

Ad Hoc Committee to Review the Criminal Justice Act
Public Hearing #6 – Philadelphia, Pennsylvania
April 11-13, 2016

Transcript: Panel 3—Views from Community and Federal Defenders

Judge Cardone: Morning, everyone. I'm going to ask everyone in the audience, and actually here, too, because I think mine went off yesterday, make sure that you silence your cell phones. I think sometimes we forget because we put them away, but they still are on. Please make sure you silence your cell phones.

Good morning. We're going to start with our first panel this morning. I'm not going to make many opening remarks, other than to say this is our second day here in Philadelphia, and we are trying to gather as much information as we can.

This morning's panel is views from the Community and Federal Defender's, so we have Miriam Conrad, who is an FPD, is the Federal Public Defender out of the District of Massachusetts; Marianne Mariano, who is the Federal Public Defender from the Western District of New York; David Patton, who runs the CDO in Southern District of New York; Leigh Skipper, the CDO in Eastern District of Pennsylvania; and James Wade, FPD from the Middle District of Pennsylvania, right?

James Wade: Yes.

Judge Cardone: We're going to begin. I'm going to ask each of you. We received your submissions, had the opportunity to review them, and what I would ask you to do is to make a brief opening statement and then we will begin with questions from the panel, the Committee. We actually have five of you and a lot to say, so if you could keep your opening really brief, because I'm sure we'd much rather be able to have a discussion with you. We'll start with you, Ms. Conrad.

Miriam Conrad: Thank you very much, Judge Cardone, and thank you to the Committee. I have had the opportunity to observe some of the hearings in Portland, Oregon, and also in San Francisco, and have been . . . as well as here yesterday. I've been very impressed with the obvious devotion that all the Committee members have given to this task, and how seriously they have taken this endeavor. We very much appreciate it.

Because our time is relatively short, with the number of people who are speaking today, I just want to take this time to just highlight a couple of brief things. One, first of all, is that our office is unusual in that we have three districts. We have New Hampshire and Rhode Island, as well as Massachusetts. I don't think any other office in the country has three. There are a few that have two, and those have much greater land mass than we have. Nevertheless, it's three different districts with three different cultures.

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One illustration of that is the fact that the CJA use of experts in Massachusetts is somewhere in the 20s, whereas in Rhode Island, it's in the single digits. I'm trying to look at why that is, and whether that is a result of lack of training or education or culture in the district, or whatever.

I know yesterday Judge Sorokin talked about comparing use of experts by CJA with the use of experts who are outside providers in the defender office. I'm not sure there's an easy way to do that, especially given the fact that we have investigators and paralegals on staff. We could probably figure out how often we use them, but it would not be the same kind of comparison. I would think that our use, once you count investigators and paralegals in there, would be upwards of 50%, so far higher than what the national average is.

One thing I do want to say about our office is that our office has often been held out as an example of a so-called "boutique law firm" that has too many lawyers and not enough cases, which is partly a reflection, I think, of the types of cases in Massachusetts. But it also, I think, is something that has to be looked at in the context of the U.S. Attorney's Office, where, when I last looked, they had almost 90 criminal AUSAs and indicted less than 500 cases in the course of a year. That works out to about six cases per AUSA, per year.

We did very well in the work measurement study, and contrary to what I think we feared going in, that we would be cut, we were found to be pretty severely understaffed, and we are in the process of hiring and bringing our staff back up to where it was pre-sequester. We lost about 13% of our staff overall during the sequester, and had twelve furlough days.

Other than that, I guess the one other thing I wanted to add, Judge Sorokin and Judge Gertner both yesterday talked about the question of quality. I know that's been a focus of this Committee as well, as opposed to quantifying things. I just wanted to share with you that a few years ago, I think it was right around the time of the sequester and there was a big push in Massachusetts to cut CJA costs in the form of the CJA guidelines that you've heard the Massachusetts witnesses talk about. At that time, one of the judges had a meeting with the entire CJA panel, or those who attended, suggested that the size of CJA attorneys' bills could be a factor that would be considered in deciding whether or not they should be reappointed to the panel. We have a three-year term. He explained that that was not meant to say that the cheapest lawyers would be the ones most likely to be on the panel, but he preferred to cast it as the most efficient lawyers.

Nevertheless, I am concerned that that kind of statement to the panel, coupled with the CJA guidelines that set low presumptive rates and appear, as Judge Gertner described, to discourage the use of experts, especially psychological experts, has had sort of a chilling effect on CJA attorneys' willingness to bill.

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That's all I have, except to say that Judge Sorokin and Judge Gertner kept referring to my proposal to fund the defenders equivalently with the U.S. Attorney's Office, or I should say proportionally, and it's really David Patton's idea, not my idea. I just endorse it.

Judge Cardone: All right. Ms. Mariano.

Marianne Mariano: Thank you, Judge. I just also would like to thank the Committee for the incredibly hard work I've watched in person in Portland, Oregon. I've watched a number of the videos of prior testimony and hearings. I know that this Committee has come prepared to all of those hearings. It is incredible to me your commitment, and I want to thank you because the work you're doing is going to help ensure that we can continue to fulfill our critical constitutional mission. And it is our constitutional mission to serve clients and not the court.

I think here on this panel today, the best thing we could do is turn it over to you for your questions. Just like any appeal, usually the questions get to the heart of the matter. You have here on the panel, since we're in Philadelphia, I think three views. One is, "Give me liberty or give me death." Mine is probably more like, "No taxation without representation," and completely inappropriately but typical Leigh Skipper is, "I have not yet begun to fight."

With that, I will forgo any other statements. I hope I am prepared to answer anything you ask, and if I am not, I will get you an answer. Thank you.

Judge Cardone: Thank you. Mr. Patton.

David Patton: Thank you, Judge Cardone and Committee members. I think it's obvious, we're all incredibly grateful for the hard work that you're doing.

The topic for Philadelphia is structure, and as Marianne said and in my written submissions, I advocate for a completely independent organization. That said, I recognize that there are pros and cons to any structure. I certainly would not put form over substance, and to the extent that there is some structure out there that can solve the really pressing problems that this Committee and many other committees have identified over the years, I'm all in favor of it. I just happen to think that those problems won't be solved absent an independent structure.

I fear that seven, ten, twenty years down the road, there'll be another commission without some real fundamental structural change that will be hearing many of the same things that you've been hearing. I think the only way to really solve them is to have a governing body whose sole mission is the provision of high-quality defense services, and to do that within the

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confines of being financially responsible.

As the Committee I think already knows, the biggest challenge with that first piece, high-quality representation, is how do you measure it? It's a problem not just in our world, but in the legal profession generally. How do you measure attorney performance? In the Federal Public Defender world, we've tended to do that by pointing to surveys. There's the oft-cited Professor Yoon and Judge Posner survey, which, of course, I'm happy to accept its results, which says that federal public defenders are fantastic. But, I'm also wary of those sorts of results, and I'm reminded of a very comprehensive study that was done right before the CJA was enacted in the early 1960s. Harvard Law Review engaged in a comprehensive study, and that's in a world where lawyers weren't paid at all, where you had people representing clients with no criminal defense experience, and where 90% of the respondents to that survey—judges, practitioners, prosecutors—found that the level of preparation was either very adequate or adequate. Of course, now we come back and we know that that was a horribly dysfunctional system, so I'm a little bit wary of how those of us within the system view it, because history has not always been kind to those views.

I think that it's particularly important to be concerned about quality, where it is so hard to objectively measure it . . . where you have a system that, to my mind, creates some real disincentives to good practice. Where you have CJA lawyers who have to think about compromising confidentiality in order to get the resources that they need, who have to think about currying favor with judges, in some ways, to think about whether or not they'll remain on the panel if they press for the resources that they need. Where federal defenders answer to the judges, ultimately.

I think it's a bigger problem than just discrete instances of voucher cutting. I think that a system where the defense function ultimately is supervised by judges is a fundamental problem in terms of what that does for the culture of defense, and I think it would be far healthier if the defense function was answering to a governing body whose mission it was to provide resources and within the framework of what's available in a world of limited resources, and to focus on high-quality representation.

Speaking of resources, I was reminded yesterday listening to Judge Walton, when he noted that other judges have come before this Committee on the topic of resources, and used the Chevy/Cadillac analogy. We know that representatives of the Budget Committee have used that analogy on Capitol Hill with our appropriators. I understand the point that they're making, that we live in a world of limited resources and tough decisions have to be made, and they're not unlimited, but I can't ever think of judges going to Capitol Hill and saying, "Congress, please give us enough money so that we can do some Chevy judging." I don't ever recall DOJ going to Congress and saying,

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“Please give us enough money to do some Chevy prosecuting.” They don’t do it. They’re advocating for their programs, as they should, and I worry that nobody is truly advocating for our program. They’re talking about a program, but it’s a fundamental difference. If we had an actual defender organization making those points, I can guarantee you we would not be making that sort of analogy.

I’ll finish up by saying I don’t know the answer to how we would fare dealing directly with Congress. I think it’s a fair question. I happen to think that we would do at least as well as we do now. I think a statute could be structured with a trigger mechanism tied to DOJ and law enforcement funding. In an article I’ve written, I talk about how other agencies do that. There is precedent for doing that sort of thing. I don’t know how we would fare, but I think we would do okay, and I’m willing to take that chance. I do know that if we don’t have fundamental structural change, we will continue to see the problems that we’re seeing, and along the way, some of our clients are going to be hurt in some very concrete ways. I look forward to discussing it further with you and answering your questions.

Judge Cardone: Thank you. Mr. Skipper?

Leigh Skipper: Thank you, Judge Cardone. I welcome also the Committee to Philadelphia and applaud all of your efforts. As I look at the questions that you’re faced with, I want to say first and foremost that I’m very happy with the model we have as a CDO here in Philadelphia. As you heard from Chief Judge Tucker, Judge Restrepo, we have a very interactive infrastructure here where our input is highly valued and we’re part of the court structure, but yet we also maintain our independence. Working closely with both our chief judges on the circuit and in the district, our chair of the Criminal Business Committee, as well as Judge Goldberg on a variety of CJA issues, I think we’ve fared well.

I think that that’s pretty similar to a lot of what you’ve heard, that on a local level, you will see, in most districts, if I were to generalize, a sense of cooperation and understanding and efficiency. But when you look at things on the national level, one of the questions we have, certainly I have, is why, during sequestration—and a series of other actions within the Administrative Office—were defenders disproportionately targeted, so to speak? Why were the cuts so drastic, and why, while other agencies were impacted, it was disproportionate to the defender office? I had to close a branch office, I had to lay off people. Thanks to the supplemental funding, too, that we received from the Executive Committee, we were able to avert furloughs, but it was tough.

I want to also note that I come to you as chair of the National Association of Federal Defenders, and in that capacity, we’ve tried, like the Federal Judges

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Association, to advocate on our behalf, and we're precluded from doing so within the confines of judiciary policy. I think one of the telling things I want the Committee to really feel is the passion and dedication all of the people who work within the defender system have for their work, for the quality. When that quality that has taken years to arrive at, with the support of the court, when that quality is compromised or threatened, it really, from a morale standpoint and from a representation standpoint, can be devastating. We have those concerns.

Now, I happened to personally net out that we should remain within the structure of the judiciary, but a model with some variations that would be similar to perhaps a Federal Judicial Center, or maybe a variation of the Sentencing Commission, but something within the, frankly, protections that's afforded within the judiciary, but the autonomy for representation that we need. A case in point would be clemency. The Defender Services Office sought and fought to obtain our right, our opportunity, our commitment, to represent former clients during the clemency process, and we were denied that by the General Counsel's opinion, that it was deemed an executive function and not judicial. And I note, perhaps, perhaps, maybe that's why we have this extensive backlog in the clemency process now. It's questionable whether all those cases that are ripe for review will be timely entertained during this administration.

We have a host of issues that are of concern, but I think that with some . . . I don't want to call it tinkering, because it would have to be more substantial than that, but certainly within the protections of the judiciary, I think there's a lot that can be done.

Questions were raised . . . in seeing Judge Goldberg, I'm reminded of a question I heard yesterday with respect to panel interaction and what due process is afforded during a review of either performance related functions or voucher cutting with respect to a panel member. Judge Goldberg and I, several years ago, which was ultimately adopted by the court's Criminal Business Committee and then the Board of Judges, adopted a process where, to avoid those pressures we've heard so much about and the oversight directly with a judge presiding over a case, if there were any issues that arose that the judge thought was at issue, whether it's performance-based, again, or voucher issues, there's a process of review. The due process afforded, and I believe it was Judge Walton in question, but the due process afforded is that the matter is then sent to my review committee, the selection and review committee for the panel, and we provide for the attorney to come in and tell us certainly what they see as the issues, present their side of the case, and then we prepare a report and recommendation that goes to the court's Criminal Business Committee. In all of our recommendations, they're just that the court is free to accept, reject, or modify.

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That's the process, and it does remove some of the tensions that might be inherent in a lot of discussions we've heard today. So I think it's worked well in the instances that we've had. You will hear later from our panel representative Jeff Linde, who is more privy to the voucher-cutting issues that are unique to our district, or that occur in our district. In my office, we do two, as you know from my submissions we do two main annual CJA trainings where we have approximately 150 or more for each session, one in the fall, one in the spring. We do an introduction training for new members. There is a process for review during the three-year staggered term if somebody's performance is subject to question.

Then, just lastly, appreciating the time limitations here and having received my submissions, I want to talk about diversity. I'm proud of, in my circuit, the number of defenders we have of color. We probably have the most, I'm pretty sure we have the most, the VI, the Western District, and the District of Delaware, and myself, but I think we need to have more of a concrete plan to raise the diversity representation throughout the entire program, and that has to be through an aggressive targeting. I know it's not easy, I wrestle with it myself in my office, but I think we need to come up with a concrete, committed plan, and then actually have a measure to ensure that there's implementation, so that we have a diverse body within the defender community.

Again, I will certainly yield myself to any questions at the appropriate time, and I welcome you all to Philadelphia.

Judge Cardone: I'm sorry, Mr. Wade.

James Wade: Thank you, Judge Cardone, and other Committee members. I'm just going to amplify my comments on structure and my position on a CJA center outside the judiciary. You have to ask yourself why, and why, for me, comes down to two points.

One is that I think it brings us closer to the ideal. I think Judge Prado's Committee identified this twenty-some years ago. I voted against it at the time, when I had the choice, being afraid of what happened to Legal Services and seeing the benefits of being within the judiciary at that time. I still see those benefits, but I think this is the time to move towards the ideal.

Second is timing. A chance to review the CJA doesn't come up but once in a generation to take a hard look, because everyone's busy. Everybody's doing their jobs. The sacrifice that all of you are making, and the people that testify before you to thoughtfully consider it, only arises at certain points in time. This is the opportunity, or, I do think it'll be another generation.

What results do I expect from a CJA center outside the judiciary? I think

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probably every defender has their own version of this nirvana that might be there, but it's not concrete. It's going to be developed over time. I do think there are some benefits that will come with such a center. They might come without such a center, but I think they would have been focused on a little earlier with such a center. I'm thinking of panel attorneys, for instance. I think there'd be a different process. I see that as an administrative process, of advocating for a budget in bigger cases, putting that together, submitting bills, getting them reviewed. That process needs to be smooth, easy to do.

Over time, if you had a group that was dedicated to that, and when I say a group, I don't think, I'm one that doesn't believe defenders should be doing that. I think there's a group that you would train that would have long-term knowledge on these matters. You would develop things like, in places where you need an interpreter, do you really have to ask the judge to approve an interpreter in a case where the person doesn't speak English? It gets to be a no-brainer. Do you really need . . . I mean, transcript requests. All those things, to me, seem more administrative, that you could have a body of people that would take that burden off of judges. I would take it off of defenders that are doing it. I'm not currently doing that.

But I think that would have been addressed. I think we probably would have coordinated with the Department of Justice on clemency. I think that it would have been in advance. They would have a partner to reach out to and work together on to say, "This is going to be a new initiative, we need people to do this." I think that was a missed opportunity. When it was coming up, I thought, and also with 782 type of reductions, because it's uneven across the country—I have a standing order, I represent everybody that wants us. They can reject us for conflict, or we can identify a conflict—but why would you let just defender clients get the benefit of a 782 review, or your former clients for clemency? Shouldn't it be everybody? So I think that we've missed some opportunities that, in coordination with Department of Justice, we could work together with them when you had a CJA center outside.

I do think that we'd also be focusing on quality: quality for defenders and quality in CJA representations. That'd be a primary focus. It's a difficult subject, but I do think that would be perhaps a benefit of that.

I think I'll reserve any other comments, and I'll await questions from this panel. Thank you.

Judge Cardone: All right, thank you, Mr. Wade. Before we proceed, I keep hearing a buzzing. I don't know, it might be a cell phone. If any of you have cell phones near the microphones, if you'll just move them away, we might be able to avoid that.

All right, let's start with Mr. Cahn.

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Leigh Skipper: I just assumed that was our limitation on time.

Judge Cardone: Yeah, it's my little buzzer, right here. Mr. Cahn?

Reuben Cahn: Thanks. Leigh, let me start with you and talk about . . . you mentioned the protection of the judiciary, and I'd like to get specific about what we're talking about when we talk about the protection of the judiciary. What is it you have in mind that being in the judiciary does for us specifically?

Leigh Skipper: Well, I think what it does is it's a lab for some of the benefits we've received in terms of growth consistent with our case-loads historically over time, and I think that, I question without any empirical data where we would be if we didn't have what I would call protections within the judiciary. Again, reference was made to Legal Services Corporation, Planned Parenthood was recently the subject of some discussion as it relates to funding. So it's more of an infrastructure that I think historically I look at and say, okay, I can see the appreciative improvements we've made since I started in the program some twenty-five years ago, in terms of resources, and parity, and the like, that I question whether we would have received, again, without any data, had we not been affiliated with the judiciary.

Reuben Cahn: I guess my question is more . . . I'm looking for more specificity than that. Is it that you believe it's in particular the judiciary's advocacy before Congress? Do you believe it's merely the patina of respectability that is conferred on us by being a part of the judiciary? What is it about this relationship that benefits the program of the Criminal Justice Act?

Leigh Skipper: I believe that there is a degree, for lack of a better characterization, of protection while wrapped within that infrastructure. Now, does that not mean we are, in terms of the hierarchy, as you well know, viewed on an equal setting within the administrative office? No, and dare I say, hell no. We've seen examples of that, where we have, again, as I indicated, disproportionately . . . I mean, why were not the cuts—and certainly you know better than I—disproportionately, impacted on the program, on the defender program?

I don't know if I'm answering your question directly. It's a sense of having seen the benefits and the growth. I don't seek to present a picture in which the program hasn't benefited. I mean, we're all a product of our experiences. I came from the local Philadelphia defender office, where resources were very scarce, where we did pretty much everything on our own. To have the ability to have resources and obtain experts, while not at the level of the government, was certainly something I questioned whether we'd be afforded if we were not within this structure.

Reuben Cahn: Let me ask you a question about that. One of the things that I've heard said

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and that I find a little bit hard to understand is people say that were we not a part of the judiciary, we would lose the support of the judiciary. The judges I know support indigent defense because they believe that this is an important part of the system of justice and needs to be adequately funded. Is it your perception that if we were not formally a part of the judiciary that we couldn't any longer count on the support of the judges you know?

Leigh Skipper: I can only contrast that, Mr. Cahn, by what occurs magically when one enters the confines of the Beltway, as opposed to our respective districts. There's something that transpires when that happens, and you have committees that don't prioritize or seem to consistently value what we do. The Defenders' Services Committee is a prime example, when the jurisdiction was moved, as the Committee well knows, to Judicial Resources. Having a committee that historically would meet with us, was appreciative of what we did and our work with more insight, and then to be summarily moved out of that structure in terms of the real power, why?

No, certainly, all of my judges are very appreciative and support our function, but I can't explain what happens within that structure and why one particular committee within the Judicial Conference has additional leverage or greater power over another.

Reuben Cahn: I want to see if I understand your position. Are you seeking maximal independence while remaining formally a part of the judiciary, or do you just want tweaks to what we have right now? What is it that you think is the optimal arrangement?

Leigh Skipper: I think that in terms of some of the administrative oversight and functions are, frankly, not necessary. My colleague, Mr. Wade, referred to some of them. Request for transcripts. Provide the money, conduct your audits, obviously, and an assessment. But the defenders should be afforded the independence to determine what is representation and what is proper, so less oversight within that structure, yes.

Reuben Cahn: Ms. Mariano, let me turn to you. You mentioned taxation without representation, so I gather you're looking at a sort of model of less drastic change than, say, Mr. Patton . . . also, maybe that's going to align with what Mr. Skipper is suggesting. Could you elaborate a little bit on what you think is the proper vision for this program?

Marianne Mariano: Sure. In my written statement, I thought that it might be useful to propose structural changes that I think could happen without any statutory amendments, but I would also support a model within the judiciary like the FJC or the Sentencing Commission, which has obvious independence, but would require statutory change.

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For me, what I think is we need a top-down affirmant of our independence within the judiciary if the judiciary is committed to our independence. What I mean by that is the restoration of Defender Services Office to the Office of Defender Services, or otherwise known as a directorate. I was in D.C. for a very brief period of time, a six-month stint, with Defender Services Division when it wasn't a directorate. It was only a directorate from 2004 to 2014. It has to be a meaningful elevation—not just a restoration of the acronym, but an actual restoration of it to a level where I, as I proposed in my written testimony, think it answers directly to the director, Director Duff, and the Judicial Conference.

I think that we have to have the independence to draft our own budget. I do think, though, that the Judicial Conference Committee on Defender Services, if it regains its jurisdiction, is a meaningful way for the Judicial Conference to understand our program. I think we need representation on that committee. It's interesting to me, I'm our liaison to the Criminal Law Committee. We have a member on the Criminal Rules Committee and on the Evidence Committee, but we don't actually have anybody on our own committee from our community.

In my testimony, my written testimony, I proposed at least three members from the defender community become members of the Defender Services Committee: a representative from an FDO, a representative from a CDO, and a representative from the panel, and that the DSAG chair would continue to liaison with the committee. That would give you direct voice from the field. That would allow the Defender Services Committee to understand what defenders are grappling with, because we grapple, as a group, with what our various offices do. It's parochial, what we do. What I do in Buffalo is not what you do in San Diego. Our clients are different. The types of prosecutions are different. Our courts are different. We have to very much be relatively independent law offices to provide the high quality legal services necessary.

My model would allow us to have more voice in that process. I think it would be valuable.

When judges come out of Defender Services Committee, they usually leave having a really better understanding of what we do, and a newfound respect for it. I don't mean that they come on disrespectful, they don't, but when they leave, they have now looked into the weeds, and they see the kind of work that we do with the very limited resources we have, and how efficiently and effectively we get the job done. I think if we could have a bigger role within the judiciary, that would be true across the board, and it's what you're seeing on the local level. It's why so many defenders have come to you and said, "Well, in my home district, it's pretty good," as did my CJA rep, as have I, as has Judge Feldman, who testified before you yesterday. It is pretty good. In

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the Western District of New York, I think we do well.

I think that can happen on a national level, if we are given independence within the judiciary, and if within the administrative office, there is an understanding that we are different. The characterization of us right now is a court service. It's almost unethical. I am not ethically obligated to serve the court. I am ethically obligated to serve my clients. I am ethically obligated to ensure that my office serves those clients. So, while I know it wasn't intended to be offensive, it is not a fair representation of what our program does.

I do think by a top-down recognition of the importance of the program, I think that could give us the independence, the further independence that we need to get our mission accomplished.

I think for the CJA, it is trickier. I can address that a little bit. In my comments, I proposed . . . I come from the Second Circuit, and Jerry Tritz, I think, has been the gold star in case-budgeting attorneys. I hear his name mentioned quite often, and I know there are now ten case budgeting attorneys, or circuit case-budgeting attorneys. Jerry has made a big difference in the Western District. I invite him in to lecture to my panel, and they reach out for him when there's a mega-case, and they reach out for him when there isn't. When they need help finding the right expert, or when they need help figuring out how to make that application to the court, they know that Jerry Tritz is available to them. That's been really significant.

In our circuit, it works, I think, very well. And so for me, what I proposed was having local case-budgeting attorneys that would work for Jerry Tritz, in my case, or whoever is in the shoes at the circuit. I think having one in every district would only enhance my panel's use of expert services. I would propose alternatively, because I do know, and I've heard Judge Walton ask the question, should the circuits be involved at all in the voucher process, and I know all circuits are different . . . I think that the directorate, the Office of Defender Services, could also employ the case-budgeting attorneys, one for each circuit and then one in each district. I think that is another model that could work. I don't know if that could be done without a statutory change.

I do think judicial oversight can be maintained by a simple accounting. It would anonymize it. It would also take out of the hands of the presiding judge a request for an expert. That, in particular, seems to be fraught with conflict. I mean, we do risk assessments in many cases, especially when you have child pornography cases, and the decision to have that is easy in my office, because whether or not we use it is the decision we make once we get the report. But, to have a panel attorney go to the court and say, "I want to consult with somebody," and then not use it, that can't possibly go unnoticed by the court.

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I think there are ways that we can help gain further independence for our panel. If putting that in the defender office would help my panel, I would do it. I'm not sure that my office is the right place for it.

Reuben Cahn: Can I ask, Mr. Patton and Mr. Wade, you've both advocated for a position of complete independence. My questions for you are coming from the opposite direction. I'd like to know why some of the lesser solutions are impossible. For instance, you mentioned, Mr. Patton, the need to have a group of individuals stewarding the program who are entirely devoted to the advancement of the program's interests. Some would say the Defender Services Committee is such a committee. Why would not restoring their authority, restoring the authority of the Defender Services Office to the former Office of Defender Services, why would those not accomplish what we need to accomplish?

David Patton: Well, first of all, because Defender Services Committee, even under the old model, just doesn't have the authority to do that. They don't truly run the program. At the end of the day, it's the Budget Committee and the Executive Committee and the Conference as a whole that runs the program. Of course, also, so much of that power is devolved locally.

I think it's important to distinguish between the judges and the judiciary. I feel tremendous support locally from my judges, and if you asked me . . . and, by the way, I cover both Southern and Eastern District of New York, and I would never hear the end of it if I didn't correct that.

Judge Cardone: Apologies.

David Patton: Please don't try to get me in between Judges Pollak and Gleeson on the EDNY debate.

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

I think that we are not like Legal Services or Planned Parenthood. I think we are a fundamentally different program with much more bipartisan support. The history of Legal Services, where it got into where it was most controversial and where it got into trouble all throughout its existence, throughout the '60s, '70s, '80s, '90s, was on its law reform efforts, which is just very different than direct client services, which is what we do. The politically-charged aspect of Legal Services was largely the law reform efforts.

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The co-sponsor of the CJA Act was one of the most conservative Republicans in the history of the Senate, Roman Hruska. The co-sponsor of the amendments in 1970 to create Federal Public Defender Offices was Barry Goldwater. One of the people that stepped forward during sequestration to co-sign a letter seeking more funding for us was Senator Jeff Sessions, who certainly doesn't necessarily view things the way defenders do on the substance of criminal justice issues, but recognizes the importance of the job we do. I think there is bipartisan support for a strong federal defense that aligns with both conservative and liberal ideologies: conservative ideology on checking government authority and overreach, and liberal views on social justice issues. So I think we would have support. I think we've had nothing but support in general from Congress for our program.

Reuben Cahn: Mr. Wade, can you give me your views on that question? Can a lesser solution, a lesser surgery, be successful?

James Wade: The short answer is I think not, but I do think . . . I think the same problems and issues come through the current structure as would be confronted by another structure, the CJA center outside the judiciary. Why am I against the lesser solution, as it's being called, is it's part of . . . the CJA center might have its own bureaucracy, but we're plugged into the court and judicial conference way of handling business. It's orderly, it's cautious, judicious. They have biannual meetings, and agenda items get worked up. They're backed off of the U.S. Judicial Conference meeting in order to handle the business orderly and efficiently. That's a long process.

When people get placed on the Defender Services Committee, I'm sure they have no idea how much work . . . it's not just two times a year, it's throughout the year. Conference calls, mail votes, things like that. It's a very active committee.

The same issues . . . I think that the Center would be more directed at that. I think we probably do need to get out of the official court process that's all geared on the twice-annual meeting of the United States Judicial Conference. I'm thankful for . . . my view is an adaptation view. We had an introduction in the beginning. The judiciary introduced the defender organizations, they supported them, we've grown under that adaptation, and now the structure that's really helped us grow, and I'm very grateful for, I think we've outgrown it. I think we do need to have the center to more quickly adjust and focus.

Now, I'm not, I don't believe I'm Pollyanna on this. If we had a CJA center, I think we're going to understand more what the budget folks face in the judiciary. We don't probably have a very good understanding of that. We probably underestimate it, is what I'm getting. I think we're going to have bad times and good times under such process, but I think we will feel better

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about the process in the end. I think that there could be an individual case that could sabotage us at some time in the political process. But I think we would overall, that the net would be a benefit. I think we're going to be more flexible under a lesser structure, and respond to things, I'm thinking, like, 782, retroactive amendments, clemency. I would like to have a quicker response and more resources poured into an emerging issue.

Reuben Cahn: Ms. Conrad, where do you come out on these issues? Where are you on this spectrum?

Miriam Conrad: I certainly think that we should not be within the AO. I think the most important thing is the money, because I think if we were guaranteed that no matter where we were, we would have enough money that we would be on parity with DOJ, I have a hard time imagining that my counterparts would not favor some form of independence. It's the fear of losing money, I think, that stops a lot of us and has stopped a lot of us cold. If you fix the money, which is a huge, huge if, I don't say that lightly, I tend to favor either complete big-I Independence, or something along the lines of what the Prado Commission recommended.

The one place that I part company with that is the recommendation that the boards be volunteer boards. I think there's far too much in the whole defender CJA provision of services that is done on a volunteer basis. We have a CJA board in Massachusetts. Our chair, Jessica Hedges, is going to be testifying tomorrow afternoon. She works incredibly hard, and none of her time is compensated. She serves a really important function within the indigent defense provision. I don't think we should be relying on volunteers to be making important decisions about provision of indigent services and policy and the like. I think if we did have a CJA or defender center, a separate institution, as it were, whether it's equivalent to the FJC or if it's something outside of the judiciary entirely, I think that we would hopefully not have the problems we had about clemency. We also had similar issues with the head of the AO telling judges during the sequester that we could not get funds for experts from the courts, which put us in the terrible bind of basically funding representation of our clients out of the pockets of our employees through furloughs.

I think there are a number of areas in which, even if you fixed whether or not we're a directorate or we are under court services, even if you fixed the circuit having the right to say how many AFPDs a given office has, even if you took away the power to appoint the FPD from the circuit . . . and I say all of this wanting to point out that the First Circuit has been incredibly supportive of my office and of the other offices within our circuit. It's not a complaint about the specific judges, it's a complaint about the structure. I think the structure is the problem.

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Judge Cardone: All right. Ms. Roe.

Katherian Roe: One of the things that defenders often mention if you get them all together in a group, about what they love about being a federal defender, is being able to have independence in how they run their office. Now that, obviously, is not the big-I, but the little-I, that you get to make your own decisions, you get to run your office as you see fit as much as possible. Obviously, there's some oversight, and now we have work measurement formulas and things like that that somewhat interfere with that ability.

But if there's a national center, as Mr. Patton and Mr. Wade have talked about, do you worry that there's going to be less opportunity to do that, to run your office independently, when there's a national center with a board of directors and then a regional center with a board of directors, just to use that structure as an example? That's a question I have because obviously, you're all defenders, and that's something, I think, that is very valued.

David Patton: I mean, I would hope that a center that's devoted to the provision of quality defense would recognize the importance and the value of a certain amount of independence among the offices, but I also don't think it's a bad thing to have some accountability to a group that is solely focused on quality representation. I think it's a much more difficult dynamic when the supervision is by the judiciary that doesn't have that as its main mission.

To the extent that there is some top-down supervision and management, I would much prefer that it come from a governing body whose sole mission is quality representation.

I'll also say that I agree with you that, given the amount of autonomy that we typically do have within our offices, the much bigger problems are the problems associated with the CJA panel attorneys. I do think that is the number one big ticket item that needs to be fixed: their rate of pay, the way they have to get resources, the confidentiality issues that arise from even asking for those resources, even when they're granted. I do think that is the bigger problem.

Leigh Skipper: If I could just answer or follow up on that.

Katherian Roe: Sure.

Leigh Skipper: I do have the concern about the autonomy or the independence being compromised in such a setting that you mentioned. I note that during the sequestration or in preparation for sequestration, through various working groups within the structure of the AO and working with DSO defenders through discussions, we're afforded the opportunity to make the tough calls, because our view was, "We know what's best for our office and how we can

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maintain the proper balance between quality and given the constraints imposed upon us,” as opposed to . . . we were very fearful of, “Here’s the formula. You can have X amount of people and Y amount of different positions, and this must happen,” as opposed to the discretion afforded to make decisions to hit the number that had to be hit, because of the drastic cuts.

Katherian Roe: I’d like the others to answer this too, if you’d like to. One of the other issues that’s related to that is that, as we’ve heard all over the country, and as, I think, we all know, defenders did it differently. Some people furloughed, some people just took pay cuts and stayed on the job. Some folks terminated some of their employees. There were all kinds of strategies in a way to deal with the sequestration which, I don’t know if that would be the same, if it was dictated from a national center.

If other folks, Mr. Wade, if you’d like to respond.

James Wade: I think it’s a legitimate concern that little-I independence would be affected. In some cases, I would think that maybe it should be. I see that in the quality area, and I’m not just talking about CJA panel, I’m talking about Federal Defender Organizations. Hopefully a national center would elevate everybody. Now, there is the tension between one-size-doesn’t-fit-all, and uniformity. I think that would have to be worked out over time, but I do think it will impact some of the little-I independence. I think that’s the short answer, I feel that.

Marianne Mariano: For me, it is a concern. I come from the Western District of New York. We are more Midwestern than New York-centric, so we’re different. What my practice is like is nothing like David’s practice. In fact, you would think Jim Wade and I might have similar offices, but we don’t. Not at all. He has, I think you said, five federal prisons. It completely changes how maybe what would look on paper to be similar districts out in the middle of nowhere, so to speak, are not. They’re not. The practices are completely different.

I do worry about it, and I feel that the judiciary actually has to grapple with that on its own. There are regional differences amongst all of your districts. There’s judges on this Committee. I know that that is a theme within how the judiciary, how the third branch of government, actually manages its own business. I do feel like the judges recognize the regional differences and can better protect those interests than a centralized, within the Beltway, big-I Independence center.

I have real fear about the politicalization—I’m missing a syllable, probably, there—of that, and who would be appointed, and what they would understand or know about my practice or my clients. I do have that concern. I’ll leave it at that.

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Miriam Conrad: I don't really envision, and maybe I'm being naïve in that regard, that center taking that level of a hands-on role in running the individual offices. I see it as functioning in terms of budgeting, which, of course, has an immediate effect on us, but I can't imagine we would have less of a voice in how our offices get staffed or budgeted than we would under the current system. I think they could also provide very valuable support in the types of situations like Jim Wade referred to, in terms of Drugs Minus Two, *Johnson* issues.

There are experiences that we have nationally or in one district that transfer pretty neatly over to another district in dealing with, for example, allegations of misconduct in a crime lab. Instead of each of us trying to figure out, and, of course, we are all very collegial with each other, but if you had a national depository of that kind of information, I think it would be helpful. I don't see it functioning in the same way that DOJ does, in terms of handing down edicts about, "This is DOJ policy, and you have to follow it," because we're representing individual clients. You're never going to have, I would think, that kind of bureaucratic setting of policy, because you can't tell someone, "Plead this client to this sentence," or "Take this case to trial." Those are all individual decisions you make in an individual case, which is one of the things I've loved about being a public defender since I started in a state PD's office.

I don't know. Like I said, maybe I'm being naïve, but I don't see that as being such a concern. Frankly, maybe, for example, right now in the *Johnson* situation, we have some districts where prosecutors have agreed to waive the statute of limitations. We have other districts where they haven't. Each defender is trying to negotiate that and fight it out on its own. Now, there may be sort of a downside to what I'm about to say that I haven't thought through completely, but if there were a national defender organization that could negotiate directly with DOJ to say, "Look, we've got this problem. Can we come to an agreement that we won't file all our petitions on June 24th, and you'll agree to waive the statute of limitations," instead of each one of us fighting it out on our own turf, I'm not so sure that would be a terrible thing.

Marianne Mariano: Could I comment . . .

Katherian Roe: Is what you're describing something like a Defender Services Office with flexibility and more of a forward-looking function?

Miriam Conrad: Yes. I mean, it's really . . . I think what I'm envisioning is more taking DSO out of the judiciary entirely, or out of the AO. It's not necessarily changing the function of what they do. Whether you call it an institute or you call it an agency, or whatever you call it. I think it needs to be, as DSO is, filled with people who are familiar with the defense function and give defenders a voice, and CJA lawyers, a voice in the policies that they have to live with it.

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Katherian Roe: Can we talk for a minute about the funding issue? Since that seems to be, it seems like, at least, that one of the most important parts of this is that folks who talk about whether or not the CJA program should be independent, the defenders should be independent, always come back to “if there was funding.”

Mr. Patton, I know that you had, and it’s been attributed to Ms. Conrad, but I think in your statement, you talked about linking the funding of the defender program to law enforcement/prosecution/DOJ, if you will, and the possibility that that might solve the problem that we keep talking about, is whether or not it will be funded, whether or not it will be fully funded, whether or not even if folks are positive about having a strong criminal defense, whether they’re actually willing to pay for it. Could you talk about that for a moment?

David Patton: Sure, and I’ll say I hope someday our biggest problem is who gets to take credit for the funding trigger that equates us with DOJ.

Look, I’m hoping that throughout having these discussions, people will chime in with ideas. I’m not wedded to any particular way to do this. The proposal I’ve made is that you create a floor, and that there is a funding floor that is tied to a percentage of DOJ and federal law enforcement funding. I would never suggest that there needs to be a one-to-one ratio. We do different things. They do different things earlier on in the process. Lots of things they do don’t result in actual prosecutions. We do different things. Sometimes fewer prosecutions might mean needing more resources for us, and vice versa.

What I’m suggesting is some measure of protection, a floor. Whenever my beautiful bill is passed someday, it would perhaps say, let’s take whatever figures existed in the previous year, whatever is most easily measured, and whatever it is, 5%, and you don’t go below that floor in future years. I do think it makes sense when DOJ goes to Congress and says, “We have these enforcement priorities and we want to establish these new enforcement programs”, that that be considered in the context, in the total context, of what that means in terms of needed resources and that the defense resources be considered at the time that Congress is considering launching those initiatives or funding those initiatives.

I think that it makes sense to do that, and if I could just also, just on that last question about the top-down approach. Certainly what I’m envisioning, calling for big-I Independence, doesn’t envision a terribly different role than what we have now in terms of functions that the AO serves and that the Judicial Conference serves. It’s just who’s in charge of those functions. I certainly don’t expect any sort of dramatic difference in what Washington is telling local offices about how to engage in their practice.

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Judge Gerrard: Yes, very well. I want to talk about structure in a moment, but before I do, I want to visit about diversity with you, Mr. Skipper, because we haven't peeled back on that very often. And my question is this: what efforts have been made? Because I led a minority injustice task force and then committee in Nebraska, and it takes more than just recruiting to both establish and maintain diversity within an office. I want to talk about what efforts you've made here in Pennsylvania, but then maybe a little deeper, particularly for those areas in the middle of nowhere, and I come from one of those areas. Yet, our defendants are 65%, 70% persons of color.

I want you to discuss with the Committee a little bit about what you've done in Pennsylvania and maybe some ideas. I'll ask other panel members on ideas of diversity, particularly in those areas.

Judge Cardone: Stay on the mic.

Leigh Skipper: I appreciate the question, Judge. To begin with, I think that what has to be recognized as what I'll characterize as a ground game commitment with no immediate return. What I mean by that is, the penetration into various minority affiliations or bar associations or BALS, Black Association of Law Students, has to be done so people are familiarized with the program and the commitment to the work, and the dedication. I think that, frankly, a positive word travels. If there's that infrastructure and commitment to attend those job fairs, to participate in those conferences, then you're piquing interest there. You can fortunately make a career, if you're really dedicated to this and enjoy the work, and you can constantly be challenged. So I think the marketing of it has to begin with something way before there's an opening for a position and you have a pool of applicants.

That takes dedication of resources. What we've been able to do in my office, I don't know the specific numbers, I should have had those before I opened my mouth. We do see, I have seen, and I'm proud somewhat, I don't offer any great success, but, it's really a function of being more flexible in what we're looking for various positions. By that, I mean we have research and writing positions, we have paralegal positions. If someone is not quite ready for an assistant federal defender position, then you bring someone in to get them exposed to the work and see what that interest is, and then maybe down the road, something else will materialize.

Also, on the national level, through the National Association of Federal Defenders, we've begun, in its infancy, is a process of a databank of applicants for a variety of positions throughout the system. If a defender in that obscure place of Western District of New York has an opening for a position or saw a candidate that expressed an interest in the program and was impressive, then that databank would store that information and then other

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defenders would have some privy to qualified candidates. People are willing to relocate. People are willing to go to different cities. I think you have to experience it because of the commitment to the work.

I think it's a host of issues, no simple answer here, admittedly. I think you have to hit that ground.

Judge Gerrard: Right. Ground game, early on.

Leigh Skipper: Yeah, exactly.

Judge Gerrard: Long term commitment.

Leigh Skipper: Correct.

Judge Gerrard: Okay, all right. Very well. Other thoughts from the panel on the issue of diversity?

Marianne Mariano: It is difficult, Judge. In my community, it's very difficult to get a diversified applicant pool. I have been able to diversify my office to a limited extent, and I speak only of ethnicity. Gender diversity is easily achieved at my office, but ethnic diversity is not. I recently hired four people. Some of those are term positions. Before those four hires, I had managed to diversify my office and have a staff that was about 33% ethnic diversity, for lack of another word, African Americans and Latino employees.

I hired four people, and I maintained my gender diversity, there are two women and two men, and there were no minority applicants in those pools. And I pulled one of those postings and tried to recirculate it, and could not . . . now, I should say obviously I got a lot of response, but there was no obvious minority candidates within that pool. I reached out to minority bar associations. It's very, very difficult.

I will give DSO props. They have been really trying to help us, and, like Leigh said, our association. They've really been trying to help those of us who have difficulty diversifying our candidate pool reach out to some new entities, including the National Bar Association. Just this past, or last week, we had a conference call with . . . I can't remember the gentleman's name.

Unknown: Karl Racine.

Marianne Mariano: Karl Racine, who is the Attorney General in D.C., who helped identify some really good places to send our postings. I'm optimistic that, as I move forward, I have some other places to reach out to.

Judge Gerrard: So databanks and crossing borders and things.

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Marianne Mariano: Exactly. It's so important, and, I have to say, just adding what I have added, I think raises the quality of what we do in my office 100%.

Judge Gerrard: All right, very well. Other thoughts? Ms. Conrad.

Miriam Conrad: I'm sort of in the same position that Ms. Mariano is. I mean we, we're not in the middle of nowhere, I don't think, but we do have some difficulty, certainly, recruiting from other parts of the country because Boston has a bad reputation in terms of the racial climate. It's not a particularly diverse place, particularly in the legal field. When we do try to recruit from out of state . . . I mean, we send all our postings on the national website, we send them now to the National Bar Association, to the National Hispanic Bar Association, to the local affinity and minority bar associations. We really try to get the word out. We post on Idealist.org, which is a website for people interested—for all our positions, including legal assistants—for people interested in working in a sort of nonprofit or public interest environment. We try to do all of that.

I've had difficulty. I had one wonderful candidate who was in a Southern Federal Defender Office, and we made him an offer, and he was African American, and he had sticker shock when he came to Boston and saw what the housing prices were like. This was actually for our Rhode Island office, which is a little cheaper than Boston. And then, there were difficulties. His spouse was in a health profession, and was going to have . . . the certification requirements in Rhode Island were just such that it would have been very difficult for him to transfer. He wound up going to a different Federal Defender Office in, I think, the Western District of Pennsylvania.

We face those challenges. Boston is a desirable place to live, but it's also an expensive one, and it does not have a good reputation. It's a constant struggle, and we're always looking for new ways of reaching out and getting more applicants interested.

I should say we hire . . . most of our AFPDs have come from the state public defenders' offices, and I want to make sure, as my connection to those offices has gotten a little more remote the longer I've been away—from the Massachusetts office, anyway—I think we need to try and make more of an outreach effort.

Judge Gerrard: Very well. Yes, Mr. Wade.

James Wade: Judge Gerrard, we have a terrible situation. We're struggling with diversifying the office. I agree that we're in our infancy in this, but I would . . . we poach, is the number one and cheapest way, to try to poach from the larger offices nearby. Sometimes that works, and sometimes that doesn't. But I think perhaps one of . . . and, it's not my idea, but training of defenders

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about how to approach this is helpful. Basically, our internship programs, we do not have paid interns anymore. When I first started, we used paid interns.

I think if we had a more robust paid internship program . . . we occasionally get somebody that . . . University of Texas sent us one of their public interest students and so she was paid by the University of Texas to work in our office. We haven't segregated the funds dedicated to an internship program where we could help bring people along, and I would put in a plug for that . . . along with sharing applicants that maybe came close to what you were looking for, but you're not going to extend the offer, sharing that information amongst offices, which the Association is trying to do, is also, I think, another hopeful prospect.

Judge Gerrard: Okay.

Leigh Skipper: Just, if I can just add . . .

Judge Gerrard: Yes.

Leigh Skipper: One additional comment that we found successful is, if we find an applicant where we see potential in, we stay in touch with, we try to make every effort to stay in touch. I have an example where a graduate participated in a post-graduate fellowship that was funded by her law school. We maintained contact with her, and because we had met with her, although she didn't get the job initially, fast forward a year, a year and a half later. We recalled her, we were impressed with her, and we ultimately hired her. You have to really maintain those contacts, as well.

Judge Gerrard: Okay, very well. Well, I appreciate all of your efforts. It's a serious issue, and this Committee is taking it seriously, so any other input that you would have, we would appreciate. Our courtrooms, our probation officers, the defense function must begin to both look and act more like the clientele that we serve, so we appreciate your efforts in doing that.

As to structure, I wanted to start with you, Mr. Patton and Mr. Wade. I was particularly struck both by your written comments and what you testified to, Mr. Patton, that if there was no fundamental change in independence, that there would be many ways in which your clients would be hurt. I want to talk about some of those primary ways, because regardless of what our views may be individually, as a Committee, we will be submitting a report to the Judicial Conference, who we must persuade. One of the ways of persuasion is, how would your clients be hurt in fundamental ways?

David Patton: As I said earlier, I think the biggest current problem is with the CJA panel, with respect to how on the ground it's impacting them on a daily basis. Just last week, I had two lawyers, not in response to me coming here, just two

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CJA panel lawyers in the Eastern District of New York called me with different issues, one where a judge denied an expert, the other where the lawyer had put in for an ex parte submission, as he should have, for an expert, and at the very next conference, the judge turned to the government and asked for the government's input on whether or not it was really necessary, and ended up assigning and approving the need. That doesn't show up in any statistical counter of not appointing an expert. This is a perfectly reasonable, good judge, but I just don't think they understand why that's so problematic.

That goes on, you know, on a relatively regular basis, and the idea that you have to spell out the need for an expert, and the example Marianne gave is one I've talked about as well, which is just the idea that you're asking for a psych report, and it's approved and the money is spent, but lo and behold, the judge doesn't get a psych report. That's a problem.

Judge Gerrard: That's true. Mr. Wade?

James Wade: The injury . . . when you use the term 'clients,' I'm viewing the clients in a national viewpoint, instead of just in my district. I think it's odd that people can't get lists from the United States Sentencing Commission to help identify people that might be eligible for certain benefits, like retroactive amendments like the Johnson litigation. There's very uneven justice out there, and so the clients get hurt when you don't have a process to incorporate that. I think the Sentencing Commission, like I envision the Department of Justice, if they had such a center, they would more easily reach out to it and collaborate with it, and eventually would get this ex officio member on the Sentencing Commission like the Department of Justice, and I do think things would work out. I think it'll take time.

I see the injury as uneven justice, whether that's part of the federal defender representation, or the CJA panel.

Judge Gerrard: So what you're talking about, in a sense, is economies of scale, also, whether it be in discovery and e-discovery, or some of the other areas?

James Wade: Yes. I would think that, and particularly in e-discovery, I think we're in a shift of how discovery is delivered. There's policies in jails that such a center could work on, could work with the marshals to have in their contract provide that their prisoners, at least, have some mechanism to review electronic discovery. My judges don't want to pay an attorney to go into the lockup and physically go over the discovery with them. They would like to have mechanisms that would make it more convenient to review electronic discovery, and, I think, save costs at the same time. A national center, I think, would improve things like that.

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Judge Gerrard: Very well. I think I'll . . . I would want to hear from the other side on the risks, by the same token of going to an independent, but I'm going to allow colleagues to ask, and you can pipe in.

Judge Cardone: Mr. MacBride.

Neil MacBride: Thanks, Judge Cardone. Thank you to our panels this morning. Very, very helpful to hear your perspectives. Just an opening comment. We've now . . . I think this is our fifth or sixth or seventh hearing.

Judge Cardone: Sixth, or eighth, or ninth . . .

Neil MacBride: A common theme is that I would say a majority of defenders or CJA reps that we've heard from say, "Things are working just fine in my district, but I understand in other districts, it's terrible," or, "I understand at the national level, it's terrible." I don't know if it's one of those phenomenon that you sometimes see in these issues, kind of like years ago there was that statistic that the approval rate for Congress was 15%, but individual Congressmen had a 90% approval rate in their home district. Everybody liked their own Congressman, they just thought the other 529 were crooks.

All kidding aside, it's something that we as a Committee need to grapple with, because we hear, more or less, a lot of satisfaction from individual defenders or the sense that their local judges are supportive of the system, and yet, this sense that something is not quite right.

Related to that is, it's interesting to me that even on this panel of five real experts and distinguished, experienced individuals, I think two of you would vote for independence for secession, and the other three would vote to stay in the Union, so to speak. That's a key issue for this . . .

David Patton: Can we not characterize it that way?

Marianne Mariano: I like that characterization, though.

Neil MacBride: Yeah, no. There's any number of bad analogies, but it points out the difficulty of this Committee. You take all defenders and lay them end to end, and they can't reach a conclusion, or you'd have to separate them into separate groups to reach that conclusion.

We're very glad that Chairman Cardone is leading us, because it's some tough decisions, all kidding aside.

I wanted to start with a question about parity, and, I think Ms. Conrad and Mr. Patton, you both have spoken about this in your written statements a little bit today. That is, I think one or both of you, I'll credit both of you, made a

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comment about how the defense function is really sort of on the back end of prosecution decisions, and has to be considered, in a sense, a cost or a direct result of a decision to charge. That certainly makes sense. I think that is objectively true, and it's an interesting way to think about it.

I've asked a couple witnesses, either in closed session or in the public fora, if you're aware of studies that have been done, or, if not, if you can conceive of a study, if you had access to perfect data, say, from the Justice Department or from an individual U.S. Attorney's Office, how would you attempt to divine what a baseline or benchmark would be in terms of creating an algorithm or some sort of a mathematical equation? My own personal sense, when I was U.S. Attorney, was that my office was much bigger than Michael Nachmanoff's, my very good friend and very distinguished FPD. We would talk about this, and he would kid whether I would support one-for-one funding, and I would laugh and say, of course not, and that's because you guys are only in 30% of our cases, and you tend to not be in the complex financial cases where we have three or four AUSAs on that case, as opposed to, say, a Hobbs Act robbery, where there's an asymmetry between the resources we need to put on a case where traditionally, our office is not involved. We talked about the national security mission that my district had which almost never resulted in charged cases, but was a big time suck as to AUSAs.

We would sort of talk, and we would sort of issue spot and sort of put on the virtual whiteboard the fact that, when you start drilling down into it, you see that there is a divergence sometimes in terms of how a particular U.S. Attorney's Office is having its AUSAs spend their time, and what the FPD on the other side is doing. Trying to track up, trying to quantify your point, Ms. Conrad, about if the prosecutor charges in a case where it's in your lane, then you guys get brought in, and there, I think you can start doing some of that comparison.

I'm just wondering, beyond what you've described conceptually, which is very helpful in your testimony, what would this sort of study look like, and how granular might it be? I would love to hear your thoughts about that.

Miriam Conrad: So, you know, I don't think the answer is one-to-one. A very simplistic basis would be to take the percentage of the cases that we do, but even that doesn't work, because, for example, it cuts both ways. In terms of investigation, we're relying on our own staff to conduct the investigation, on our own staff investigators. They're relying on the FBI, the DEA, the ATF, and, of course, they may be deploying more resources in doing that.

I'm sure Mr. Patton has a much more sophisticated analysis of this, and I'm hoping he's going to jump in, but here's a really simple one. Let's say we're adequately funded now. I think we are, some of us, feel that we're pretty

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well-staffed or will be, once we get to implement the work measurement formula and so forth. If the budget for the U.S. Attorney's offices, not DOJ nationally, but the U.S. Attorney's Office division, if that goes up x percentage, we go up x percentage, because that means . . . or, you could even do it for DOJ. If the DOJ budget goes up, then ours goes up, because we're going to be responding to whatever new prosecution enforcement initiatives they implement.

I have no idea how that would play out in reality, or what percentage of the DOJ budget goes to the U.S. Attorney's offices, and one of the problems, of course, is that we don't really have access, and I don't know if the Committee does, to information from DOJ about how much money they spend on experts, how much they pay experts, in what percentage of their cases they use experts.

But I'm going to kick the question over to Mr. Patton.

David Patton:

I think Miriam basically described what I've thought about, which is use descriptive data. Rather than worrying right at the outset of normative, what is the ideal percentage, you could at least start by just looking at what the current percentage is and making that a floor. I agree it can't be one-to-one. I mean, in the Southern and Eastern Districts of New York combined, there are roughly 300 criminal division AUSAs. We have been staffing up like crazy in the past year recovering from sequestration and responding to the new work measurement, and we've gone from forty lawyers to forty-five.

Now, we represent roughly half of the assigned cases, so total percentage of the criminal cases, we're probably somewhere at around 40% of the total cases. Do I think we should have that exact ratio of lawyers? No. It's a different job, but we're nowhere near that. There are all of these other resources that don't count as U.S. Attorney resources, like the law enforcement agencies, and I think you would want to wrap those in to whatever formula you devise as well, and at least start there as a floor. If, in last year, let's say, last year's ratio was 5% once you include all the relevant federal law enforcement and DOJ criminal side. I'm pulling this out of the air. I have no idea what it would be. But if it's 5%, then it should never drop below that, and if DOJ funding goes down, our floor goes down, but we could obviously come in and say, "Look, the case numbers alone or the DOJ resources alone don't tell the full story. Here's why we should do better than that. Maybe we will, maybe we won't." That's the appropriations process.

I do think that we are in a better position to make that case. I recall having a conversation with AO budget folks a couple of years ago, and they said, "Well, how can we ask for x amount when the cases are dropping?" I just thought, "I can't believe that this is our person in Washington," because there are a million and one reasons why our resource needs might go up even if our

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case numbers are dropping. E-discovery is a huge piece of it. Thousands of hours of videotape that we now get. Everybody's walking around with a personal computer on them. There are all sorts of reasons why our resources might not be strictly tied to case numbers, which is how it's tied now.

Neil MacBride: Okay. Mr. Skipper?

Leigh Skipper: Thank you, Mr. MacBride. I just wanted to comment on the notion that while we've pretty much said here today that locally we have nice structures and successful structures and cooperative structures and the like, nationally, we're in communication with our colleagues through various working groups. That is not the case nationally, and we're privy to a lot of that information. If you were to take the Western District of North Carolina, I'm sure the Committee's heard about the circumstances there, the CDO model, the federal model, and to the extent of judicial intervention and whether that was proper or not, but the swiftness and that whole process.

There's also, unique to each district, different processes related to the timeliness of appointments, interaction with the court at various stages with respect to client visitations, hiring practices we're privy to, I'm privy to, where the local court is not just inquiring about the formulas, but more specifically, who that particular candidate is and the pressures that are inherent with that as to hiring.

These are the national issues we hear when we talk about these issues that are substantiated through our discussions with our colleagues nationally.

Just to put it out there, we defenders represent in all types of cases, and we pride ourselves in that. We are involved, certainly, in my district, my office, in a lot of terrorism cases. I don't want to say a lot, that might be an over-representation, but certainly involved in terrorism cases, major international terrorism cases. We certainly participate in a lot of white collar cases. We have a diverse docket. There's that marketing piece that maybe we should do more of when we try to work on, when we're out there. We don't go to various Bar Association functions to pound ourselves on. We've got a guideline, departure or variance of a significant magnitude. We do all of that as well.

Neil MacBride: Right. If I could switch gears for a minute, we've talked at this hearing and previous ones about structure and org chart and where to put the federal defender box, and whether it's within the judiciary, whether it's outside, whether they're dotted lines or dashed lines, how it's paid for, etc. Again, there's, and at least I haven't heard much of a consensus from your community.

So, question for the panel, anyone who may have a view, here. We're hearing

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this afternoon from a panel of military counsel. Obviously, that's a very different system, and one that's not unlike some systems you see around the world, where, whether it's in the judiciary or the executive branch or a truly independent agency, you have the same entity overseeing both defense and prosecution, probably made most famously in *A Few Good Men*, where Kevin Bacon and Tom Cruise are playing basketball, and they're joking about, "Well, you're the defense lawyer this week, but you're going to rotate to the prosecution in a couple of months."

All kidding aside, it rolls up under the same chain of command. You've got the same appropriator looking to increase the bucket of dollars. You don't have splintered parts of the executive branch, you don't have, more importantly, splintered appropriations committees. You have one entity writing the same check, and sort of, hopefully, in theory, keeping an eye for both and valuing both. It's a radical solution, but when you're sitting around and dismayed about the fifty-year history of the defender organization on the org chart, do you ever think about other radical models like that or anything else?

Anyone can answer.

Leigh Skipper: That would be radical. Certainly radical.

Marianne Mariano: I was going to say, no.

Miriam Conrad: No.

David Patton: I think the military has also struggled with that model.

Marianne Mariano: Yeah, I don't. I mean, I actually hope to watch that panel, because I'm interested in hearing what they have to say, and Chris Capece, who's a federal defender in one of the West Virginia districts, is a defender who came from the military, so he probably will also be very useful to you.

I've hired a couple former JAG guys, and they say that the way, sort of the pecking order of the work is, first you're defense counsel, then you have to go do some civil work writing wills and such, and then, if you're good, you get to be a prosecutor. I would hope that you'll ask a little bit about that, because that concerns me that the rewards system is that you are then elevated to this like, the prosecutor model, and then I would question the entity's commitment to both sides of that equation.

I think, Mr. MacBride, you point out just in your own opening comments, that U.S. Attorney's offices, you question whether there could be parity because there's this sort of behind-closed-doors work that they do that isn't comparable to what we do, and how would we ever figure it out? Well,

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wouldn't that be true if the mothership knows, if they are looking at it from above and say, "Well, I've got to make sure there's more resources over here, because this is what they're going to do, and I think this is good enough." I don't think that that works. I think that the defense function is reactionary, like the judicial function, and that's why I do think the judiciary is a better model.

Again, I don't want to be mistaken as believing where we are right now is the better model, because it can be improved upon, and I hope that this Committee will recommend real change, big-I or otherwise, for staying even within the judiciary. I look forward to that panel, and my own personal opinion is that that would be fraught with danger, for lack of another term.

Miriam Conrad: If I may, even if you didn't have the kind of rotation, which I think would be completely impossible. I think one of the great strengths of our program is . . .

Judge Cardone: Can I ask you to move the microphone?

Miriam Conrad: Oh, I'm sorry.

Judge Cardone: That's okay.

Miriam Conrad: One of the great strengths of our program is the commitment and dedication that people in defender's offices have to criminal defense, and I think the idea of rotating people . . . I'm not sure that that's really what you're asking, but as opposed to just structurally.

But structurally, I think it's also problematic, partly for the reasons that Marianne says, but also, one of the challenges for public defenders generally is when they first meet their client and the client thinks you work for the government. If you literally work for the same agency that the prosecutor works for, then I just would have a really . . . even if there were some way to make sure that there's no interference, that there's no cross-information. I mean, look at what we just went through with putting the IT into DSO, or excuse me, the AO. Would we have the same IT? Would they have access, potentially, to some of our data? It just seems an impossible situation, but, if nothing else, the optics are terrible.

Neil MacBride: Okay. Just one last question, Judge, if I have a minute.

Judge Cardone: Yeah, go ahead. I was just thinking the defense counsel would have access to the prosecution's, too, so.

Miriam Conrad: There you go.

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Marianne Mariano: Can I reconsider my answer?

David Patton: I might make that trade.

Judge Cardone: Go ahead, Mr. MacBride.

Neil MacBride: Just a final question. I'm being a little bit playful in saying this, but another theme from all these hearings is this morality play of saints and villains. The villains, typically, in these hearings are the judges who cut vouchers and don't affirm the importance of defense work and sort of see it as more of a pro bono obligation. Another villain that shows up sometimes is the AO that just doesn't understand or doesn't care or micromanages. DOJ is sometimes a villain because they prosecute too much or because they try and trip up the defense. Congress sometimes plays that role.

On the saints side, it's defenders who are doing heroic, important work, and I want to affirm that that is absolutely the case.

What I've not always heard, and I'm just curious, it may not exist at all, but in terms of when you think about the CJA and how it operates and how it can be improved, are there ever additional reforms or best practices that you identify on the defense side? For example, there are reports sometimes people see about waste, fraud, and abuse with vouchers or billing excessive time. You read anecdotes about somebody who starts out as a retained lawyer, runs through the retainer, and then ends up being appointed to the CJA, and they actually jump ahead of CJA lawyers who otherwise should get that appointment.

The question is, apart from the big, the macro issues, the structural issues, the independence issues, raising rates for CJA panels, all of which are really important, are there other, do you ever think about aspects where on the defense side, things can be improved, systems improved, processes improved, controls improved, or is it simply just everything's working great, and it's well-intended, but ultimately harmful micromanagement from judges or the AO, etc.?

Marianne Mariano: I'd really like to answer that, if folks . . .

Leigh Skipper: I think we all do.

Marianne Mariano: Yeah. I think we're all ready.

I'm going to focus mostly on the CJA side, but let me start with my own house.

It would be great if DSO could have some autonomy, and if when people like

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Cait Clarke, who've been committed to the work we do, can actually answer our questions without six layers of supervision that makes the answer really antiquated by the time it gets to us. So on that side of the equation, yeah, we could really use that. That is something that not only could we gain the value in having DSO be very responsive to the needs of the field, but also attract talented people like the woman who's running it right now, and give her the freedom to actually run that office.

On our side of the equation, I do think that there are things that can happen nationally that will funnel down to the field that will elevate what we do, and we do it at a high level right now, and it can be better.

On the CJA side, I think we take the voucher review and the expert review out of the hands of the individual presiding judge and put it in one person, there's a lot of things that can happen. One, we would identify panel members who don't really understand that process and get them the assistance they need to more properly account for the work that they do in a timely way. Two, we would obviously identify abuses. Chronic misrepresentations, to the extent they're out there, and I don't know that they are, would be more readily identified if there's one person in a district looking at all of that. The third thing, I think we would also be able to ensure we are educating and training the panel, particularly new members, on the need to employ service providers.

I do think that there are ways that changing a good program will make it a better program, which is what I hope the work of the Committee will do. I don't sit here pretending I can't get the job done. I just hope I can get it done even better.

David Patton: I would . . . sorry. I just reminded of Professor Kerr's comment yesterday about there are the two questions. There's the, who should do the process? And then there's, what should the process be? In our line of work, those are not two separate boxes. The amount of, the type of process you can do depends, in part, on who's doing it. I'm not comfortable, I don't think most defense lawyers are comfortable, with judges engaging in the type of process that I think would be necessary to both improve the quality of the work and to ferret out any sort of abuse.

I think that requires, to do quality review, requires real, in-depth peer review, and I think that that is a big piece of improving quality and keeping an eye on fiscal management. And I don't think this structure allows for that to be done in an ethical way.

Leigh Skipper: I want to mention efficiencies in what we constantly look at, certainly with respect to issues such as cost containment. When you talk about voluminous discovery, multi-defendant cases, we try to coordinate to the extent that

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there's no conflict. The use of services, the utilization of what we have on board, so that we can kind of oversee and assist with our infrastructure. It's those type of efficiencies we are constantly looking at that improves the quality and also serves as a cost containment measure.

James Wade: I'm looking at the centers to help us with some of those problems on our side. I only hinted at it in my remarks about quality. I think that we should look at ourselves. We think we're doing great, we give some good feedback, but everything isn't great everywhere. I'm hoping that a center can, over time . . . I like peer review. I think we'd be more aggressive on peer review if we had a CJA center spreading ideas maybe we should be looking at. Some people call it restorative justice, the Oregon hearing talked about it a little bit. We should at least be exploring, maybe have pilot projects on other ways that people are providing indigent defense services. I'm not sure we're on the forefront . . . I mean, we're always touted that way, and I'm proud of what we have. I don't see villains in the judiciary. I see it as well-intentioned, a thoughtful process, but it is a little bit stifling, and a little bit conflict-ridden.

I don't actually ascribe any motives, bad, evil motives. Actually, they have been our friends, and I would tell you, my district and my experience with the districts that I've been associated with and the circuits have been all good. But there are inherent conflicts. We need to look at ourselves. We're not perfect, and maybe we're not as innovative as we would be. At least, that's what my hope is in this CJA center or national center.

I'm going to throw in one little quick word about formula. That was part of your . . . you have lots of big questions. I'm going to leave the where to place this someplace else, but the formula . . . the base formula, I think, could work on a crude level. I understand why it would be nice to have that. I'm worried, my only caution is, are we early in the process if we don't have such a national center, maybe not direct correlated to the DOJ main justice. We don't have the price of that yet. I'm worried about when you set this, or the idea that it might be too early in the process.

The idea of a floor, at least initially, on some crude measure that we could refine over time, I could get behind.

Miriam Conrad: I would like to echo the point that I don't think there are any villains here. I think there are judges who are put in the position, for example, of making decisions in a case where they may have a conflict of interest, because of access to information. That doesn't mean that they're bad people. It doesn't mean that they're making bad decisions. It means that they're being asked to do something that they don't have any training or experience to do, and they don't have the information that they need to make those decisions.

Leaving that aside, a couple of things that I would like to see. One is a way to

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provide more support to the CJA lawyers. Someone I think last night at the program at the Constitution Center asked about, you know, sort of the disparity between federal public defenders who have resources within their office and resources nationally, and CJA lawyers, who don't. CJA lawyers, there are wonderful programs that DSO puts on, training programs, but the CJA lawyers who attend those, who all rave about them, they have to go there on their own dime and on their own time. There also was this issue that's come up about CJA lawyers as far as the overhead that varies from city to city. We get a locality, but they don't get a locality increase.

I would like to see CJA lawyers compensated for attempting training programs, certainly at least having their expenses paid for. I would like to see, I think if we had this type of center, the center could also provide direct support to the CJA lawyers. We try very hard, and I think it's true of all of the defenders across the country, to support CJA lawyers through websites, through listservs, through local training programs, but I think there needs to be something more, and I think that it has to be, for example, as I've said before, the work of a CJA board chair should be compensated.

The other thing is re-entry courts and restorative justice and these types of programs. That kind of work doesn't really count into our staffing formula, and it raises some very difficult ethical issues sometimes. There's always been a debate about, in a re-entry court, whether the defender is representing the client or if the defender is part of the so-called "team." And it would be great if there could be some provision of whether it's CJA or a defender who plays more of a hybrid role. I think as we start to think out of the box in terms of how the criminal justice system operates, I think we also have to think outside of the box in terms of how we staff and fund it.

Marianne Mariano: Can I offer just a quick observation on the idea of peer review? In my district, we have a CJA Committee. If you read my CJA rep Rodney Personius' testimony, he really delves into the function of that committee. There are two attorneys from my Rochester division, two private attorneys from my Buffalo division, and two magistrates. The district judges can send to the committee . . . and me, I should say. The district judges can send to the committee a voucher for review when they have a concern, and the magistrate judges won't be involved. And I've personally taken the position that I won't necessarily be involved, though I will support the attorney's role in reviewing the information, supply them with information from the docket, that type of thing. I want the attorneys to feel, the CJA to feel they can come to me and not worry about me looking at their vouchers later. Obviously, if that changes, it changes.

The work of those attorneys on that committee is dead serious. I think in some ways, it's a little careful what you ask for, because CJA peer reviewing their colleagues' work is no joke. They do not rubber stamp their colleagues'

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work, including people who are friends. I've watched them review the vouchers of excellent attorneys in my district who are friends of these attorneys, and they take it dead serious. They cut those vouchers, they recommend cuts to those vouchers, or they support those vouchers, but they do it in a very meaningful way. Peer review cannot be underestimated.

I read an article once where former defense attorneys make terrible judges for the defense, that we're always harder on ourselves, so to speak. I actually think, though, that peer review of vouchers, a system that allowed attorneys to be a part of that, would help develop cultures in districts. Really productive cultures, both for attorneys who are self-cutting now and maybe for attorneys who don't actually know the proper billing cycle. And, of course if there's anybody abusing the system out there, it's not going to be tolerated, because now they're going to own it. I think that there's a lot to be said for that.

Judge Goldberg: Could I follow up with what she just said?

Judge Cardone: Sure.

Judge Goldberg: I want to just . . .

Judge Cardone: We're going to run a little bit over.

Judge Goldberg: Just challenge you a little bit on that. So in San Francisco, we heard of a system where there was an administrator, and everyone loved the system there. The administrator, I think it was under the umbrella of the court, very experienced criminal defense attorney, a lot of experience and reviewed all the requests for investigative fees and reviewed the vouchers, and everyone loved the system.

You say everyone takes the peer review very seriously, and I'm not doubting you on that, but who's better to be the watchdog? If you went out to private practice, and I know the defense bar is very close-knit. There's a lot of camaraderie. If you went out into private practice, and your closest friend in the defense bar submitted a bill to you that you thought was not only excessive, grossly excessive, let's talk about \$20,000.00, and you said, "This is my good friend, and this is this person's livelihood," are you in the best position to be that watchdog with your friend, or is a judge in a better position to be a watchdog? Judges don't have friends, so maybe we're in the better position to do that.

Can you really vouch for that system, where friends are looking at bills that affect the livelihood of other friends?

Marianne Mariano: Well, we all know defense attorneys who really only have one friend. There's always that guy. Assuming that this review, this peer review, is actually

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looking at the whole, the continued funding for a program, the importance of it to be transparent when it's audit time, the importance of it being able to be justified to Congress, yes, I think peer review actually allows for the community to ensure, on a regional basis, really, that the quality of defense is there and that the compensation is accurate, without a conflict. That's the real issue. I feel the judiciary has a conflict.

We're here, I think, because it's just as Judge Prado's report predicted. When dollars became tight, a dollar for defenders was a dollar that didn't go to the judiciary, which just isn't true in our appropriations process.

And so I feel that there's just an inherent conflict in removing particularly the presiding judge from reviewing these things . . . at least alleviates the pressure of that conflict.

Judge Goldberg: Will you recognize the conflict of one criminal defense attorney reviewing the bills of another?

Marianne Mariano: Well, I mean, I think the idea of boards is much more . . . well, actually, no. My idea would be one person doing it for each district, answering to the circuit. Sure. I mean, I think that that person has to be wisely chosen.

Judge Goldberg: Obviously, your opinion is, and I'm not saying I disagree, because I thought the system in San Francisco was terrific. Your opinion is, of those two conflicts, let the criminal defense attorney do it.

Marianne Mariano: Yes.

Judge Goldberg: Okay.

David Patton: I also think that there's a distinction between peer review of quality and peer review of vouchers. I actually think . . .

Judge Goldberg: Yeah, I'm talking about voucher review and request for investigative fees and things like that.

David Patton: I think, frankly, even in my totally independent model, some separate administrator that's overseen by a local board that's not somebody in the Federal Defender Office, not necessarily a peer in that sense, makes a lot of sense. When I was referring to peer review, I simply meant an organization dedicated to criminal defense, and particularly with selection and training on the panel.

Judge Goldberg: Sure.

David Patton: Which, selection itself, I think is problematic and is governed in most places

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largely by the judges.

Judge Goldberg: Yeah. That's why I think the San Francisco model got raves from all around, because they had selected the right person to be in that position, and that's crucial, obviously, for all the reasons.

Marianne Mariano: Judge, I do think it has to be a person who is hired to do that job. I think that the commitment of our volunteer lawyers who serve on all of these committees is really amazing, but I do think that would create a different pressure as well if they're not actually employed to do the jobs.

Judge Cardone: I have a question, and I want to ask it because I have in front of me Federal Public Defenders and Community Defender Organizations . . . because I think it was you, Mr. Patton, who raised the issue of judges versus judiciary. We're looking at structure, and there's sort of two things that go on, that we see. One is the sort of local, the issues of locality and how the judges affect how the functionality for the CJA panel as well as the defenders organizations function at a local level, and then we have, obviously, the higher structure, which has to do with the administrative office and those issues.

I want to address, because I have both FPDs and CDOs in front of me, the issue of the judiciary having involvement. I think you brought this up, Mr. Skipper. The idea of the judiciary having involvement in FPD versus CDO, or coming in and saying, "I don't want an FPD anymore, I want a CDO, because I just think if I had a CDO, it would be better. It would be a better way of doing things." Or, vice versa, a CDO, judges coming in and saying, "I no longer want a CDO, I want an FPD." We have in front of us both. To me, it's not really an issue of which one's better. I think, for whatever reason, you guys have what you have. But for me, I think the question is, what should judges be allowed to come in and tinker with, whatever organization is there, how does it affect what you're doing? Does it have an effect on what you're doing? Is it sort of saying to you, "No matter what you think, I have more power"? What does that tell you, as a FPD or a CDO, if judges can come in and change what you're doing?

Who wants to answer that?

Leigh Skipper: I'll take a stab at it, just from a CDO standpoint, that, as I indicated, I'm happy with the structure in that, make no mistake about it, when a chief judge or any judge, Article III judge, whoever the judge may be, when he or she contacts me, we have to respond. But those are along the lines of policy or performance concerns and the like. They're not along the lines of the management and the inner workings of my office. I am very receptive and seek feedback and comment on a continuing basis, as to issues of concern to the court, systemic issues.

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Similarly, I think there's a dialogue that works both ways, but I don't feel the sense at all of, "If you don't do this . . ." You know? There's implications that result. I don't feel that at all.

Judge Cardone: But, you know they have the power, right? You know the judges in your district could come in and say, "We're not working with the CDO anymore. We want an FPD office." How do you feel about that power?

Leigh Skipper: We've certainly all learned that. That's an actual power that exists, but I don't feel that at my level. I don't feel that oversight, I don't feel that tension. That is a function of being within your judiciary. I recognize that, and I just don't feel it.

Again, on systemic and court issues and the like, I feel and I think that's proper, but not as to the inner workings and management of my office, or the structure of my office. That lies with my board.

Judge Cardone: Now, when you say you don't feel it, you don't feel it, what, because of the judges you currently have? What if that culture were to change?

Leigh Skipper: Well, I can't speak to . . . I don't think it's a culture. I think it's the practice. Maybe that is culture, but I've never been subjected to that type of oversight focusing on my office operationally that I thought was unfounded or improper.

Marianne Mariano: It's alarming, Judge. It's alarming. You're talking about . . . that's happening. You're talking to us, but if you had talked to us two years ago . . .

Judge Cardone: Can you get a little closer?

Marianne Mariano: So sorry. If you had posed . . . first of all, I don't even think you would have posed that question two years ago. If you had posed that two years ago, I think we all would have been like, "Whoa, well, that would be kind of crazy, but that doesn't happen." But, we know it can happen.

Having elected which type of defender office a jurisdiction will have, I think then the judiciary has to step away. Otherwise, its motives for wanting to change the structure really will be called into question, even if it's the best motives. It may be that the Second Circuit comes to me and says, "You know, we think the CDO model really works better. We won't have to reappoint you every four years." That would be nice. "You could pick how many AFPDs you want. We think that that's a better model, we want to do that throughout the circuit," and engage me in that conversation, engage maybe my court, maybe my community, CJA community.

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That isn't exactly what happened in the one instance we know of, and so I think it's alarming. I don't know what the answer to that is, you know, within my proposal, I mean, within my structure, I don't propose how to address that, but it's alarming. The motives for choosing to change . . .

Judge Cardone: But they could be very good motives.

Marianne Mariano: They could be very good motives, and they might not be. That's the problem. It shouldn't be . . .

Judge Cardone: How do you see structure that works, where . . . I mean, obviously, I'm a judge. As a judge, I have an interest in ensuring a good defense, and if I feel that the FPD isn't giving me a good defense, how do you see . . . how is that corrected somehow, without me coming over and saying, "I don't want an FPD anymore, I want a CDO," or "I don't want a CDO anymore, I want an FPD."

Marianne Mariano: Right.

Judge Cardone: Tell me how you see that.

Marianne Mariano: Well, the shift in structure is what I can't understand. How you do it now, for my district, if I'm not doing a good job, the circuit isn't going to wait until my four-year reappointment process to let me know that, and if they do, they do. I think the local judges communicate through the circuit about my performance, and if there's anything in question, if there's a cause for concern, I'm at will. There's no guarantee I get to keep this job.

Judge Cardone: That's not true with the CDO.

Marianne Mariano: CDOs, however, have to answer to their board, and their board would have to be responsive to criticisms from, whether it's the judiciary, the defense community, or the U.S. Attorney's Office. The board itself has to govern under the terms of the grant. They still receive tax dollars. They have to ensure that the defender's performance is good.

Judge Cardone: Mr. Skipper, that's why I wanted to have this debate with all of you here. Go ahead.

Leigh Skipper: Certainly lively. I appreciate that, Judge Cardone. I would, frankly, be of the view that my colleagues in the federal setting have more security, that, through the limb of a board or whatever, if my performance was not . . .

Judge Cardone: Can I have you pull that microphone a little closer?

Leigh Skipper: Sorry. I'm of the view that I have less security, given the scrutiny of the

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board, and the at-will status that my colleagues in the federal system. I think that we have constant interaction and review, but through whatever function or process, given the at-will, we're in an at-will state. The CDO's also, from the management standpoint, we have to operate in compliance with state laws. During sequestration, I just want to note, we had a lot of different issues among the CDOs because of different state laws and how we had to carry out these cost reductions and sequestration.

So in answering your question, Judge Cardone, I think that the structure is such that, yes, we have to recognize that reality, but there's that buffer and protection that I think works. That's the bottom line.

David Patton: Judge, can I just say, I think it is a problem that it's placed on the judges to have that responsibility. If a judge thinks a U.S. Attorney's office is not doing a good job, they have ways of communicating that or participating in some discussion about that, but they don't have the ability to fire the U.S. Attorney. And I don't think the corollary power should exist. I have, given our current structure, I prefer the CDO matter, perhaps unsurprisingly because that's where I sit, but I have a board full of people who are tremendously talented and committed only to the defense function, and that ought to be who's evaluating me and deciding whether or not the office is doing a good job.

Judge Cardone: Anybody else want to add anything since I have the whole gang here? Okay. Any questions from the back?

Prof. Kerr: Judge Cardone, could I?

Judge Cardone: Sure.

Prof. Kerr: I have a big-picture question about not only the ease of changing the models or moving to big-I Independence, as it's been described. Are there any measures short of that where we could test whether such an approach would work?

Let me maybe express it in a slightly different way. I understand the arguments in favor of narrowing or eliminating the role of judges in this process, the "who decides" question. I think those arguments are plausible that it would be better, but I'm just not sure. It seems to me that it'd be difficult to try to make that shift in a way that was easily reversible or testable. So I sort of, I think to myself, "Okay, it may be right that we could improve the system by shifting the model, but it may be that we make the system much worse by shifting the model," and if we try that, are we stuck with it? Or is there any way of either testing it on a smaller than national level, or, if we were to move to a model of a Defenders General or whoever is having the power instead of the judges, where we could shift back? My natural instinct would be that if we're not reasonably confident that we could

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improve the system, shifting in a way that's probably irreversible, or at least really difficult to reverse, is ill-advised.

I'd love to get any feedback from you all about whether I'm right, that if we were to shift the model, it'd be really tough to shift back or to do it in a partial way so we could see how well it worked for a while, and then come back.

Marianne Mariano: I think for me . . . I keep jumping in here. Typical defense lawyer. I think I've proposed a pretty moderate, by some people's standards, change. If we were to gain medium-I independence within the judiciary, and if defenders got to translate or transmit our budget as we think we need it to Congress, and also weigh in on legislative changes, the way that we ought to be able to outside of the judiciary's position, we would have to own that. And I envision in what I proposed a conversation within the judiciary about that, because the judiciary does have a Budget Committee and a Legislative Committee, and I think there could be a lot of give and take and discussion about what's prudent and what isn't. But, at the end of the day, if defenders' budget and legislative priorities were transmitted directly to Congress through the Judicial Conference or not, again, I don't necessarily know if that's possible. I mean no disrespect if it isn't. But if it were to transmit through without being tinkered, we would have to own it, and the judiciary could weigh in in opposition to it. I think often we would probably garner your support. We often do now on many things.

So I do think it's a step in that direction. I think it would put us on a stronger footing if we were to then become our own outside agency, because we would have developed those lines of communication to the Hill on our own behalf. I think that what I've suggested, to some degree, is that middle ground.

Miriam Conrad: If you're suggesting some kind of pilot program? Is that sort of what you're saying, in terms of being able to pull it back?

Prof. Kerr: Yeah. I'm wondering if there's anything short of the full change that might work.

Miriam Conrad: Well, I mean, for example, I think you could take those districts in which the Federal Defender Office administers the panel, but they basically, everything still has to be approved by the judges, whether it's vouchers, as I understand it, or the assignment of counsel, and you could take that step out and see if there's any change. My understanding in those districts is it's sort of a formality that the judge signs off on these things. I think that would be a good either test case to look at or maybe a pilot program.

Leigh Skipper: Globally, I have the concern of, if we were out in the big-I, and then if this

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doesn't work, hey, can we come back in?

James Wade: I think you're probably . . . it'd be hard to do it within our system. I think you may have to look at other systems that are maybe doing it. I don't know. I don't know enough about the District of Columbia's Public Defender Service to know if that is a model you can look to, to see what the involvement of the judges are with that model. Are we going to be closer to that model? Might have to look to some existing organization, or maybe one of these new organizations that I'm talking about that maybe we're not . . . things that they're doing that we're not doing that are somewhat more independent.

I think it'd be hard, though I just have recently thought, okay, if there were a CJA center, is there a transition? How do you get there? And I, too, see moving the Defender Services Office along . . . you don't want to flush all your experience out. Then, I imagine we'd create some new structures, but how do you transition to that? There is this transitional problem in my view, though I am still CJA National Center.

I do think that that's a hard thing to wrap my hands around, how that happens. Over time, I assume that's what would happen.

David Patton: I don't know that I have an answer, other than to say that I worry that that would be basically the death knell for any real reform. I think to go back to Jim's point, we kind of have a moment in time. If there's not some real, fundamental structural change now, it will be quite a long time. I'm not quite sure how you would measure the success or failure of that pilot program. We're having enough trouble doing it with a current existing large program that should have loads of data, and yet, it's very hard to do.

I think for me, the bottom line is, we all kind of know what a really good ideal system would look like, and rightfully, as you've expressed, we're concerned because it comes with risk to make that change. I just happen to be on the side that I think it's worth taking that risk, but I agree it would be a risk, and I think it's worth taking.

Judge Cardone: Anybody else in the back? Professor Gould?

Prof. Gould: Thank you. Ms. Conrad, you started the panel today by giving us an estimate for the percentage of cases that your office uses a paralegal, an investigator, an expert, and I heard you to say around 50% of the cases.

Miriam Conrad: I said I'm guessing it . . .

Prof. Gould: No, no, I understand.

Miriam Conrad: At least 50%.

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Prof. Gould: At least. Okay. I'm not asking you to give us a number that you're going to stick with forever and that it's under penalty of perjury, but could the rest of you give us an estimate of how often you think in your cases your lawyers are using an investigator, a paralegal, some other sort of service provider?

Marianne Mariano: The fact that they're readily available means all of them.

Prof. Gould: All of them.

David Patton: I'd say close to . . . it's hard for me to picture any case that wouldn't have a paralegal, investigator, some other person working. I'd say it's close to 100%.

Prof. Gould: Okay.

Leigh Skipper: Totally agree.

James Wade: That would be our situation, also.

Prof. Gould: Okay. So then, comparing your representations to those of the panel attorneys who handle cases in your districts, there is a tremendous disparity, then, between how often you're using them and how often they're using them. Looking at your districts, the high water mark for the use of experts is 28%. I'm not going to give you the district. The low water mark is 5%. Again, I'm not going to give you the district. How is it that this Committee should look at the difference, then, in the quality of representation between the FDOs and the CDOs in your district versus the panel lawyers? Because, if I'm being really provocative, and that's the beauty of being a professor, I can look at this and say either you're providing services that are a waste of taxpayer dollars, or your colleagues on the panel side are not hitting their Sixth Amendment requirements.

I realize that's very provocative. The truth is probably somewhere in between, but how should the Committee see this?

Miriam Conrad: Well, I think there are a few concerns in there. One is, the only reason I didn't say 100% is the examples I can think of are certain types of maybe an illegal re-entry case, where it's going to be time served, or a false passport application, or something where, you know, basically time is of the essence. I still might be asking an investigator or a paralegal, or maybe even my legal assistant, to get some court records. Now, I don't know who does that in a CJA case. I think the more important and troubling thing is that we probably get the vast majority of those cases, because they're single-defendant cases, and we take all the non-conflict cases, which means that they are probably getting cases that require more in terms of investigation.

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I do think it's troubling. I had a long-time panel member say to me a while back, "You know, we do a lot of work. We have a lot of career offenders, a lot of armed career criminals. We spend a lot of time looking at their priors." This panel member said to me, "Well, I can't do that because I don't have an investigator to go get me the court records." And I said, "Well, first of all, you could just write to the court and ask for the records, or you can ask the court for funds to get an investigator," but if someone who's been on the panel for a long time is thinking that way, I think that's a huge concern.

Leigh Skipper: I think it's analogous to whether one would ask the government would they ever prosecute a case without a case agent. I mean, the agents are right there at their beck and call constantly, so the degree of interaction is a constant flow for a variety of tasks, whether mundane or sophisticated, or the employment of actual what we would characterize as experts for mitigation or forensic evidence, in addition to the investigative services unit. The government always has a case agent and can hit a button and get a whole squad together for whatever endeavor they need.

David Patton: I don't think the truth lies in between.

Prof. Gould: Where's the truth, then?

David Patton: I think this is the model, and that most, the vast, vast majority of cases, both for efficiency and quality's sake, require paralegal, investigative expert services. I think part of the reason is all of the structure that we've talked about in terms of how that's covered, and the disincentives that are in place for CJA lawyers to request those services, but also, we just set all these bureaucratic paperwork hurdles. There's just, there are several points in the process where there are disincentives for CJA counsel to go through that process.

Prof. Gould: Like what?

David Patton: Having to fill out the forms, rather than, "Oh, I'll just do it myself."

Judge Goldberg: Is that enough of a disincentive that if a CJA lawyer is, "Well, I need to do this for my client, but I don't want to fill out the paperwork?"

David Patton: It shouldn't be, but we're living in a system . . . I've talked to a lot of my panel attorneys about this, and I think we're at a decent percentage. I don't think it's, in an ideal sense . . . I believe we're in the 22-23% range which is good in comparison but not as high as it should be. There are just the bureaucratic disincentives, there is going to the judge and perhaps feeling, fairly or not, and I really don't ascribe villains to this process, but if there is a perception that you're a high biller or a frequent requester of these things, it

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could affect your standing on the panel. That's a problem.

Prof. Gould: Even with a case budgeting attorney in New York.

David Patton: The case budgeting attorney doesn't play the role of daily vouchers. That still goes . . . I mean, Jerry Tritz is terrific.

Marianne Mariano: He doesn't approve experts.

David Patton: He does the larger case budgeting. Now, fortunately for us, a lot of the judges do rely on him. When they have a concern, they'll go to him, and he's been terrific. I think Jerry Tritz is fantastic. I think we need a full time Jerry Tritz with some small staff to do all of the vouchers. In my big-I dream, you would have that office that does that.

Prof. Gould: Why in your big-I dream? Isn't it just simply a Federal Defender and a Community Defender together without the panel lawyers?

David Patton: Because we have to deal with conflicts. I do think that there's a lot of merit to a hybrid system. I think there are a lot of benefits to having the private defense bar involved in this work.

Marianne Mariano: We'd only be able to take two. You can have a defender program for fifty-eight . . . you know, you'd have to have fifty-eight defender offices for it to all be a defender. I do think that there's just a little . . . I've heard you pose that question before, and I think it's a bit of a faulty premise, because we utilize our investigators the way that I know some of my members of my panel utilize their other support staff to get records, for example, or to track down folks to help with bail or to help post a bond or to get the real estate. Our CJA are not literally doing nothing for their clients. In my district, we're about 14%, 15%, so it's not like 85% of the time the panel fails to do basic investigative work for their clients.

So, you know, it is somewhere in the middle, but defenders have on staff those services, and the panel have to go to a judge and justify. How do you justify? "We think there's a suppression issue, I need somebody to go knock on doors and see what they saw." Some judges will sign that, and other judges will want a whole lot more, and therein is the conflict. Jerry Tritz is great, but he doesn't approve expert requests. He's been terrific for my panel in terms of how to go about asking. It'd be great if he was the decider, and I think he could do that fairly and critically.

Miriam Conrad: Can I just add, I think if a panel lawyer put in a request for an investigator to go get court records, I don't know that that would get approved. I think the judge would likely say, "Why don't you just get it yourself?" Then, the problem is, of course, if you're spending the time . . . let's say you actually

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have to go to the court. That's going to up your bill. It's inefficient, for one thing, but also, if the panel lawyer is using in house staff, let's say a legal assistant, to do that, that's using up part of their overhead, which means that they're also cutting their own rate on that case. It's problematic, although I agree with Marianne that I doubt that the rest are doing nothing.

Judge Cardone: All right. I'm going to go ahead and end it, although we could probably talk all day. Let me say for all of you how much we appreciate you being here. I want to also tell all of you that should you . . . these conversations stir up a lot of other thoughts and ideas. If you have anything you want to add, please feel free to submit to us anything you would like in writing. Certainly you can contact our staff, but we want to hear from you and we want your ideas because we're trying to really get as much as we can.

I want to thank all of you. We're going to go ahead. We have a working luncheon, so I'm going to eat into that a little bit, literally. We're going to take a fifteen minute break and then we'll start with our next panel.

James Wade: Thank the Committee.

Judge Cardone: Thank you.