Ad Hoc Committee to Review the Criminal Justice Act
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Transcript: Panel 1—Views from Innovative State Court Models

Judge Cardone: Before we get started, let me explain a little bit about the format today. Each of you as our beginning panel will have the opportunity to make a brief opening statement, and after you've made that statement, then we will begin questioning by the Committee. I do want to encourage you. We read your submissions, so we don't need to go over those. If you'll just make a brief opening statement, we have found as a Committee that engaging you in conversation really does give us a lot more information, so we'd appreciate you keeping it brief.

Let me introduce, then, our first panel. This is Panel One, Views from Innovative State Court Models, and we have with us Judge Thomas Boyd, Michigan State Court from the 55th Judicial District; Avis Buchanan, Director, Public Defender Service for D.C.; Julia Leighton, General Counsel, Public Defender Service for D.C.; and William Leahy, Director, New York State Office of Indigent Services. With that, we'll start with you, Ms. Buchanan.

Avis Buchanan: Good morning. As you said, I'm Avis Buchanan, the Director of Public Defender Service. I'm with Julia Leighton. We'll split our remarks. I will focus on the institutional defender side, and Ms. Leighton will talk about the panel. Both sets of comments are summed up easily by one word, independence. The public defender function should be independent of the judiciary. The judicial system has heard this repeatedly, dating back to the passage of the Criminal Justice Act. The Prado Report advocated for a version of it and laid out a solid plan of action. Numerous voices in this most recent review have joined in the chorus for independence, and it's time to act before the judiciary is doing this exercise again in twenty years.

David Patton, the Executive Director of the Federal Defenders of New York, laid out a very useful and comprehensive framework for how to approach getting independence for the public defense function, and when you act, you should aim high because it will be what we all live with for a long time. Independence is the first of the ABA, American Bar Association, Ten Principles, and it's first because everything else flows from independence. It's what allows you to have the highest performing organization.

The Public Defender Service was fortunate to have the organizers recognize this when the Public Defender Service was established in 1960. We already had a panel in the District of Columbia, but there was a recognition of a need for a separate institution and a recognition that that institution needed to have independence, including independence from the judiciary. That independence

allowed PDS to become the high-functioning public defender office that it is, an office that enjoys an excellent reputation for a quality service. It's an organization that has a variety of service. We were the first to have a social worker on staff, the first public defender office to have a social worker on staff. It's an office that's governed by an eleven-member board of trustees, not any judge or chief judge. It's a voice for the indigent defendants in the District of Columbia. It's an office that's not beholden to the courts, and it's an office that developed a nationally respected forensic practice. It's where we decide which experts to hire, which experts to use, how to use them, and how much to pay them, not the courts. It's an office that deals directly with funders to make its case for its budget.

You should aim high. Don't assume that full independence is impossible. Be creative. Think Apple, think Uber, think Google, be principled. It's what you do when you resolve your cases, and that's how this issue should be resolved. Be better than PDS. A federal judiciary that last century gained its separation from the Department of Justice and the funding process should do the same for the federal defender system. The clients the federal defenders represent are counting on it. Thank you.

Judge Cardone: Ms. Leighton, anything you wish to add?

Julia Leighton: Yes, as you've heard and read, PDS is an exceptional institutional defender because of its caseload control, its culture of excellence, and its unyielding to commitment to quality representation, all of which were made possible by its complete independence; but I cannot say the same for the defense function as a whole in the District of Columbia. While PDS provides training and other support for the panel of lawyers in the District, the panel system and its budget is managed exclusively by the judiciary. Panel attorneys experience many, if not all, of the problems faced by panel attorneys in the federal system, voucher cutting, inconsistent appointments, lack of transparency, impediments to accessing investigators and experts, and concerns about alienating the very judges that pay them during litigation. Such an approach to prosecution would not be tolerated. It should not be tolerated for the defense function.

As we set forth in our written testimony, the key elements of a quality defense system are independence, caseload control, a culture of excellence, and resource parity. Because I do want to get to your questions quickly, I will share a few thoughts about just two of these elements and how they should be addressed with respect to the panel system, first, parity with the prosecution and second, creating a culture of excellence.

I submit that the argument for parity is so simple and so obvious it's not hard to sell to the public or to funders. Why do you need pay parity? Because you get what you pay for. We all know that, and if you want a quality defense

system, if you want to retain quality lawyers, you cannot consistently underfund them. Why parity in resources? Because even a superior athlete is at a disadvantage if she has inferior equipment. While for an athlete it may just be the loss of competition, how can we disadvantage people who are facing decades of prison time and even death? If you want a quality system, a fair system, the panel system must be paid on a par with prosecutors, and it must have access to similar resources.

By resources, let me be clear. I'm not just talking about investigators, litigation specialists, and experts. I'm also talking about lawyer time. Lawyers must be able to spend time researching, investigating, consulting, and preparing their cases based on the needs of the specific case. Quality representation is not checking off a list of items typically done in similar cases. It is not doing what a particular judge deems is appropriate in hindsight on a specific case. Quality representation demands that a defense lawyer be skeptical of every piece of evidence, challenge every expert opinion, and look to the evidence the government may not have found or may have underappreciated. In a number of PDS budget submissions to Congress, we have detailed cases, even very serious cases, where post-indictment, PDS has secured a dismissal from the government based on the evidence we marshaled, the evidence we brought forward. Some of these cases were very expensive. Quality representation may require expenditure of resources up front, but it will save the Criminal Justice far more money in the long run and save the Criminal Justice's public reputation.

Parity alone is not sufficient. The panel must be designed to create a culture of excellence. As we detail in our submission, this requires appropriate incentivized pay systems, competition, and training. I will focus here on competition. The overarching goal for the design of the panel system must be to maximize the quality and the success rate of the lawyers on the panel at its outset and over time. No one, not the institutional defenders and not panel attorneys, should be able to secure a position defending those who cannot afford counsel and who do not get to choose their own lawyer, and get to work on cruise control. I am not imposing anything here on the panel attorneys that we do not impose on our own attorneys at PDS. Securing a position at PDS is intensely competitive, and advancement at PDS is not based on seniority but on ongoing performance. To keep pace with prosecutions and the use of new and evolving forms of evidence, continual improvement must be the goal for both institutional defenders and panel attorneys. Our clients and the public deserve no less.

I know the recommendations in 1993 that institutional defenders and panel attorneys should be as resourced, as exceptional, and as independent as the prosecution ultimately received little traction, but what was true then is true now. One change since 1993 is that the national crisis in indigent defense is more widely acknowledged, and more federal defenders are speaking up to

give voice to their call for resource parity and independence. It's past time, past time for my comments and past time for us all to get it right. Thank you, and I look forward to your questions.

Judge Cardone: Mr. Leahy.

William Leahy: Thank you, Judge Cardone. I want to do three things with my brief time here, one to give an anecdote from personal experience that might shed a little bit of perspective on the Committee's decision making, second to just make brief additional comments about both Massachusetts and New York. I covered it, of course, in my written testimony, and third to just make a point about a couple of the proposals that you have before you.

First the anecdote. Back in late 1991, I was about four or five months into my tenure as Chief Counsel of the Committee for Public Counsel Services in Massachusetts. I was about three to four months ahead of testifying before Judge Prado's committee at the hearing in March, 1992 in Boston. The Committee for Public Counsel Services was about seven years into its existence. Of course, as I mentioned in my written remarks, this was an independent entity with an independent committee and was a new breath of fresh air in Massachusetts. That was true then and certainly is still true today, but a new chief judge—chief justice is the actual title—of the Supreme Judicial Court had come into office, Paul Liacos, a brilliant law professor and lawyer, a professor of evidence, and a brilliant jurist. At the same time, there was tremendous criticism of the judicial system in which my agency was housed for administrative purposes for its excessive budget and its budget's growth. A lot of that budget growth deemed excessive by certain legislators was due to the growth of the newly independent and better performing Committee for Public Counsel Services.

Chief Justice Liacos sent me and my board chair a letter saying, "We need to review the committee's budget proposal before that budget proposal goes to the governor and to the legislature." This had never happened during the seven-year tenure of my predecessor as chief counsel. We sent an equally unappealing letter back saying, "No dice," which led to a preemptory, "You are summoned to my chambers." We walked in girded for battle but nervous about the outcome, Walter Prince, my committee chair and I, and we didn't have just Chief Justice Liacos. We also had Justice Wilkins who, if you read my piece carefully, is a star of Massachusetts history, Associate Justice Herb Wilkins. It turned out not to be a pitched battle. It turned out to be the Chief Justice saying, "I'm sorry. I overstepped. I've been talking with Herb, and I wear two hats. I'm the chief justice of the court, and I'm also the person who has a role in appointing your board members. I overstepped my bounds due to the political pressure. I should not have. You do not need to submit your budget for approval to the courts. Go in peace." We went in peace, and that was the one and only time in the Massachusetts history where this tension

came in.

It occurred to me as I replayed this very memorable meeting in my head that Liacos and Wilkins, in a sense, are the yin and yang of your decision making. Liacos is the, "We've got to keep control," and the Wilkins is, "No, you have to elevate independence." I share that anecdote because sometimes anecdotes can teach in a way that lots of writing and talking may not.

Quick additional notes about Massachusetts and New York. Massachusetts, it took from 1978 or 9 when the Wilkins committee report came out calling for an independent governance of indigent defense . . . took about five years of legislative to and fro. The bar associations versus the salaried public defenders, the cost concerns versus the quality desire, all of that, it took a very long time. That's a piece of Massachusetts history that I think has relevance here because, as I'll get to in my final point, there are some things I think you can do in real time, and there are other things that you can and perhaps should do that are going to take a while and are going to require action by another branch of government. That all happened in Massachusetts, and it can happen here in the federal system.

New York, very interesting moment New York right now. I've been there five years. I've just signed on for a second five-year term as director. There are the five counties in New York City which are both well-resourced by City funds and also boosted by State funding that went into place about six years ago to reduce caseloads. The City is in quite good shape in relative terms. There are problems. There always are, but then we have 2014, the settlement of a major class action lawsuit by the State of New York with the New York Civil Liberties Union, the *Hurrell-Harring* case. I'm sure you've heard about it. That covers five of the fifty-seven upstate counties, and my office is charged with implementing the terms of that settlement, which are excellent, caseload reduction, specific quality improvements, counsel at arraignment in every case in every one of the 1300 or so town and village courts disbursed throughout Upstate New York, excellent settlement. Five counties are in; fifty-two are out. Now we have a bill. We have a political controversy. We have a political movement that is based on equal treatment. We, of course, have statewide responsibility, so notwithstanding the lack of adequate funding in the other fifty-two counties, we have a responsibility to move forward there, and we are doing that.

I guess the sub-note there is incremental change so-called . . . it's often used in a disparaging way. That's change. As long as it's positive change, that's moving forward. That's the opportunity I respectfully suggest was missed in 1993 and must not be missed in 2016, or '17 I guess is really what it is.

My final point is to emphasize something I did say in my written statement, and that is the amazing and powerful development of federal defender

leadership during the twenty-four or twenty-five years since Judge Prado's committee issued its report. People I know well, such as Miriam Conrad and Marianne Mariano, and people I know less well like David Patton, and I confess I've only reviewed the Philadelphia hearing. The other five hearings, you have all the benefit of that, and I do not, but I went to the hearing that was most recent, and people I knew, I was curious as to what they would say. I should add Jessica Hedges from the CJA panel in Boston, as well. I thought her remarks were great, and Steve Asin and Richard Wolff, and all of the things that you have. It's a very different landscape. You now may have confidence in the ability of federal defender leadership, mature federal defender leadership, to move forward successfully and independently.

I've spent a lot of time thinking about the Mariano proposal for serious reform within the judicial branch and David Patton's preferred center for federal defense. I support both of them, and I suggest to you that there's no inconsistency between them. You can do the Mariano reforms now. You can elevate the defense function within the judiciary to make it as independent as a defense function can be within a judicial branch, and you can propose . . . not implement because Congressional action, I'm sure, is required. You can propose a, "perfect solution or a more perfect solution for Congress to consider going forward." I hope you will do both. Thank you.

Judge Cardone: Judge Boyd.

Judge Boyd: Thank you. Good morning. It's a real honor to be here. The right-to-counsel services at the state level in America exist on a broad continuum where substandard practice is prevalent. Public defenders offices that meet national standards for the defense function or have evolved beyond them make up only a small portion of that spectrum. How the majority of states fail to meet the dictates of the Sixth Amendment right to counsel can vary. Some systems struggle with existing excessive caseloads or withholding counsel at critical stages of proceedings or creating financial conflicts of interests for lawyers. Yet at the root of all these problems is the lack of sufficient independence of the defense function. Conversely, the best public defender systems, like those in Massachusetts and the District of Columbia, protect the indigent defense system and the lawyers from undue political influence and judicial interference through independent commissions.

I'm here to talk about my state, Michigan, which is just at the beginning of implementing changes we hope one day will put us in the category of these model defender organizations as well. I'd just like to make two points. I serve as a member of the Michigan Indigent Defense Commission, which is a statewide commission appointed by our governor, Rick Snyder, which is housed in the judicial branch of government.

I also serve currently as the president of the Michigan District Judges

Association, which is the association of essentially municipal court judges in most states, judges of limited jurisdiction. One of the things we do is we lobby the Michigan Legislature on behalf of our courts and our constituencies. As you might imagine, one of our goals is to oppose legislation that reduces discretion. We avoid the word "shall" in any legislation we can, and we embrace the word "may." It's one of our guiding principles as a legislative-active judiciary. However, when it comes to the issue of indigent defense, we're willing to give up control. Not only did we embrace the ABA's Ten Principles, including number one, independence from the judiciary, we helped write the legislation that includes the word "shall" in several places as it relates to the indigent defense system and the judiciary. What we've embraced in this context, rather than "may," is independence.

Finally, the indigent defense system in Michigan is a local system. Sorry, the criminal justice system, excuse me, is a local system. Everything about the criminal justice system, cops, courts, jails are all local functions, so much like the federal judiciary, district by district, everything we've done is county by county, eighty-three different counties, eighty-three different systems. Now the result is what is referred to as a patchwork quilt of justice or injustice, depending on how you look at it. There's a 2008 [report] from the national legal aid defender who describes this county system as incredibly broken. You are familiar of the comment of Justice Breyer recently about only 27% of the public defender offices at the county level are adequately funded in resources. These are things that I know you know well.

However, it's a reality. We're not going to change the local control of the criminal justice system through the defense function. What we've done is we've developed a system to change and strengthen the defense function within the local control, preserving local control. We've done that through a system of minimum standards. What our plan is to develop minimum standards, and then have each local jurisdiction develop their own plan of how they're going to comply or meet those minimum standards. I guess it's probably way beyond my level of experience or expertise to suggest to you, but I do respectfully suggest to you this might be a model that you can look at, that if you had developed minimum standards on a national level, each individual court, individual district, could retain the authority to develop their system in a way that is compliant with those minimum standards. However, it is really the standards that are all important.

I guess to embrace Mr. Leahy's term, there's nothing wrong with incrementalism. For a number of years I've described the Michigan Indigent Criminal Defense System as a large boat that's been going the wrong way for fifty years. The boat's begun to turn, but big boats turn slowly, and we've got a long way back. I'll be happy to take your questions, as well as my colleagues on the panel.

Judge Cardone: Let's start with Judge Fischer.

Judge Fischer: Thank you, Judge Cardone, and thanks to all of you for being here at our last set of hearings. As I think all of you have noted, we've heard a lot of things, but you all have something additional, I think, to contribute. From the state perspective of where I started, I realize there's differences, but there's many similarities, and I think there are things we can learn. You said, Judge Boyd, that there have been fifty years of attempts at reform that have failed to bring uniformity or quality control, but now you've most recently mentioned developing minimum standards. Can you tell us a little bit more about that and how you're going to develop the standards, and then how are you basically going to sell them to whoever has to implement those?

Judge Boyd: I'm going to take that question as twofold. In the implementation, which I think though really also there's the implication of the people who are going to have to pay for those, the Legislature. That's two different issues. The implementation is really going pretty well, and that is that each individual criminal defense system, which define as a local court and its funding unit—which might be a county, it might be a city, it might be a group of townships, depending on the court in Michigan—are really just struggling with this system.

In my remarks I noted the judge from one of our rural counties, when I sent him a copy of *Missouri v. Frye*, and I said, "It's crystal clear now, if you ever doubted it, that you have to have a lawyer during pre-trial bargaining, and many of our rural counties do not provide lawyers to defendants during pre-trial bargaining. At arraignment, if they are determined to be indigent and eligible, they're asked to meet with the prosecutor first to see if they can work something out before they are appointed an attorney. *Missouri v. Frye*, if you ever doubted it, makes it crystal clear you can't do that." I sent him a copy of the opinion and gave him some time to read it. I called him back a week later, and I said, "So, we agree?" He said, "Well, yes, I see what it says." I said, "So will you have lawyers at pre-trial?" And he said, "No." I said, "Well, do you disagree with the way I read the case?" He said, "Oh, no, it's real clear what they say." "Well, why won't you have lawyers at pre-trial?" He said, "I don't have the money for that." The systems locally, in terms of implementing, are really hungry for compliance. Again, my 250 colleagues on the district court bench aren't objecting to giving up control to do the right thing. The implementation side isn't really as problematic as the funding side.

Now on the funding side there's two realities. One is we're at a really unique moment in time politically where the left and the right agree that the defense function is underfunded and needs action. As a matter of fact, the member of the Michigan Legislature who co-sponsored the original indigent defense

proposal in Michigan in 2009 is now a member of Congress, Justin Amash, who's probably one of the most conservative, libertarian, right-wing members in the United States House of Representatives.

Believe me, I understand that's saying something, but the point is . . . Representative Tom McMillin served with me on the Governor's Advisory Commission. He then was the sponsor of the legislation which led to the creation of the Indigent Defense Commission. I'm a non-partisan elected official in Michigan. I don't have a partisan stripe. Previously I worked with Democratic politics. I was employed by the Democratic National Committee. I have a history. Representative McMillin and my history are about as apart as two people could be. When I spent some time working with him originally, it took me awhile to understand that his libertarian streak is so strong, he honestly doesn't believe any governmental functions should exist, but if a government's going to exist, it's number one responsibility should be to protect people from the government, so he's a huge supporter of the indigent defense function. Between the marriage of the left and right, we are at a place and time where the political will is stronger than ever to support people who are accused of crime I believe.

The second thing is we have an advantage in our system, and that is there's going to be someone like you sitting in review of what the Michigan Legislature does. We've set up a system where there's been findings by two levels of governor-appointed panels and embraced by the Legislature. Most of the ABA Ten Principles are now encapsulated in Michigan law. That panel is producing standards. Those standards in two days will be heard at a public hearing by the Michigan Supreme Court. Once the Michigan Supreme Court adopts those standards as the constitutional requisites, the Legislature is going to have to face the Hobbesian choice of either paying the bill or having a federal judge tell them how to. No legislature wants to be in that position, so I understand the politics on my level are a little different than perhaps on yours, but in reality, once you determine something is constitutionally mandated and it's done by a distinguished panel with the authority of the court, the legislative branch really kind of has their hands tied as it related to getting the job done. I hope that's responsive to your question.

Judge Fischer: Thank you. Mr. Leahy, you've indicated that you do think there's a role for judicial involvement. In fact, you've talked about the involvement in New York's commission with judges, and you mentioned, and clearly I think this is true, that it works because of the people involved. What protections are there, if any, to make sure that the judges involved are always going to be people about whom you can say the same thing, or what should we be looking to avoid or put in place to make sure, to the extent the judges remain involved, depending on what we recommend, of course, and what can be implemented, that the system still works?

William Leahy: Well, I certainly recognize that it is not adequate protection to have the fortuity of having a series of heroic and balanced individuals, you know, the Wilkins of the Liacos-Wilkins in New York as we have had the good fortune to have three consecutive chief judges who both chair the board and do so in a way that absolutely honors the principle of independence. Notwithstanding that in New York my agency is placed within the executive branch for administrative and budget purposes, so that's the same branch that appoints that chief judge. The answer to your question, what kind of protections are there? They have to be embedded in the structure. They can't be dependent upon the people, and that means seriously limiting in the short term and eliminating in the long term the role of federal judges in overseeing any aspect of the provision of indigent defense services, just as the federal judiciary would certainly not want to play any role, other than in the resolution of a legal controversy, in overseeing the prosecution function.

Judge Fischer: Thank you. You also mentioned things such as the judges shouldn't be involved in selecting CJA attorneys or FPDs. Are there other problems that one faces that we should try to eliminate or limit if we take those functions out of the judiciary and put them somewhere else?

William Leahy: Well, there's always the question of filling the void. If judges, for example, now review vouchers, and I know you have a number . . . Just from the Philadelphia hearing alone, you have a number of very thoughtful proposals about how those vouchers might be reviewed without imposing a gigantic bureaucracy, and certainly that is done in . . . it's not done in New York yet, but it is done in Massachusetts with an arm of the agency that reviews attorney bills for both quality reasons and also in an audit type function to make sure that the work that is billed is in the service of clients and is not fraudulent or so negligent as to be unsustainable.

Judge Fischer: Thank you. For our representatives of the Public Defender Service, either one of you or both, because as I'm sure you've heard when we've spoken to you before, you are being cited as one of the models that we should look at and consider. When we do that, what should we tweak? What's your wishlist of things that you could change because nothing's perfect? What help do you have for us in that regard?

Julia Leighton: I think we mentioned this in our written submission, that there . . . The real person you should ask is Norm Lefstein when he comes next because he wrote the statute, and I'm sure he's had thoughts since then of how he could improve upon that, but I think it's small tweaks. As Ms. Buchanan said, independence has been the cornerstone of everything we've been able to do. It's made us able to keep our clients front and center through good times and bad.

I think that we are working towards some more formality in our board

process, in the selection of board members. I think that we mentioned in our written submission that, while judges are not permitted to sit on the board, nobody ever said anything about law enforcement. Now, I don't believe we've ever had someone who is current law enforcement, but I think that should be said. Again, I would refer to Norm Lefstein's presentation because I think thinking about the board is very important in two respects, thinking about diversifying the authorities that get to participate in selection and building in a system that generates self-nomination by the institution, by the panel, that generates a board where your goal is to find people who are of a stature in the community that they can advise and protect the institution despite being on some level nominally selected by some entity outside of the institution and outside of the panel.

Avis Buchanan: There are a couple of other limits. One is the idea that we have to go to the Office of Management and Budget before we go to Congress to make our budget request. Then I think we'd like a little bit more freedom in making sure that we meet all of our client needs. There's a part of our statute that says that we can do other things with the approval of the board, and it's not clear exactly where the limits of that language are, and it could be a little bit even more generous, I think, in that language because it could be viewed as limiting depending on who's reading the statute.

PDS has a lot of independence, but there is some that it doesn't have. An example of that is a current situation we're facing where we need office space, and we have to go through the General Services Administration in order to do that. As it was, we had to get their authorizing statute to provide services to the Public Defender Service because we didn't have leasing authority, but the suggestion is that because of their priorities they would move us potentially away from the courthouse, and we have to petition to get an exception for that. That is clearly in conflict with our priorities, our client needs, but we don't control the outcome of that process.

Judge Fischer: Thank you. Thank you, Judge Cardone.

Judge Cardone: All right, Ms. Roe.

Katherian Roe: Thanks. Judge Boyd, I'm going to start with you. I'm trying to get a clearer picture of the Michigan system and how it works. From my understanding of what you were just saying, you said, "We have eighty-three counties. It's local." Does that mean that the funding is by county funding, not state funding?

Judge Boyd: The funding is local. Felony courts, the court of general jurisdiction, the circuit court, is organized on county or multiple county levels. The misdemeanor system, which is the limited jurisdiction court where I work, is either a county or a local unit. For instance, a municipal or misdemeanor

court that's the full county is a district court of the first class. A district court of the second class is a county that doesn't encompass the whole county, so that's where I sit. I sit in the capital county. A capital city has its own court, as does East Lansing, the home of Michigan State University, and I have the balance of the county, so that means there are three levels of misdemeanor courts.

Katherian Roe: Okay, you know at this point . . .

Judge Boyd: We're all local, but . . .

Katherian Roe: I'm sorry I asked.

Judge Boyd: The answer to the question is it's locally funded.

Katherian Roe: Okay, that's very complicated, but let me tell you where I'm going with this. What I'm trying to figure out is, when the funding comes through, is the funding for the court . . . Is the public defender's office part of that same funding?

Judge Boyd: Yes, when I get my budget, I get two million to run my small court, and the public defense function is in that two million. Every court in Michigan is in the same situation, which means that any dime I spend for public defense is a computer I can't buy for someone in my office. There's a direct conflict within my budget between my priorities as an administrator and the public defense function.

Katherian Roe: The reason I asked that is because when you said that, even though the judge that you were speaking to knew that he had an obligation to appoint counsel earlier on in the process, he was choosing not to because he said he didn't have the money. When he said he didn't have the money, he meant also that if he used the money on that, he couldn't use the money on something else for the court that he might want to use it. Is that accurate?

Judge Boyd: That is accurate.

Katherian Roe: There's the tension right there.

Judge Boyd: There's multiple levels of conflict in our current system that we're hoping to root out, but it is the core of the independent function, whether it's "I'd better not upset the judge because I'm not going to get the next case," or "I'd better not ask for an expert because I'm not going to get the next case," or simply that function of "I, as a judge, if I spend an extra dime on this, it's a dime I can't spend on my personal staff, my probation staff."

Katherian Roe: I'm interested in asking you about that because you talk about minimal

standards and, if you will, minimum standards that are set in all these counties in an effort to try and have a raised level of public defense, but when I hear you say that and you talk about the eighty-three counties, it seems to me that implementation really is the key, right? It's how they implement these standards, and that just reminds me of the same issues that we seem to be discovering when we go around the country and find that we have ninety-four federal districts and some of the things we do work very well. CJA plans, whatever it may be, work very well, voucher review, in some districts, and then in other districts they don't. I'm wondering how it is that in Michigan, with this new process that you have, how is that working in actually implementing and having some kind of consistency across those eighty-three counties when it's locally implemented?

Judge Boyd: I guess I want to start with two prefatory points. First is, in this picture, I'm clearly the before picture, so we're just beginning. The second thing is, and I should have noted, that is the way the statute works is each new dollar spent. For instance, the four initial standards that the Michigan State Supreme Court will take up in public hearing this week . . . One of them is you'll have to have a lawyer not only at pre-trial but at arraignment. Consistent with some language in *Missouri v. Frye* and some other cases that you're probably more familiar with than I am, we have to have a lawyer at arraignment. Another one of the two initial standards is describing the way that the initial interview between the lawyer has to take place and when.

Each individual system, assuming the Supreme Court adopts those standards, has to come up with a plan for doing that. My system is 1 of 3 out of, whatever it is, 120, that we actually have a lawyer at arraignment, 3 out of 120 or whatever it is. The others will have to say, "This is how I'm going to plan to have a lawyer at arraignment, and this is what it's going to cost." That new incremental cost will be at State expense, so the local expense is capped at essentially a three-year average of 2011-2013. The local expenditure isn't going to change, removing that conflict from the local system in implementing a better plan.

As we move forward, that's why I say it's the Legislature, the same battle that you all face, the Legislature will have to make those decisions in terms of paying for the improved standard. Each individual system will have to submit a plan to the Indigent Defense Commission saying, "Here's how we intend to meet those standards. Here's how we're going to have a lawyer at arraignment. Here's how we're going to require that initial interview to be conducted." Then we'll look at it to make sure it does meet the standards, national norms. Sometimes we'll have to tweak it both ways. I assume some communities—I hope mine is one of them—will send them such a Cadillac plan, shooting for the moon, that they'll say, "You got to damp it down a little bit." At least that's my goal for writing one. The other communities will try and short-circuit it and say, "Well, we're going to just do this," and I think

the commission will have to say, "That's not really enough."

I think that's the quality control there is that each plan has to meet that minimum standard in a way that the commission is going to accept and be willing to pass the bill on to the Legislature.

Katherian Roe: Thank you. Mr. Leahy, I'm going to move to you and just ask you a few questions about the New York system, and actually I'd like to compare it to the Massachusetts one. What I read from your statement, or gathered from your statement I should say, is that in Massachusetts you've been doing this for a long time, and this is something that you're kind of moving on from there in New York. I'm wondering about the funding for Massachusetts because I don't know too much about the system, although I'm familiar with it, but I've heard that the funding is somewhat of an issue. If you could, tell us about that and compare that to the issues that you're having in New York where you're working.

William Leahy: Well, the long history of the funding in Massachusetts is that from the time when the Committee for Public Counsel Services was created and came into being in 1984, there was about fifteen million a year being spent on public defense funding in Massachusetts for the entire state. It was very low on the national scale of spending per capita. By 1991, when I finished seven years of being Deputy Chief Counsel and overseeing the statewide public defender system, which is a small component of the client representation, it was forty million. We were being called the mini budget buster, which led to that meeting with Chief Justice Liacos that I talked about.

By 2004, when the private lawyers in the City of Springfield went on strike and refused to accept cases and then Governor Romney demanded that I, as chief counsel, fire those lawyers and never permit them to take cases again, and we responded with a lawsuit that asked the Supreme Judicial Court to implement the committee-approved rates of pay for hourly pay for private counsel as opposed to the funded. There was about a . . . it would have been about a tripling of that rate.

The court didn't do that, but it did unanimously say that the current payment system had set up an unconstitutional state of affairs. At that point, 2004, we were at about $100 million. By 2006, after the court order and a legislative commission and legislative amendments, we went up to over $200 million. I believe since I left in 2010, it's come down a bit from that. I don't exactly what the budget is, but it is incredibly better resourced than it was throughout all of its early history. That was the result of the kind of work that the PDS leaders have told you that they've done, marshaling not just legal arguments but political support across the political spectrum and through the entirety of the legal community for the principle that the poor are entitled to effective representation just like those who can afford to retain counsel. That's the

historic answer to your question.

Katherian Roe: Let me ask you about New York, just to follow up on that. In New York, if I understand correctly, the five counties in the City essentially or in the area of the City, they get funding from the City and from the county and from the state?

William Leahy: Yes . . .

Katherian Roe: The other areas, the other counties, just get funding from the county?

William Leahy: Primarily from the county, about 80%, and about 20% from the state through something called the Indigent Legal Services Fund, which is a collection of various revenue streams into a fund that is dedicated primarily to the purpose of supporting what we call mandated representation in New York. Our agency oversees criminal defense and parent representation in the family courts. In New York, I think, if you remember the Kaye Commission that came out to national attention in 2006 . . . In fact, we're about three weeks from the ten-year anniversary of the Kaye Commission Report. It called flat out for a statewide public defender system very much like the Committee for Public Counsel Services in Massachusetts. It didn't say that, but that was the envision, so a top-down, state-based system with regional offices and so on.

There has just not been the political appetite in New York State to do that yet, so in 2010 the Office of Indigent Legal Services was created, and our office does not provide or really directly oversee . . . I used the word "oversee" a few minutes ago, which was a generous use of the term. We don't directly oversee public defense representation. There are 135 providers of mandated representation in the 57 counties outside New York City. There are another 15 or so in the City, and those are assigned counsel programs. Those are public defenders, legal aid societies, conflict defender offices, all types, three or four sometimes per county, an average, as you can tell, is more than two per county.

We provide standards. We certainly have promulgated standards. We recently promulgated eligibility standards, which have been acclaimed by national organizations and have been met with the kinds of concerns about funding that Judge Boyd has mentioned in Michigan. Same thing in New York, how do we pay for this? If we really have a fair standard for eligibility, how do we pay for the increase in the number of clients? In New York, it's a work in progress. The lawsuit is a big breakthrough, and we've got a ways to go. We've got our work cut out for us.

Katherian Roe: If I understand you correctly, the lawsuit only affects five counties, so in those five counties, if you're alleged to have committed a crime and you get public defense services, you're probably going to do pretty well; but in some

of those other counties where it's all county funds and they were not part of the lawsuit, it could be a very different story?

William Leahy: Yes, it's an intolerable situation. You described it very well. It's not sustainable even in the short term is what our position is, and we're trying to persuade the powers that be to recognize that and act upon it.

Katherian Roe: Thank you, sir. I want to turn my attention to PDS now and the women from PDS, Ms. Buchanan and Ms. Leighton. The question I have for you is the one that I think we always have, and that is, we know you've been successful in funding your organization. It's been, from what we can tell, successful for many years in funding and in providing services. You actually go to Congress, which is where the federal defenders and the CJA folks would have to go. Can you tell us why you think you've been successful, what you do that makes you successful, how this might work if this Committee decided to recommend something similar, and whether or not—this is a four-part question—and whether you think there may be a difference in the fact that you're so small compared to the size of what our budget would be?

Avis Buchanan: The Public Defender Service has not always been this well-funded. The current funding stream is from Congress and that has led to a certain stability in the funding that wasn't necessarily the case when we were funded by the District government. What makes the difference is independence. I was not an administrator but I was a staff attorney in the 80s, so my understanding, in the 80s, when D.C. funded the Public Defender Service was that D.C. made two payments per year and gave that money to the Administrative Office of the United States Courts. We were on the federal pay scale then. We were getting D.C. money but through the federal government, and that was designed to insulate PDS from political interference by the D.C. government, and it worked.

We were not as well-funded then. There was at least one year when there were furloughs, the budget cuts where we were constrained to reduce non-client spending to make sure that we had enough money for experts, where there was pressure on attorneys to make sure that they ordered the transcripts only when really necessary and didn't order less transcripts in order to save money. There have been times when we've had to work within those very severe financial constraints, but the purpose of everybody's actions, even then, was client-centeredness. To do the best for our clients, to protect our clients, and we didn't have to answer in making those decisions to anyone outside of the office except to the board.

It's the independence that makes the difference. The funding certainly helps. It has allowed us to do a lot of things that we weren't doing in the 80s and 90s, but it's the independence that drives that kind of decision making and that ability to prioritize based on client needs as opposed to administrative

needs or system needs.

The size, PDS's size, I'm hoping that you don't think small. Yes, you have a big system, but I don't even think it's the size that makes a difference. It may be more complicated to scale it up to that level, but I don't think it's impossible. I think that PDS can be a model for the positioning and for the independence, but that it's still achievable.

Julia Leighton: I would add to that, and I think we talked about this before, and I have to answer this question because the directors never do. The directors at PDS have good relationships with the Hill. They know the program inside and out. They've lived the program. They can explain it to Congress. It is no different than any other audience, and they come in as subject-matter experts. They come in passionate about what they do. They know their performance, and they know the outcomes they're achieving, and they can describe it to Congress.

An example of that is—again, I think Congress shouldn't be the fear here—is PDS's independence was essentially overlooked during the Revitalization Act. I wasn't there then. Neither of us were there then, but essentially the Revitalization Act came, and PDS woke up one morning and found it was assumed into a Title V agency. Two years later we have a Technical Corrections Amendment Act that pulled PDS out and made it as unique and as independent as one can and still ask for your funding from someone. It was not a battle. It was not a political battle. I think describing why PDS should not be within the executive and not within the judiciary is not a hard conversation. There may be a lot of steps to getting there, but I don't think the concept is hard to sell to people who just haven't thought about it before.

I think that part of what happened in the Revitalization Act is nobody thought about it. As soon as you put the proposition to people of who should be deciding how the indigent defense system spends its budget, it's not hard for all funders to see that it should be the institution itself, which doesn't mean you give up on accountability. That's what a board's for, and that is ultimately what your funders are for. So many of the things that we've described that we've taken on, that we've done, that we've innovated to keep up with modern prosecution practices are things we tell Congress about every year. We're proud of it, and so far they've been very accepting and supportive of it.

The other comparison that's out there is don't just look at our size and say, "What is the size of your budget?" Look at the Department of Justice's size. What is your budget in comparison to that? I think there's probably still a lot of room to grow.

Katherian Roe: Thank you. Thank you, Judge Cardone.

Judge Cardone: Judge Prado.

Judge Prado: I think we've covered this before, but how large is the board and what are the qualifications to be on your board? Who is on the board?

Avis Buchanan: We have an eleven-member board of trustees. I think that's been the size from the beginning. By statute, four members have to be non-attorneys who are District of Columbia residents. By implication, the other seven are lawyers, although that's not laid out explicitly in the statute. The qualifications are the non-lawyer and D.C. residents, and beyond that, you can't be a judge and be on the board.

Judge Prado: Who appoints the board?

Avis Buchanan: Our appointing authority is a panel of four. By statute, the Chief Judge of the United States Court of Appeals for the District of Columbia, the Chief Judge of the Trial Court in the District of Columbia . . . sorry, excuse me. The Chief Judge of the Trial Court in the District of Columbia, the Chief Judge of the D.C. Court of Appeals, the local Court of Appeals, and the Chief Judge of the local trial court, the Superior Court of the District of Columbia, and then the Mayor of D.C. Those four have appointing authority. The chief judge of the D.C. Court of Appeals is the chair of that panel, and all they do is appoint the board members, and that's by statute, but the statute does not have a breakdown about how that process should happen. Our board has adopted rules and procedures for that to happen. By practice, the board selects, vets, and proposes members to the appointing authority for their review and approval. Occasionally one of those members will suggest a board member, but it's by vote. After that, that panel has nothing to do with our board or the Public Defender Service.

Judge Prado: Okay, but three of the four people who appoint are judges?

Avis Buchanan: Yes.

Judge Prado: Do you submit recommendations to these people?

Avis Buchanan: Yes, we do. The board does.

Judge Prado: These judges?

Avis Buchanan: The Public Defender Board of Trustees, yes, submits candidates, proposes candidates.

Judge Prado: What happens, if it has happened, when you have a policy disagreement with the judiciary? They want to run things a certain way, and you think they

should be run a different way. How are policy disagreements between your office and the judiciary handled? Who goes to talk to the judges, or does the board go? Do you go when there's situations of that type?

Avis Buchanan: All of those things happen. It depends on the nature of the issue. I have gone to the chief judge of the court of appeals. I have gone to the chief judge of the trial court. We've gone to the presiding judge of the criminal division or the family division. Our board, when the matter is of particular seriousness or where we haven't made enough headway with the judges, will then intervene when they think it's appropriate. Clearly we can't force them to act, but we can certainly persuade or try to persuade. We may have legislative . . . We may approach the legislative body in D.C. to possibly think about an end run around whatever the problem is. They can't necessarily impose things on the court, either, and we've sued them depending on what the nature of the problem may be, or we've gone to the Judicial Disabilities and Tenure Commission, which is the body to which the judges have to answer.

Julia Leighton: Judge Prado, I was worried that your question may have been asking what we do when the judges are complaining about us. This is all what we do when we're complaining about the judges.

Judge Prado: Either way. Since judges aren't there, I'm wondering how do you communicate with each other, not on individual problems but on a policy issue. How's the communication done between your office and the judiciary?

Avis Buchanan: We've made proposals to the judges. We've made arguments to the judges. The same process as we do in cases, we make our arguments. We make them in writing. We make them in person. Whatever influence we can bring to bear on that decision-making process we use.

Julia Leighton: I really think the judges don't presume to think that they can say much about the policies and procedures of the Public Defender Service anymore than I think they presume they can say anything about the policies and procedures of the U.S. Attorney's Office. I think to the extent that they engage with us on that, it's directly with management, and it has to do with trying to reach some compromise on an operations level.

Avis Buchanan: I can give you an example. We protested against the Marshal Service's policy of shackling juveniles, and that was a policy that was supported by the court, endorsed by the court, and we got a group . . . We complained to the court, asked them to change, and we just kept pressing. We talked about going to the Legislature to see what options we had there, and I think the court, after listening to all the complaints, pulled together a body of all of the stakeholders and fleshed out the issues. Ultimately what came out of that was an administrative order that led to a presumption against shackling children with procedures for justifying it. That was an issue PDS did the drumbeat on,

and that was the outcome and that was the process.

Judge Prado: Who goes before Congress to request your budget?

Avis Buchanan: I do.

Judge Prado: You do?

Avis Buchanan: Yes.

Judge Prado: Judge Boyd, do you ever foresee the system getting to be totally independent from the judiciary?

Judge Boyd: I certainly could see a future where there aren't judges on the commission. It's the nature of its evolution that includes in the statute up to two current or retired judges. It's a fifteen-person commission. I think that's really just sort of evolutionary and personal. I could see a time when that was written out of the statute. It is limited in the statute to two current or retired judges.

The Michigan Constitution says all of government must be in one of three branches, and within the executive branch one of X number of principal departments. I apologize I don't remember the number, so we have some constitutional constraints within the Michigan Constitution about how to create an entity. There can't be an entity that's nowhere. As I just understood the answer from the Public Defender's office, it's kind of in limbo, not in any branch of government. The Michigan Constitution doesn't allow for that. There was quite a bit of discussion about whether it belonged in the executive branch with the prosecutors, or whether it belonged to the judicial branch which we're trying to seek independence from, and because of the constraints of Michigan's Constitution, we decided an independent entity within the judicial branch of government was the best of worse options. Unless there's a constitutional change, it can't be sort of free standing. It has to be in one of the three branches of government.

Judge Prado: Mr. Leahy, you want to respond?

William Leahy: Yes, the Massachusetts board structure bears some similarity to PDS in the sense that the judges of the Supreme Judicial Court appoint the board members but they don't sit as board members. For all of the time I was chief counsel, the justices appointed all of the fifteen-member board. Since I left, there's been an amendment, and now they appoint nine, and the governor and the senate and the house of representatives get to appoint two each.

I have an anecdote about that as well. It's my revered Judge Wilkins, Herb Wilkins, the architect of independence in Massachusetts. I think he was chief justice by this time, and I was chief counsel for a few years. He said, "Well,

you know, I really love the work that your appellate lawyers do. They're the best lawyers." I said, "Aw, that's great." I'm smiling. He says, "But I want to talk to you about a policy you have." I said, "Oh, what's that?" He said, "Well, this practice you have of giving every appellant, every criminal defendant whose appeal is rejected by the intermediate appellate court . . . you advise each and every one of them of their right"—it is a statutory right—"to appeal for discretionary review from the Supreme Judicial Court." Now obviously this is not as bad as cert. It's not like getting struck by lightning, but it's relatively rare, on the order of perhaps two or three percent are approved. In Chief Justice Wilkins' view at that time, by leaving this decision in the hands of the client, we were not doing as much as we should be doing to shut down what, in the court's view, were frivolous requests. They did not present a novel issue and did not attract the positive attention of the top court.

We talked that over, and that was just . . . I just said, "No, that's our policy. We've given it very careful consideration. It's client-centered. It honors the clients. It's the client's last chance for state court relief. It's a predicate to the seeking of any subsequent federal relief by habeas corpus or otherwise, and we have to stick with this." He said, "All right, I understand that. Okay." He, again, respected independence.

More affirmatively, an independent agency is always involved in any facet of policy that the judicial branch is considering that impacts indigent defense. Criminal rules, I sat on the Criminal Rules Committee of the State Supreme Court in Massachusetts for all of the time I was chief counsel there. Any issue that comes up that has any relevance, if you're a well-regarded, independent agency, you're always going to be at that table. If you're ever not . . . I think one time there was the beginning stages of creating drug courts and what the philosophy and what the judicial rules should be. We were not invited to that initial discussion, so we invited ourselves. Of course, our self-invitation was accepted. That's a healthy relationship, I think, and important point that just because judges may have a role in appointing members to boards, that does not mean that judges thereby influence the board's decision making.

Judge Boyd: At an operational level, we have four standards before our Supreme Court this week. We've begun to create the next four. Number one of those next four is an independent standard. I just was working in a work group just late last week where we began to craft that language. The first draft of that language says that on the operational level, within the trial court system, the judges will have no more control over the defender than they do over the prosecution or retained counsel. I can certainly complain to my elected county prosecutor about the assistant prosecuting attorney that he or she sends to my court, but that's it. I don't have any more right than Chevron's lawyer. Our goal will be that that will be the same at the trial level, the same

level of independence, and I believe we'll be there within the next three years.

Avis Buchanan: I just wanted to refine my answer. I spoke earlier about suing the court. We don't really sue them. We litigate, so even in the context of the juvenile shackling, we challenged that rule in the context of a case, and when we lost at the trial court level, we brought it to the court of appeals who then ruled against us. They referred us to work to try to see if we could come up with a solution with the court on our own, so it's not suing but it is litigating.

Judge Prado: Independence gives you the ability to function as you want to, but it also depends on the budget and how much money you get. You might have independence, but if you don't have the resources to do the work you want to do, are you really independent? I guess my question is, do you think you could still rely on the support of the judiciary to help you get the funding that you want to be able to function independently? Well, that's the question. You have not gotten to that point yet, but I mean the more independent you get, does that mean . . . Do you have any concerns that the less judicial support you will have to ultimately get your budget? In other words, okay, you guys want independence. You go on your own. See if you can get your money or not, or do you think you'd still have the support of the court for the requested funding that you're going to request? Maybe we have not gotten at that critical point yet, but can you predict what could happen in a situation where there's total independence? Will the judges still come to bat for you to get you your money when they have no say in how you run your office is, I guess, the question . . . maybe that's too frank, but . . .

Avis Buchanan: Well, in the context of the District of Columbia, one, we've never asked the judges. They've never been part of our funding requests or funding arguments. Independence is still the choices that you make within whatever limits you have. Everybody has a limit on their budget, even if it's a well-funded budget. We still have limits, but it's the choices that we make. When sequestration happened, we decided where the cuts were going to go, not a judge. If we were compromised in our budget and if we thought it would help to have the court's influence or the court's support in the funder's decision-making process, we would ask them to support. Right now, again, I refer to our office move. A move of the Public Defender Service and some other criminal justice entities in the District of Columbia away from the courthouse would have a substantial impact on the functioning of the court, the efficiency, et cetera, so one of the things I did was ask the chief judge if he would be willing to support a request to the General Services Administration for proximity and exception to what's called the delineated area; so when I can use the judges, I will, but they don't influence what choices we make in how we spend our funding.

Julia Leighton: I hope that in your consideration of whether . . . Part of this is we've been

independent for a very long time, so we're practiced at this, you could argue. I look at the testimony you've heard and the people that have appeared before you, and I see no less qualified a group to defend their budget, to develop their budget. Is there a role for the judiciary as you go through this process if you choose to go through this process and recommend going through this process? Yes, and it's exactly the right role for the judiciary. It is to support independence and to support parity. It is a support of fairness. It isn't advocacy for one side or the other. It puts you, I'd suggest, where you are most comfortable. It is what you actually do day to day in your courtrooms, defend fairness.

William Leahy: Judge, your question made me smile because back when I was chief counsel in Massachusetts and I would go to national conferences and I would meet with a lot of fellow defender leaders who didn't have the degree of independence that my agency had been granted by statute, they used to say, "Wow, independence must be great," and I said, "Yeah, we're independent in every way except for every single dollar we have to persuade the legislature and the governor to approve." In that sense independence is always qualified, and its continuation is always dependent upon widespread support. Nowhere is that support more essential than from the judiciary because the judiciary sees the quality of justice every day. You see the quality of representation every day, and if your opinion is that lawyers are overbilling and underrepresenting the agency, that supports that representation is going to suffer is your eyes and inevitably in the eyes of the funding sources, which of course are the other branches of government.

On the other side of that coin, support from the judiciary doesn't require a judicial opinion as we received in Massachusetts saying that the system is unconstitutional. It can be much more reliably and much more consistently the kinds of testimony you give and the kinds of conversations you have and the general reputation of the provider of representation in your district or your circuit or your state or whatever it happens to be. That's why in my paper I tried to encourage continued judicial support even while I advocate for independence from the judiciary. It can't be a divorce. It has to be a change in the relationship and a continuation of judicial support for the Sixth Amendment right to counsel.

Judge Cardone: Anything further?

Judge Prado: No, that's it. Thank you.

Judge Cardone: Professor Kerr.

Prof. Kerr: First, thank you all for your very helpful testimony and for coming to speak with us today. We've really been focusing on, I think, what to my mind is perhaps the linchpin of this problem, which is not only independence, but as I

think Mr. Leahy mentioned, there's always going to be some cabined independence, right? There's always going to have to be someone who's making the decision. To my mind that really raises a political question in the sense that that asks us to figure out what Congress might do in various future scenarios if there's more independence or a continuation of the status quo. It's obviously a hard question to figure out what future Congresses might do or how they might respond. I mean, I'll offer a set of concerns and really just invite you to respond. I'm just going to give you my best guesses or at least where I'm coming from.

I think the current situation today, as Judge Boyd mentioned, is one where left and right have largely converged on the importance of the defense function, and that strikes me as somewhat of a shift from how it has been historically, where on the conservative Republican side there's been less focus and interest in that. I wonder how stable the current situation is, and here's my concern. My concern is that maybe we recommend that there should be a move towards independence based on what seems to be the current political environment where we think, "Oh, you know, the public defenders could probably do pretty well by themselves. PDS has done quite well, and maybe that's the model." Then in five years or ten years, who knows what the next election will bring, much less what Congress will look like in ten years or fifteen or twenty years. We have a very different environment and the politics have changed. Maybe crime rates are different in ten years than they are today, and crime becomes a political topic again, and defunding public defenders becomes a big, appealing argument for certain politicians. Then we say, "Oops, that didn't work out quite as well as we'd planned."

That's my concern when I hear the arguments in favor of independence. Anything you can say that can address that or address those concerns or tell me why that's not something I should be worried about? Anything like that would be incredibly helpful for me in trying to figure out this problem.

Avis Buchanan: That may happen, but that doesn't mean that you don't do independence now while you can. You're taking advantage of a moment in time where all of the circumstances, all of the things are lighting up to make a most favorable opportunity, and you should take advantage of that. The bigger question to me is, if you don't do it now and the situation gets worse, then you're still stuck with a system that doesn't function as well as it could have. Independence is a goal in and of itself.

The other thing I would say is that I think there's a certain inertia. Congress isn't really paying much attention criminal justice function of the criminal justice system. It's the other people who are bringing it to their attention. That's always going to happen. If the political situation changes and someone comes and says that we should revert to another system, to me, I think that

would be a tremendously financially burdensome change to make. Even those who would want to revert would have to overcome a tremendous amount of inertia, momentum, and status quo, so my answer is just because that might happen in the future doesn't mean you don't do it now and have that in place for as long as possible, even if you don't control what happens five years, ten years down the road.

Julia Leighton: I really worry what a system looks like that lives on this kind of paternalism, and I think it just fundamentally misses its function, its role, its goal, and there's no reason to shy away from that. The important thing to do is to start now defending it, building it and defending it, getting all of us used to it as a way of doing business, a way of doing justice. I guess you're not supposed to ask questions of your hosts, but what's to say the judiciary is going to stay in favor? What's to say the judiciary is actually going to be the best defense? Who knows what the next election will [CROSSTALK].

Judge Goldberg: Can I answer that question since you've asked? Because we preside over trials where our job is to make sure that justice is done, as opposed to Congress who, as my colleague here said, can shift with the wind.

Avis Buchanan: Yes, and some of your judges are doing now.

Judge Goldberg: Pardon?

Avis Buchanan: What some of your judges are doing now about public defenders and their attitudes toward public defenders. The idea that a public defender is just there to make sure that all the boxes are checked off while the person is being convicted, so you may have more of those on the bench than you do now.

Judge Goldberg: Are the judges in your district like that?

Avis Buchanan: No.

Julia Leighton: What an awkward question to ask, right, and only one that we're going to be able to answer and only one where we're going to be able to go to our commission to talk about our judges by being independent. Let us be in control of the whims that come our way rather than subsuming us into an entity that isn't a good fit. It isn't part of the judiciary's job to be zealous advocates for indigent clients. It's just inconsistent with your job, and in the end I think you give us a good answer for how you can be supportive of fairness and be spokespersons for fairness, but when it comes to getting into the trenches and fighting for what we do and how we should do it and how we should be evaluated about how we do it, we're the ones that are obligated to our clients. We're the ones that are obligated under our rules of professional conduct to keep that goal center all the time.

William Leahy: Professor, your question is thoughtful and fair and appropriate. None of us knows what the political future is going to hold in the United States Congress or anywhere else for that matter. To my way of thinking, the concern you have expressed powerfully supports the recommendation I made at the end of my five, or maybe a little bit more, long presentation at the outset, and that is to urge this Committee to proceed in two bold steps. First bold step, reform within the judicial branch along the lines recommended, the recommendation I'm familiar with, Marianne Mariano. Very detailed, get rid of direct . . . Elevate the significance, the independence of defense within the judiciary, take steps to get rid of judicial oversight of attorney bills. Nobody was more relieved in Massachusetts thirty-some years ago when judges did not have to review attorney bills any longer. They were the most pleased people on the planet because it was always the last thing before a vacation day or a weekend. They'd have a stack of attorney bills they had to review. It wasn't meaningful. It wasn't thoughtful. It was subject to tremendous abuse based on personality and otherwise.

Remove those vestiges and also create a proposal for Congressional consideration. It might be ignored. It might be passed. It might be amended. We don't know what will happen, but do your job appropriately by saying this is what an independent structure would look like. We think it is worthy of . . . I don't have to tell you how to hedge your bets, but put it out there for public political consideration. One of the things, Norm Lefstein I'm sure will talk about this with you, that separates us in a very negative way, post-Gideon from the British experience, is that England passed a law and provided federal support, federal funding, for the defense function. It wasn't just a hallowed constitutional right articulated by the United States Supreme Court. It had political reality. That hasn't happened in the United States. It needs to happen.

It should be part two of your recommendation, or it should be the recommendation part of what I hope will be an action/recommendation proposal to the Judicial Conference and I hope will meet with their approval because the other point I want to make, and I think it's apparent but it doesn't get said often enough. I think we've all written about it. There has been a lot of progress made under this flawed system. The federal defender function has grown in professionalism, in quality, and yes, in many ways in independence, as is shown by the quality and the number of the very thoughtful and very courageous proposals that have been put to you by the people who now serve in the federal defender system. It's a great question, but it doesn't call for temperance. It doesn't call for abstention. It calls for action in two different ways along the lines I suggested.

Judge Boyd: I have to tell you I'm in awe of my colleagues looking at this panel and telling you what you ought to do. I'm not going to do that. I can tell you, though, I've been in the rooms where only judges are there, and the questions

have been asked, how will I fund my campaign if I can't appoint the attorneys? When just last month a presiding judge in the Criminal Division of the 36th District Court for the City of Detroit urged her colleagues, "At arraignment, your goal should always be a plea. Arraignment without counsel, your goal should always be a plea," the rooms where only judges are. I'm not saying you share those same problems, but in our system, in the balance of power between the branches, it occurs to me that if the defense were truly independent and funded at a level beneath that required by the Sixth Amendment, who would be the ultimate arbiter of that? It would be the judicial branch determining the level of funding in an underfunding lawsuit.

As it relates to this balance of power, the court will be heard. Is that pretty? No. Look at the State of Kansas. The State of Kansas is in a pitched battle because the court . . . everything is statewide funded. There's no local funding whatsoever, and there's a battle between the legislative and judicial branch of government in which everyone suffers. It is not a perfect system, but at the same time, how can you let the conflict set? How can you look out at everybody and say, "I'm the official. I wear black instead of black and white stripes. I'm behind the plate. I'm calling balls and strikes, but that one team, I choose them and I pay them. If they don't do what I want, I get a new player." How can you possibly look at the rest of the country and say that that's fair? Nobody understands the federal judiciary. I don't, but everybody understands the game and fairness. It's just patently unfair the way we currently do it.

Prof. Kerr: These are helpful responses, although I want to push back a little bit on them. To some extent, if I can summarize kind of all four of the responses together, there's some perspective of, if we turn towards independence, the defenders may lose in Congress, may have budgets cut, and it may turn into a bit of a political football, but better to be a political football and lose than to have a system that is structurally not consistent with the ideal version of the defender function. Is that what I'm hearing, or is it more a sense of confidence that the defenders can do well in Congress, or is it a sense that if the defenders don't do well, the Supreme Court will say that we'll set the budget through the Sixth Amendment, which strikes me as unlikely, but who knows what the future of the Supreme Court will be? Am I getting that correct, or am I just wrong in trying to summarize it?

Julia Leighton: I think it's both. I am both confident that defenders can communicate with Congress and the public, and I'm confident that even in bad times defenders deciding how to use what resources they have is the best way to assure that the most is made of those resources on behalf of our clients.

Avis Buchanan: And the defenders lost under sequestration. The judiciary made a choice about how that money was going to be spent, and my understanding is that all or most of the cuts came on the defender side in order to preserve this

funding for the judges.

William Leahy: I would just add, just to be very clear, this is not just fealty to a principle called independence. This is also a very strong sense that our brothers and sisters in the federal defender system are the people who should make those decisions and carry the burden, and it's a tremendous burden, of funding advocacy for the function that they perform.

Prof. Kerr: Thank you.

Judge Cardone: I have a couple of questions for PDS, either Ms. Buchanan or Ms. Leighton. You talked about, and we've heard the way you function, and we've heard from Judge Boyd. Do you have any sense of, given where you're at in the system, where this Committee, if we somehow come up with a scheme of independence, where the federal defender system should be placed? Independent agency in the Department of Justice? Any sense of where you think it would work?

Avis Buchanan: Not the Department of Justice . . .

Judge Cardone: Okay.

Avis Buchanan: definitely. Yes, as independent as possible. PDS has that status now. We're not part of the District of Columbia government, and we're not federal employees. We describe ourselves as an independent organization governed by an eleven-member board of trustees and funded by the federal government. We don't really fit anywhere. We practice in the judiciary. We fight against the executive, and we're not part of the legislature. We're not part of any of those.

Judge Cardone: Do you want to add . . .

Julia Leighton: There's a lot of small questions, and we've had to work with this. We've had to work with Congress to get clarity that our statute permits us to buy insurance because we can't make use of the Federal Torts Claims Act. We couldn't make use of the District's Torts Claims Act, but it's appropriate. We want our own lawyers. It would be perverse to allow the executive to decide how and when we would have to settle suits. The incentives could go contrary to PDS's interest. One example is that we don't settle suits. We litigate them. We don't settle. If we did, we'd have the potential of opening the door to hundreds of $600 lawsuits. We had a suit where a former client said, "I will settle for $600," and our counsel said, "I have to take the offer back. I will take the offer back, but my advice to them will be not to settle," and we didn't.

I think that it then puts to things like, as Ms. Buchanan was talking about,

having to work out who has the authority to lease for us. It takes time and it takes work with the statute, but I think you can get there. You can build your way to even answering those small questions. We receive a certain set of federal benefits, but our employees are not Title V employees. They are at-will employees. PDS's director has personnel authority. She has accountability to the board. We have a grievance procedure that ends with the board, but those are things we've developed to answer our unique situation where we are. We look to the federal government for best practices. We look to the District for best practices, but we ultimately decide on what's best for PDS and its clients within our authorizing statute. Where things are missing, we go to Congress.

Judge Cardone: Along those same lines, my second question is, when you do your budget presentation, one of the things that has been raised to us is the issue of when you prepare your budget and you present your budget, it makes a big difference how you fall. In other words, right now the judiciary is with, I think it's the IRS and GSA. That can make a big difference. One of the things that has been presented to us is that the budget should be at the same time as the DOJ budget because if the DOJ is going to have twenty billion, and you're going to give one million to federal defenders, does that make any sense? Any thoughts about budget presentation to Congress?

Avis Buchanan: We litigate against the U.S. Attorney's Office in the District of Columbia, as well as the Attorney General's Office of the District of Columbia on the juvenile side. It would be a little bit weird for us, awkward for us, because of our unique status, but I think there is some argument to be made that that works because you've got parity and the best way to know what the resources of the prosecutor are is to be reminded of them and to have them right there with you. Ultimately, it's up to the defenders to make their case for their budget. That's what we do. We spend a lot of time thinking about making sure that the funders know that these are people who are being impacted and whose freedom is at stake and how hard we work. We're going to do our best to persuade our funders to fund us at the requisite level, whether we're sitting next to a prosecutor, sitting next to the courts as we do, or are by ourselves.

Judge Cardone: Ms. Leighton, anything you want to add?

Mr. Leahy, I guess my question for you has to do with we're looking at a national program much like you had to do in Massachusetts statewide or New York and the concern about the quality of justice under the Sixth Amendment when you're talking about jurisdictional issues. My question to you is, how do you equalize that? I mean, the Sixth Amendment should be the Sixth Amendment no matter where you are in any place. Do you have any advice for us about, and how are you addressing that in New York where you have this lawsuit that addressed five counties but doesn't address the other counties? How do you get everybody on the same page? Any thoughts?

William Leahy: Reform always tends to always start with very thoughtful proposals, well considered, well vetted, well explained. You're fortunate here, I think. You're not operating on a clean slate. You have Judge Prado's work to build upon. You have the history of both the pluses and the minuses of the last twenty-four, twenty-five years to build upon, and you have a spate of specific proposals that you'll be considering. I'm thinking, to look at the ultimate reform as I would see it and whether you call it the Center for Federal Defense Services, the one that David Patton elaborates upon. One of the things that's interesting about that proposal is I believe, if I'm not mistaken, all of those board members . . . I think seventeen of them are appointed by judges at various . . . A lot of judges get one each circuit or certain regions. I forget the details, but it honors something we've been talking about throughout about what's the appropriate way for judges to be supportive while acknowledging and valuing independence. That is certainly one way.

How you advocate is . . . Most of us grew up being courtroom defenders and then suddenly . . . generally it is suddenly, you're thrust into this leadership position because nobody knows what the heck to do. There's a vacancy, and one governor's counsel in Massachusetts once sneered at me and said, "So what? They picked the best litigator and expect him or her to be an administrator?" I said, "Yeah, something like that," so you learn, but this wouldn't be so unstructured. This would be thoughtful, and here is where the last quarter century of professional development of defender leaders, and I mean to include CJA leaders. I don't mean to include just federal defender staff leaders, and CDO leaders, obviously, like Patton as well. We're ready now. We're so much more ready to hear the Prado wisdom that we were twenty-five years ago. We have a base of reality that far exceeds what we had twenty-five years ago when a lot of federal defenders just stuck their heads in the sand and said, "I just want to keep my relationship with the local judge." We all remember that. I'm not saying that has changed a hundred percent, but I think it has changed significantly.

You have an ability to do what PDS has done, what CPCS has done, what we're trying to get done, and I think we're real progress at Indigent Legal Services in New York, and that is to build a widespread political recognition, including vibrant judicial support, for the principle that poor people are going to be treated fairly in our criminal courts. It's about as fundamentally American principle as you can find, really. No wonder that, in principle again, nobody likes to fund it. Sometimes you think nobody likes to fund anything, but that's what you do. You build it. I think the structure is the . . . I really urge you not to listen to me on what the appropriate federal structure should be. Certainly listen to PDS. They have some involvement with it. Certainly listen to all the people you've heard from and have submitted proposals to you because I will miss some of the pitfalls because of a very limited experience. I know very little about federal court structure, but I think

you have some very good proposals to consider. I think you can have the confidence that those can be proposed and can be persuasive.

Judge Cardone: Okay, so am I understanding you to say that it's sort of like build it and they will come? In other words, what you're doing in New York State is you're building in those five areas that you do have some control, a structure that you think is the proper structure, and then the other fifty-two will come along with that?

William Leahy: Well, not only that, I probably didn't toot our horn enough. We have, with very limited state funding—I'm talking under ten million additional dollars in the past five years—reduced the average institutional defender caseload throughout Upstate New York by over 100 weighted cases per attorney, and that's just by repurposing state money that was formerly just sent out to the counties to do with as they wished and now is part of a cooperative process in each and every county, all fifty-seven, with the county government, the two or three or four county indigent defense providers and my office working together to see how that money can be more intelligently spent and how the slight additional amount of money can be targeted at serious ills such as no counsel at arraignment, such as wildly excessive caseloads. You can look at it either of two ways. We use that term "incremental." The caseloads 5 years ago were over 700 on average. Now they're inching down almost but not quite to 600. Now is that adequate? By no stretch. They're horribly excessive caseloads still, but progress, significant, double-digit, statistical progress.

That kind of epitomizes these claims we've been making that defender leaders know what they're doing and should be empowered to make the decisions that advance the right to counsel. When I say, "we", we collectively and specifically, we the federal defender community have earned that right.

Judge Cardone: Judge Boyd, my question for you is, one of the things we've seen and what you talked about is still a system where the judges are involved. One of the things we've seen is, how do you hold judges accountable? In other words, whether it's a district judge, a circuit judge, or appellate judge, you can put all of these standards that you want to put into place, but if a judge says, as your judge said, "I don't want to spend the money to do that," or "I philosophically don't agree with that," how do you hold the judge accountable? Any advice?

Judge Boyd: I have none. Our system will eliminate that soon. Like I said in response to Professor Kerr's question . . . I'm sorry, Judge Prado's question, within three years we will be in a situation where the judges have no more involvement than they do over the work of the prosecuting attorney's office, which is an independent elected county official in Michigan, the prosecutor. I don't think there is a way to change the . . . My judges are much more subject to review than an Article III judge, and there's still no way to get them to behave, for

lack of a politically correct term. Our view is that if you try and fix the humans involved in the system, you will continue to fail. If you fix the system so it runs in a way that the humans can't affect it, then we're going to succeed.

If you look in the Federalist Papers, in Federalist 10, when James Madison writes, we're going to do this and set up the legislative branch of government in the absence of better motives. The entire country is set up on a system that people are flawed, so what we are trying to do is set up a system that mirrors that, that says that people are flawed. We have to set up a system that eliminates them from the process. Again, within the next few years we will have no more involvement from the judges than they have over retained counsel or the prosecution function.

Judge Cardone: Okay, I guess my follow-up to that question is, I assume in making that decision there were people that were adverse to it, that felt it should stay within the judicial function. We've heard repeatedly, who knows better how to judge the performance of defense counsel? Who knows better how to make sure that there's fundamental fairness here? We've had some of that discussion here. In your debate to get to where you've gotten, did you have that debate?

Judge Boyd: Yes, of course, but they're clearly in Michigan minority views, clearly minority views, an office premised on things that were simply unacceptable, like the role of the lawyer funding political campaigns as an elected judiciary, a very real consideration. The board of the District Judges Association, which is twenty most active leaders from around the state, unanimously supported the independent function from the very beginning. We see this as a trade-off that must be made, relinquishing that control over the defense function. It's a trade-off that must be made to assure fundamental fairness, systemic fairness, to take it away from individual judges who may have an absence of better motives, to use Madison's term, and who may not have the best interest of the defendant or the system involved.

In the federal system—and I don't know the answer to this. You all do—if you all conclude that in every district everything is fine, then perhaps you ought to pursue a status quo going forward. If you see some districts, even if it's only a handful, where judges don't behave in a way that you're comfortable with, well then you've got to do something else. What's the something else? For us, we're just trying to raise the floor, and it begins with independence from the judiciary.

Judge Cardone: I guess, and I hate to take all the time, but here's what I'm struggling with. Judges, probably all judges, but I would say certainly as a federal judge, we see ourselves as fundamentally fair, so for you to tell me somehow that I can't do this function and do it fairly just really goes against my grain. I've

heard this repeatedly throughout the country that . . . it's almost like insulting my integrity to tell me I can't do this and be fair about it. Any advice?

Judge Boyd: I think it's probably one of the reasons that David Carroll trots me around the country to say it because I'm with you. I'm a judge and I'm saying that I can't be fair. I've worked very hard and my defenders, and I have, I believe, great defenders who I am proud of who win jury trials all the time and do a great job, but they serve at my pleasure. It is so fundamentally unfair, I've got to let that go. I guess I am criticizing myself in saying that it is human nature.

Think about the United States Supreme Court case that describes the conflict in the West Virginia Supreme Court that talks about the fact that it is not just the impropriety but the appearance of impropriety. In Michigan, our judicial cannons did not include the appearance of impropriety in our disqualification rules or in the cannons. It just said we had to find a disqualification on these certain rules, and when the Supreme Court said you have to look at what it looks like to everybody else in the West Virginia case it was adapted. Actually the Michigan rule now says in disqualification, "or the appearance of impropriety standard as stated by the United States Supreme Court case in" . . . you know the case and I'm blanking on it, but the point is that we have to worry about what it looks like to everybody else. Again, maybe it's my absolute, absurd, eight-year-old Little-League-playing self that wants to tell you that you can't sit behind the plate and calls balls and strikes when you employ one of the teams and decide what uniform and what equipment they get to have. Nobody outside the judiciary is going to accept that as fair.

Your Honor, I do not intend to insult you or any member of the federal judiciary. I just have to say that, looking at this as a human being from the outside, it just does not pass the smell test, and all . . . not all. There have been minority voices within my bench and our general jurisdiction bench, the circuit court, that have voiced that concern, but it is a minority. We are all ready to say that we should have no more control over the defense than we do the prosecution.

Judge Cardone: Thank you.

Avis Buchanan: Can I add just a little bit to that? I'm sorry. Are you running out time?

Judge Cardone: Yes, we have time. We'll make time.

Avis Buchanan: One, it's not whether or not the individual judge can be fair. Some of them can be fair and have been fair and are fair and recognize the importance of the defense function. It's whether that the system is fair, just as Judge Boyd said. I was thinking about this last night, and I thought, "I think a judge would think it would be odd for him or her to direct a public defender to use a certain expert. You should use this expert to make your case," but it's just the

flip side of the coin of denying a request for reimbursement for an expert and after the fact. It's insinuating himself or herself in the defense function, in the process, in the litigation of the case. I think those are equal sides of the same phenomenon, the same dynamic. You don't want to have a judge telling an attorney what expert to use. Why would you want a judge saying, "No, don't use this one, or I'm not going to pay for it"?

Judge Cardone: All right, Judge Walton.

Judge Walton: I have the greatest respect for what the Public Defender Service does in the District of Columbia, and I wish that could be replicated throughout the country. My concern, and I want to get back to this whole issue of independence because ideally, yes, I agree that aspirational that's what we should have. My concern is political, and that is I think maybe it's reflective of what you said about the history of PDS funding. When you were subject to local D.C. government, you suffered as far as getting what you needed. Now the United States Congress appropriates your funding, and I think they feel far removed from what happens in the District of Columbia. Now they have put their hands too much in local politics and local government in other areas, but you'd don't get any push back, as far as I know, from the local government as far as the funding that you seek to receive. I don't think there's anybody from the city who goes to Congress and says, "No, PDS should not receive what they're requesting," and I don't think you get that push back from the court.

Theoretically, however, I don't know if that would be the case at the national level because you are talking about a lot of money, you are talking about political perspectives that vary significantly around the country as compared to the political environment in the District of Columbia, and I could see push back from individual congresspeople in certain districts who would feel they don't have the same perspective about the importance of the role of the defense function in our criminal justice system. I guess the concern I have is whether you would fare as well, which is not what the federal defender should get under an independent system, and I look at the Legal Services Corporation and what Congress did to that as a result of the aversion of providing legal services for poor people. I'm not sure that that same perspective would not come to bear as it relates to the defense services in the criminal justice system despite the fact that there's the Sixth Amendment.

How do you get me to get where you are, which I want to get where you are because I think the defense function is very important. It's critical to our system of justice, and while it's not perfect, it's a lot better than what you see at the state level in many states. My fear is that if you get that total independence, despite what you've said today, that you might not fare as well as you're faring now, not you but the defense function within the federal system.

Julia Leighton: Nobody's got a crystal ball, and I certainly don't purport to have one. Referring back to the time where we were less resourced under the District of Columbia, when we were under the District of Columbia government, understand everything was . . . the District was in serious financial trouble and had difficulties managing. I don't think there's any indication, and I've not heard of any, though I wasn't in management then. I was just tunneled down trying cases, that we were being picked on in any way, shape, or form. It was simply what was happening across the District, which goes back to our earlier point, which is we made the decisions about how to best survive that and still serve our clients. I think the other piece of this that you're asking about . . . again, who knows where it goes, but this is the opportunity for the role for the judiciary. It is to be the umpire even with Congress. If the prosecution function is being wealth-resourced and is having access to resources that you routinely see lawyers before you not having, it's a voice you should be raising to Congress.

I suppose the harder question is, is it just because you no longer have control over the defense function that you wouldn't come forward and defend the defense function to Congress? I think you would. I hear judges that care about that and would. I think you would probably voice the same if we were to ever enter a world where suddenly there were no resources spent on prosecutions. I think that my comfort comes of what the crystal ball holds in the future is both that you will do as Judge Boyd has suggested but still care about the system and still support it and still voice that support when needed if it comes under attack.

Judge Walton: The other question I had was, I understand how the structure would look if you're talking about parity between the prosecution function and the defense function as it relates to federal defenders. How does that look, however, in the context of panel lawyers? How do you create parity? Are you talking about paying them a salary commensurate with what prosecutors make, or are you talking about some other system because I don't know how you can draw an analogy between parity when you're talking about private lawyers providing defense services as compared to an entity like the Justice Department.

Julia Leighton: I think it takes a couple of forms, and I think we laid this out a little more in our written submission. What we're talking about is actually independence and quality representation and how do you create that. I think it's a little different with an institution than it is with a panel system because the institution can provide a lot of non-monetary supports and leverage collective knowledge. I think for the panel system you're adjusting that a little. It does start with pay parity. It can't be that ultimately a full-time federal CJA lawyer makes less on a ongoing basis than their counterpart. At some point you will drive quality out of the system, but you also need to think about ways to

incentivize pay so you don't create perverse incentives, short-changing cases, pleaing cases just because the financial system works that way, and you need to provide training and support.

I imagine you're essentially working with, and I saw this in somebody's testimony. I thought it was an important comment that you really can't have a institutional conflicts counsel in a lot of the jurisdictions because of the very large multi-defendant cases. You do need a panel system, and you need a panel system that's capable, has the quality and available resources to try those kinds of cases, as well as an institutional defender, so I think you are looking at a professional administrative system that can provide some of the key elements that institutional defenders have that make then successful. That's access to things like considering things . . . training is a big one, offering training but paying for it. We pay all of our lawyers to train. They receive their salaries while they're training. I think the huge absence here is we don't pay panel attorneys for seeking training that's approved, pre-approved training that would advance them in their abilities to perform their functions, that go beyond that that's required of a license. Nobody just walks out of law school, does eight hours of training, and becomes a good criminal defense lawyer. Sadly, even in the District, that's all that's required after you get on the panel, eight hours of training.

We have panel attorneys upon panel attorneys that come to our trainings, want more trainings, and still do it without being paid. I think if you paid them for those trainings and targeted the trainings for what they need, you're going to build that capacity.

I think you also need to consider systems that allow for co-counseling, mentorship, but you can't depend on it coming from people's . . . just their goodwill. At some point you have to build into the system the resources to reward people for doing these sorts of things and doing them well.

Judge Goldberg: Just a real quick one because I know we're pressed for time.

Judge Cardone: That's all right.

Judge Goldberg: Ms. Buchanan, if I understand your system, you directly go to Congress, you get your budget. Congratulations, by the way, on all the success you've had.

Avis Buchanan: Thank you.

Judge Goldberg: Then the oversight of the money, the watchdog for lack of a better word, that's your board?

Avis Buchanan: Well Congress is still overseeing the money. We have to report on how we spend it with each subsequent budget submission, and they do ask follow-up

questions and they can require . . .

Judge Goldberg: Your board does a little of that as well?

Avis Buchanan: Our board does get information about our budget. It does not approve our budget request. It is not asked to do that, and I've not asked it to do that, but they do stay informed.

Judge Goldberg: My question, what I wanted to get to was, if we went national on this, so to speak, and that's been the discussion, do you have specific recommendations for us as to, A, should there be a watchdog in place, an auditor so to speak, to watch the resources that would be allocated, and who would that be? Do you have a specific recommendation?

Avis Buchanan: Our statute does require an annual audit, an outside audit, so our funding and spending is audited consistent with the federal auditing standards. If you have an entity, a top-level entity, where all of that information is rolled up and that budget compilation is rolled up to, that entity could be the audited entity and overseen by a board.

Judge Goldberg: Who would do the auditing?

Avis Buchanan: It could be an outside auditor. We contract for an outside private auditor every year who comes in and looks at our books.

William Leahy: Another model, if I could, Judge Goldberg, is in Massachusetts there is an internal audit unit within the agency, and then the state auditor performs, probably every three or four years, a thorough, independent, outside government audit.

Judge Goldberg: That person then sends their results to who, the legislature?

William Leahy: That goes to the chief counsel, and on occasion that can lead to a disciplinary action against an attorney, let's say, for fraudulent billing.

Judge Goldberg: A chief counsel, I'm sorry, of . . .

William Leahy: Of the Committee for Public Counsel Services, the independent agency.

Judge Goldberg: Okay.

Avis Buchanan: There's also . . .

William Leahy: It can go to the board as well.

Avis Buchanan: There's also the General Accountability Office.

William Leahy: Thank you.

Judge Cardone: Anybody else? Reuben?

Judge Gerard: Just briefly, I want to thank all of you for your testimony. It's been illuminating this morning. Judge Boyd, good luck to you at the Michigan Supreme Court. I must say, I'm a little surprised by your testimony. Minimum standards have not been adopted by many, if any, supreme courts, and so I wish you luck in your testimony before the Michigan Supreme Court. Complete independence in three years with uniform implementation in eighty-three different jurisdictions, Michigan would certainly be a beacon on Hill if that is adopted.

Judge Boyd: We only have four initial standards. It's going to take us some time to get there, but it is certainly the path we're walking, yes, sir. Thank you very much. You're correct.

Judge Gerard: Good luck.

Judge Cardone: Reuben? Mr. Cahn

Reuben Cahn: Just a couple questions. First for Ms. Buchanan. As I recall, you're the individual who does the advocacy on the Hill for the budget primarily.

Avis Buchanan: That's correct, yes.

Reuben Cahn: Do you have anyone assisting you?

Avis Buchanan: Yes, Ms. Leighton.

Reuben Cahn: The question I have is I think we, as lawyers, tend to think of advocacy in terms of appellate arguments. That you're going to show up once, make your best argument, and then walk away. That's not the way Congress really works, so how much time and effort are you expending over the course of a year in maintaining relationship with staff, with members, and is that feasible in a billion-dollar program, or would there need to be a dedicated office that assumes that role?

Avis Buchanan: Well, there's how we've done it, and there's how it could be done. I said Ms. Leighton jokingly, but there's a staff. We have a budget and finance staff that prepares the budget materials. The deputy director is involved. Ms. Leighton is involved. I'm involved, but I'm the spokesperson primarily for dealing with Congress. We meet with Congressional staff, and when Congress decides to hold a budget hearing, I'm the person who testifies in support of our budget request. Beyond that, we don't have much interaction with

Congress. They tend to leave us alone, and we have it found it so far in our interest to just stay in our corner and keep doing the work we do and just report on our success and the efficient way we've used the funding that we've been given with each successive budget request period.

What we could do, however, and we've thought about doing, is doing more targeted advocacy during the year and keeping those lines of communication open, but because it has worked for us so far the way we've done it, we haven't pushed for that to happen. We don't spend much time outside of the budget cycle dealing with Congress unless they take the initiative to approach us.

Julia Leighton: Some of our other agencies within the District that sort of fit into the same circumstances we're under have dedicated staff. I certainly think it makes sense to have dedicated staff. Again, I think this is an example of where PDS has picked where it focuses its resources. Frankly, we focus our legislative resources on the legislature that affects our clients, not on the legislature that affects us. If we had more, we'd do both, but we started and that's where our current focus is, is focusing on issues that will affect our clients. I think there's no question you need a professional staff. I think that's true of every entity. Yourselves included, I suspect, have people who pay attention to what's happening on the Hill, track legislation, make relationships with the staff, and think through the nitty-gritty work of writing legislation and when it's not quite where you want it, making the technical amendments afterwards.

Avis Buchanan: We have gone to Congress when we've needed amendments to our authorizing statute or had some other problem, and they've known us. We've developed good relationships with the staffing, and we've had success, but we do talk about taking where we are and increasing our level of sophistication in that area.

Reuben Cahn: Mr. Leahy, you've had to deal with both the New York and the Massachusetts legislatures. Do you have any wisdom to offer us on that question? You want to just put . . .

William Leahy: Well, your point is a very good one about the difference between courtroom advocacy and persuading reluctant funders to provide you the resources that you need to do that courtroom advocacy. I remember one time while I was grabbing a cup of coffee one very stressful morning. It was the middle of the summer, and the legislature was not in session. Someone came up to me, I think it was one of our private lawyers, and said, "Boy, it must feel really great that there's no budget pressure going on." I must have not had my coffee yet because I turned to her and said, "Budget is 24/7, 365," and it is because there's always some inquiry about something you're doing or what you're spending or what you're not spending or what the needs are, so this is

a challenge. This is one of the reasons why I make such a point about the development over the past twenty-five years. We are light years ahead of where we were twenty-five years ago in terms of the capability of our defender leaders to do this.

The other thing is you have to do this, and PDS, Avis and Julia, have spoken to this. You have to do it with limited staff. You cannot have a bureaucratic-ridden staff. You can't have a lot of resources devoted to having a super bunch of razor-sharp budgeteers. You have to have the resources you need, but they have to be lean and they have to advocate for the resources that go directly to client service.

What I'm saying, long story short, I hope is, the defender leaders have developed that capacity. They've advocated with the judiciary so far. Hopefully you'll give them a more independent voice within the judiciary short term and support those of them who are advocating for this for a more independent entity going forward, which of course would require Congressional consideration.

Julia Leighton: If I could add just one thing. One of the things that the judiciary can do to support the new independent national entity that's going to be advocating for its own budget and for how it allocates its own resources is access to data. If there's something we've experienced on the Hill, it's that showing your performance, showing your outcomes, talking about what's happening overall in the system and where you fit into it is very important and that requires access to data. Right now on some level the court has it all, and it's also the data that's needed to continually improve and build and look for trends in how we can get better and how we can be stronger. That would be a huge area of support in that effort is the access to data.

Judge Boyd: You know, in Michigan . . . you all watch the national news. Michigan's Legislature is dedicated to structural deficits in funding schools and education across the board, funding roads, funding cities, funding public infrastructure like water systems. Michigan's governor is going to go down in history, and all of you know his name because of the awful tragedy happening in Flint, but at the same time, the big bow we've turned around is with a Republican governor, with a Republican Senate, with a Republican House, with Republicans appointed by the Republican governor or nominated by the Republican Party in charge of the Michigan State Supreme Court, so to the extent it's been identified by one of the panelists earlier that there's predilections based on partisanship, I would say to you that's not our experience. It is a moment in time perhaps that we can set up a system in place that will survive the turbulent partisanship that might be ahead, but at this point Michigan on this issue is turning the corner in the hands of fiscal conservatives and structural deficits across the board.

Reuben Cahn: Nothing else.

Judge Cardone: On behalf of the entire Committee, thank you very much. Thank you for your thoughtful comments. Thank you for your time. I want to tell you that should . . . as I told you when we started, stimulating conversation makes a big difference. I know you've all given us written submissions, but if you would like to add anything, please feel free to contact us and give us anything more you would like because we really want to hear everything you have to say. Thank you.

We're going to start a little bit late. We're going to take a ten-minute break, so we'll start at about 11:40. Thank you.