now on procedural issues as well as claims of constitutional error.

Resource centers facilitate the continuity of counsel. In many cases in the past, counsel appointed in the state courts would decline to continue providing representation once the state proceedings were concluded. This would require new counsel and a delay in presentation of the case. The activity of the resource centers in retaining counsel used in the state proceeding has reduced the frequency of these interruptions.

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

## Recommendation

The Congress should provide full funding for the death penalty resource center program.

### F. PANEL ATTORNEYS

1. National and local standards for the appointment of panel attorneys.

The CJA does not require that attorneys serving on a CJA panel meet qualification standards for appointment in a federal criminal case. The size and qualifications of the panel vary from district to district. In some districts all attorneys admitted to practice constitute the panel. In other districts the panel is limited to a select group of experts in federal criminal litigation. The CJA Guidelines state that:

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The membership of the panel should be large enough to provide a sufficient number of experienced attorneys to handle the CJA caseload, yet small enough so that panel members receive an adequate number of appointments to maintain their proficiency in criminal defense work and thereby provide a high quality of representation.

The Guidelines further call for matching the complexity of criminal cases with the experience and qualifications of panel attorneys.

Providing competent legal representation to defendants unable to retain private counsel is the hallmark of the CJA program. As the practice of federal criminal law becomes highly specialized and defendants face lengthy prison terms under federal law, panel attorneys should be required to meet certain minimum qualifications.

The Defender Services Committee of the Judicial Conference has adopted a model plan that provides for the establishment of local panel selection committees to recruit capable attorneys. The committee considered the question of whether detailed eligibility standards and minimum experience standards should be imposed nationally. The committee was of the view that while national qualification and experience requirements might ensure that only the most qualified attorneys become members of the panel in some districts, in other districts such specific requirements might render it difficult or impossible to find a sufficient number of attorneys to serve on the panel.

The model plan calls for the establishment of panel selection committees in each district to consider applications, to evaluate the qualifications of the applicants, and to make recommendations to the court regarding appointments to the CJA panel. Panel selection committees in each district are in the best position to tailor minimal national standards to local conditions in order to address recruitment issues and the availability of experienced counsel.

In addition, "second chair" counsel programs should be instituted in some districts, regardless of the availability of compensation, in order to provide training for young lawyers under the supervision of the more experienced members of the trial bar. Appointment of less experienced counsel, perhaps without compensation, should also be

considered in cases where counsel would be beneficial but is not required, such as in non-capital habeas corpus cases where appointment of counsel is discretionary. Accordingly, the model plan provides for a "CJA Training Panel," consisting of attorneys who do not have the experience required for membership on the CJA panel, but who may be assigned to assist members of the panel in a "second chair" capacity.

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#### Recommendation

Only minimal eligibility standards for panel attorneys should be promulgated nationally. Individual district plans should take into account the prevailing local conditions most likely to produce qualified panel members.

#### 2. Additional training for panel attorneys.

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

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

As a result of recent legislation enacted at the recommendation of the Judicial Conference, CJA funds are now used for training of panel attorneys. Very effective educational efforts have been taken by the Defender Services Division of the Administrative Office of the United States Courts and the federal defenders to train panel attorneys. Although federal defender organizations frequently address training needs for the panel attorneys in their own districts and participate in training programs in other districts, panel attorneys expressed frustration to the review committee and a sense of isolation over the absence of focused resources and guidance.

The reason for the present lack of adequate training in many districts is financial. The training needs of several thousand panel attorneys throughout the nation are currently supported by a single training coordinator in the Administrative Office of the United States Courts. In 1992 she was able to organize 35 local training programs for panel attorneys, largely in non-defender districts. The funding level for training is a tiny fraction of that provided to the Department of Justice, which employs a full-time staff of approximately 25 to support the training of about 5,000 assistant United States attorneys.

With adequate funding, the Administrative Office -- working in coordination with the federal defenders, the Federal Judicial Center, the United States Sentencing Commission, and local courts and bar associations -- could provide panel attorneys with the training they need to assure effective assistance of counsel to their clients.

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## Recommendation

Congress should fund the CJA appropriation at a level sufficient to allow the Defender Services Division to provide low cost training programs for CJA panel attorneys, in conjunction with the Federal Judicial Center, the Sentencing Commission, the federal defenders, and others.

## 3. Support services for panel attorneys in every district

Federal defender organizations often provide legal advice, support services, and training to panel attorneys in their districts. In districts without defender organizations, however, little continuing support, advice or assistance is provided panel attorneys regarding the processing of claims, procedures for obtaining approval of investigative, expert, and other services necessary to an adequate defense, or substantive guidance as to federal law and procedure.

Establishment of a federal defender organization in every judicial district, or combination of districts, where such an organization would be cost effective, where more than a specified number of appointments is made each year, or where the interests of effective representation otherwise require establishment of such an office, as recommended in Section D-1 above, will help to improve the quality of representation provided by panel attorneys. In those districts and locations where it is not feasible to establish a defender organization, every effort should be made to encourage the courts to adopt a plan establishing a panel attorney support office.

Establishing a federal defender organization in every district where feasible, and creating a panel attorney support office wherever a federal defender organization is not feasible, will do more to enhance the provision of quality representation at the most economic cost than any other reform of the CJA.

## Recommendation

In those districts where the establishment of a federal defender organization would not be cost effective, where there are too few CJA appointments, or where the interests of effective representation do not require the establishment of such an organization, the courts should establish a panel attorney support office.

## 4. Performance standards and reviews for panel attorneys.

Consistent with the development of minimum eligibility standards for appointment to CJA panels, there is a need to evaluate the performance of appointed counsel to ensure that federal criminal defendants consistently receive quality representation. Several national and state organizations have developed specific performance standards for attorneys. Similar standards should be adopted in each federal judicial district to assess the work of local attorneys appointed under the CJA.

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Assessing the competence and performance of individual attorneys can only be performed at the local level. Due consideration must be given to local standards and practices, and an attorney's abilities are often assessed over the course of several appearances in the federal court. Each court should develop its own performance standards and monitor the panel attorneys appearing before it.

#### Recommendation

The courts should develop performance standards for panel attorneys and monitor their performance.

#### 5. Increase in panel attorney compensation.

The \$40 and \$60 hourly rates paid to CJA panel attorneys are seriously deficient. In many locations, they do not even cover the basic office overhead costs of law offices. Thus, many lawyers accept assignments of cases from the federal courts at a financial sacrifice to their livelihood.

The Review Committee heard from panel attorneys around the country who expressed anger at the level of compensation. Some stated that they had resigned or would resign from the panel. Others stated that the quality of representation by CJA panel attorneys is being compromised in some instances by the financial burden placed on them.

The CJA authorizes the Judicial Conference to designate "alternative" rates of up to \$75 per hour and to adjust all the rates annually. Unfortunately, funds have not been provided to implement these rates.

The Defender Services Committee of the Judicial Conference adopted the following resolution in June 1990:

The Sixth Amendment to the Constitution places upon the government the obligation to provide, at its expense, effective assistance of counsel to persons financially unable to secure their own legal representation. Pro bono legal services have been an outstanding contribution of the legal profession to our society and have greatly assisted the government in providing these constitutionally mandated services. The complexities of modern criminal litigation and the economics of practice, however, make it fundamentally unfair to expect lawyers to perform increasingly burdensome work for which they are inadequately compensated. It is the sense of the Committee that equal access to justice is impaired when, for those with limited financial resources, that access depends upon mandatory pro bono legal services.

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Fair compensation should be paid to all panel attorneys providing representation under the CJA. The compensation should cover reasonable overhead and a fair hourly fee. Although there may be some practical problems in administering such a structure because of the possibility of widely fluctuating rate computations, the compensation rates should take into consideration some amount to cover reasonable overhead.

In addition, a good deal of lawyer, clerk, district judge, and circuit judge time is spent in seeking and approving exceptions to the compensation limitations for individual cases. Courts generally require the requesting attorney to file a memorandum and supporting documentation to justify the exception. As the complexity of criminal cases increases in the federal courts, the number of appointments in which defense counsel submit compensation claims in excess of \$3,500 for a felony case, for example, grows. Much of this administrative time could be avoided if 18 U.S.C. § 3006A(d)(2) were amended to authorize the Judicial Conference to establish and modify the dollar limitations on compensation under the CJA.

#### Recommendations

The Congress should provide sufficient funds in the CJA appropriation to allow the Judicial Conference to set compensation rates for CJA panel attorneys at a level that includes reasonable office overhead and fair compensation, plus appropriate cost of living adjustments.

18 U.S.C. § 3006A(d)(2) should be amended to authorize the Judicial Conference to establish and modify all dollar limitations on compensation under the CJA.

#### 6. Compensation of panel attorneys for extended travel time.

The Review Committee recommended that the CJA be amended to require payment for all necessary and reasonable travel associated with CJA representation. Section 2.26 of the CJA Guidelines allow, but do not require, compensation for an attorney's travel time, such as to visit a client at a detention center or to conduct business at a courthouse.

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Attorneys should be compensated both for the time and expenses of their travel where necessary and reasonable to a CJA representation. There is no need, however, for a statutory amendment. The CJA Guidelines can be amended to require payment of an attorney's travel time and expenses.

#### Recommendation

The CJA Guidelines should be amended to require compensation for the time spent by CJA panel attorneys in necessary and reasonable travel.

#### 7. Reduced rates for services of paralegals and law students.

CJA compensation is predicated on panel attorneys receiving compensation for their personal services plus reimbursement of certain expenses other than office overhead. Generally, no payment is allowed for services performed by support staff, including paralegals. Accordingly, panel attorneys must handle all routine matters themselves, charging attorney rates, or forego compensation for support staff who assist. This arrangement is significantly out of step with modern law office practices and can result in inefficiencies and additional costs to the CJA program.

Panel attorneys should be encouraged to use law students and paralegals to assist

in all appropriate matters, and these legal assistants should be compensated at a reduced rate. Section 2.31 of the CJA Guidelines has a limited exception that permits panel attorneys to charge, as an expense, the cost of having law students conduct legal research for them. This exception should be expanded to allow counsel to employ law students and paralegals to conduct the full panoply of duties commonly performed in law offices by such personnel.

Authorizing compensation for paralegals and law students at reduced rates should result in greater efficiency and lower costs for the CJA program.

#### Recommendation

The CJA should be amended to authorize payment, at reduced hourly rates, of compensation to paralegals and law students who assist panel attorneys in CJA representations.

#### 8. Prompt payment of panel attorneys and experts.

The Review Committee and the Defender Services Committee have reported that panel attorneys have complained of delays in the review of CJA compensation vouchers by judicial officers and that these delays sometimes extend over several months. In extended cases, where large payments are involved, delays can impose serious financial hardship on attorneys, especially sole practitioners. Moreover, in any type of case, regardless of the amount of the fee involved, long delays in the approval of vouchers may undermine attorneys' willingness to serve on CJA panels.

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There is a need to monitor the time periods associated with the judicial review of CJA compensation claims in order to assist courts in minimizing any delays and to facilitate the development of more accurate projections regarding CJA appropriations expenditures.

#### Recommendations

The CJA Guidelines should be amended to provide that, absent extraordinary circumstances, judges should act on vouchers for compensation of panel attorneys and other service providers in CJA cases within 30 days of submission.

The judicial councils of the circuits should prepare periodic reports listing all CJA compensation vouchers that have been under review for more than 90 days. The chief judge of the circuit, or the chief judge's designee, should intervene and take appropriate action if a voucher has not been acted upon within 90 days of submission.

#### 9. Indemnification of panel attorneys for malpractice.

Panel attorneys are exposed to malpractice and related civil actions arising out of their CJA representation. They are neither reimbursed nor indemnified under the CJA for the expense of legal counsel to represent them during malpractice proceedings or for compensatory or punitive damages arising from their CJA work. Accordingly, they are

required to subsidize their own defense in these cases.

If panel attorney rates were increased to cover average overhead costs and reasonable compensation, the cost of malpractice coverage could properly be considered an element of overhead. Until funding is provided to raise attorney compensation to such a level, however, CJA panel attorneys should be indemnified to the same extent as liability insurance indemnifies criminal defense attorneys.

#### Recommendation

Until such time as the Congress appropriates sufficient funds to allow the payment of compensation rates to CJA attorneys that cover reasonable office overhead, panel attorneys should be reimbursed or indemnified for civil malpractice and related actions arising from their CJA services.

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### G. LITIGATION SUPPORT

#### 1. Making counsel available to defendants as early as possible in a case.

The CJA authorizes representation for an eligible person at "every stage of the proceedings from his initial appearance before the . . . court." With the advent of sentencing guidelines, information provided by a defendant at a pretrial services interview (which normally occurs prior to the defendant's first appearance before a magistrate judge) can have a potentially adverse impact on the sentence the defendant eventually receives.

The Review Committee recommended that the CJA be amended to provide for early appointment of counsel to cover representation at the pretrial hearing and for qualifying grand jury witnesses and those who believe they are targets of investigation.

There is no need to amend the CJA. Its scope is broad enough to authorize representation at earlier stages of a criminal case than the defendant's first appearance before the court. The CJA Guidelines authorize representation at the earliest stages, and the Judicial Conference encourages the courts to appoint counsel prior to a defendant's interview by a pretrial services officer or probation officer.

#### Recommendation

Congress should fund the CJA appropriation at a level sufficient to allow districts to implement procedures that ensure that representation is provided to eligible persons as early in the initiation of proceedings as possible.

#### 2. Pilot program to give certain defendants a limited choice of appointed counsel.

Individuals accused of a federal crime who possess sufficient financial resources to pay for an attorney may seek to hire the lawyer of their choice. Individuals who lack the funds to pay for a lawyer, however, have no choice in the selection of their CJA lawyer.

Given the critical nature of the attorney-client trust relationship, there should be experimentation in some districts with providing at least a limited choice of counsel to certain defendants who are eligible for appointed counsel.

#### Recommendation

An experimental program should be developed in volunteer pilot districts to give certain CJA eligible defendants a limited choice of counsel.

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3. Discretion for judges to order payment of travel expenses for certain defendants to attend court proceedings.

By statute the United States marshal is required to furnish subsistence and transportation to an arrested person who is released from custody back to his or her residence. In addition, the court may direct the marshal to provide a financially eligible defendant who is released from custody with transportation and subsistence expenses to travel to the court for further judicial proceedings. There is, however, no authority for payment of subsistence during the course of the proceedings, for travel expenses for the return trip to the defendant's residence, or for successive trips to appear at subsequent court proceedings or related matters. When a defendant is unable to afford the cost of temporary quarters, the pretrial services office of the court may be able to assist in providing shelter in low-cost subsidized facilities, but not other expenses.

The present lack of clear statutory authority to pay for travel and subsistence expenses in these situations has resulted in substantial hardships to certain defendants, particularly those who have no funds and are required to attend lengthy court proceedings. Accordingly, there should be explicit statutory authority for the courts to provide assistance with transportation, housing, and food for financially eligible defendants in appropriate circumstances.

#### Recommendation

18 U.S.C. § 4285 should be amended to give the presiding judge in a case discretion in appropriate circumstances to order that funds be provided to CJA eligible persons for travel to and from court proceedings and related consultations and for subsistence during court and related proceedings.

4. Requiring the prosecution to provide copies of discovery materials to defendants, with costs paid from the CJA.

The Review Committee recommended that the CJA or the Federal Rules of Criminal Procedure be amended to require that the prosecution provide copies of relevant discovery material to a defendant represented by appointed counsel and that expenses associated with duplication of discovery materials be reimbursed from the CJA appropriation.

Rule 16(a) of the Federal Rules of Criminal Procedure obligates the prosecution to make discoverable material available for inspection, copying, or photographing by the

defense. The prosecution is not obligated to supply copies to the defense.

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The Defender Services Committee has suggested that the presiding judicial officer be given discretion to make reasonable allocation between the prosecution and defense of the duplication expenses associated with discovery under Rule 16.

#### Recommendation

The proposal to require the prosecution to provide copies of discoverable materials to the defense and allocate the costs of duplication should be referred to the standing Committee on Rules of Practice and Procedure, for consideration in accordance with the Rules Enabling Act.

5. Safeguards to prevent inappropriate discovery by the prosecution through payment of costs of fact witnesses.

The Review Committee recommended either that the CJA be amended or that standing orders be entered in every district protecting information about defense witnesses contained in expense reimbursement documents from discovery by the prosecution.

The Department of Justice, through the United States Marshals Service, is responsible for reimbursing defense fact witnesses. In 1986 the CJA was amended to authorize a federal defender or clerk of court, rather than the United States attorney, to certify the fees and expenses of fact witnesses for eligible defendants. The review committee believes that the possibility still exists for the prosecution to use the payment of these vouchers as a means of obtaining discovery.

The Review Committee further recommended that eventually the authority for reimbursing defense fact witnesses should be transferred from the Department of Justice to federal defenders and local administrators.

#### Recommendation

The Defender Services Committee should study the advisability of legislation to transfer payment of the reimbursement of defense fact witnesses from the Department of Justice to the CJA appropriation.

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#### H. OTHER

1. Review of the defender program every seven years.

The Review Committee recommended that legislation be enacted to provide for a comprehensive study and analysis of the CJA program by an impartial entity every seven years.

Many changes have occurred in the CJA program over its 28 years. The program has adapted well and innovatively to changes in national law enforcement policies, growth in case load, and changes in federal sentencing laws. Nevertheless, the serious lack of funding has created strains and stresses in the program. Oversight, evaluation, and review of all aspects of CJA activities are needed on a continuing basis. Moreover, a global examination of the program would be appropriate every several years. There is no need, however, for legislation to accomplish this purpose. The Judicial Conference can arrange for periodic comprehensive reviews of the program.

#### Recommendation

The judiciary should arrange for a comprehensive, impartial review of the CJA program every seven years.

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#### VII. SUMMARY OF RECOMMENDATIONS

o It is essential that the Congress provide full funding of the Criminal Justice Act to ensure that the protection guaranteed by the Sixth Amendment of the United States Constitution continues to be provided to the people of the United States into the 21st Century. Funding should be provided at a level sufficient to:

- ensure adequate funding of the existing federal defender organizations and death penalty resource programs,
- pay fair and reasonable compensation to panel attorneys,
- establish a federal defender organization in each district where such organization is feasible,
- provide adequate administrative support for the CJA program,
- enable the administrative office to provide low cost training programs for all CJA panel attorneys, in conjunction with the Federal Judicial Center, the Sentencing Commission, and others, and
- implement procedures to ensure that counsel is provided to eligible persons as early in the initiation of proceedings as possible.

o The CJA appropriation should remain as a separate account within the judiciary's budget and should continue to be presented to the Congress through the Judicial Conference of the United States.

o Congress should provide sufficient funds in the CJA appropriation to enable the Administrative Office to develop additional statistical and financial information to document and evaluate fully the cost, quality, and effectiveness of the CJA program.

o Recognizing that federal defender organizations consistently furnish high quality representation to CJA defendants and provide a cost-efficient alternative to

representation by CJA panel attorneys, the courts should take steps to increase the number of cases assigned to federal defender organizations.

In districts currently served by a defender organization, these steps should include:

(1) approval of additional assistant federal defender staff in appropriate circumstances; and

(2) review and adjustment of district appointment procedures.

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o The Administrative Office should conduct a study to determine: (1) the measures currently in place to obtain reimbursement of funds expended on behalf of defendants who are financially able to retain private counsel, and (2) what additional efforts should be employed to ensure that CJA funds remain available to intended beneficiaries.

o The Congress should authorize the judiciary to receive a fair share of the total assets forfeited to the government by criminal defendants. At a minimum, the CJA appropriation should be reimbursed from the Department of Justice's assets forfeiture fund for those costs associated with providing CJA representation for defendants whose assets have been seized by the Department.

o The proposal for creation of a new Center for Federal Criminal Defense Services should be rejected. 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 Courts.

o The judicial districts should be left free to choose either a Federal Public Defender Organization or a Community Defender Organization to provide defense services in the district, as the CJA now provides. The circuits should be encouraged to involve volunteer lawyer committees in the selection or reappointment of the federal public defender, as the CJA Guidelines now provide.

o There is no need to vest voucher approval authority and other panel attorney responsibilities in a new local administrator to be appointed in every judicial district.

o The CJA should be amended to eliminate the requirement in 18 U.S.C. § 3006A(g)(1) that a district have at least 200 CJA appointments annually in order to qualify for a Federal Public Defender Organization or a Community Defender Organization.

o The CJA should be amended to require that a Federal Public Defender Organization or Community Defender Organization be established in all judicial districts, or combination of districts, where such an organization would be cost effective, where more than a specified number of appointments is made each year, or where the interests of effective representation otherwise require establishment of such an office.

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- o National recruiting and equal employment opportunity programs for the defender system should continue to be encouraged and facilitated. The Defender Services Committee should continue to review employment policies and make appropriate recommendations to the Judicial Conference regarding EEO program development, implementation, and compliance.
- o The Defender Services Committee should develop an EEO program for the panel attorney program.
- o The Administrative Office, working with representatives of federal defender organizations, should develop evaluation procedures to monitor attorney and staff performance in these organizations.
- o The Administrative Office, working with representatives of federal defender organizations should develop standards and evaluation procedures regarding the management of defender organizations. Standards and procedures should also be developed for the management of panel attorney operations.
- o The Defender Services Committee should study whether specific procedures and clearly defined standards should be developed regarding the reappointment and removal of federal public defenders.
- o There is no need to amend the CJA with regard to the salaries of federal public defenders and their staffs. The Congress, however, should fund the CJA appropriation at a level sufficient to adjust the salaries of the personnel of federal defender offices to a level equal to comparable positions in the United States attorneys' offices.
- o The Congress should provide full funding for the death penalty resource center program.
- o Only minimal eligibility standards for panel attorneys should be promulgated nationally. Individual district plans should take into account the prevailing local conditions most likely to produce qualified panel members.
- o Congress should fund the CJA appropriation at a level sufficient to allow the Defender Services Division to provide low cost training programs for CJA panel attorneys, in conjunction with the Federal Judicial Center, the Sentencing Commission, the federal defenders, and others.

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- o In those districts where the establishment of a federal defender organization would not be cost effective, where there are too few CJA appointments, or where the interests of effective representation do not require the establishment of such an organization, the courts should establish a panel attorney support office.
- o The courts should develop performance standards for panel attorneys and monitor their performance.
- o The Congress should provide sufficient funds in the CJA appropriation to allow the

Judicial Conference to set compensation rates for CJA panel attorneys at a level that includes reasonable office overhead and fair compensation, plus appropriate cost of living adjustments.

- o 18 U.S.C. § 3006A(d)(2) should be amended to authorize the Judicial Conference to establish and modify all dollar limitations on compensation under the CJA.

- o The CJA Guidelines should be amended to require compensation for the time spent by CJA panel attorneys in necessary and reasonable travel.

- o The CJA should be amended to authorize payment, at reduced hourly rates, of compensation to paralegals and law students who assist panel attorneys in CJA representations.

- o The CJA Guidelines should be amended to provide that, absent extraordinary circumstances, judges should act on vouchers for compensation of panel attorneys and other service providers in CJA cases within 30 days of submission.

- o The judicial councils of the circuits should prepare periodic reports listing all CJA compensation vouchers that have been under review for more than 90 days. The chief judge of the circuit, or the chief judge's designee, should intervene and take appropriate action if a voucher has not been acted upon within 90 days of submission.

- o Until such time as the Congress appropriates sufficient funds to allow the payment of compensation rates to CJA attorneys that cover reasonable office overhead, panel attorneys should be reimbursed or indemnified for civil malpractice and related actions arising from their CJA services.

- o Congress should fund the CJA appropriation at a level sufficient to allow districts to implement procedures that ensure that representation is provided to eligible persons as early in the initiation of proceedings as possible.

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- o An experimental program should be developed in volunteer pilot districts to give certain CJA eligible defendants a limited choice of counsel.

- o 18 U.S.C. § 4285 should be amended to give the presiding judge in a case discretion in appropriate circumstances to order that funds be provided to CJA eligible persons for travel to and from court proceedings and related consultations and for subsistence during court and related proceedings.

- o The proposal to require the prosecution to provide copies of discoverable materials to the defense and allocate the costs of duplication should be referred to the standing Committee on Rules of Practice and Procedure, for consideration in accordance with the Rules Enabling Act.

- o The Defender Services Committee should study the advisability of legislation to transfer payment of the reimbursement of defense fact witnesses from the Department of Justice to the CJA appropriation.

o The judiciary should arrange for a comprehensive, impartial review of the CJA program every seven years.

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