

Ad Hoc Committee to Review the Criminal Justice Act

Public Hearing #6—Philadelphia, Pennsylvania

April 11-13, 2016

Transcript: Panel 7—Historical Perspective on Defender Services

Judge Cardone: It is a little past 9:00 and I know we were supposed to start at 9:00, but we tend to run over because this has all been so very fascinating. Let me start by saying for those of you who are in the audience, if you have cellphones, and actually if you're on the panel or the Committee, if you have cellphones, please make sure you put them on silent. The other thing we've discovered is that if you have cellphones and you keep them too close to the microphones, they tend to make it buzz. For anyone who has a cellphone, please keep it away from the microphone.

We're going to start this morning. Again, I want to welcome our panel. We're going to start this morning with the historical. As you all know, we're looking at the structure of the CJA. We're here with a historical perspective on Defender Services. I want to welcome all of you here. We'll start with a brief opening statement, and especially because we're running a little bit behind, if you'd leave us plenty of time to ask questions because I think a lot of us have had the opportunity to know you previously, but also because we've gotten your submissions and so we have an idea of what you want to say in those submissions, and we'd like the opportunity to question you.

On our first panel is Mr. Steven Asin, former Deputy Chief of the DSO; Mr. Robert Burke, former Training Division Chief of the Defender Services Office; and Richard Wolff, former Legal, Policy and Training Division Chief of the Defender Services Office. With that, Mr. Wolff, we'll start with you with an opening.

Richard Wolff: Sure. I want to thank you for inviting me to provide input for your important study. In 1991, I was hired at the Administrative Office to staff the Criminal Justice Act Review Committee so I have a sense of the scope of your undertaking and the challenges that you face. Of course, the conditions were quite different. Back then, panel attorney's weren't reachable on the internet. Our best way of directly communicating with them was stuffing correspondence into the envelopes that were transmitting their voucher payments.

After the Prado study and report, I worked in what is now the Defender Services Office until March 2014 for the most part as Chief of Legal, Policy and Training Division. My joint statement with my colleague, Steve Asin, focuses on our experience in the AO in terms of how the agency operates vis-à-vis the CJA program. We will be glad to address questions you may have about it.

I want to take the opportunity in the few minutes that I have now to talk

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about the independence issue with a capital “I.” That is, the overall placement and governance of the CJA program. In many ways, this hearing brings me full circle in my AO career. I am enormously proud of the work that the Prado Committee did and the improvements in the program that can be traced to it. Things like the nearly universal presence of Federal Defender Organizations in the federal criminal justice system, a network of district panel attorney representatives and higher hourly panel attorney rates.

What was called the centerpiece of the Prado Committee recommendations that is the establishment of a freestanding center for federal criminal defense services was not approved by the Judicial Conference. The proposal proved to be highly controversial within the judiciary and among the federal defenders and so it was cast aside. The issue has never gone away, not because of some die-hard advocates who wouldn’t let go of it, but because it permeates the very core of the program.

For over twenty years, the program has continued to encounter issues far beyond the few that Steve and I reference because of its placement under the supervision of the judiciary. A court that had previously eliminated its Federal Public Defender Organization and continued to require every member of the Federal Bar, even civil practitioners to represent CJA defendants facing serious consequences. A circuit chief judge who wanted to limit compensation for panel attorneys to one visit with their clients in jail, panel attorneys caught between their duty to their clients and their dependents on the court for approval of their compensation and for future appointments.

These are some of the consequences of having judicial control over key aspects of the CJA program. Defendants who can afford to retain an attorney don’t encounter such problems. CJA defendants shouldn’t either. To me, it is a basic matter of principle that the governance of the public defense function should not be vested in the judiciary, which would never consider returning its administrative operations to the Department of Justice as they were before the AO’s creation in 1939.

Congress explicitly recognized the problem and the ultimate solution when it authorized the use of Federal Defender Organizations in 1970. The Senate report states: “The committee recognizes the desirability of eventual creation of a strong, independent office to administer the Federal Defender Program. It considered as a possibility the immediate establishment of a new independent official, a defender general of the United States. It also considered establishing a special directorate for defender programs within the Administrative Office of the United States Courts. The committee however does not recommend founding an independent office at this initial stage. Such a step would be premature until Congress has had an opportunity to review the operations of the defender program over the course of a few years, nor does it recommend placing the overall direction of these programs in the

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Administrative Office. Clearly, the defense function must always be adversary in nature as well as high in quality. It would be just as inappropriate to place direction of the defender system in the judicial arm of the United States government as it would be in the prosecutorial arm. Consequently, the committee recommends that the need for a strong independent administrative leadership be the subject of continuing congressional review until the time is ripe to take this next step.”

I think the Senate Committee had it right back then. I think they understood what was ahead for the program. More recently, the report of the National Association of Criminal Defense Lawyers on the Federal Defender program emphasized the importance of the CJA program’s independence from the judiciary.

I fully appreciate that there are counter views. I don’t find them persuasive. I also understand the awkwardness of a committee created under the Judicial Conference considering such a position and the potential futility of convincing the Conference, but we are now forty-five years past Congress’ vision that it be done when the time is ripe to take this final step. In the meantime, the systemic problem will persist. Thank you.

Judge Cardone: Thank you. Mr. Asin.

Steve Asin: Thank you. When I think about the structure of the Defender Services program, I begin with the recognition that the Criminal Justice Act statutory scheme never really established a national program at all. As you know, the CJA was enacted as a response to the problems that federal judges began to face back in 1938 when *Johnson v. Zerbst*, the Supreme Court established the federal constitutional right to counsel in all criminal cases in the federal courts. The problem was that there wasn’t any money to pay for those lawyers. Not only wasn’t there any money to pay for the lawyers, there wasn’t any money to reimburse or compensate lawyers for the expenses incurred in putting on a defense, including the use of investigators or any experts that the defense might need for the representation that was required.

To solve the problem, the Criminal Justice Act authorized local courts to set up a local system for paying private lawyers. It’s not a national system for managing these appointments and payments. It was all up to individual judges and local courts consistent with the federal judiciary circuit council governing scheme to make arrangements for the appointment of counsel in their districts. Even when Federal Defender Organizations were authorized six years later, the decision to have an FDO and the authority to appoint defenders was made at the local level without national coordination or management.

Indeed, there’s nothing in the Criminal Justice Act that portends all the

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systems and oversights that are now in place, all the Judicial Conference committees that have a say in how defender organizations and how the CJA programs manage, including their own committee on defender services, the Judicial Resources Committee, the Budget Committee, the Executive Committee, the Space and Facilities Committee, the Codes and Conduct Committee, or any of the other entities and structures that exist at the national level that so impact the operation of the program today.

For many years, this wasn't really so much of a problem. The program's fiscal requirements were small and there wasn't any crying need to have a national structure in place or complaints about the lack of a national program being provided for in the statutory scheme, which is not to say that the people involved in providing services pursuant to the Criminal Justice Act did not care. You tell someone that they are responsible for something and eventually, I think they should do something about it. People want to do a good job. They don't want to do a bad job. The drive for national leadership came from those who cared about the quality of services being provided and getting the most out of the limited funding that was available to them. That is to say being cost-effective in the context of providing quality services.

These people for the most part, at that point, were Federal Defender's, the small group that had been established in the first decade or so after the Act. They started demanding support for the types of services they felt they needed to do a better job; they wanted training; they wanted specialized staff; they wanted investigators; they wanted paralegals; they wanted administrative officers; they wanted to have authorities to travel to both conduct the business of their offices in addition to doing the investigations necessary for their cases; they wanted other support; they wanted equipment; they wanted selectric typewriters, for those of you who are old enough to remember when that was a cutting edge technology, and then word processors and computers.

They wanted all those things and their staff. It wasn't just the leading defenders. It was the people in those offices, who were doing the work. It was administrative officers, for example, who said, we need to have a way of keeping track of this money. We want accounting systems. We want to have some ways of managing the administrative responsibilities we have that will increase our ability to do that.

Around 1975 or so, the Criminal Justice Act Division in the AO was created to help provide these additional services and provide support for the Federal Defender's and the program as a whole. Working with the CJA Committee, later the Committee on Defender Services, they too began to say, if we're going to do this job, we want to do it well. The people who staffed that office under the leadership of my former boss, Ted Litz, were passionately committed to the operation of the Sixth Amendment and the operation of the

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Criminal Justice Act. Committee members, whether or not they . . . as you heard from a number of former committee members who have testified before you. When they became . . . many of them had no familiarity with public defense or even criminal defense. Once they became enmeshed in the issues facing Federal Defender's and the Defender Services Program, they too became committed to improving its performance and to trying to solve the problems that were being encountered. From these forces, the committee staff at the AO, the Federal Defender's, there emerged then eventually panel attorneys there, but there emerged the elements of an effective programmatic administration. Defenders in the committee began developing the elements of a cooperative scheme for managing the operations of their offices that produced high quality and cost-effective services.

I don't think the same could be said for the panel because the control over the appointment of payment was disbursed among individual judges, and their principle mission was not . . . nor was most of their time spent on the operation of an effective public defense system. Their independence and lifetime appointments left them unaccountable to anyone for the operation of their panel appointments. It wasn't really until, through the really . . . Honestly, through the leadership of my office and the committee, that we established the national system of panel attorney representatives that we will really began to be able to have an impact on the operation of panels throughout the country. My recollection was that was in the 1990s, but who knows?

The judiciary was happy to empower the Defender Services Committee to take on this responsibility until money became a factor. Congressional spending restrictions led to increased focus on all federal appropriations and programs. As the judiciary's budget grew overall, it began to see a tactical need to limit the growth of the defender services appropriation as a way to limit the overall growth in the judiciary's appropriation.

This was pretty much the situation that existed when I started with the program in the late 1980s. Since then, the judiciary's focus and control over the federal defense function based upon its need to protect its own institutional interest has steadily increased, culminating in the steps it took in the 2013 year of sequestration and beyond.

I think that the need for national leadership of the federal defense function is now beyond question. It is what Congress requires even if no one else thought it was necessary. Just as there is a need for national leadership of any billion-dollar national program, the CJA may assign responsibility for the appointment and payment of counsel to local authorities, but Congress fund those disparate appointment and payments through a national appropriation and the appropriation must be managed, which means that the program must be managed in accordance with norms. You have to be able to project

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requirements as accurately as possible to justify request for funds, and you have to be able to account for the funds that are expended.

It really may not be obvious to everybody, but you cannot do this without addressing the quality of services provided, any more than a contractor working on your house can justify the amounts charged without reference to the quantity and quality of the labor and materials that will constitute the work performed.

At the same time, while there will always be some commonalities among what is required to defend individuals charged with similar crimes in comparable jurisdictions, individuals in criminal cases are unique. The constitutionally guaranteed right to counsel requires that the persons with ultimate responsibility for determining what time and resources the defense of an individual requires is the attorney assigned to represent that individual.

Resolving that tension between adhering to national, regional and local norms and preserving the autonomous judgment of the individual criminal defense lawyer paid with public funds is at the heart of a task facing those entrusted with oversight of a public defense system. Those who work in the AOUSC and in the DSO in particular are placed in the middle. In the absence of a coherent national program, they must mediate between all the parties to achieve agreement and consensus because it's noted in our written testimony, the AOUSC has little direct authority. If a judge does not want to follow the CJA's dictates, let alone Judicial Conference policies, the AO cannot direct the judge to do so.

A defender's judgment regarding how best to manage his or her office, let alone how best to represent his or her clients cannot be second-guessed by the Administrative Office. The Administrative Office must abide by the Judicial Conference decisions regarding the allocation of funds between Federal Defender Organizations and panel requirements. Even in areas where one might think the AO might have an administrative prerogative such as the electronic system used to manage the appointment and payment of panel attorneys and the information such a system collects, the Judicial Conference decision-makers are in control and responsive to the interest of individual courts and judges.

Lack of accountability can of course be liberating. It allows federal defenders to maximize control over the operation of their offices and it allows panel attorneys to be, for all intents and purposes, the sole arbiter of the quality of services they provide within the resources available to them.

This is not inherently a bad thing. The people who go into this work are for the most part motivated to do so, to do the best possible job they can for their clients, which is perhaps the best insurance that the money they are paid to

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represent assigned clients is well spent. When the sum of the cost of those individual representations exceeds a billion dollars, accountability is required. We ought to have a program where those who approve vouchers are required to adhere to rules, and those who oversee its funding do not have conflicting obligations.

The question facing this Committee is not how well the judiciary has done in managing the defender services program within the existing constraints that limit its ability to do so. It is whether there is sufficient or indeed any rationale for continuing to operate within those constraints and limitations, rather than making the changes needed to give the defender services program the elements that any modern governmental or business programmatic model would have. A governance structure that has an un-conflicted mandate to carry out a clearly defined mission and that can be held accountable for its successes and failures. Thank you. I'll be happy to answer any questions.

Judge Cardone: Thank you, Mr. Asin. Mr. Burke.

Robert Burke: Thank you. Thank you for the opportunity to provide my input. I want to start by saying that . . .

Judge Cardone: Can I ask you to get closer to the microphone?

Robert Burke: Sure. I want to start by saying that it was a privilege in my experience to work in Defender Services and to work with defenders and panel attorneys. There were people who I think were incredibly committed to the Sixth Amendment right to counsel and did fabulous work in providing quality representation to the clients of the program, which isn't to say that I don't think there are problems and that there might be a better way to handle the program.

I think for over fifty years, we've been trying to fit the square peg of indigent defense into the round hole of judicial administration and it's time to create a square hole for the indigent defense function, and one that as Steve said is thoughtfully considered and coherently designed so that it respects the independence and quality of representation.

The difference in the missions responsibilities and interests of the judiciary and defender services, the competition for funding, and the necessary and understandable judicial focus of the AO, as well as its overly hierarchical and bureaucratic nature make it structurally difficult, if not impossible to administer the defender services program with proper recognition of and respect for the independence of the defense function and the obligations of the lawyers to their clients.

The IT scenario that Steve Kalar presented to this Committee, the shift of

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responsibility for defender HR, the budget conflicts mentioned in Steve's and Dick's written testimony and the procurement problems noted in mine are all symptoms, in my view, of the differences in the mission focus, understanding and commitment of the judiciary, and CJA programs' participants, and AO, supporting those two programs. There are many more examples that we collectively could give you from the time we spent in Defender Services, but I think those are sufficient to highlight the problems.

The actions taken during sequestration placed I think in high relief the problem with judiciary and judicial administrators governing and managing the Defender Services Program. In my view, it's time, consistent with all national standards on the issue to have the program governed and administered by persons knowledgeable about, experienced in and unquestionably committed to federal criminal defense and the right to counsel.

With regard to panel administration, I believe it's clear from the testimony of panel attorneys to this Committee and from countless conversations with panel attorneys around the country at training events and conferences that the judicial administration of the panels is resulting too often in the lesser quality of representation for clients by panel attorneys, not because of the lack of commitment or skills of the panel attorneys but because of the low pay, voucher reductions, the failure to obtain resources for investigation and experts, and the threat of removal from the panel for vigorous representation of the clients or advocacy for themselves.

I want to say that I feel also privileged to have worked with the Defender Services Committee. I think as a body, that committee has advocated vigorously for the independence and quality of representation of the program. Some members came with defense experience and understandably had a grasp of what the program . . . the obligations of the lawyers were. Others came I think with very open minds, listened, learned and understood what the issues were.

But, I think even the makeup of the committee presents sort of a schizophrenic view of the program within the judiciary and the AO. On the one hand, the program is considered part of the judiciary for administrative purposes and processes. On the other, not so much for governance, and that's reflected I think by the fact that there are no voting members who are criminal defense attorneys on the Defender Services Committee.

I made some small number of recommendations in my written submission. Since looking at that and thinking about it some more, I have some additional ones and I'd like to close by identifying what those are.

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I think the Defender Services Office should not be a part of the judiciary and the AO at all but a separate, independent entity. If the Defender Services program remains within the judiciary and the AO, the structure should be changed to give it greater independence, including: direct access of its chief to the director of the AO; DSO having direct access to Congress and institutionalization of the use of Federal Defender legislative detailees in both chambers of Congress; a majority of the Defender Services Committee being made up of federal defenders and CJA panel attorneys; the Defender Services Committee having responsibility for the program budget, including human resources; and, the restoration of the IT function to Defender Services.

Also, if DSO remains within the AO, I believe the training division should not remain there. It provides substantive, not administrative support to defenders and CJA panel attorneys and should be moved back into a Federal Defender Office as other substantive support projects are. In fact, consideration should be given to an amendment to the CJA that would allow for the creation of a defender and panel attorney support office to address training in specialized areas of practice.

Judges should have no involvement whatsoever in the administration of the CJA panel. That function should be performed, as all national standards require, by persons knowledgeable about and experienced in federal criminal defense and independent of the judiciary.

More funding should be provided for training, including more funding to pay the travel costs for panel attorneys to attend training, and the creation and funding of training positions within FDOs, that is staff that work on at least a 50% reduced case load and also have responsibility with the assistance of the training division for local training. Additional funding should be provided to defender services to manage, particularly with regard panel attorneys, the increasing volume and complexity of electronic discovery. Consideration should be given to establishing at least in some districts special panels of attorney with specialized training to be appointed in cases involving voluminous or complex discovery.

Any amendments to the CJA necessary to implement these recommendations should be pursued. Thank you.

Judge Cardone: Thank you, Mr. Burke. We're going to go ahead and start with the panel. Let's start with Mr. Frensley. Do you mind starting?

Chip Frensley: Sure, that will be fine. Thank you all for being here. Good to see you again. I wanted to start with Steve. One of the things that's always struck me about Defender Services within the Administrative Office is what I perceive to be the tension that you and Dick allude to in your written submissions. I see it as the serving of two masters. The idea that you have judges who are contacting

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Defender Services and asking for information and wanting you to do things, and then at the same time, you have defender organizations and panel attorneys who have their own needs, and when those two needs conflict, what does Defender Services do?

Can you talk a little bit maybe about that tension and perhaps to the extent that you are familiar with, maybe, some specific examples where you felt like that tension really came to bear itself, and how you feel the office could do better in those situations?

Steve Asin:

I agree with you about that tension. You have to understand that we knew, we took the job, we knew that we were working for the Administrative Office of the U.S. Courts, and we knew that the mission of that is to serve the federal judiciary. I guess the conception is that what the federal judiciary wants us to do because we're assigned to the Office of Defender Services, is to do what we could to support the judiciary in having the best public defense system possible. Highest quality. Most cost-effective. That's the primary interest.

What I would tell staff and what I would tell judges when describing what my mission was, was I'm here to tell you how to go about and help you, give you advice on how to go about doing that. The problem is, that when judges would call us up for advice or other elements within the AO or the judiciary would call us up for advice about their program, their interest was not necessarily in having the best public defense system possible. Their interest might have been, "I want to have control over the lawyers who appear in my courtroom." It might have been, "I want to ensure that I can decide who I appoint." It can be, "I want to make sure that the budgets are kept under control and don't impact other parts of the appropriation."

When that occurs, there's a direct conflict. There's a conflict that arise. The hope is that the people . . . in carrying out your message, saying, well, you may indeed want to have control over the lawyers in your courtroom, the hope would be that you could say, well, I know that you do, judge, but what we have to focus on is making sure that we have the best lawyers there for this client. Maybe not just the best lawyers but also the ones that can provide the services most cost effectively. I would hope that the people above me in the agency would support me in doing that. That really doesn't occur.

That would be a nice hope, but that's not really what the reality is. The reality is that, as I said, we said in our testimony, the mantra in the AO is you are there to serve the judges and do what they want as a result, not necessarily what you think is programmatically the best thing or anything else. If this is what the judge wants to do, talk to him, provide advice, but in the end, you don't want to do what they want to say. There was a conflict.

How we resolve that was . . . I guess I'm not able to really go into . . . it's just

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multi-varied ways. That was the day-to-day business that you had to do there. You do that by bringing other judges to bear to try to persuade, or to try to bring other people involved to try to communicate with the courts, or those people who wanted those different results. Oftentimes, it would become a very complex situation.

I think that one of the most difficult examples that became very problematic for us had to do with the provision of counsel in death penalty habeas cases. I've always felt, in my experience working in the program for all these years, was that the death penalty representation puts into high relief problems that exist throughout the entire system, but you don't always see them. When it comes to the death penalty, they do come into high relief.

As you know, one of the things that was accomplished during our tenure was the creation of specialized units within Federal Defender Offices to provide representation in capital habeas cases. Not every district that had capital habeas caseloads had capital habeas units, and that's a whole other story which we could talk about why that is the case. Situation arose, for example, in Texas where we had . . . there was a need to have . . .

I guess this was alluded to I think in Steve Bright's testimony where a judge needed a lawyer to provide representation in a capital habeas case and sought the assistance from one of the resources that the committee had established to help in that process, one of our death penalty resource counsels. A recommendation was made to them, and we were able to arrange to have lawyers from our capital habeas unit in California central from L.A. and provide representation in that case. When the chief judge of the circuit found out about that, she was offended and called up and said, "What are you doing? I don't want this to happen. I think we can do it more . . . I want to have Texas lawyers providing this representation."

The result of that was getting the committee involved and getting our chair involved and a lot of discussions. Out of that became an elaborate protocol agreement, which I think the committee may have been familiar with already, for providing for the representation of people in one district by lawyers in another, coming from another district.

The resolution of that was . . . my understanding was that, in my experience there, it became a very complicated process for effecting the provision of counsel and what I think should have been a fairly simple straightforward manner. We do it. I don't recall during my tenure instances where we weren't able ultimately to get the lawyer that we wanted into the . . . that the district judge really wanted into the courtroom, but it became very time-consuming and complicated.

That's the type of thing that would happen. We would look for very

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elaborate, more and more solutions and the more . . . involve more and more parties in trying to get a solution. When you do that, the solution could become very complicated.

Chip Frensley: Dick, Bob mentioned some very specific recommendations that I perceive as ways to improve independence but maintain a presence within the judiciary. I was wondering if . . . obviously it's something you've given a lot of thought to. Do you feel like that there are any sort of outer limits to the amount of independence that could be achieved in the defense function but still remaining within the ambit of the judiciary?

Richard Wolff: Are there outer limits to it?

Chip Frensley: Right. In other words, just things that you just can't get to in terms of independence as long as you stay under the judiciary.

Richard Wolff: I think what comes to mind to me is feeling that this is a separate function, adversary function in our system. Defense attorneys have expertise in that function. The judges have expertise in adjudicating, but many of them haven't been defense attorneys. I will echo what Bob said actually that the Defender Services Committee I think has done an outstanding job. People did come to it with carrying degrees of experience and have been great advocates for the program. Even with that help and assist from that committee, there are limits to what is able to be done. Not only are there limits, but at times, the Defender Services Committee just isn't listened to. I know you've heard a lot about the jurisdictional change, for example, that the Executive Committee imposed in moving jurisdiction away from the Defender Services Committee.

There is an internal judiciary power structure, if you will, and defenders aren't a part of it. I don't think they can ever really hope to have the administration of this program in the way it should be without them having the leadership role. I think in some ways when we . . . Prado one, back in the early '90s, the system maybe was too immature. There weren't defenders in many places.

I also think, using Bob's square hole analogy maybe, that when resources are big enough, when the hole is big enough, the square peg can fit in there, but it was only when resources started getting squeezed, and sequestration being an example, that the friction really came to bear. That's when you saw, I think, the defenders stand up and say "enough!" They got an incredibly rare anomaly from the Hill to the sequester, and they have likewise I think, with the jurisdictional change stood up and been more than active participants in this work measurement formula that was imposed upon them, taken away from Defender Services and given to another committee.

That's what convinces me more and more that they don't need the . . . what

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they probably did need in the beginning of this program was the assist to be nurtured and to grow into as good a program as it is by the judiciary, with its protection. I'm very convinced the federal defenders can stand on their own. I think for the panel, it's even an easier job in the sense that you're not literally under their wing, but you have all the pressures of having your compensation and appointments and all the rest, judiciary.

To answer also what you were asking Steve, it makes me think about the voucher reduction guideline which we almost take for granted now. Back a number of years, voucher cutting was a major complaint. At that time, the guidelines, the Judicial Conference policy was that a judge . . . I think the language was, "may wish to inform counsel when there's going to be a reduction." We took it to the Defender Services Committee, our supportive committee to recommend a change to that guideline. We were very disappointed, to put it mildly, that they at first did not support that change. It got heated, quite frankly, about it, and it took some more time before we got what is now the guideline. I think Judge Gleeson, as chair, basically almost shamed the judiciary into saying this is a fairness issue. We're about fairness. It shouldn't come to that.

I think what's so frustrating from our vantage point at times is how much effort is required to get some very small, what seemed like some very small and reasonable steps. It's still a guideline. Any judge who wants to cut a voucher, and not contact attorneys can do that. I actually do think the culture gradually has changed on that to the better. I'm pleased by that.

Robert Burke: I just want to add to Dick's last comment about how frustrating it is. It's not just frustrating. It's incredibly wasteful and inefficient. In the seventeen years I was there and the twenty-something years they were there, I can't tell you how many meetings we had to go to, countless, countless meetings, hundreds, maybe thousands of hours of work, explaining the responsibilities and the interest and the mission of our program so that people who didn't understand it could understand why it had to be treated differently, rather than having administrators who are aware of what those issues are, understand them, and can make the decisions in a much more efficient way and a more economical way.

Steve Asin: I just want to offer by way of example, just to give you the types of things that I thought were daily occurrences. I remember during those discussions with the committee about the statement of reasons guideline and I was going back and forth with members of the committee. We had a very . . .

Judge Cardone: You're talking about Defender Services.

Steve Asin: Defender Services Committee made up of very good people who really cared about the issue. One of the judges who was very . . . long history of being

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very active in his local, his courts, administration of their CJA panel, was all in favor of this guideline. He didn't really understand what the problem was because when he would take those CJA vouchers home on weekends to review them and give them a thorough review because he felt that's what they deserved, as indeed they did. He would write extensive comments on any cuts that he made right on the voucher so that the panel attorney would have the advantage of knowing that. He didn't think there was a problem with that.

Of course, he had been doing this for a number of years, but what he didn't realize was that the panel attorneys never got those vouchers back. The vouchers were never returned to the panel attorneys. Here was a judge who cared about the program, cared about the issue, thought he was making a difference, but because really this wasn't his job, he didn't understand how the actual mechanics of the program worked. No one was reviewing what he did. No one said, okay, you're the person who's reviewing the vouchers. You want to put a statement of reasons. This is how you go about doing it. No one did that.

It's an example I think of how even very well-intentioned judges who care about the program can try to do their best, but because it's not a professionally run program, it doesn't have standards and requirements, it doesn't have a system of professional voucher reviewers who are trained and then audited and then their work is reviewed and all that sort of stuff. You can have people who would make very good, well-intentioned efforts to no avail.

Chip Frensley: Dick, one of the concerns that's often referenced, particularly in light of the budgetary issues and sequestration was the fact that many in the judiciary perceived resources to Defender Services to diminish resources available to the judiciary. I'm just curious how you would respond to the concern perhaps that if the defense were independent from the judiciary, whether and to what extent that same concern might exist as between the panel and resources to defender offices and if that conflict would be exacerbated by the independence itself.

Richard Wolff: We're positing that the program is independent and then your question is panel versus defender allocation.

Chip Frensley: Right.

Richard Wolff: I think that that goes to what the governance structure would be, and I would think that you would want to have a representation of both defender and panel interests in a fashion that you have to come to some understanding of what that's going to be. I just think that's the give and take of governing a program and you have to listen to your constituents and make that decision.

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Chip Frensley: I assume you think that that tension would be preferable to the tension that exists between the court and the defender function.

Richard Wolff: Absolutely. I think one of the most difficult things under the current system is just . . . now the defender service . . . I know you've heard this before to some extent: A budget request comes out of the Defender Services Committee and then it goes to the Budget Committee and then it goes to the Judicial Conference. The ability to shape and fashion that after its left Defender Services is very difficult.

I don't want to make it sound like there's always great conflict and upheaval. I think in many instances, the judiciary and the committees might align on how the breakdown. When we were facing shortfalls, I mean spending plans, for example, the strategy that was followed, and I think with as much success as you could hope for, was fund the defender offices, keep those operations going, and if you have to, you suspend panel attorney payments. That sometimes led to a supplemental appropriation from Congress, recognizing they had to do it, or the next fiscal year when funds became available, that shortfall was covered. I think that was a successful strategy in tight times. The judiciary followed that up until the sequester. That was a time when there wasn't alignment.

The panel attorney rate cut I think was something that came as a total shock to the system, if you will, because we've been working for so many years to get the rate increased. Anything signaling a cut in that rate seemed so counterproductive. That money was lost. That wasn't money that was paid back when funds became available. Those dollars were gone. Panel attorneys who were already operating at the rates that are, as fashioned, pro bono, below market rates and are not the statutory maximum were reduced even further.

Chip Frensley: Thank you.

Steve Asin: I'm here. I'm sorry. I just want to offer that I think that one of the things that really distinguishes those situations that you posited to Dick is what the mission and the mandate is of the decision-makers. It's interesting to me that the strategy that Dick described is one that both you and Reuben participated in developing as members of the Defender Services Advisory Group that it was where we had a common goal, that we had a common mission, an agreed upon mission that we were going to try to preserve the best public defense system we could. There's a debate about how do you go about doing that.

There's a reason that the decision about maintaining Federal Defender staffing levels and funding to do that at the expense of suspending panel attorney payments, there's a reason why that decision was made and was

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agreed upon by both panel attorneys and defenders. It could have been different. There could have been a different balance. They could have said, well, I don't want to just maintain defender office staffing levels. I want to maximize them because that would give us maybe longer term maximizing defender organization representations, which is one of the program's goals. There was a compromise. It was a decision that was based upon reason and judgment.

That's different than if you were to sit there and say, well, let's have the person who's running the Department of Justice be the decision-maker on how we're going to balance that decision or it's going to be the Judicial Conference making that decision about how to do the balancing. I think that what distinguishes it and what allows you to resolve those conflicts is having a common mission and goals.

Judge Cardone: Can I follow up on that? Because one of the criticisms we've heard is that decisions were made to always defer attorney payments for those who weren't part of the committee or understanding why those decisions were made. It was seen as a way of putting off money and making a debt that was going to have to be paid for the next year. Then, merging that with sequestration, there was a concern that the Executive Committee felt that it was just not being managed well. Do you have any input about . . . in other words, you were just avoiding . . . the Defender Services and Defender Services Committee was avoiding the idea that sequestration was coming and that Defender Services just didn't think that should happen to them. Any comments?

Steve Asin: Yes, I'd like to comment upon that. I think that . . . I guess there's a couple of different things to say about that. In the first instance, you can understand that when sequestration happened, no one thought sequestration was going to happen. The President of the United States didn't think it was going to happen. Leaders in Congress didn't think it was going to happen. No one thought that sequestration was going to happen until sequestration happened.

The judiciary had a longer term concern which we've discussed and you've heard about, and we all know about, of controlling cost in the judiciary. They had a multi-year interest in reducing overall judiciary cost, including reducing, as we've discussed, reducing Defender Services cost. That was coming from the Judicial Conference and they had their reasons for doing it, which I think had to do with limiting the overall growth, as we've discussed, in the judiciary's appropriations.

Congress had not taken that attitude towards Defender Services. Congress was not saying, oh, Defender Services, you're out of control. Your spending is way out of control. They were funding us based upon assumptions that the defender organizations were efficiently managed. They wanted us, of course,

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to have more efficiency, but no one was saying we were out of control in that area. They were prepared, as they eventually . . . they believe that the panel attorneys were a necessary payment. There were all these different judges approving individual payments. The idea that there was somehow . . . the average cost per case was relatively low, especially compared to private bar metrics, and it had not been rising in any particularly significant measure.

They saw our program largely as a mandatory program even though we're not a mandatory program. We don't . . . an entitlement program. The language of the statute is largely written in language similar to entitlement programs. It says that "if you get arrested and you get charged with a crime, you're entitled to a lawyer." If it had said "you're entitled to receive money to hire a lawyer," it would have been an entitlement program, but it didn't. It said "you're entitled to have a lawyer appointed."

The fact that the payments have to come from someplace else takes it out of that entitlement category, but the Congress funded us based upon that assumption. That's why year after year, we would get the additional funding. Their view about us when we would have those . . . it happened in a number of years . . . at a number of different fiscal years prior to sequestration that there was a shortfall. Yes, we did run short and Congress did have to fund us out of the next year's funding, but would they have preferred not to have to do that? Yes, they would have preferred not to have to do that, but they continued to provide us with the funding that we need to meet those payments because they thought it was reasonable.

With the Judicial Conference though, they had a different viewpoint. They thought that our program was not taking the same types of cuts that the rest of the judiciary was taking because they weren't getting funded in that way. They felt that why should our program, why should Federal Defender's be able to continue to hire staff to meet increasing case load demands when our clerks' offices can't do that? They wanted us to join in this larger effort. It wasn't because Congress wanted us to do that. It wasn't because there was some mandate that was threatening their future of our defender services program, because we weren't taking enough cuts. It was because we weren't on board with that.

Yes, their complaint was that we weren't taking radical cuts in anticipation that sequestration might happen. We took the view that, as Congress had taken, that this is a constitutional mandate and you can have all the sequestration that you want, but when you're going to arrest somebody and charge them with a crime, they're entitled to a lawyer, not a sequestered lawyer. They're entitled to services.

The view that we put forth to Congress, which I say we put forth to it, it was the basis upon which we based every appropriation request. We were asking

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for the amount of money that was needed to provide the basic elements of a defense, not a Cadillac defense, not a Ford defense, a Sixth Amendment defense. There wasn't a lot of excess money in there to pay for those that we could frill away. If you don't give us the money, our representations are going to go down.

The Judicial Conference, the Executive Committee is developing a spending plan. They believed, no, we can cut defender organization funding and it will not increase the number of panel attorney appointments that we need to increase panel costs, because they can provide representation. The same number . . . represent the same number of people with less money. That's the position that they were going to take, which I think was a position which Congress did not assume was true. I think in fact it was not true. It's not to say that you can't get by with less for a little bit more, but operate as a basic assumption that you're over-funding the program for the amount of work that's necessary I think was simply incorrect.

It wasn't just in the sequestration year. If you look back to the records from I think by 2012, 2011, I can't remember the exact, the specific dates, but there were decisions made recommending appropriation requests and the Budget Committee's approval of defender services . . . recommendations regarding Defender Services appropriations requests where they would come in and they would look at our request that was put forth by the committee of Defender Services. They'd look at the justification for it and they would say that's simply too much. We're going to cut that appropriation request by X percentage.

Reuben Cahn: It's simply too much because?

Steve Asin: Because it is too much of a percentage increase over the previous year's funding level and will jack up our overall judiciary appropriation request to beyond the percentage that we're trying to limit it to.

Reuben Cahn: And therefore?

Steve Asin: Therefore, we're going to just arbitrarily cut that in response to . . .

Reuben Cahn: Therefore, what would be the consequence of the request exceeding that predetermined amount?

Steve Asin: They believed that it would undermine their advocacy for the entire judiciary's appropriation before the Congress, would make it less successful. That particular year, I thought what was really striking about that was that it the . . . other times when they had . . . in previous years when they had . . . we would go to the Budget Committee and we'd have this debate about whether or not our request was too high or too low, well, not too low. Too high.

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There would be a different analysis presented to us from the budget staff at the AO, supporting the work of the Budget Committee would say, no, no, your request, you don't really need as much as you say you would need. You need less. We would get into some debate about that, and then that's where the fight would occur.

This was an instance where the Budget Committee said we're not going to debate your numbers. We're not doubting what you're saying that that is the calculation of what is needed. We're just telling you you're not going to get it and you're going to have to operate with less. It's one thing if you're a local public defense system, or you're [a] national public defense system and your funding sources says that to you. You have some hard decisions to make. How you deal with things when you actually have a sequester, when you actually get a cut; [it's] something that we've spent a lot of time talking about.

It's quite another thing when the agency that is responsible for your program is prepared to go forward to the funding source and say, you know what? We're not going to go forward and ask for all the money that we think that we actually need to manage the program. I don't know what motivates all the judges on the Budget Committee. It may be that they actually believe that even though they couldn't put their finger on it, they couldn't do an analysis of it, that there just had to be a way for us to provide the same level of representation with less money. I don't know. It wasn't transparent at all what their actual thinking was.

As an administrator in the program, someone who works for the government, I felt that our responsibility is to make decisions that are transparent, that are based upon reasoned analysis, not based upon supposition, whim, some thought that you have based upon whatever experience you had, it should be subject to a process. The process that we were subject to had none of those elements of transparency, stated rationales and reason.

Robert Burke: I think this is an important example for demonstrating the tension and the difference between having governance and administration by people who are knowledgeable in the field because all along, the defenders were saying . . . and the people in Defender Services who are knowledgeable about it, "this is what our needs are." There were many in the judiciary among the Budget Committee and in the AO who said, no, you don't need that much. When sequestration came and when the work study came, after not having given credence to Defender Services and the defenders about what their needs were, it turned out the defenders were right. They had pretty accurately identified their needs in terms of human resources and other capital.

Judge Cardone: Just a quick follow-up, Mr. Asin. What was going to be the plan? One of the criticisms is that you weren't planning for sequestration. If this budget that

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you had put together and sequestration happened, was it the plan that by deferring payments to the attorneys, you felt that Congress because they knew it was pretty much a mandate that you had to give people in defense that they would realize, they would figure out where to get the money to pay them the next year? Was that the idea rather than to do some sort of cut the way it was done?

Steve Asin: I'll say that there was a . . . there are better sources for what the plan is than what I'm going to say here. My recollection is that the committee, working with the defenders and the advisory group, had come up with a proposal that involved a certain amount of funding going to defenders, I believe to keep on board staff or pretty close to that, I think. Then, there would be some cut to the panel attorney portion that would require suspension of payments. Depending upon how the numbers worked out, I think there was vision for furloughs at some point later on in the year so it would have been a less dramatic cut.

One of the advantages that was true about this approach that the committee and the conference had taken, prior to the sequestration year of the suspension of panel payments is that a lot of things happen during the course of a fiscal year. If you make a decision so that oftentimes we would be projecting, for example, the suspension of panel payments will be six weeks this year. We're going to have to start suspending panel payments in the middle of August. By June, it comes around, well, the defender expenditures weren't quite as high as we projected. Panel payments were being expended at quite the same rate. Now it looks like . . .

Judge Cardone: You weren't indicting as many people.

Steve Asin: Right. Now it looks like it's a four-week suspension. Then, it comes to like two weeks before, we found some money and we can transfer this money from some other account and make up the difference and it's only a two-week suspension. You have those options to play with, as well as the options that who knew what was going to happen during sequestration? Hindsight is a great thing, but it had never occurred before. Yes, there was clearly a possibility that the Congress would respond and say, well, we're not going to let the payments just sit there for six or eight weeks, or that if that happened in the following year, that the impact of that would have been such that we would have achieved protection. Those are some of the things that might have happened.

The other thing about it, to understand, is that thinking about what would happen is different depending upon what your overarching advocacy strategy is on the Hill. What would happen might be really different if this was an independent agency with this solely focused mandate that was focused on how best to ensure the funding for this program during the period of

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sequestration. You would make different calculations. You'd have different risk factors. You'd have different opportunities for success than you would if your battle is being fought within the Judicial Conference for how they're going to manage their overarching federal judiciary funding strategy to get through sequestration.

How are you going to present your overall picture when they weren't suffering the same number of potential cuts the Federal Defender Organizations were facing? They had a whole different strategic approach. It may be that . . . I hope that if it was the chair, Judge Gibbons were here, the chair of the Budget Committee were here, she would be able to articulate a really good rationale why this made a lot of sense for the federal judiciary as a whole to take this approach. That may have made sense for them as a whole, but within that context, this program gets hurt.

A lot of things have to be balanced. The issue is whether or not it is acceptable in our constitutional framework to have the judiciary's interest balanced against the public defense interest. If it had been a question of the judiciary balancing off probation offices versus clerks' offices versus circuit executives' offices, you have to make judgments. You have to make balances. That would seem to be entirely appropriate. I think the question here is whether or not it's appropriate for the judiciary to be making these balances where they're doing it between this separate, independent defense function, which really has an oppositional interest within our adversary system.

Reuben Cahn: Let me try and drill down a little because I heard Mr. Burke say that he thought there was a failure of knowledge that the Budget Committee didn't properly appreciate that when defenders said these cuts will do X to us, they really would do it. You're positing a different mechanism which is that the judiciary had to balance its overall interest against those of the defender program in the circumstances and the interest conflicted. I guess I'd like to turn to Mr. Wolff and get his view on how he sees what occurred in sequestration. Was there a failure of knowledge? Was there a failure of planning? Was there a conflict in interest? What drove the problem?

Richard Wolff: Ultimately, I wish I knew. I wish I could answer that I know for a fact what drove the problem. I think that we had a sense that what the Defender Services Committee was saying, which is the committee most knowledgeable about it, was not being heard or listened to. That was particularly concerning. I think there were people . . . they may have been well-intentioned. I can't know that for sure.

I think part of the problem is there's always the anxiety quite frankly in our position of not knowing whether this is just a misunderstanding or lack of knowledge or whether there's a deliberate attempt to limit resources. I have

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to say there are times, sequestration was one of those things, where it seemed like there was a real attempt to limit the resources. I think that happened at other times too.

Reuben Cahn: Let me ask about that. My recollection is that prior to sequestration, there had been a decision by the Budget Committee, I guess endorsed by the Judicial Conference as a whole, to impose caps on the growth of the Defender Services account that weren't directly related in any way to judgments about the needs of the program or the growth in case load or anything like that. They were essentially fixed caps of a certain percentage level. Is that recollection correct?

Richard Wolff: That is. There was a time in which I think the Budget Committee viewed while the appropriations climate is tightening, we've got to try to limit our increases. Our subcommittee only gets so much of an allocation so we have to try to limit what the requests are. There was a decision in the Budget Committee that was endorsed that the different appropriations have a cap on them. You've heard about the dollar for CJA is not a dollar for the courts. Our program was growing at a rate faster than the court budget was growing. As I recall, the way the budget caps ended up coming out, reversed that. That is, the cap would allow us to go up let's say 5%. The courts were a little more. It altered the balance.

Reuben Cahn: Let me ask you explicitly. Did any of you hear that view expressed within the Administrative Office that a dollar for the defender program was a dollar that salaries and expenses account couldn't get?

Richard Wolff: I attended meetings in which the Budget Committee chair said that to other chairs of committees. That was not any secret in that sense.

Reuben Cahn: That was a reason to restrain the growth of the defender program?

Richard Wolff: I think that they looked to the defender program . . . the chair of the Defender Services Committee was often in a very uncomfortable spot in those meetings because they were being looked to restrain the program growth and what are you doing? There were a lot of different things. There are different ways of containing cost. I think we had some strategies for containing cost, and the Budget Committee had some strategies. It was very difficult to promote ours and to fend off, if you will, theirs.

Some of the things that I think about are for years, benchmarks were talked about for panel attorney payments. They wanted benchmarks. I think part of it was just to help judges . . . this just goes to judges having to make decisions on vouchers and trying to figure out how to do it. The hope was that by having data benchmarks on a certain type of case, it will cost this much, that would help the judge. We told them our payment system won't give you data,

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sort of garbage in, garbage out. We couldn't tell that this case was a plea or a trial. It was a single defendant, multi-defendant. There was insistence that this be done. Eventually benchmarks were issued with so many disclaimers on it. We insisted that there be these disclaimers that they were really useless.

We thought, for example, on the other side, one of our suggestions was supervising attorneys in the courts could be helpful for judges. The first time that we took that on, because it was in the courts, the supervising attorneys were taken out of the salaries and expenses account. It was piloted I think and there were three of them. After the pilot, the decision was the Judicial Resources Committee, I think it was, basically took the view, or court administration, or case management . . . I can't remember. The point was this is going to come out of clerks' formula so the answer to that is there will be no additive for this. You cannot add to your clerks' formula to have a supervising attorney. Which in the end, I think the three were grandfathered in, but it basically stifled that.

The next go-round was case budgeting attorneys. We came to the conclusion these large cases, large panel attorney cases, often death penalty cases, were costing such a large percentage of the panel attorney portion of the program compared to the number of representations. The case budgeting was a process by which instead of waiting for the end of the case and the judge getting sticker shock that it had added up to this much, to do a case budget early in the case, which could be altered so there was a common understanding of what sorts of expenses could be expected. Case budgeting attorneys were piloted and they're experienced criminal defense lawyers who could help do that.

This time, we decided we'll take this out of defender services' money and we will have an FJC study done of it because we're always told there's not empirical data supporting these things. That pilot was done and the FJC study came out and said that those case budgeting attorneys had more than covered their cost and that this was a good program, and ultimately went to the Judicial Conference then and the conference endorsed those positions. I'm very gratified to hear that . . . I didn't know that there are something like ten out of the twelve circuits now.

Even after that Conference approval, one of the members of our Economy Subcommittee, our liaison, was complaining about the FJC study and the faults in it and everything, because this was going to be, at that point, three people, but potentially 12 FTEs added to our appropriation. Even though the study was showing it was saving money, even though the panel attorneys liked it ever so much. You'd think they wouldn't have liked it. They were endorsing it. Everybody was on the same page. Judges were endorsing it. But we were getting pushback even after conference policy was that this was a worthwhile thing to do from our appropriation. We were getting pushback

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about that.

Judge Cardone: Any other questions?

Reuben Cahn: Let me give Dr. Rucker some time.

Judge Cardone: All right, go ahead, Doctor.

Reuben Cahn: Otherwise, I could eat up the rest of the session.

Dr. Rucker: I think we all could. It's nice to see all of you. Thank you for coming here. If I've understood what some of you were saying, I think all three of you actually, you're calling for independence. Let me ask you to talk a little bit about that. What form would you like to see this independence be? Would it still stay within the judiciary in some form like an FJC model, a Sentencing Commission model? Would it be outside? Tell us how this would work. How can we better support the Sixth Amendment and people's right to defense? How do we get to this model that you're envisioning in a real world, not an idealistic world but realistically? Mr. Asin, do you want to start?

Steve Asin: Yes. I think that certainly for me, when I entered government, it's a mystery. How do you actually run programs and do all this funding and how does it actually all work? It seems mysterious and complicated and complex. How would you go about doing this? I think that there are two, I look at the reform for the program existing in two spheres. One is at the national level, setting policy, doing the appropriation, doing the budgets; and the other is in the area of the appointment and payment of counsel, both the panel attorneys and the powers of the district courts to do that. You have to address both of those problems.

I think at the national level, to get to this question, is there any limit as to what you could . . . Mr. Frenslley, asked if there was any limits to what the autonomy can be within the judiciary. I don't really think that there are. You have to think about what it means within the judiciary. If you consider the Sentencing Commission to be within the judiciary, the Federal Judicial Center to be within the judiciary, I think you can have one of those models.

First, you have to do really one very simple thing. You have to remove the authority of the Judicial Conference of the United States over the program. Once you do that, you have to vest it in something else. Once you do that, everything else can basically remain in place. That authority that has now replaced the authority of the Judicial Conference then becomes responsible for figuring out all the details of what other operational adjustments you might need to make over time?

What would that look like? You have models from state systems, but you

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have models within the federal judiciary. You could do the Sentencing Commission model. You could have a board. You could make that . . . you could look at the functions of the committee on Defender Services now and say those functions are now going to be vested in a commission and you could initially keep the committee on Defender Services the way it is and let it figure out a system for replacing it or you could come up with . . . I'm sure you've been looking at different models for how you might constitute that.

Dr. Rucker: I'm sorry to interrupt you, but when you talk about that, the way the Defender Services Committee is right now, it's basically judges, running it?

Steve Asin: Right, but I'm saying that . . . it is running it, but you look at what its authorities are. You take the authorities that it has and you say that's going to be our independent commission. The role that it plays . . . and staff in the AO, the Defender Services Offices, they no longer report to the director of the Administrative Office of the U.S. Courts. They can keep their offices there and you can reimburse the AO however you want to do it. They'll do the functions that they're performing, but they're simply now reporting to this and responsible to this commission the same way that administrators in state systems that report to independent commissions are responsible to them.

The functions that you have within the AO that support the program, personnel, these different administrative functions, they can still be there. You can contract with them on a reimbursable basis, however you want to do it. If you look at . . . there are other models to look at. You can look at the Office of Independent Counsel that I'll recall what those used to look like. I'm familiar with it a little bit because my wife used to be an associate at Independent Counsel in one of those Independent Counsels' Office. They were supported by the Administrative Office of the U.S. Courts. They're a prosecutorial arm. Their oversight came from Congress. All the administrative, the personnel, the paychecks, all that stuff came out of the . . . to buy space, equipment, all that stuff came out of the Administrative Office.

I think it's not a radical idea. It doesn't require a lot more money. It doesn't require any more money really. That's at the national level.

At the local level, the Prado Committee recommended these local boards and stuff, but you have a model now for panel attorneys, for the administration of it in various Federal Defender Offices that manage them. I think whether or not you . . . I know there's not universal acceptance that Federal Defender Organizations should be managing the panel, but if you look at Mr. Kramer's testimony yesterday, or what goes on in the District of Oregon, these other offices. You simply take the judges out of the equation. They're no longer doing the voucher approval and you would have a system in place.

It doesn't involve more money and all sorts of other stuff. You would have to

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have some more money maybe to add some services to other defender offices. Don't get me wrong about that. In the scheme of things in terms of offsets what you'd get from a congressional viewpoint, from what you'd get from offsets from the S&E account, sales and expenses account, it's not really a lot of money. I'm not familiar with the details of what the funding situation is in FY 2016. If you were to look at the resources of the FTE that's available in 2016, you might very well find you have enough FTE this year that you could actually add that staff to do that.

The thing that remains then is the appointment of federal public defenders. I don't really have a particular view about that. If you want to leave it with courts of appeals to do those appointments, I guess you could leave it with courts of appeals to do those appointments. I would tend to think that if I were . . . I don't know how much feedback you've gotten on the development of these different models. Certainly, you would want, there's a variety of models out there in the states, you'd want to talk to a lot of different people to come up with the solution.

For some things, once you got these basic elements in place, you would then have with this independent agency within the judicial branch and let that group focus on the details of that. Maybe you'd have some . . . they'd be charged initially with a five-year transition plan for developing another model for appointing federal public defenders or something. You'd work out the details of it. I don't think it is . . . I think that it is a doable solution. Not everything has to change all at once. You don't have to be creating . . . spending a lot of money. It doesn't require a whole . . . there will be some rewrite of the statute, but it's more of a technical rewrite so it doesn't have the political risk that's associated with saying, well, Congress is going to take a whole review of the criminal justice system and be able to tinker with that and with other things. I think that's, those are some of the ideas I have had.

Dr. Rucker: I'd like to hear from Mr. Wolff and Mr. Burke as well, but let me throw out a couple of other ideas that Mr. Asin made me think about. You're talking about cost maybe not going up so much. I would wonder if cost should go up some because hourly rates for the attorneys may need to go up some. Mr. Burke has talked about training. I think there needs to be lot more training in many different areas, but also for the use of experts and more use of experts which would all I think potentially increase the cost of this. Mr. Wolff?

Richard Wolff: I don't disagree with anything that Steve said. I think that was basically the Prado Committee approach, was to have an independent agency within the judiciary. I think because that was viewed as the easiest leap, if you will, out from under the Judicial Conference and just stand on your own and have the ability still to on a reimbursable basis or whatever, have the AO doing certain things as other judiciary agencies do.

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I think the ideal is outside, is on your own. I realize that's a bigger step that requires carrying more infrastructure, if you will, with you. My regret is that the first time around, we didn't get the first step done. I'm certainly very sympathetic with David Patton's testimony yesterday about really breaking free. I think that anything would be better, is really almost what I have to say in terms of the shift. It doesn't matter which one. I think you just have to move in order to eliminate some of the just the inherent conflicts that are there. Yes, more resources for the things you mentioned. That could happen now if allowed and you don't have to change anything if you can advocate for those.

I think the structural concerns, form follows function what I think they say in architectural parlance, and as long as you have the Budget Committees and the Executive Committees and Judicial Conference which is directed towards, and not inappropriately, they're trying to run the judicial branch of the government. The defense function is different and it doesn't quite fit and it can stand on its own at this point. I would at least move it, as Steve suggested, thinking that's probably the more feasible likelihood when you get into the realities of it.

Dr. Rucker: Mr. Burke.

Robert Burke: I'll be brief. I agree with Dick. I think ideally, it's completely independent. I think it could work as an independent entity within the judiciary. The key I think is that whatever the governing body is should be made up of a majority of people who are knowledgeable about and experienced in federal criminal defense. I think in terms of the appointment of defenders, that body could do it, although I think it would be wise to have a mechanism that allowed them to get input from the district and circuits involved because there are some I think important factors to be considered in that regard.

Dr. Rucker: Let me just ask one more follow-up question if I can of Mr. Burke since training was the area that you focused on. Can you give us some insight about how you think training can be improved right now? We've got thousands of panel attorneys. A lot of what we've heard is they don't know how to manage e-discovery. There's a whole lot of things they're not doing as far as when you look at service provider use it's extremely low. Can you give us a sense of how you think training should be improved in the future?

Robert Burke: Training in this program is difficult because of the large number of panel attorneys. It's hard to reach all of them, and that's why I advocate for more resources, both in defender offices to allow them to do more training and more effective training, but also in Defender Services. The National Litigation Support Team has done, in my opinion, an amazing job in all aspects of the work, including training, but they're overwhelmed with the amount of work they have to do so more resources are needed there.

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Not only because of the voluminous discovery in some cases, but even in the routine cases, there's so much digital information and the technology changes so fast that it's difficult for people to keep up with it. More resources are needed to reach those people more regularly in training them on those issues and a number of other issues.

One other thing I would like to focus on because we've talked a lot about some of the committees but not as much about the AO is that I think that this singular focus of people in the AO on the judiciary, which is understandable given the body that it is, is really problematic. The example that I give in my written submission about procurement is in some respects has a lot to do with what frankly I consider to be poor management and leadership around the whole procurement issue that's existed for the whole seventeen years that I was there and is really probably beyond the scope of this Committee.

I think it happens in part because of the singular focus on the judiciary, and, frankly, in my experience, an unwillingness among a lot of people in the AO to listen to how this program is different and why you need different processes and different treatment. I think over time, there's been more and more resistance in the AO to having those conversations.

The example that Steve and Dick gave about the transfer of jurisdiction over the HR issues I think is really illustrative. There's no way in my mind that the failure to consult with Defender Services before that was done was accidental or negligent. In my opinion, it was absolutely intentional, and in my opinion, it was incredibly irresponsible, lacked integrity and transparency. Those kinds of things happen too often and I think are just clear signals and reasons for why this administration of the program doesn't work.

Dr. Rucker: Thank you, Judge Cardone.

Judge Cardone: Judge Prado.

Judge Prado: Let me just thank all three of you for your years of service to Defender Services, to the Defender Services Committee, to committee of defenders, public defenders' panel attorneys. You've kept the system going and thank you for all your hard work, Steve, and I started about the same time. Hair was a different color then.

Steve Asin: Yours was too.

Robert Burke: I probably had some . . .

Judge Prado: You had more hair. Dick, probably one of the best things that came out of the Prado Commission was that we discovered Dick Wolff and he was able to

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join defender services. He's really the guy who wrote the Prado Report. Dick, thank you.

I guess y'all were here yesterday. Y'all, that's a word we use back home . . . you were here yesterday when the panel of public defenders was here and I asked about give me some horror stories, I guess is what I'm looking for. As a judge, you're looking for facts to back up recommendations of change. What we hear is everything is fine in my district. I've heard of other problems in other districts. I guess I'm looking for those horror stories that we can then take as part of our report and say, look at what's happening. This is horrible. We need to make the changes. I'm thinking now that maybe it's a more subtle thing that is hard to articulate.

The fact that there are horror stories might be more isolated, perhaps it is enough to say there's a problem with the systemic way of doing things that if it's happened there, it can happen here and maybe change does need to be made even though we don't have tons of stories. The influence is more subtle, me writing a letter of recommendation to the public defender to hire my law clerk, telling the public defender how you might be unhappy with one of his lawyers and that public defender has to come around for reappointment every four years. The circuit asks the judges for their impression of that person so there's some politics involved and that the public defender has to be nice to the judges and be a politician of sorts.

I'm just wondering if that is what we have, and is that enough to make the change, the fact that there aren't that many horror stories? Maybe you in the main office do know of a lot more stories that are difficult for the defenders themselves to speak about. If you could address that issue.

Steve Asin: I heard you talk about that yesterday and I started making some notes in my little book.

Judge Prado: You have a whole book.

Steve Asin: Yes. I went through and I made a few notes about all the horror stories that I had. If you want, we can extend the hearing another couple of hours, I could . . .

Robert Burke: "Brief" and "a few" mean different things to Steve than they do to someone else.

Steve Asin: Frankly, I think that from a national perspective, from a national office, seeing the battles that we fought on the appropriation level, on the policy level are the things that stand out to us when reflecting on this after being away for a few years. I do think that those, because they have such a systemic impact on the ability to actually carry out through the service, there's stuff we

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haven't even talked about, battles over how much of a rate increase to ask for for panel attorneys, which really, major impact on what happens. I think that those are enough.

At the same time, when there is an issue in a defender office, you do hear about it at the main office because you have a relationship because to some extent, they think of you as a headquarters office. You would have some history and some experience that can help them through certain situations. You do get these calls over the years from different offices, sometimes from defenders, sometimes from judges seeing problems in defender offices, what do I do? There is a tension with doing anything that involves . . .

There is a certain pressure that comes from having a regular four-year appointment that's true for Federal Public Defenders, that doesn't really exist for Community Defender Organizations, both in terms of trying to address problems in the office that you might see or that a judge might see in an office or even a fellow defender might see in an office because the amount of . . . what's available as a remedy for a problem in a defender office, it's not a subtle thing. There's appointment or not getting reappointed. That's the ultimate remedy, so you're reluctant to do that.

To give you an idea. Over the years, what I would get calls from defenders about, would be judges, who in a district, regularly feed candidates to an office and say: I'd like you to hire these people. Judges who say . . . one district average . . . more than one district, I want to see the candidates and interview them before you hire them or at least I want to see their names. We have, I think offices where I don't know that I . . . districts where I don't know that I want you providing representation in this class of cases because it's taking too long. It's not as efficient.

I would say, to me, an example of interference, systemic problem with interference in the operation of an office, I can think of one that's bigger, of the problems that existed historically in the Fifth Circuit with defender offices not getting the staff, not even feeling that they were comfortable in putting a request for attorney staff increases that they felt that they needed to the circuit court of appeals because of reactions that it would draw. Offices who felt reappointments would be . . . their job status would be impacted if they decided to put in a request to have a capital habeas office, an office devoted to doing capital work. Offices that felt compromised in their ability to make recommendations for appointment of counsel in capital cases, that certain recommendations would not be well-received and so I'm not going to do that.

I would even say that there are problems in any institutional defender office which needs to be confronted. Whether or not you have federal judges or judges appointing you as a defender, if you're a defender and you're

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appearing every day in a court, you're part of a system, there's always a tension between being a system player and being someone who's an advocate and an adversary. You have to balance that. There's all sorts of pressures I think that happen in defender offices all the time about that which would go on under any system and it's just part of the nature of the business, but they really I think could aggravate it when you know that you're up for appointment every four years.

Richard Wolff: I'm going to mention actually a panel attorney thing that came to mind, which is we . . . for quite a while, we talked about vouchers cuts, but voucher delays was another significant issue that happened at times. It's one thing when the judge decides to cut you and you try your best but that's that. It's something else when a voucher sits on a desk somewhere or now it's electronic, I gather, but somewhere in the courthouse is a voucher, and we would get calls about I haven't been paid. Of course you're always wondering, well, is there truth to this?

In our position, we couldn't . . . all we could do is say, well, who have you talked to? Have you talked to the court? Have you talked to that? On occasion, when there seemed to be a fair degree of credibility, we would call the court, call the chief judge, if we had to at times, that they never liked getting that call. They never want them to talk to another judge about a voucher on their desk. In the end, we devised a ninety-day report as a means of at least fleshing out ninety days in chambers that the circuits should send a report forward from each of the districts' answer when a voucher has been there for ninety days or more.

That helped. It was interesting. When the judge's name went on a list, it actually seemed to help. There are always individual circumstances, but sometimes, I don't know if it was negligent or if it was punitive that a panel attorney had to wait that long to get paid. A lot of these attorneys need . . . as we know are solos and they need that payment to come through, whatever it's going to be.

On the national level, another thing has popped to my mind, and that is for a long time . . . I don't know. This isn't a horror story, but it's just another structural interesting item. For a long time, the Judicial Conference policy has endorsed a federal defender becoming an ex officio member of the Sentencing Commission. DOJ has a presence, the judges are on it, private lawyers. Federal defenders who do the bulk of the work, they're given a statutory right to comment on guidelines, things of that sort. Conference policy endorses that. There was a time on one of the criminal crime bills that was going through that it looked like they might be able to attach a right or whatever and get through. There was a little bit of optimism. Maybe this is the time.

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We started a process in the office with the Defender Services' Advisory Group of, okay, well, functionally, how will we do this? How would this be done? Of course, the defenders basically said, well, we'll pick a person to be on the commission or we'll put the name forward. I started this process of contacting others in the AO about that being done. It was resisted in many quarters that defenders would just name someone, who they think should be the nominee or whatever, the appointee. There's a tradition that I think is within the judiciary about whether it's slots on Judicial Conference committees or various things that oftentimes, two names go up at least to the director or he takes them to the Chief Justice, but there's always a choice there or whatever.

We seemed to get it through eventually, all these different layers, and it took a long time. It got to the director's office and it never came back. We could never free that up. That's just a small issue, but it strikes me as symptomatic of . . . control. There's always just that little tweak of having give us . . . we want two names or we want to pick.

The same things happen with congressional detailees. Congress has asked for defenders to help on the Hill and they sometimes ask for specific individuals. The Administrative Office Legislative Affairs, they hate that. They can't stand . . . this is not something that Congress should be picking. We should be deciding. Again, they want a couple of names. They never want to just forward one name or even when it's a rather important member of Congress, they don't just say, all right, we will. There's no particular reason perhaps that they might not want to send somebody.

There's the broader concern too of the size of that detailee operation, if you will, because the courts may want detailees. Courts have their own concerns. That's why it doesn't fit. It should be separate and the court wouldn't have to worry about that. The judiciary wouldn't have to have that work.

Judge Prado: Assuming there had been a separate committee like the Sentencing Commission or FJC, sequestration hit them just like everybody else. Had there been a defender commission, would sequestration have been handled differently and not had the impact that it had been under the courts?

Richard Wolff: I think Steve was describing it. I think it probably would be because I don't think they would have started with a cut of a rate. They would have tried to minimize the impact upfront. The other thing is that if there's a separate agency, we'd have congressional relations. We would have direct contact with the members of the appropriations subcommittee and be able to have . . . they know impacts better. Eventually, it happened, but it was after damage had been done. I think that had we been in a separate agency and been able to communicate more directly and had a consistent congressional relationship, there would have been a better appreciation of what that impact could be, and

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it could have been avoided.

Robert Burke: Go ahead, Steve.

Judge Cardone: Microphone, Mr. Asin.

Steve Asin: I think it's important that, to Dick's point that, when you go back and say what-if, what might have been? You have to put it in a context. Had we had a separate authority, separate ongoing relationship with Congress in developing a response to sequestration, there would have been a dialogue directly about our program and what the problems we were facing and we would have worked out some solution.

The short answer I think is yes, based upon the fact that the Committee on Defender Services which itself, my recollection, was trying . . . understood the competing needs and its role within the Judicial Conference, but in itself . . . even taking into account judiciary wide concerns, came up with a different approach that was based upon . . . that was derived from discussions with the advisory group and input from defenders and panel attorneys. I think at least to that extent, one can say it would have a different approach and would have had a different outcome.

Robert Burke: Judge, if you don't mind, I'd like to go back to your first question and address it with regard to the panel. I think that this question of having a critical mass of horror stories is a problem and probably was for the committee that carried your name. I guess I have a couple of thoughts about it. The first one is, I just think it's a conflict for judges who have a financial interest in seeing their mission and their interest funded, their salaries, their buildings, their staff, to be making decisions about pay issues and resource issues for CJA panel attorneys. That to me is sufficient for removing that function from them.

You've heard testimony from a number of panel attorneys that I think provides some really good examples of how that problem plays out. It's a limited number, but I can tell you from talking to panel attorneys all around the country, there are more examples. They often aren't documented because the lawyers fear a certain retribution that they won't get cases or won't be reassigned to the panel.

Judge Prado: I'm shocked that that goes on.

Robert Burke: I think that if there are fifty or sixty or eighty in a year, that's too many.

Judge Prado: How do you see this new commission, committee, whatever we call it, how do you see the makeup of it? Right now, Defender Services is all judges. Would there still be judges on the committee? Who would appoint the new

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committee? Maybe that's for us to do, but do you have any idea of what you envision this commission, committee, looking like?

Robert Burke: I guess I have two thoughts about that. I don't have detailed ideas about exactly who would be appointed. As I said earlier, I think a majority of them should be people knowledgeable about and experienced in federal criminal defense. I think that it would make some sense to have judges on the committee. I think there's value and input that we need to get from them about the operation of the defense system and the impact they're going to have on the court that it's important for people to consider, but they shouldn't be in a position where they have a majority and can control the outcomes.

Richard Wolff: I'm not as inclined to have judges on the committee. As I said, the defense function is really a separate function. What's happened is we're used to it this way. It got put in the judiciary. We've gotten used to the fact that the judiciary oversees the program, but Congress itself, when they set up defender offices, said we're going to need strong, independent leadership outside judicial control. Absolutely. The defense function, I think they would want consultation with the federal judiciary. I would assume there'd be judicial relations. There'd be relations with the Department of Justice.

I think there are a lot of avenues that if the defender function was separated of cooperation that might take place between the Justice Department and the defense function that some of which happens now, but it's the exception rather than the rule. E-discovery is an example of a collaboration that was for the good of everyone. There are other circumstances I think where those collaborations might take place, but they're harder to do in the current arrangement.

I think there is a whole potential that would be freed up. I think the judiciary is going to be a very important constituency for the defense function always. I don't know that a judge needs to be on the board essentially running the program. In this sense, all that confidentiality concern of what can we say and what can't we say, what might go . . . I wouldn't want to put a judge in that position.

Robert Burke: I think Dick makes a good point, so I retract my . . . I think there could be cooperation with the judiciary and DOJ outside of this entity, but especially the confidentiality concerns are critical.

Judge Prado: Steve, short answer because the chair . . .

Judge Cardone: We're running over . . .

Steve Asin: I don't have a strong view. I looked at this somewhat when a study that Judge Gleeson was chairing a number of years ago and brought in models from

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around the country, and I think that that's what I would look to. I think it's a complex question. It's a question of how much time your Committee has to draw on all the different views to give it full consideration. I think it's enough for your Committee to say that there are shortcomings in the current system that independent governing public defense commission governing board should be established of some sort and perhaps pursue with a lot of different input what that should look like.

The other thing I think is that when you come up with these proposals, I think that there's a lot of complexity, but the issue, for example, whether or not it should be within the judicial branch of government has an implication for where the appropriation is, right? All these commissions and FJC and Sentencing, they're all part of the judiciary's appropriations, which means that we go to the same appropriations committee as the judiciary, which means maybe there is some inherent conflict in there. It may be not a good idea to do that.

Judge Cardone: Can I follow up with something? There has been a suggestion that it be placed somehow, because we hear about parity with the DOJ and that there's no way to get those numbers or really for anyone to compare numbers between the defense function and the Department of Justice. If somehow the defense budget was in the same committee as the Department of Justice budget that the people that make those decisions would be able to compare apples with apples and see what's going on in DOJ versus what's going on. Any thoughts about that, having worked in this?

Steve Asin: The judiciary used to be in Commerce, Justice, State, Judiciary, and Related Agencies and we used to be in the same general appropriation with Department of Justice. At the time, we would try to make those comparisons and get the staff to work on it. The fact that we didn't have great success at doing that doesn't mean it won't happen in the future. That's why I think I would get in . . .

Judge Cardone: That's when it was still in the judiciary. I'm saying is there somehow . . .

Steve Asin: When it was still in the judiciary, so if it's on the outside, I think you might have a greater capacity for doing that, but I don't have the expertise. That's the type of thing I would, in making this decision, I would look to get some input from congressional staff, from appropriation staff in particular because a lot of staff on the Hill are not familiar with appropriations processes, to get those ideas and insights. That question might drive your decision as to whether or not it's within the judicial branch or not. I just don't know. I'm just raising these issues for you to look at.

Judge Cardone: Thank you. Anybody in the back?

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- Judge Gerrard: Just a quick question for Mr. Asin. If we are to certainly remove the authority from the U.S. Judicial Conference, you had talked about the Office of Independent Counsel. What type of model is that as opposed like FJ . . . I'm familiar with Sentencing Commission and FJC that may be within the judiciary, but just briefly.
- Steve Asin: I'd have to be brief because you'd have to really not rely on me for that. Essentially, you could look back at the Independent Counsel Act, it's set up under the direct control of Congress. There is some administrative support that they get and services they got from the Department of Justice, but it was insulated within there. You have to actually look at how that's done.
- Judge Gerrard: Frankly, that interests me somewhat but we'll take a look.
- Steve Asin: It is an interesting thing. I invite you to explore that.
- Judge Gerrard: Thank you.
- Judge Cardone: Nobody? On behalf of the entire Committee, thank you so much. Really it has been tremendously helpful. The historical perspective is exactly that. It's tremendously helpful to get that depth. We appreciate, as Judge Prado said, your years of service and your willingness to come and speak with us and speak with us frankly. As I've said before, if this has spurred any thoughts, I think Judge Prado and Dr. Rucker mentioned that if you have any ideas about structure, if you have any further comments you want to make, please feel free to submit those to us. We are happy to receive them. On behalf of the entire Committee, we want to thank you.