

## **Ad Hoc Committee to Review the Criminal Justice Act**

Public Hearing #7—Minneapolis, Minnesota

May 16-17, 2016

### **Transcript: Panel 6—Views from the Judiciary**

Judge Cardone: Ready? We are on our last session of the afternoon, “Views from the Judiciary,” and we are starting a little bit late but we’re happy to be here. The only thing I do want to say is we have, we can go into our break, I think everybody would be fine with that since we’ve just had a long break. We have a video, or live-stream that we’re going to do at 4:30 so I’m going to try to break us off at around 4:25 to make sure that we can get that done.

With that being said, our panel participants are Judge Paul Borman, from the Eastern District of Michigan; and Chief Judge John Tunheim from the District of Minnesota. Welcome, thank you gentlemen for being here. What I would ask you to do is make a very brief opening statement since we are running a little bit late and so we can get right into the questions. We’ll start with you Judge Tunheim.

Chief Judge Tunheim: All right, thank you Judge and I appreciate starting late and accommodating me for my slow arrival here at the courthouse.

I’ll be very brief, first of all I appreciate all the work the Committee is doing. This is an important subject and we’re all very interested in the recommendations that you make. I wanted to mention just a couple of things in my statement. We have, I think, a very good system here in Minnesota, we’re very appreciative of the hard work that our federal defender has done and her predecessor did for many, many years before that. We have a strong panel and we work very hard at making sure that the panel stays strong. It’s changed frequently and we rely heavily on the excellent criminal defense bar in our community to provide services.

One of the things that I wanted to mention today is the difficulties we have had with the review of the vouchers at the circuit level. I don’t know if this is the practice in other circuits in the country but it’s had a significant effect on us here in Minnesota. We’ve had, I think, over a relatively short period of time a fairly high percentage of the vouchers submitted by our court have been cut at the circuit level. I tried to explain to the Chief Judge that we review them very carefully here. That our Federal Defenders Office reviews them very carefully and catches any mistake. The judges review them carefully to make sure that it’s not an unwarranted amount of money for what the attorney has done in the case.

The review of the circuit, frankly, at least to the extent that I’m aware, is simply a review of our vouchers versus vouchers from other districts within the circuit. It deals very little with the merits of the work done. We can and

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often do write memoranda additional memoranda trying to justify the costs that our attorneys have put in for reimbursement. It's hard to write a memo for every one of them, there's quite a few that go in, and I think standards are perhaps different in our district in terms of the amount of time a lawyer has put into a case. I mentioned one in my written materials, the fact that our detention center is a significant distance away from the courthouse and it really is about, at least, on a good day it's a forty-five minute drive there, on busy days, or days when it's snowing or bad weather, it's a lot longer drive and there's additional time put in doing that.

It's a significant amount of dollars that has been cut and if this is the practice elsewhere then I guess we have to live with it, but it doesn't seem to be warranted given the fact that we pay close attention to the vouchers, we review them carefully, we sign off on them and our review, based on our knowledge of the cases, is, I think, well done. Whereas at the circuit it's just a look at the amount of money and the assumption that, "Well, that amount of money is too much for that particular kind of case."

Every case has it's own unique issues, and we have, the lawyers in our cases are already taking a significant cut to the hourly rate that the CJA Act pays. That's fine, we have no disagreement with the amount; it's another big cut from an already big cut in contribution to the districts. I don't see the necessity for continuing with circuit court review of vouchers.

I also wanted to mention, briefly, our mentoring program that we've devised here under Katherian's direction, where we are training younger lawyers to handle criminal cases in our courts. It's a mentoring program and a chance for lawyers, younger lawyers, who with to get involved in criminal defense work to have the opportunity to do so. I think it's working really really well. We pay for it out of the non-appropriated account, so it's not CJA finds going to it. We have trained, I think, the number is twenty some, twenty-six or so that have been trained so far to be able to handle cases. I thinks that's a great idea and it's been administered well in our district and we're very proud of that. Thank you.

Judge Cardone: Thank you. Judge Borman.

Judge Borman: Yes. In the Sixth Circuit we do not have problems with the vouchers, at either the court of appeals level, or at the district court level. In fact, I know Miriam Seifer, the Chief Federal Defender there, in her presentation to the Committee by letter, indicated that she did not want the voucher review taken away from district judges or court of appeals judges.

We have a court attorney at the circuit court level, Bob Rance, the case budgeting expert and he's fantastic. Any major case that any district court judge gets if the person needs interim payments, if it's going to be a long

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case, or mega cases you called Mr. Rance and he sets up a budget and the district judges, if they have questions on vouchers they can call Bob Rance. To bring in someone who knows nothing about the case, that has not been involved in the case at the district court level, to deal with the voucher at the district court level seems to me like you're creating something, at least in my circuit, that would impede the ability to get things processed properly and I don't think that person would have a feel for the work that the lawyer did in the case.

I do echo the concern even more seriously in our district with regard to vouchers increasing. Our detention facilities are in, many cases, two hours away from the Detroit area. Which means it's a whole day, which means it's a lot of hours billing for the judges. I think that one thing the Committee should recommend is training new judges at the FJC program for new judges. Training existing judges, like we have the judge program that was in Charleston for district judges and there's one in San Diego later this summer, to tell them that they should be expecting more large vouchers and to understand why. Because there's more mega cases, discovery is increasing in a lot of these cases with regard to audio discovery and the number of documents and terabytes. For the CJA attorney to do their job it requires a lot more time.

Particularly with the defendants being those who are incarcerated, pre-trial, being long distances from the courthouse to effectively represent your client, you have to go and see them. You can't do it by a phone call. You don't have the protection of lawyer/client privilege. Also, the difficulties of their families going to see them out there. Hopefully we can work with the marshals to see. There just aren't beds available. The two main jails in the city in Detroit have been shut down because they weren't adequate for housing prisoners. Even, I mean not even, but state prisoners or federal prisoners.

On the issue of appointing attorneys, I was the federal defender for fifteen years and now I've been a judge for twenty-two. We have panel, a blue ribbon panel of experienced federal practitioners who get applications from attorneys and they screen the applications. These blue ribbon lawyers have been in the court a long time, they know who knows what and who doesn't know what. We have an excellent CJA panel. I think judges or magistrate judges should not be involved in picking CJA attorneys. I don't think a judge should control who comes into his or her courtroom to practice law. If somebody has done something wrong they can deal with it in other ways, through contempt or other matters if it gets horrible. The idea of someone thinking that, "Well, if I act too aggressively then the judge may knock me off the panel. Or cut my voucher." I don't think is the way to go.

I think that the best way to appoint a CJA panel to make sure it's good

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lawyers is to have a blue ribbon panel of lawyers, screen them, and also have an administrator within the Federal Defender Office make the appointments and not have magistrate judges or district judges make the appointments and control who gets in or not gets in their courtroom to be a CJA criminal defense attorney.

The big issue is independence or not independence, I see my good friend Judge Prado. I was a defender twenty-two years ago when the first Prado was there and I see they also pick on the Southern District.

Judge Prado: I'm the same one.

Judge Borman: I know. They pick on the Southern District of Texas because that's where the people know where the rubber hits the road. They have Judge Cardone now and Judge Prado. It's the Western District, I apologize, right? San Antonio is the Western District. They picked two people to go over and share this Committee and it's a really important job and I know, by reading, I've read a lot of the testimony at prior hearings, I know what is being discussed, I know the angst that the defender programs and CJA lawyers are feeling from what's happened to the Defender Services Committee. I think it's a tragedy, there was sequestration in 2013, but the impact is not over, because there still has stripped away from the Defender Services Committee, the job that it was set up to do and that it had done for all the years before 2013.

They've stripped away Judicial resources has part of it now, the AO has technology, this is absurd. This is like, part of my district includes Flint, Michigan, they have come and appointed emergency managers to do what the Defender Services Committee should be doing. Like in Flint, they appointed an emergency manager and destroyed the water system. Here's having individuals brought in, who are not within the Defender Services Committee, tells the Defender Services Committee, "We don't think much of you." Tells the federal defender programs, "We don't think much of you." And the CJA Lawyers as well.

We have a good Defender Services Committee, and I think the AO should restore them to the position like other committees and let them effectively run the program. I know Judge Blake will be chair until October and Judge Lohier will be coming on as the new chair. These are fine Judicial officers, and the Judicial Conference should let the Defender Services Committee be the Defender Services Committee and not pluck away things like resources, technology. It's very destructive.

It's not like the defenders and CJA lawyers are having PTSD, post-traumatic stress, after 2013 sequestration, when you can say, "Get over it." But you can't, because it's still being marginalized, the Defender Services Committee, and I believe as well, the federal defender programs, and the CJA defense

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attorneys.

Judge Cardone: Thank you Judge Borman. Let's start down at the end with Dr. Rucker, go ahead.

Dr. Rucker: Do you want to go Judge Prado.

Judge Cardone: No, go ahead Dr. Rucker.

Dr. Rucker: Thank you Judge Cardone, sorry Judge Prado. Thank you for appearing before us. We appreciate this very much and I look forward to your responses. Let me start with some issues that we've heard about in our hearings across the country and repeated again both times today, and yesterday I should say as well. This has to do with the composition of the panel and one of the things we've heard repeatedly is that the panel is an aging panel and I wanted to get your thoughts about this and see what you think about that, both in terms of the panel aging and also the diversity of the panel. We've heard that the panel basically is composed of older white males. I'd like your thoughts about that and what do you think we might do to diversify the panel, get more young people on the panel as well. Judge Tunheim.

Judge Borman: As I put in my statement to the Committee, we have achieved diversity in our panel. We have a situation where if someone applies and they may not be ready for it, we have, they can mentor with someone who's on the panel and sit in some cases and then come back and apply. We have, I would say a good balance of diversity in the Detroit panel.

Chief Judge Tunheim: I think it's an excellent issue to look at nationally. I think from my standpoint our panel, we'll there are certainly quite a number of members of the panel that fit that category of older experienced white male criminal defense lawyers, we have some good diversity that we're trying to build on each year. I think that our second chair program with the twenty-six new people who have been trained and have had the opportunity to second chair a case, not everyone has gone through a trial, some are obviously resolved in pleas. I think that has helped because there's great diversity among that group. They have to apply and be selected, and I think that, I think we're trying to bring in younger people, people that don't have the necessary experience for us to put them on the panel, because we don't see that background. Once they get the training and the experience the plan is to have these people on the panel and hopefully enable them to represent defendants before us.

I think we're trying to do that through this new second chair program, that's, I think, we've been running it for three years now, Katherian, is that right. Two or three.

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Katherian Roe: It's like a two year program but it goes back a ways. It's probably ten years old by now. Nine years old I should say.

Chief Judge Tunheim: I see, I was mistaken. I thought that we started it more recently. It's a program that I think has done quite well and that's one of the ways that we're trying to address the issue, with our own funds.

Dr. Rucker: Okay, thank you. Let me turn to some financial issues. Again, we've heard repeatedly around the country that the panel attorneys would like to see higher hourly rates and sometimes they're talking about considerably higher, sometimes \$175 or even \$200 an hour. That has implications then for the statutory maximum for attorney fees. We've also heard concerns about what they consider to be a very low statutory maximum for expert rates. If we did raise the hourly rate for attorneys that would certainly have an impact potentially on how quickly they could get to the statutory maximum.

Do you have thoughts about that the hourly rate might be either in your districts or nationally as well and also what do you think about raising the statutory maximum for what's an extended or complex case and for the service provider maximums.

Chief Judge Tunheim: I think, certainly, raising the statutory maximum is something that should be addressed and looked at. Everyone's taking a cut to do the work. We expect them to be as professional and do their normally excellent work in every single case and they're doing it for less than hourly rates. I don't know that there's anyone who is receiving their typical hourly rate. Any increase, I think, would help because we do lose people, lose attorneys from the program. Sometimes it's because of the voucher cutting, sometimes it's because of the significant cut in their hourly rate. Often times they don't tell us why, they just say, "I'd prefer not to be on the panel." And you can suspect why. I think that a reasonable increase in the rate and an increase in the statutory maximum would help us with those problems.

Judge Borman: I agree, I think the statutory maximum has to be raised. I mean it's ridiculously low for experts and as well for attorneys in complex cases. That's when the district judge has to spend more time if it's not a statutory maximum then they can sign off and it's done. This way it goes up to the circuit, creates more bureaucracy for the circuit, you're a circuit executive and I think you have other things that you'd rather spend your time on than working on the vouchers and trying to find a reasonable amount that the person should get. Or whether it even belongs in front of you since you haven't dealt with a case and the district judge has.

I think that, I hope that the Committee will significantly raise the expert witness investigator type fees and also raise to some amount the hourly rate that the CJA lawyers get. I think it all goes to the mentality and I think a lot

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of the testimony was district judges think that the money that they're giving to CJA lawyers is somehow going to cut the amount of money that district judges are going to be able to have to do things within the Judiciary. It's not so, I think, that that's a significant point to deal with and would avoid a lot of the conflict that Judge Tunheim was talking about, if the rates were higher than wouldn't have to go to the circuit court to get approval every time you want to hire an expert for more than the minor amount that's allowed right now.

Chief Judge Tunheim: I think that the budgeting, the individuals who do the budgeting for the large cases, we share one with the Seventh Circuit, the Eighth Circuit and the Seventh Circuit share. I think that's a great idea and that has been very helpful. But we still have the problem with the voucher cuts on most of our vouchers that go up to the circuit, the higher cost items.

Dr. Rucker: Let me follow up on that, if I may. If we raised the statutory maximum high enough so that it wasn't \$10,000 but a higher number so that they wouldn't have to necessarily as many go up to the circuit. Could I ask you to put numbers on that, about what you think you might be a reasonable number?

Chief Judge Tunheim: That's a good question. I'm not sure but I think raising up to at least \$15,000 would certainly help us a lot because we have a lot of vouchers that fall within the \$10,000 and \$15,000 range that have to go up there and end up getting cut.

Judge Borman: I would second that. We're getting more and more mega cases, there's gang cases, I know other big cities are getting gang cases where they're adding RICO counts and it goes to trial and there's multiple defendants. The vouchers are getting higher, even on regular cases, when you're plugging in the discovery and the driving distances, the use of experts. I think both have to be raised significantly and it will alleviate a lot of the problems that Judge Tunheim spoke about with regard to circuits getting involved. They don't need to be involved and if it goes higher than it goes up there.

I think case budgeting attorneys are a great asset to the Judiciary at the circuit level. I don't know if the Ninth, I think the Ninth Circuit, only the Fifth Circuit doesn't have one. Okay. Yeah.

Chief Judge Tunheim: I think maybe there's an alternative to being able to have certain cases designated as complex cases and the maximum would be much higher there because that's where we're getting. I had one case that involved I think a close to ten week trial with three defendants and obviously the bills were very significant there. I wrote plenty of memoranda to try to make sure that the parties, the lawyers weren't cut on that one.

Dr. Rucker: Thank you. Thank you, Judge Cardone.

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Judge Cardone: All right. Now Judge Prado.

Judge Prado: Thank you, madam chair. We heard testimony at several locations from various people and the consensus from the defender seems to be that there needs to be more independence from the courts. The panel attorneys are complaining about vouchers. Is it some of our colleagues that are, it seems like neither of your districts has problems but it's those circuit judges or it's judges in other areas. Is it the judges or is it the system that we have that is the problem? In hearing these complaints and suggestions of independence, the Judiciary is slow to accept change. We all know that. If this Committee were to recommend independence as has been proposed by, I guess, a majority of the defenders, more independence, do you have an idea of how it would be accepted, would it be receptive, would our colleagues be receptive to such a change of taking the responsibility of court appointed lawyers and public defenders outside of the Judiciary. Or to what extent should it be taken out of the Judiciary or can we fix it within the Judiciary.

It's always been there since day one, part of the Judiciary. We as judges think we can be fair, we have a responsibility to see to it that the Sixth Amendment is complied with. Should it stay with us, should it not stay with us and if this Committee were to suggest that it not be with us, how receptive do you think our colleagues would be to that recommendation?

Judge Borman: I think it would be terrible to go out of the Judiciary. I did back in '92, I do now. The Judiciary, when it goes to Congress, it is a separate branch of government. An independent defender system would go to Congress, not be part of one of the three branches, and would say, "We need one billion dollars to defend people that the professor who testified earlier said, 'People don't like, generally, criminal defendants.' Give us one billion dollars." I think that Congress would not respond positively. I think Congress respects the Judiciary, I think the Judiciary respects defenders and I think the Judiciary respects CJA lawyers. They know how important they are within the criminal justice system.

With the Defender Services Committee over the last thirty-seven years that I've been, first fifteen years as a chief defender and then twenty-two years as a judge, have been advocates for the Sixth Amendment. For the strength of the defender programs and their independence. When they go to Congress, Congress listens. It's an equal branch.

When a program, like legal services if we're going to be like that or the Defender Services would go to Congress, I think the reception would not be good. If they ever did something I think they'd put so many restrictions and controls over it that it would be unable to function effectively as it is now. I think that the Judiciary, all of you and all the judges, know the importance of

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the defender programs and the CJA lawyers with indigent defense.

The question is, we have a committee within our Judicial Conference that represents that program and has represented since it began. A lot of the judges that came to that committee were not believers but when they met with the defender personnel and they met with the defenders and they experience every day in their courtrooms they become believers that to effectively carry out the Sixth Amendment the Judiciary has to be behind it. When they go to Congress, they're judges, they get the Supreme Court Justices coming to Congress.

When judge advocates come to Congress things will be good for the defender programs. When an individual head of some program that's split off from any of the three branches comes to Congress, I think the results would be catastrophic. I'm a strong believer in continuing with the Judiciary but in putting back the Defender Services Committee to its rightful position and to educating judges. Programs about the importance of the Sixth Amendment through the Defender Services Committee, the defenders and CJA panel lawyers.

Chief Judge  
Tunheim:

We're fortunate here in the District of Minnesota, we've had, I think, a great deal of trust between the judges and our federal defender and our Defenders Office through the years. We share, I think, a really important goal of making sure that the program is as strong as it possibly can be and I think that shows in the results that the office and the panel attorneys get in front of our judges. I think some of our judges probably would not mind not having the overall responsibility but frankly, our goal is to hire strong people and then make sure they do their jobs well. The panel itself, we obviously approved that and if there's someone we think is not doing a job that they should that message gets to the defender and the whole process has worked well.

I would be concerned if it were completely independent about the funding, as Judge Borman is concerned about, I think that the Judiciary, in many respects, can protect the program nationally. At the same time, I can see the arguments and the arguments relative to independence, I just think the way the system is currently working works very well for us in the District of Minnesota.

Judge Prado:

What can we do to remedy the problems that we do have; it seems, I guess, the major problem is voucher cutting. Is it a matter of educating our colleagues about the importance of giving lawyers the money that they're due? Is it a matter of some of our colleagues not getting the message? Some of them think they have a responsibility to balance the budget, I guess, and the way to do it is to cut vouchers? I don't know. What do we do to solve this problem that we have of our colleagues that are arbitrarily cutting vouchers without explanation? Or punishing lawyers and somehow we also hear that

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some lawyers are taken off the panel if they look like they're taking up too much of the courts time, or, "This is a guilty plea, you shouldn't get this much money." What do we do, how do we fix that problem?

Judge Borman: I think and I hope that what the Committee would come out with is a recommendation to restore the Defender Services Committee to its rightful position within the Judicial Conference and to get rid of all the emergency managers that it's throwing in top of that and taking away the role the Defender Services Committee.

With regard to vouchers, I think education is important. I think, like at this program in July where half the district judges are going to be there, they have to explain to them why the vouchers are going up and what is going on in the system with regard to the number of hours requires, discovery and things like that. To also explain to them that, "Well we're not saying that whatever someone throws in on a voucher is automatically approved, but the district judge goes over it. When you go over it, recognize that this is part of the system, it's not taking out the Judiciary's money, it's a separate line." And that they should recognize that the Sixth Amendment requires additional monies. Also to train them and say, "Look, under the program, that red book with all the Judiciary policies in it, where it says that the judge should talk with the lawyer, but it doesn't mandate it before they cut vouchers." It's honored in the breach, that's why I think that it should be part of a training program that the FJC puts on every year so that judges understand that it's not just an individual judge doing something about a judge harming the effective assistance of counsel.

I think that's important and I commend Judge Prado for raising it. I just want to take a minute to commend this Committee. I know, based on every I've read, and it took me hours and hours to read it, that you have devoted almost 100 or even more hours to have these Committee hold hearings all over the country. I think that shows how seriously the Chief Justice is in terms of setting up this Committee and how serious the Committee is in trying to right a situation that need righting and that they have gone to extreme lengths to have all of you be willing to do this. I really commend the Committee for its work.

Chief Judge Tunheim: I think that at the district court level education is the answer for judges who think that they are balancing the federal budget on the CJA program. I think that it's sort of an interesting issue because we're told from the circuit that if we cut a voucher then that demonstrates to the circuit that we are being vigilant about the costs involved in a case and there would be less likelihood that the voucher would be cut at the circuit. There's this perverse incentive here to go through and try to find something to cut in the hopes that it wouldn't be cut further when it goes up to the circuit review.

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Frankly, the kind of circuit review that we get is not really, doesn't really help the system. It's a comparison between how much it takes for an average drug case in Minnesota versus how much it takes for an average drug case in one of the other districts in the circuit.

Everyone has different standards of what they expect. As judges in this District in Minnesota, we expect our panel attorneys and our assistant federal defenders to do a really good job in every single case. To diligently represent the defendant, to bring motions, to ask issues to be tested and not to just roll over. I think the costs are higher as a result. It's very very frustrating to our lawyers, I know, and it's frustrating to judges in our district as well to see the vouchers that are over the limit get cut at such high levels.

I don't really see a need for that kind of review. We have a thorough review in the Federal Defenders Office and we have a thorough review from the district court judge. Why is it necessary for another review, which is superficial at best, at the court of appeals. I don't understand it.

Judge Prado: Judge Borman, one more question, if I recall that you were the liaison representative for the Defenders at the Defender Services Committee but you were there without a vote. Do you think that it would continue with the Defenders Services Committee that defenders would have a voice in the vote . . .

Judge Borman: Hit the mic.

Judge Prado: Do you think that defenders should have representation and a vote on the Defenders Services committee?

Judge Borman: I think their presence is important whether they have a vote or not. I don't think it's critical. The same, one of the things that increasing vouchers is sentencing hearings. It used to be you come to a sentencing hearing, you walk in and there would be allocution and there would be a sentence. Now, with the Guidelines that have to figured exactly, because every circuit and the Supreme Court says, "First thing you do is figure out the correct Guidelines." And that's like a whole separate series of rules and knowledge that people and judges have to be trained on and that attorneys have to be advocating on behalf of the client. That also takes more time, so that's going to be reflected in terms of the memos and hearing and things like that.

Getting back, I'm sorry Judge Prado. Getting back to your question, I think there should be defender presence at the Defenders Services Committee hearings, or meetings that they have. I think that's a really critical, important thing. In the old days they used to have a defender meeting every year of all the Chief Defenders and the Defenders Services Committee would be there as well to meet with all the Defenders. Those were wonderful sessions where we

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discuss things and they laid out things and we laid out things and that was good. I think that is important, I think that should be brought back.

Judge Prado: One more. Right now the public defenders are appointed by the circuit court. Do you see a problem with that system, should it continue, should we have set up some other method of choosing public defenders.

Chief Judge Tunheim: Well, I mean, we've been fortunate here, I can't complain about the appointments that we've had and we've only, we've had, two in my memory. The process has worked well and there are district judges that are part of the interviewing panel the same way we do with bankruptcy judges. There is a role that's played there.

I think that it is probably, it probably overall would be better for the district court to do it. I don't know what the politics are there. We're closer to the lawyers who actually do the work in the courtroom day in and day out, we see them all the time, we know who they are, we know the strengths and weaknesses of various candidates well. I guess I would probably favor returning that task to the district bench, district court bench. I say that having not had a problem with that the circuit has done in our district with appointments.

Judge Borman: In the Eastern District of Michigan we have a Federal Community Defender who our non-profit board selects that individual. Throughout the Sixth Circuit I've seen other, the public defenders being appointed and reappointed and I think there's not a problem. A circuit court usually comes down and talks to the chief judge of the district court and gets the feelings about whether they should do it, maybe not all of them do, about who they think would be the best candidate. There should be consultation and there usually may well be a district court judge on the committee. I know they just recently appointed a new bankruptcy judge in our district and the circuit had local bankruptcy judges on the committee that helped appoint the new bankruptcy judge. I don't think that's a major problem in this situation.

Chief Judge Tunheim: I think what usually happens is that there's a Committee of the Judicial Counsel, that's the way we do it here in the circuit, who would then interview a certain number of applicants and then recommend finalists, maybe five finalists or three or seven or whatever the circuit wants. The circuit bench would do the final interviewing in making the appointment, that's the practice that the circuit follows.

Judge Cardone: Now you're done. Judge Fischer.

Judge Fischer: I was afraid I wasn't going to be able to get a word in, here. Thank you both for being with us. We all love Judge Prado.

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Judge Cardone: Yes we do.

Judge Borman: Yes we do.

Judge Fischer: In the various hearings that we've had around the country we've heard from public defenders and CDO's and district judges about the different relationships between the court and the public defender in this particular district because we have your wonderful federal public defender on our Committee. We know quite a bit about what she does here and you've mentioned some more.

In your district, apparently, the public defender manages appointments, you mentioned she does not want to take on the task of handling vouchers, so I'd like to hear a little bit more from both of you about what your public defender does, is there more you would like your public defender to do, do you hear any complaints from the panel members? Any concerns about conflicts, that kind of thing, and are there pluses and minuses if you could flesh out the whole relationship for us that would be helpful.

Chief Judge Tunheim: I think that we are, our bench is satisfied with the overall relationship and the work that our federal defender does. The office is very careful on conflicts. The office does excellent training for the panel attorneys each year. The judges have complete input if there's someone on that list that the judges feel is not appropriate. We have the ability to talk to the federal defender and that person generally is not going to be on the list anymore or is probably not going to get cases. We have a good relationship back and forth there.

We appreciate the hard work the office does with the voucher system making sure that there are no mistakes made in the calculations, flagging issues for us to review. I'm not sure there's anything more that we could, our federal defender has time for anything more with all of the work that she does in addition carrying a load in the courtroom as well. We're very satisfied with the relationship right now.

With a different federal defender it might be different, of course. Personalities make a difference, our court is very satisfied with the way our system works. We don't need to have someone else to come in to do appointments, we don't need to have a magistrate judge oversee the process like some districts do. It works out well. I'm sure that if there were any complaints I would probably be the first one to hear about it. I have not heard complaints.

Judge Fischer: If there were, I should say, but for the legislation, so you think your judges would say, "Why don't we let the public defender do the vouchers, we don't even need to see them." Or do you think they would still want to retain some final approval over vouchers.

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Chief Judge Tunheim: I think that most of the judges would say fine, let the Federal Defenders Office review the vouchers. I think the judges, we do provide, I think, an important role in that process, having been the individual who's presided over everything and has seen what has gone on. I kind of like to have that little bit of oversight, at the same time I think most of our judges would probably say it would be okay to give that up.

Judge Fischer: Thank you. Judge Borman.

Judge Borman: We have a community defender program but it's very, very close to the court in a sense that the community defender does the appointment process, not the vouchers. They have outstanding training programs a couple times a year bringing in individuals to get the CJA lawyers up to speed and the criminal law is changing every minute at the Supreme Court level and particularly at the circuit level as well, on sentencing issues and other criminal issues. It's important to have the training, they do great job. We have had the defenders been there for the last twenty-two years and she has worked in the office when I was Chief, as a Chief Deputy for seventeen. She has totally respected by the court and the defenders are, and they judges many times will suggest that an attorney on a case, "Why don't you talk to the Defender Office about something because they have the knowledge of the criminal practice in the district."

Judge Fischer: Do you think your judges would be willing, assuming she has the time to do it, to at least give that first review of the vouchers to the CDO.

Judge Borman: I think that she would be the one that would take away the shoe laces and the belts and stuff like that because she's got a lot of work to do, as Kathy knows as well, in terms of doing the whole process of running the panel, hearing all the complaints, and dealing with the cases that are coming out of the U.S. Attorney's Office that are more and more complex and require every week to have eight or ten new CJA lawyers on one case because of the multi-defendant RICO, gang cases. They have a lot to do and I think the vouchers were something that, the judges heard the cases and I think we have to educate our colleagues better. I'm sure the criminal law committee in our district and at the meeting and at judge meetings I say, "You have to understand it's in terms of discovery, in terms of going to detention facilities, the vouchers are going to be more and they should be honored."

Chief Judge Tunheim: If the question is whether to eliminate judges from voucher review, maybe there's a middle ground too to consider where the federal defender has the final oversight of the actual vouchers but there's a report on the amounts that are sent to the judges and if the judge has a concern about the amount the judge would have the opportunity to look at the documentation and provide input to the federal defender. That may be a middle ground that could be

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considered.

Judge Fischer: Thank you, Judge Tunheim.

Judge Cardone: Ms. Roe.

Katherian Roe: Judge Borman I'm going to begin with you, you've mentioned a couple of times the issue of education and educating your colleagues. I wanted to raise with you the issue of philosophy versus education in the voucher review and the voucher reduction area. Some of your colleague who reduce vouchers say that it's not that they don't think the work is necessary, it's not that they don't think the work is reasonable. It's that they just think that lawyers should understand that they're not going to be paid fully for their work on CJA cases, that they shouldn't expect to. That seems like me to a philosophy issue, not an education issue. Can you tell me your thoughts on that?

Judge Borman: I think it is an education issue because, I think that they were in private practice themselves before and maybe fifteen years ago and the amounts were a lot lower in terms of criminal cases and cases were very simple. There was a plea, a sentencing and not a lot of work to do. The groundwork has changed and I think that it's important to train the judges and to explain to them that this is a new day, in terms of what the Sixth Amendment means in terms of effective assistance of counsel. You can change a philosophy if you say what your mindset was ten years ago or what goes in front of you when you're looking and reading a voucher has to change because we need good lawyers to be in the CJA, now more than ever where there are multi-defending cases and your office can only take one of the people. We need a lot of good lawyers. To get good lawyers you have to pay them what they're entitled to. They should not be cutting vouchers.

I think that I would be glad if any judge, district wanted someone to come and explain it. I know I was a pied-piper to try to get some other districts to finally adopt defender programs. There are a couple that didn't and now they did, "Why did we do it twenty years earlier, my God it makes the judges job so much easier." Having a good CJA lawyer makes the judges' job a lot easier too and I think that has to be explained to them and I think having a Defenders Services Committee send out memos to them and also to have each district judge.

During the sequestration it was the chief district judges around the country that went to Washington and said, "You have to stop what you're doing to the defenders." That's who was there leading the charge. Judge Preska, Judge Rosen in Detroit and judges from all over the country from Los Angeles as well saying, "You're ruining the Criminal Defense Bar, you're ruining the Sixth Amendment." I think it can be educated, there was a lot of philosophy about people having certain views on a lot of things that's changed in the last

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fifteen or twenty years in this country. Thank God. I think this is something that the Defenders Services Committee should emphasize and get out and get other chief judges, get the chief judges around the country to put that on the agenda of their judges meeting every month. At least a couple times a year to say, “This is important to our system.” Or have the head of the criminal law committee explain it to their colleagues.

Katherian Roe: I’m reminded of a recent memo by the, I should say it’s been a while now, by the Director of the AO where he sent out such a memo to all of his colleagues, circuit judges and district judges alike saying, “You shouldn’t be cutting vouchers to balance your budget, you shouldn’t be cutting vouchers just to cut them.” Yet, we still have the same philosophy that it’s pro bono work, and that lawyers should know that some of it’s going to be cut. That’s why I’m asking you about the education versus the philosophy issue.

Judge Borman: Right. It has to be down at the district court level, where not just, we get memos every day from the AO and some we follow, some we don’t look at or we think about. You have to have the AO, Mr. Duff, or the chief justice say, “Look, the chief judge of the district should put it on the agenda for the judges meeting and explain it to them.” You have to do that because there will be a crisis, there is a crisis when they randomly cut vouchers. I agree with you 100%. The way you change philosophy is tell people to change their mind on things. They’re doing it every day in this country based on the Supreme Court decisions and new laws. You get along. That’s how you do it. You deal with it. Not just with a toss away memo.

Katherian Roe: Thank you.

Chief Judge Tunheim: I think when, just to add to that, is . . . what is the value that is added to the process by having the circuit court review each of these vouchers. What value does that add? I think that’s the way to phrase this and ask this question. If they’re just looking at them from a superficial standpoint and applying their personal philosophy about whether the work should be more pro bono than it already is or whether one district is spending more of the federal money for the CJA lawyers than another district is and therefore they should be equalized. Those are decisions that, or applications of philosophy that are unrelated to whether the person did a good job on the case and put in the hours necessary to adequately and expertly represent a criminal defendant.

I know Katherian, you’ve written many yet letters over the years to lawyers apologizing for the fact that their vouchers were cut. I’ve done the same thing, frankly tired of writing those letters and encouraging the lawyer to stay with the system. I just don’t think there’s any value being added. There’s nothing that is to be gained from having that kind of review as we have suffered through it for the last basically fourteen years.

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Katherian Roe: Chief Judge Tunheim I also wanted to ask you a question that's similar to that, in that different districts have different kinds of cases and one of the things that we've heard from attorneys in this district is that they're concerned that they are in a district, I'm sorry, in a circuit, where there are other districts that do not have the same kind of cases we have. They don't have the same kind of white collar cases, same complex cases, the terrorism cases. Those are the bills that come out much higher than the cap. If we were to recommend and it was adopted by the Conference, that the circuit judges would not review the voucher. The district judges would compare their vouchers against other vouchers in their district. Do you think that would be beneficial, for instance, to your district. To only compare the vouchers to the other vouchers in your district.

Chief Judge Tunheim: I think that would. I think every district has a different standard of practice and that's probably the way it should be in our country. It happens, we all have different local rules for civil cases and some of them vary greatly. I've been involved in the next generation electronic filing system and all the work that we're doing to try to put that together and one of the chief road blocks is the various ways the districts do everything around this country. I think the standards are rightly varied from one district to another. The base is important, of course, but they do vary.

I think we certainly could do comparisons. As a defender you're in a good position to make that comparison. As judges, we can compare it to other cases that we've had. I still think that the primary look needs to be at what is being requested and why it's being requested. What's the work done in the case. The judge knows the kind of work done in the case. The judge knows if there were complicated motions that took a lot of time to put together, a lot of different hearings before a magistrate judge and eventually before a district court judge. Difficult issues in sentencing that have required a lot of briefing for the judge and maybe evidentiary hearing before the. There's a lot of differences among the cases and it doesn't necessarily relate to, and it doesn't relate to, the competence of the attorney and whether the bills are justified.

I think we certainly could do comparisons within the district and that would be a better comparison than comparing the District of Nebraska, for example, with the Western District of Arkansas or the Northern District of Iowa. There's different standards that apply. It has been hurting us in our voucher review. I don't think any of the other Districts in the Eighth Circuit have had sustained the cuts to vouchers that we have.

Katherian Roe: Thank you. One more.

Chief Judge Tunheim: You've had quite a few as well.

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Judge Cardone: Judge Walton do you have any questions?

Judge Borman: You need a microphone (to Judge Walton).

Katherian Roe: I'm sorry (passed the microphone).

Judge Walton: I'm impressed with the mentoring program that you have but how much does that cost to operate.

Chief Judge Tunheim: I don't have overall figures. We approve, since there's no appropriated funds for that program, we are permitted to use the unappropriated account and our budgets, our numbers get fairly high and so we have the money available. I think some have been relatively high. One concern we had for a while is that maybe some of the in depth work that needed to be done on a particular case was shifted over to the second chair where there wasn't going to be a voucher that had to be approved by the circuit. I think we got beyond that, we've got some rules in place to prevent that concern from being realized. I think a lot of the cases probably run in the \$15,000 to \$20,000 range overall. I think that would be an average, Katherian, you may know better than me. I sign off of the payments and they're in stages so it's always a little hard to figure that out.

It's a good program. Plenty of cases that I've had have had the second chair there and they play an important role under the mentoring and tutelage of a very experienced defense lawyer.

Judge Walton: Thank you. Judge Borman. I share your concerns about independence and the potential consequences of independence. The argument that we've received in response to those concerns is that it's felt by some that the Judiciary threw the lawyers under the bus during sequestration and that we protected our own interests at their expense. They also believe that there's an inherent conflict of interest as a result of us reviewing their vouchers. For example, if they litigate a motion to suppressed before us that we perceive to be merit-less, that all of the money that they've invested they fear is going to be subject to being cut because we felt that the work wasn't done and they think that it creates an inherent conflict. What do you think about those types of concerns.

Judge Borman: I don't think there's a conflict if the judge understands the Sixth Amendment and that's why I talk about training for judges on the Sixth Amendment. Yes, you're going to get cases where there's long motions to suppress with evidentiary hearings. We have that. We're so lucky in the Sixth Circuit that we haven't had voucher cuts for the most part by the court of appeals. The district judges are aware of the fact that cases are complex and they don't take it out on lawyers who do vigorous advocacy.

I don't think there's a conflict, I think that, to go away from the Judiciary and

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go to Congress and say, “hello, we want one billion dollars.” Would be catastrophic to the federal defender program. I think that the Judiciary, I think what has to be done is to put it back where it was with the DSO. Defenders Services Committee should be where the Defender Services matters are dealt with and they recognize the importance of independence.

We’re not employees, I mean, CJA lawyers are not employees of the Judiciary, they are representing counsel. Defenders get paid by the Judiciary but they’re not like probation or pre-trial officers. They are there to represent their clients, that’s who they owe their allegiance to. I think that the Judiciary is aware of it, and those who aren’t aware of it should be made aware of it. I think the best way to say, “Look, we can do it right and we will do it right.” is to restore the Defenders Services Committee to being the Defenders Services Committee. There is no reason for having this emergency manager mentality and taking away really important critical tasks from the Defenders Services Committee.

Judge Walton: Thank you.

Chief Judge Tunheim: Judge Walton, just let me add something there. I’m not personally aware of any situation where I think one of our judges has taken it out on a lawyer for being too aggressive. Occasionally there are complaints as judges talk amongst each other. That’s certainly possible. If someone is litigating frivolously I don’t think a judge would take it out on the attorney. They might call Katherian and say, “This lawyer is over litigating, you should consider that in future appointments or whether they should stay on the panel.” I think that in terms of the vouchers, I’ve never heard anyone say, “I’m going to cut that person because they’re over litigating issues in front of us.” I think, the civil side, perhaps judges really wish that they could do that in some cases, and all of you probably would agree with that, that some cases, many cases are over litigated.

I think all of our judges recognize the Sixth Amendment and even if there are many motions brought, they tolerate it because that’s part of their job to represent the defendants.

Judge Walton: Thank you. Thank you.

Judge Cardone: Judge Gerrard.

Judge Gerrard: I just have one question, I see the clock. Judge Tunheim. I did want to explore with you your value added concept or your question, I share that concern. I think the reason there was circuit review initially was to provide some type of due process but in fact.

Judge Cardone: Do you have a microphone?

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Judge Gerrard: I believe so, am I not speaking into it. I'm sorry. In fact I think maybe the opposite is happening. In other words there have been certain circuit interpretations that if there is a voucher cut at the district court level the circuit court can't review that. Yet, on the other hand, cases are being taken up based on a \$10,000 cap for extended or complex litigation when it's really not extended or complex, in fact.

It appears that there's not a sufficient reason to have circuit review, in fact if there is going to be circuit review it should truly be for due process reasons. If a lawyer has been cut at the district court level and then there may be a circuit court review. What is your reaction to that?

Chief Judge Tunheim: I would completely agree with that. The due process issue is important. The problem right now with the circuit is where the vouchers are being cut.

Judge Gerrard: In which there is no due process.

Chief Judge Tunheim: There's no due process at all. The only, there's no explanation given other than it is within the discretion of the chief judge to cut vouchers and it's unreviewable pursuant to a panel decision of the Eighth Circuit. That's all it is. You see the same thing on every one of them. There's no reason given so we can't say to a lawyer, "Sorry, your bill got cut because, we don't know why your bill got cut it just got cut and we're sorry about that."

Judge Gerrard: That may be the systemic review that we'll undertake. It's the Eighth Circuit today, it could be the Sixth Circuit or Third Circuit tomorrow. It just happens to be the way it is.

Chief Judge Tunheim: It could. I don't recall any problem before fourteen years ago, so I think, or maybe thirteen years ago and a half years ago. So I think it depends on the philosophies of chief judges. I don't think even prior chief judges ever did the review. They handed it off to probably staff attorneys to take a quick look and we never had a problem. When chief judges took it over then they decided that they were going to make a statement.

Judge Gerrard: Thank you, I appreciate it. That's all I have. Thank you.

Judge Cardone: All right. It is 4:30 so we are going to have, we do have that live-stream. On behalf of the entire Committee I want to thank you both for your thoughtful comments. I want to tell you both that if there's anything you'd like to add, having heard from us and some of our concerns, please feel free to do that, we would appreciate it. We thank you.

Chief Judge Tunheim: Thank you. Please remember you're all welcome back to chambers for a little reception after this.

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Judge Cardone: We'll be there.

Judge Borman: I just want to thank the Committee for getting into this critical issue with regard to Defender Services and CJA lawyers. You are very deserving of a great thanks on behalf of the Sixth Amendment.

Judge Walton: Thank you.

Judge Cardone: Thank you. All right. What do we need to do to? Five minutes? Okay. Five minute break. It's here. It's going to be right here.