

Ad Hoc Committee to Review the Criminal Justice Act

Public Hearing #6—Philadelphia, Pennsylvania

April 11-13, 2016

Transcript: Panel 8—Views from a Mixed Panel

Judge Cardone: Good morning, everyone. Thank you for being here. We appreciate you taking the time to be willing to . . . and your willingness to testify to the Committee. As I've said previously, what we're going to ask you to do is make a brief opening statement, and we have received written submissions, but in order . . . for the record . . .

These hearings are being broadcast live so that people have a sense of your testimony, if you'd make a brief opening statement and give the Committee the opportunity then to ask you some questions. I'm going to ask each of you to introduce yourselves because, honestly, I don't want to get the names wrong. We're going to start with Senior Counsel to The Constitution Project.

Madhuri Grewal: Hi, Madhuri Grewal with The Constitution Project.

Prof. Lollar: Good morning, Cortney Lollar from the University of Kentucky, College of Law.

Judge Stengel: Hi, I'm Larry Stengel. I'm a District Judge here in the Eastern District of Pennsylvania. I chair the Judicial Resources Committee.

Judge Cardone: All right. We'll start with you. Thank you.

Madhuri Grewal: Thank you. Thank you so much for inviting The Constitution Project to testify. As you probably read in our . . .

Judge Cardone: Can I ask you to pull the mic?

Madhuri Grewal: I'm sorry. It feels so close.

Judge Cardone: I know.

Madhuri Grewal: As you've likely read in our submitted testimony, we're a non-partisan organization based in Washington D.C. We've been working on the right to counsel for decades. As senior policy counsel, I work with our Blue Ribbon bipartisan committees, including our National Right to Counsel Committee, which has issued a number of comprehensive reports on the state of indigent defense in our country.

Also, on behalf of TCP, I work closely with many of the organizations and individuals who have testified before you in previous hearings. As you may know, we've been quite vocal on this issue. Most recently an "op-edit" in The

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Huffington Post, which was posted on your website about these hearings.

We've submitted more detailed testimony that outlines our concerns on a number of topics, including funding, workload limits, the importance of data collection, and independence. I want to just focus on two pieces today: independence and funding. I have no doubt that my comments are not new to this panel, so I'll keep them brief because I know I'm standing between you and lunch, but I feel it's important to add to the chorus of groups that have already spoken about these issues and discuss the fundamental and necessary restructuring of the Federal Indigent Defense System.

I first want to share a brief anecdote about my own reaction as a young attorney to the voucher system. When I was applying to law school, like many aspiring lawyers, I wrote my personal statement on the importance of public interest work and swore I would never work for a big law firm. Then I began law school and got some very good advice from a mentor who encouraged me to spend at least one summer working for a large law firm, so I could see what it was like to work for a client when funding and resources were not an issue.

I did just that. I spent a summer writing memos to associates and partners, which would then be sent on to clients, about legal strategy, including potential motions, experts, and a host of other issues. Then cut to my first clerkship after law school, the D.C. Superior Court, where I primarily assisted with misdemeanor criminal cases. I learned that, in addition to PDS, D.C. had a CJA panel system.

I was surprised to learn that instead of memos to clients and, more importantly, approval from clients for anything that may implicate funds, ranging from experts or filing motions, these sorts of decisions had to be justified to the presiding judge. It seemed to be a piece of the system where the clear conflict of interest just seemed to be addressed with a shrug. When I asked about it, why defense attorneys seem to be working for the judge instead of their clients, it was just met with a, "This is the way the system works. What are you going to do about it?"

I felt that perhaps I was naïve, but in reviewing testimony before this Committee, it seems that I'm not alone in my sentiments as a young lawyer. The bottom line is that the right to effective assistance of counsel requires access to experts, investigators, translators, and other resources. As you have heard from many people who have repeatedly testified before you, they do not seek expert assistance or they use experts who charge less, but are also less experienced because they fear not receiving future appointments.

In several districts, defense attorneys must appear before judges in an ex parte hearing to justify their requests for expert services. Prosecutors, as you

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know, on the other hand, don't have to justify any of these expenses, and there's no judicial intervention.

I especially want to flag Steve Wright's comments before this testimony about how he discussed the various stakeholders in the criminal justice system, but the real stakeholders are those whose liberty is at stake, the clients and the people whose stories are often getting lost in these policy discussions.

How odd that those folks aren't the ones who are approving funding or how their lawyer's time is allocated. It's those folks and the lives of their families and children who are implicated when their attorney's compensation is cut or their decisions are challenged by judges. Defendants are systematically denied access to counsel, and the trial resources they need to mount an adequate defense. They're the ones who are suffering most because of it.

This isn't to say this is the judiciary's fault, and quite the opposite. I know many judges who recognize these inherent conflicts and judges who have testified before this Committee that they would prefer not to be at the center of this process. Our National Right to Counsel Committee underscored the importance of creating an independent, adequately funded National Center for Defense Services out of the purview of the AO to eliminate the conflict resulting from federal defense attorneys having their pay, appointment, and ability to adequately represent their clients, determined by the very judges before whom they're trying a case.

To ensure justice, our adversarial system requires that both sides, the prosecution and defense, be represented by lawyers who have adequate amount of independence, resources, training, and time to devote to their cases. That's just not the case here. Thank you for your time.

Judge Cardone: Professor?

Prof. Lollar: Good morning and thank you to the Committee for having me. I want to also thank the Committee because it's been clear, in listening to the testimony that I've heard so far, much of it will be a live stream or a video, how conscientious and thoughtful the Committee is being in approaching this very difficult task. I do want to acknowledge that because it is a very difficult task that you have before you. I have continued to amend my oral remarks over the last couple of days as I've heard the testimony of the people who have come before me, particularly in this panel, obviously also in previous panels as well.

The thing that I wanted to talk specifically about this morning that I don't talk about in my written remarks is what my position might be on the issue of independence, because I do think that's the big question, ultimately, before

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the Committee. As I've listened more and read more, I have come to more of my own conclusion about what seems to me to be the right path. I thought I would share that with you in my remarks. Obviously, I'd be happy to talk about any of the things that I have written and some things that came up yesterday, such as self-cutting on vouchers, which I have some information about or training, et cetera.

I have been thinking a lot about this issue of independence, and especially after reading the Prado Commission Report and listening to the testimony again this morning. It reaffirmed for me how long it seems that this issue has been out there and that back . . . twenty-three years ago, it was an issue that was before the Committee then. It still seems to me that many of the issues that were raised at that time seemed to be present as well.

It leads me to think that perhaps something new really is needed rather than trying to reshape a model that is not working. That said, I do very much recognize the practical difficulties of doing that. I recognize that it's not a decision that can just be made and pie in the sky, "Let's just make it independent." Right?

Perhaps because of my own experience began at the Public Defender Service, but because that's a model I am familiar with, I do think it's a model that is instructive. I understand the concerns about it being a small model and that it may not be nationally feasible in some ways; although I think there are other concerns that I think I have less concern about that were addressed and brought up yesterday.

In my thinking, I think that I'm concerned less about the Public Defenders Service model of being in a larger scale. For example, going directly to Congress to ask for funding. During the sequestration times, for example, that was something that the office . . . if you are going to be getting your budget from Congress, it's inevitably something you think about and you plan for in ways that you know Congress is constantly changing, I think. I think that that office experienced, from what I understand, far fewer ramifications during sequestration than the Federal Defender Offices did, and were able to weather it. To my knowledge, there were not layoffs, there were fewer hires.

Back to this issue of investigative resources, expert witness resources, people may have been a little conscientious at the time, but I don't know that they were not able to get the resources that they needed ultimately to be trying the cases that needed to be made trying. I, frankly, have a lot of confidence in my federal defender former colleagues and CJA former colleagues that they can advocate quite well for themselves. If there was a committee, again, that had their own interest at heart, that they would be able to approach Congress, as some of them did during sequestration, and advocate on their own behalf.

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To me, those concerns are less . . . I feel strongly about them. I feel like those are concerns that could be addressed and that I have, again, less concern than I think others do about it. I think it's also important always to remember in the backdrop of this that, in many ways, public defenders end up being responsive to cases that are being brought by the prosecution.

The reason we're having these conversations is because there are many, many more cases that are being brought. That does not only impact the Defender Services. I had conversations when I practiced in Atlanta with the judges that impacts judicial vacancies, it impacts probation services, it impacts across the board when you have more cases coming in. I think it's only realistic to expect the defense budgets are going to likewise have to grow in order to keep pace with the demand for services.

I think I'll leave it at there. I'm happy, obviously, to answer questions that you might have about that, but, again, as I've been listening and reading over the past many weeks, I really have come to the conclusion that I think it might be best to contemplate having it outside. I very much took to heart Mr. Asin's very practical plan, I guess, or potential plan to be able to do it within the judiciary. I hope there are ways to do it outside the judiciary as well that I think are important to take into consideration.

Judge Cardone: Thank you.

Prof. Lollar: Thank you.

Judge Cardone: Judge Stengel?

Judge Stengel: Good morning. I'm Larry Stengel. I chair the Judicial Resources Committee, and have done so since October of last year. When I took over that position, I received a call from Judge Timothy Tymkovich on the Tenth Circuit, who chaired the committee for four years before that, and congratulated me on becoming perhaps the most disliked federal judge in the country sitting in the position of Judicial Resources Chair. He had a good laugh about that. It's not been that bad, but it is . . .

Judge Cardone: Yeah.

Judge Stengel: I've been on the committee for six years. I chaired the subcommittee on Judicial Statistics, which is an interesting assignment for an English major. That's the subcommittee that does recommendations for new judgeships and assesses the weighted case load of the various ninety-four districts.

I'd like to talk this morning just for a few minutes about a significant recent initiative involving the Judicial Resources Committee and the Federal Defender community, and that we were asked in 2013 to take over the

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staffing formula development for the defender community, which was at the time not very well received by the defender community, because when the Judicial Resources Committee does a staffing formula or a work measurement analysis, many times that leads to a recommendation for the reduction of staff.

Some of the history, as I have learned it, is, historically, the Federal Defender's Offices made their request for staffing needs to the AO office-by-office in the age of the sequester and the budget downturn. The Judicial Conference and Executive Committee asked the Judicial Resources Committee to take over that function so that we could have a national work measurement study and a national staffing formula. We undertook that in 2013.

It was anticipated to be delivered to the conference in 2016, but because of budget pressures that the Budget Committee and the Executive Committee asked us to accelerate that so we were able to deliver that in June of this past year.

I wanted to just, for a couple of minutes, walk through this work measurement process just to give some context and some explanation of how that goes. The Judicial Resources Committee does work measurement analysis and staffing formulas for all work units of the federal judiciary. We do it for bankruptcy clerk's offices, district clerk's offices, probation and pretrial pro se law clerks, death penalty law clerks. We're now working with court reporters and senior judges. Judge Prado and I sat on the Senior Judge Committee together and worked on that complex issue. That's where our orientation.

In this process, the JRC developed a study plan. They assembled a group of twenty subject matter experts from across various Federal Defender Organizations. The Defender Services Committee and the JRC put together a combined subcommittee. Judge Cardone sat on that committee. There was a steering group of twelve federal defenders to advise the AO in this process.

The work measurement process basically asks three questions. It asks what work a particular person does, how long does it take that person to perform that work once, and how often does that work, get performed? They go about measuring through various data-gathering models.

Historically, the defenders kept time records for the work of the attorneys, but there was no formal timekeeping system for other employees of the office, such as paralegals and administrators and IT people and the like. The bankruptcy clerks offices, when we did their work measurements formula two years ago, participated in a time study. We adopted that. The FDOs already had a timekeeping system. We expanded that so that that would take

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into account tasks performed by employees of the FDOs who work, not just the attorneys.

We had data collection, basically time sheets, like we all did in practice, and data collection periods of four weeks each. We had two of them, we developed a tremendous amount of data. We looked at specific characteristics of cases, we looked at volumes of discovery, we looked at this concept of severity codes. We looked at number of defendants, we looked at the need for travel. At the end of the process, the study developed 150 million data points for analysis. That's unprecedented in any of our work measurement initiatives with any of the other work units in the federal judiciary.

A data point, for example, would be how long it takes an attorney to prepare for a hearing, or how long it takes a paralegal to work up a file, or an investigator to take a statement, or an interpreter to meet with somebody. With all these various tasks, the time it took. That led us to these 150 million data points. I was going to try to get a graphic of maybe a galaxy that would have all these stars to illustrate it, but you get the idea.

We feel that we developed a database that was far more sophisticated and in-depth than was available previous to this study. It led to a number of inquiries as to how we would weight cases, whether we would continue to use severity codes, whether we were to do a staffing formula for the traditional Federal Defender Offices or separate out the Capital Habeas Units. We decided to separate out the Capital Habeas Units, give them their own staffing formula.

We looked at volatility of the workload, how certain kinds of cases can impact the workload of a given office, depending on what's charged in the U.S. Attorney's Office. That impacts the staffing needs.

We organized the defenders offices into certain cohorts because we perceived a difference among circuits. Sometimes circuit law impacts the workload on a defenders office different from another circuit. We appreciated a difference between the border courts and some of the other courts. We looked at the metropolitan courts. We arranged those in cohorts, which seem to make sense. I'm just going through the process to give you the highlights.

At the end of the day, despite early concerns that a rigorous, statistically-driven work measurement study would lead to a recommendation in a reduction or for a reduction of the staffing formula, actually the opposite happened. We ended up with a recommendation that was approved by the Judicial Resources Committee and approved then by the Conference for an increase in 8.6% across the board for the defender community. That's an increase not above on board, but an increase above the formula that was initially calculated by the Defender Services Committee the last time a study

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of the staffing formula was accomplished.

The hallmark of that study was unprecedented and a really wonderful level of cooperation between the defender community and the AO in their data-gathering. There were some protectionism, I think. There were some skepticism at the outset. There was, I think, some interest in preserving the data collection autonomy of certain defender offices.

I know when we took over the task of doing the work measurement, I received a visit from our defender here, a well-respected and wonderful attorney, who wanted to know what the heck was going to happen. We talked about not really knowing what the heck was going to happen, but there was a real concern from the defender community that our involvement would lead to a reduction across the board in a staffing formula. Despite that early skepticism, I think, and the suspicion, we had a high level of cooperation. Judge Cardone would be able to speak to that with her involvement in the combined sub-committee. The steering group was just outstanding.

When this was finally presented to the Executive Committee, there were a lot of congratulations on the two, both the defender community and to the AO and the JRC for their work in this project. It was a model of cooperation for the subject group that is the group being studied and the AO staff, who conducted that rigorous statistical analysis. It was really, I think, quite a success story.

We have a recommendation at this time, which has been approved by the conference for an 8.6% increase in staffing for the FDOs. A couple of those offices benefit greatly, a couple of those offices suffered some mild percentage reductions. We have a plan to phase those in and out over the next two fiscal year cycles. Usually if I talk for ten minutes about statistics, the audience is sufficiently anesthetized, and I don't really get any questions.

Judge Cardone: You don't know us.

Judge Stengel: I know a couple of you, but I'm happy at that time, with that overview to answer any questions. I did do a letter to Judge Cardone that sets forth some of these points. I'm happy to answer any questions you have.

Judge Cardone: I want to start with Judge Fischer.

Judge Fischer: I apologize in advance for taking out of what you've just been talking about, but since you are on the JRC, or have been, I wonder if you have any thoughts about how these suggestions that have been made to us, and they go from, "Everything's fine in our district. Leave it alone", to "take this entirely out of the judiciary and setup a completely different and independent structure."

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Do you have any thoughts about how the various options other than leaving everything alone would impact the judiciary, and that is should we put everything in the hands of the FPDs and CDOs? That's one suggestion. Do an FJC Sentencing Commission model still within the AO and the judiciary, or take it out altogether? Do you have any thoughts on how that would impact the judiciary? Because that's going to be one of our audiences.

Judge Stengel: Right, I guess the short answer is I have no strong opinion about that. I think that the advantage to having the defender community's staffing needs analyzed within the judiciary is that there is a long-standing mechanism in place for that and that there are work measurement specialists, there are statistical analysts. We have involved subject matter experts. They're very good at pulling in the interested parties.

There's a system in place to do an equitable and honest review of the case load. Sometimes that leads to a popular result and sometimes that leads to an unpopular result. I can't really speak to what impact it would have on the judiciary. I just know that this model . . .

Judge Cardone: Can I ask you to lean in?

Judge Stengel: Sure, I'm sorry.

Judge Cardone: Thank you. Sorry.

Judge Stengel: This model is in place. It's worked successfully with probably a dozen work units within the judiciary. It has credibility. It takes it out of the need for individual offices to make individual pitches to the AO for money, or if they're taken out of the judiciary to wherever they make that pitch for funding.

The criticism, as I understand it, and that was before my time, was that a lot of those requests were anecdotally-based, very subjective. The needs of a given office were based perhaps on something like a focus group or some other subjective standard. We have access to large amounts of data. It's more of a data-driven world today. In fact, the defender community seemed to buy into that process entirely as we move through this work measurement.

I don't know what the advantage or disadvantage would be to the judiciary. All I can say is that we have that system in place to do an equitable and balanced assessment of the staffing needs of the various offices.

Judge Fischer: If we don't need to include that billions dollars plus in our budget, is that a good thing for us maybe?

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Judge Stengel: I don't know.

Judge Fischer: Professor, I'd like to ask you a question about your statement. I was fascinated because I've been thinking about this myself, about your question: who decided what work is in "necessary" or what in fact is necessary. What does reasonable and necessary mean? What does reasonably necessary mean? Do you have some thoughts on what the answers to those questions are?

Prof. Lollar: I've been thinking a little bit about that as well. Then also Professor Kerr, obviously, isn't here today, but he had asked some prior panelists what the standard should be in terms of, for example, reviewing vouchers or whatever. My concern with a reasonableness review, or starting from that perspective, which is indirectly . . . we'll get back to your question, but I think we heard yesterday there can be different interpretations of reasonableness depending on who it is.

I think in terms of necessity, we've also heard some questions yesterday about whether, for example, investigators are necessary in every case. I happen to take the view that I think they are. Even in illegal reentry cases, there can be times when there are things that need to be investigated. It may not seem apparent on its face, but sometimes when you talk to a client, something comes up.

I think having that resource presumptively available for CJA attorneys and for Federal Defender's is something that I view as being, for example, necessary. I think necessary needs more funding than what their currently is, and several people have talked about that.

Again, back to the question that came up yesterday in terms of whether people are self-cutting on vouchers, I've talked to several people who do. One of them said, "I don't even bill for 10% to 20% of the cases that I do." Another said, "If it's \$400 or \$500 over, I don't bother." They'd always go under the cap.

I think any of these smaller pieces really play into what counts as necessary. You need somebody who's a zealous advocate who can be well funded, who can have expert availability and investigative services as well.

Judge Fischer: Does what a reasonable person with more money than would qualify him or her for indigent defense, but less than—just to choose a name at random—Donald Trump? Does that analysis come into it at all if that reasonable person would say, "No, it's not worth to doing this because I'm balancing the likelihood of success against how much it's going to cost me"? Is that part of the analysis at all in your view?

Prof. Lollar: I think that's always part of an analysis because one is always subject to

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budget, both in the Public Defenders Service and the Federal Defender. You know that the budget requests are out there. If you're going to go ask for something that's completely unreasonable, you know that whoever's ahead of you is going to say, "That's a little bit unreasonable," you need to scale back the request.

On the other hand, there are any number of requests, I think, that people, again, as we've heard, fail to make because they fear going over. I think there is somewhere in the middle. I'm certain that creative attorneys probably could come up with any number of requests in any given case, but I don't think that's the reality, and it's never been a reality that I experienced in either of the places that I've worked or that in talking to and observing people over the last fifteen years of my career that I've observed either.

I think most people are very conscientious about what they're either billing for because even within those offices, there's a budget and there's a budget that that office has. The requests, I think, need to be realistic. That said, I don't think . . . I thought I heard the number \$900 for being a cap yesterday. I can't even imagine ever having hired an expert that could have done anything I needed with \$900. I think it needs to be something higher than that, for sure.

Judge Fischer: Thank you. Ms. Grewal, I'm very interested in your four recommendations, but three and four establishing and enforcing—maybe even harder than establishing—workload limits for indigent defense counsel and then collecting meaningful data about the state of indigent defense. Any suggestions about how that could be done and how the funding for doing that would be arrived at?

Madhuri Grewal: Both very good questions, and ones that we, in our National Right to Counsel Committee, have grappled with. Workload limits—and I think I've heard this said—some of it depends on the prosecution, like the number of cases that they're bringing, and that's completely out of our control. It's just a concern that we hear over and over and over again, and one that we felt like we couldn't submit testimony without calling attention to.

Different districts that limit may be different, depending on the resources and budget constraints. We completely acknowledge that. I made reference to big law and, obviously, the budgets for Federal Public Defender's Offices are not the same. We understand that, but there are public defenders who are telling us that they have these crushing case-loads that are preventing them from providing adequate assistance of counsel.

For us, addressing that is something that this Committee needs to do in its final recommendations. We don't have a number that we can easily provide to you, but it is something that needs to be addressed.

Judge Fischer: Thank you.

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Judge Cardone: Didn't the ABA come up with a number?

Madhuri Grewal: Off the top of my head, I don't know.

Prof. Lollar: I think they did. I don't remember what the number is, but I believe they did.

Judge Cardone: I believe there's an ABA recommendation. All right. Judge Walton?

Judge Walton: Professor, I share your concern about independence, and that something needs to be done to provide greater independence for defense services. You used the D.C. model, which I'm very familiar with, as a model that maybe would be adopted by the federal system.

My concern with that analogy, however, is that, as you know, we get taxed very highly just like any other American, but we have no voting rights in D.C. There are some benefits that are derived from that in some respects because sometimes Congress just lets it alone. Conceivably, since you're talking about a local issue, Congress doesn't really care that much and, therefore, doesn't interfere.

However, if it becomes national, something catastrophic happens in the state, where there is voting power in Congress, my concern is that you may have some congressional member who may use that as a predicate of going after a funding made available for defense services. Did you think about whether that conceivably would be a downside in having total independence from the judiciary?

Prof. Lollar: Absolutely. Let me be clear that I'm not saying it is a clear-cut path that is free from challenges by any means. I think, absolutely, that's a very tremendous concern. Concerns like that are why I have been, over the last month or so, really going back and forth in my head about what really seems realistic and feasible. One of the things I do agree with Mr. Asin about is that I do think . . . I think he was the one who said it, but about having a gradual five-year plan or something, and I think making that immediately maybe logistically very difficult.

Again, my impression of what happened, for example, during sequestration was that when the federal defenders felt as though they were not being represented in the way that they thought they needed to be by the judiciary, they went directly to Congress and lobbied.

I recognize that also is a unique circumstance. It was a one-time thing. People very much rallied around social media, word spread very quickly. People who are not normally thinking about Defender Services were thinking about

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it at the time. If you're asking for a budget every single year, that becomes a very different analysis than something that comes, again, that really had never happened before, I think.

I do think it's a concern. Again, I guess my thought is we've been trying what we've been trying for a significant period of time at this point. The issue seem to, by in large, be the same in many ways, even though some of them are perhaps more subtle, as Judge Prado was indicating earlier. They may be a little more subtle in their manifestations, but it seems as though the issues have not gone away.

My thought is it seems like it's time to actually try independence and see if that works because I think that that . . . again, while I do recognize that those are concerns, I also think that most of the people who are in positions of being federal defenders got there because they're excellent advocates. I would have some confidence in their ability to go before Congress and, again, develop the relationships that they would need to make, think long term in the strategy for funding and realize that they may be subject to that and plan accordingly to the extent that they can.

Judge Walton: You referenced that both of you are . . . when you say "independence", do you mean independence within the structure of the judiciary or totally freestanding outside of the judiciary?

Prof. Lollar: I mean total independence outside of the judiciary. Again, I listened carefully to Mr. Asin. I don't know about Ms. Grewal and other people. I've talked to other people who they think if we do a model like he recommended was still within the judiciary that that gives more independence within the judiciary; that would still be sufficient. Again, I share the view that that's better than nothing, but I do mean separate and apart.

Madhuri Grewal: We mean separate and apart from the judiciary. I want to add a little bit to that advocacy for funding because we were around and very heavily involved around the sequestration cuts. Our president was very involved in advocacy with Congress. She's a former federal public defender herself. We also work very closely with NACDL on advocacy with Congress on appropriations and budget cuts.

I want to echo the sentiment that it's really public defenders or former public defenders, because NACDL's advocacy team is made up of a lot of former public defenders. They're really fantastic advocates with Congress. They can speak with meaning about what budget cuts will do to clients and people on the ground.

The lack of their ability to do that now, I think, is just . . . and I've heard it time and time again in a testimony before this Committee, it is really

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important to have that independence to allow for an independent entity to advocate for federal public defenders with Congress because those budget cuts are impacting their offices. That's one of the core reasons that we advocate for a separate entity outside of the judiciary.

Judge Walton: Thank you.

Judge Cardone: Ms. Roe?

Katherian Roe: Ms. Grewal, I wanted to ask you about something in your statement . . .

Judge Cardone: Microphone.

Katherian Roe: Oh, I'm sorry. You can't hear this voice?

Judge Cardone: This is what I do all the time: "Microphone."

Katherian Roe: I wanted to ask you about something in your statement wherein you were talking about expert vouchers and judges reviewing expert vouchers who are making a determination whether to authorize them. In your statement, you indicated that The Constitution Project had done extensive work with former judges. Based on that work, those judges had indicated that they recognize a clear conflict. Can you tell me about that?

Madhuri Grewal: Our National Right to Counsel Committee is made up of various stakeholders within the criminal justice system. It includes former judges, chaired by Judge Lewis of the Third Circuit, and we also have a number of former public defenders, former prosecutors. Throughout our work and our issuing of reports, those are consensus-based recommendations. Those recommendations come from the views of all of these various stakeholders. When I say that we have consulted with judges, it's including folks on our National Right to Counsel Committee, but also others that our committee members consult with as they reach these consensus-based recommendations.

Katherian Roe: Thank you. Judge Stengel, you were talking to us a little bit about being on the committee on the Judicial Resources Committee for the past six years is my understanding. There was a time when the Judicial Resources Committee took over the staffing, if you will, from the Defender Services Committee. We heard some testimony about how that was something that no one seemed to know about in the Defender Services Committee or the Defender Services Office, that they hadn't been consulted, that they had no information. They learned of it almost second-hand. Can you tell us what was going on behind the scenes? How did that happen?

Judge Stengel: I really have no idea. We learned through a request from the Executive Committee . . . in fact, I think I have the letter here somewhere. It was a letter

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of June 5th, 2013, signed by Judge Traxler of the Chair of the Executive Committee and Julia Gibbons, the Chair of the Budget Committee, asking . . . Given the enormous budgetary pressures currently facing the judiciary overall, they wanted us to undertake a work measurement study and take over the staffing formula process for the defender organization. That was not something that the JRC had any part in soliciting . . .

Judge Cardone: Microphone.

Judge Stengel: Sorry.

Judge Cardone: I told you.

Judge Stengel: Soliciting, or we didn't go after that. That was something that was done at the Executive Committee level. We were told that it was our responsibility.

Katherian Roe: Yet that had never happened before, correct?

Judge Stengel: Right.

Katherian Roe: You told us that the reason that you thought that the Judicial Resources Committee was asked to do that was because they had the expertise, they had the subject matter experts. Am I incorrect in remembering that the subject matter experts were actually people that came from all of the defender offices?

Judge Stengel: We assembled subject matter experts for that project.

Katherian Roe: They were from the defenders offices?

Judge Stengel: Yes.

Katherian Roe: All right. That's something that DSO could have done if that was necessary?

Judge Stengel: Pardon?

Katherian Roe: Defenders Services Office could have done that if they all came from the defenders offices?

Judge Stengel: Yes. In fact, one of the takeaways from this process is, with the increasing availability of data collection, that's becoming more the province of individual departments and individual offices. It's not just something that's done at the AO. In this process, the defender community had data to offer. They had the RAND study, they had the RAND 2 study, they had their own data collection capacity. That was combined with what the AO was able to add. The aggregate was very good and thorough and complete data collection

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process.

You're right, they have the ability, had it then, and I think have an enhanced ability now to gather data. We look forward to there being a participant in the discussion of what data we should be looking at and how to gather that data and how to analyze it.

Katherian Roe: To your knowledge at the time, was there any discussion with the Defender Services Committee or with the folks Defender Services Office or even at the AO about just leaving that work with the Defender Services Office or with the Defender Services Committee since they could compile basically the same experts as the folks in JRC?

Judge Stengel: Right. They certainly can compile a panel of subject matter experts. They thought, as I understand it—and I wasn't part of those discussions, but as was reported to us—we have done work measurement studies and staffing formulas for decades for the federal judiciary in various context, again, for the bankruptcy clerks offices, probation and pretrial, and death penalty law clerks, pro se law clerks, district court clerk's offices, court reporters.

There was a sense that there was an expertise and a system in place to gather and analyze data as the honest brokers of the data we collected without really an interest in which way it goes. We were simply making recommendations that were driven by data that we collected. Of course, the more data, the better. In this particular study, we had more data points to analyze than any other study we've done in any other department of the judiciary.

Judge Prado: The chair's gone now. Let's all break for lunch. No, I'm teasing. . . .

Katherian Roe: That's what somewhat puzzling to me is that JRC had done this for decades, but they had never done it for the defender organization. It had always been kept separate. Those determinations had been made in an effort perhaps to keep the judiciary out of defender staffing, the defenders and their organizations that would be appearing before the judiciary as a party. That's why it's puzzling to me that there was never . . . at least from what I understand from what you're testifying to, that there was never any attempt to see if that could continue. There was never a discussion with DSO or DSC about whether or not they were capable of doing that.

Judge Stengel: I have the sense that the Executive Committee thought that the process could be done better by the JRC and with the AO work measurement folks, and statistical people. We would be looking at this more as a national study. That would take the place of these individual analysis of staffing needs adopted by individual defender offices and individual requests made to the AO. I think it was an attempt to perhaps standardize it and make it a more equitable system across the entire judiciary, and taking into account the staffing needs of all

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the defenders offices using the same rubric.

Katherian Roe: Correct me if I'm wrong, but after the study was completed, the jurisdiction for staffing and budget did not go back to Defender Services Committee, but stayed removed. Is that correct?

Judge Stengel: Yes, it remains with the JRC.

Katherian Roe: Can you explain that to me? Why would it not go back? If the expertise was in the JRC, and that's why they did this study, once the study was over, why would the jurisdiction not return to the Defender Services Committee, the committee that's responsible for Defender Services?

Judge Stengel: Our history has been to do staffing formulas on a five-year basis for the various court units that which have been assigned to us. I think the defender's staffing formula is now in that rotation. The contributions of the defender community, given that we had members of the Defender Services Committee and the JRC in a combined subcommittee, as well as the subject matter experts and the steering group, those three entities had significant representation from the defender community.

I don't know that there's a benefit for returning it to the Defender Services Committee or to the defender community once this study is done. I think likely the reason is that we have a history of doing staffing formulas and then revising those on a rotating five-year basis. We have right now the statistical information available, and we would continue to develop and enhance that. I think that's probably the reason.

Katherian Roe: Does it seem to you in any way unusual or any way a conflict that the judiciary decide how many assistant federal defenders would be in each district or in the Federal Defender Offices that the attorneys, obviously, appear before the judges?

Judge Stengel: I think that's a conflict. We're looking really at a concept called an FTE, a full time equivalent. Those are positions. They're attorneys, they're paralegals, they're interpreters, they're admins. We're looking simply at case load and what the case load statistics lead us to in terms of staffing. Is there an inherent conflict in there? I don't know that I want to comment about that.

Katherian Roe: Let me expand that question a little and see what you think. As you probably know, there are FTEs based on the study, FTEs in each office. Then the circuit court decides how many AFPDs are in each office, correct?

Judge Stengel: Right.

Katherian Roe: That could be in conflict with what the JRC decided was appropriate for a

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particular office. Do you see any conflict there?

Judge Stengel: Yeah, I suppose it could be. Again, our function is, I think, limited to a gathering or statistics, an analysis of those statistics, and looking at workload, whether the workload is increasing, whether it's decreasing. We have the data points that were developed. Then we also, with the use of the steering group, added some qualitative analysis to take into account the particular needs of particular courts—the border courts, for example, courts that end up with large numbers of multi-defendant filings—and to try to make recommendations combining those factors.

Katherian Roe: Thank you, Judge. Professor Lollar, I wanted to ask you a question about voucher review. You talked a little bit about it in your statement, but I wanted to get an idea from you of the model that you were thinking about.

Prof. Lollar: That's another thing I have thought a good deal about. I do think it needs to be out of the judiciary, I can say that. The thing I've thought a lot about is whether it's a better model to have someone within, say, a Federal Defender Office or Community Defender Office, whether to have an independent CJA attorney, panel attorney, who that is their sole role. I think whoever it is, I think we heard some testimony about somebody walled off in their office who does just voucher review, but it's within the Federal Defender Office.

I guess that could work. I don't know enough about it to comment on that. I think the main thing is what everyone else has emphasized, which is that it needs to be somebody who has experience, who knows what to be looking for. A little bit tying back in with Judge Fischer's question from before, I don't think there's a set amount of time. Everything is so client-dependent. It just depends on the case and it depends on the client. I don't think saying, "This type of case should have X amount of time, number of hours that it requires," . . . it's too person-dependent.

Admittedly, I've never participated in the voucher process myself, I have not had to do that, but it's my understanding from those who I've spoken with that, again, you tend to know the outliers when you see them. They tend to be the extreme of unreasonable requests as opposed to . . . again, there's been some voucher cutting I've heard about where if there's a client who's a four-hour drive away and the judge said, "You've gone to see the person once. I don't know why you need to see them more than that. I'm not going to pay for the other eight hours you spend going there to talk to the client." That, to me, is a problem.

I think it needs to be somebody independent. I don't think I have a strong view as to whether it's somebody . . . I do think it needs to be somebody who that's their job because I think it tends to be so much of what somebody does. I think there are also . . . obviously, you've heard about people having

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basically the federal defender in a jurisdiction be the person who does voucher reviews. I think it depends on the jurisdiction, but that obviously could create a sizable amount of work. I know there are some people who do it and seem to think that that's just a part of their position. My thought is it's probably worth funding a separate position because I do think it could be at least part time of the position or a full position, depending on what district you're in.

Katherian Roe: Thank you.

Prof. Lollar: Sure.

Reuben Cahn: Ms. Grewal. Is that the correct pronunciation?

Madhuri Grewal: It's good.

Reuben Cahn: Say it again for me.

Madhuri Grewal: Grewal.

Reuben Cahn: Grewal, okay. I wanted to start with you and I wanted to talk to you. I don't know if you have information about this, but you spoke briefly about TCP's advocacy on behalf of federal defenders during the sequester. I'm wondering if you have any feedback for us on the reception TCP on either side of the aisle and any views on the likely success of defenders on advocating for themselves in light of that experience.

Madhuri Grewal: I have some information about it. I think what's tough to say is with each Congress and their budget and appropriators and the Appropriations Committee makeup that can change from year-to-year or from Congress-to-Congress. It's tough to say with any certainty what works and what doesn't, depending on the makeup for the Appropriations Committee.

Speaking as a policy counsel who does a lot of advocacy on criminal justice issues before Congress, I think what really resonates with staffers and members of Congress is people who can go in and speak with experience and lean on their own experience. Having federal defenders who can go in and speak to the importance of funding is so critical. That's why we repeatedly emphasize this independence issue to have someone who is independent from the judiciary advocating for their own budget, who can speak to why those budget requests are so critical, and not have to justify it as part of the judiciary's expenses as well.

I think, as you've heard, there's this conflict of trying to explain the judiciary's budget versus the defender's budget. I think having this

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independent entity that can go in and speak with Congressional staff about just the federal public defenders' budget is critical. I don't know if I have advice per se, but I do think it's the wealth of knowledge and experience that one can bring to the table in advocacy that ultimately translates into some success.

Reuben Cahn: One of the things that both you . . . both you and Professor Lollar emphasized that need to be able to advocate for funding. That is a basis for complete, independence from the judiciary. I guess I wanted to question you a little bit about that because, of course, the Sentencing Commission and . . . I'm sorry. I'm blanking on it. The FJC have the opportunity to submit their budgets separately. I think they've chosen to rely upon the advocacy of the Judiciary's Budgetary Committee, but certainly aren't bound by that and could advocate on their own. Is there a reason that a system in which defenders could advocate and took advantage of that wouldn't be an adequate model?

Madhuri Grewal: I think NACDL report actually does a really great job of explaining why it's important to have this independent entity doing that advocacy work. We've really pulled our recommendations from a lot of that. You're right. Given the lack of independence right now, there's not much constraining them from doing that, but, again, it's this independent function that we believe is so necessary for good advocacy, advocacy that works.

Prof. Lollar: For me, I think it comes down fundamentally to, again, this issue of this inherent conflict in having the judiciary have some control over one part of the system in front of it and not the other. I do think there are various ways in which that manifests. I think they would certainly, absolutely be lessened if there were a model that looks like the Sentencing Commission as opposed to the model that there is now. If there was the ability for in the event that, for example, the defenders felt like they were not being adequately represented by the judiciary to be able to go and advocate on their own.

I think that's the tension that's part of what Judge Walton was getting at as well, if there is this . . . in some ways, and I know that the defender community is very split on this, that there are benefits sometimes to having the judiciary be the advocate, or the people who are in favor of that view. I think it's part of the larger systemic issue of in some jurisdictions, that works great and then sometimes it doesn't. If you look at district-by-district, things vary; division-by-division, things vary. I think it could depend on who is doing the advocating in that situation.

I think as long as there's at least some mechanism for the defender community to be able to go advocate on their own if they needed to, to me that's the most important thing, but I don't know then if their voice gets silenced, if they say, "Look, normally judiciary advocate's for you. Why

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should we listen to you in this instance?” for example. I’m not inherently opposed to it, but my instinct leans more towards, again, separating these functions because I do think, inherently, there is a tension that lies there.

Reuben Cahn: You mentioned the potential advantages of having the judiciary advocator being within the judiciary. I guess one of the things I’d like to ask is if either of you have studied or if you know of anyone who has looked in a systematic way at that hypothesis? I say hypothesis because, of course, we know that there were years in which the Defender Services account has done better than the other judiciary account. Of course, we know of at least one instance when well within the judiciary, the death penalty resource centers, which were Defender Services function we defunded entirely because they’d become a hot button issue and the judiciary wasn’t able to prevent that.

We have lots of anecdotes. People have lots of views about what Congress would or wouldn’t do. I’m very interested to know if you know of anybody who’s really looked at this in a systematic way.

Prof. Lollar: I don’t. I hadn’t looked at that specific issue, but I was intrigued when asked to be on this . . . to come in and testify, how little seems to be out there that has been written, for example, in legal academia about any of these issues, which seemed to be that you’re going to find people who can do this statistical analysis and do that with a careful eye in that realm. I will continue to look and, again, get back to Committee and to the commission if I find anything. I’m not aware of any at this time.

Reuben Cahn: Judge, can I ask you a couple of questions about . . .

Judge Stengel: Sure.

Reuben Cahn: First, I’d like to say, on behalf of Defenders, we’re certainly appreciative of the role that both the committee and particularly its staff—Harvey Jones and his staff—played, as what we feel are really honest brokers in this process. Still I’d like to press you a little bit on a couple of the aspects of the way this happened.

My recollection is some time back in 2010, the Policy and Strategic Initiatives Office, which functions as a staff for the Judicial Resources Committee, had essentially been loaned to the Defender Services Office to do a subsidiary study on these ratios of staff to attorneys. I’m wondering if there’s any structural barrier that would have prevented the study that we just spoke about, the larger study, from having been performed in the same manner.

Judge Stengel: I honestly don’t know if there would be any barrier to that. I know that it was a process that proceeded incrementally. I think the impetus for getting the

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JRC involved wholesale in the work measurement study, I don't think it's any secret it was at the time of the sequester, and an enormous emphasis throughout the entire system for cost containment and even aggressive cost containment measures. I think there was a sense that a robust, statistically-driven staffing formula would be perhaps more credible to our funding sources, but I don't know why that earlier 2010 initiative couldn't have been carried over. I don't know what the Executive Committee's thinking was about that.

Reuben Cahn: I guess you led into what was the second question I had, which is when the Executive Committee made its decision, it transferred jurisdiction over staffing and compensation of defender offices to the JRC from the Defender Services Committee. This is a somewhat similar question than before, but was there any reason they couldn't have simply directed the JRC to do that study and directed the Defender Services Committee to have cooperated with the JRC in doing that study without removing final say-so, final jurisdiction from the . . .

Judge Stengel: I really have no idea what the Executive Committee thinking was about that. As a practical matter, there was a very extensive cooperative effort between the Defender Services Committee and the JRC, and that continues. It really is a joint effort at this point. I think their subject matter and content expertise is invaluable. We don't supply that.

Our data analysis and work measurement analysis is what we bring to the table. I think that may have been the thinking of the Executive Committee and the Budget Committee that we needed something that was maybe a more solid statistical analysis to seek funding for these positions moving forward from the sequester.

Reuben Cahn: I take your point on that. I guess my question is was there a reason that we couldn't have taken advantage—when I say we, defenders—of the particular expertise at the Judicial Resources Committee and of its staff without losing ultimate control over their own fate?

Judge Stengel: I just don't know that.

Reuben Cahn: For those of us who aren't part of it, the Judicial Conference is terribly opaque and never quite understand what's going on. Maybe for those who are part of it as well, I don't know.

Let me ask one other question about the way things . . . there was also a decision made to accelerate that study. Was there any consultation before that decision was made with the JRC, with the Defender Services Committee before the Executive Committee directed that acceleration?

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Judge Stengel: I'm not aware of any. I was not over sub-committee to do that. I know that the letter, June 5, 2013 to Judge Tymkovich simply asked, on behalf of the Budget Committee and the Executive Committee that we accelerate it by a year. I think that had to do with the emergent situation with the sequester and the need to get a strong statistical basis for funding requests sooner rather than later.

Reuben Cahn: Let me ask you a question about that. You mentioned both the original decision, and I think that decision accelerating it, that the request to the JRC came not merely on behalf of the Executive Committee, which is charged with determining the jurisdiction and the actions of various committees, but also on behalf of the Budget Committee.

Critical, I think, to the success and credibility of the JRC is its role and reputation as an honest broker. When the Budget Committee is part of the group directing the JRC, is there some risk to the reputation of the JRC as an honest broker? Is it more likely that people not part of the process are going to see it as an agent of cost containment rather than as an agent honestly studying the process and seeing what's really needed?

Judge Stengel: I can only say that in other context, there have been requests by the Budget Committee that we take a second look at certain staffing formula for various other work units because of the dissatisfaction expressed by that community with the staffing formula as it was delivered. Our response has been that we go where the data takes us and we remain the honest brokers of what the data reveals to us and what we recommend based on that, if there were to be policy decisions or fixes or floors or ceilings, that those are matters more of the Executive Committee and the Budget Committee.

I don't feel that our Committee has any pressure from the Budget Committee in an area of cost containment to somehow manipulate data or develop data or interpret data in such a way as to achieve a result. We remain looking at what the data gives us, where the data directs us, and what the data suggests. That's as far as we go.

Reuben Cahn: I think that's defender's experience. I was asking more of a reputational question. Is it a risk to the reputation which is one of the chief assets or goodwill of the JRC that that directive . . .

Judge Stengel: I think we do what we do. I think we have responded to inquiries from other committees, whose staffing formula for their population has been affected by our recommendations, and we respond with what the data shows us. I'm not too concerned about an impact on reputation. I get that these requests come from interested parties. The Budget Committee has a legitimate, genuine interest in how much they're going to go to Congress to ask for the judiciary.

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Reuben Cahn: Let me ask about one last thing. You mentioned both fixes and floors and others. You're talking about adjustments that, I think, are found to be necessary because data, while it's wonderful, doesn't capture the nuances of what we in the legal system do. Do you think we'd be better off if one's formulas were developed that the entire implementation was left to those offices, divisions that are directly supervising the work of whatever unit's involved because they're in a position to look at those of nuances in a way that maybe the data-driven approach of the JRC is less able to do?

Judge Stengel: I think that's a good question. With our recent experience with the bankruptcy staffing formula, there was a recommendation because of continuing and almost precipitous decline in filings that there would be a reduction in the staffing levels implemented over a several year period of time. There was some good faith and honest push-back to that because of the impact on the various bankruptcy clerk's offices.

There was, I think, a very responsible and a realistic interaction among the JRC, the Budget Committee, the Executive Committee, and the Bankruptcy Committee in coming up with a solution to that. Whether that suggests the staffing formula once it's put in place should go back to the Subject Committee for implementation. I don't know. I can tell you that where there are problems . . . personnel problems, of course, there'll be problems. These are people with jobs and people with responsibilities whose lives are affected by these decisions from time to time, that there is a great deal of scrutiny and efforts to compromise and efforts to soften any kind of negative impact from these staffing formulas. That involves the Subject Committee.

In a real sense, they are involved, but I think the JRC and the Budget Committee stay involved because they have an interest because they've come up with a formula and they have taken into account not only the statistical factors, but the qualitative, sometimes subjective, issues that drive the staffing formula as well.

Reuben Cahn: Thank you.

Judge Stengel: Thank you.

Judge Walton: I just have one other question for Ms. Grewal. One of your recommendations is that there'd be parity in funding between prosecutor's offices and defense offices. I understand what you're trying to accomplish through that. Having done both defense and prosecution, they're very different. It's one thing to have assigned twenty cases as a prosecutor as compared to having twenty clients as a defense lawyer.

I guess one of the concerns I have is if you start talking about parity, could that conceivably result in defenders having to handle more cases than what

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they should handle, because if you talk to prosecutors, they'll tell you they're overwhelmed by cases. Having, as I said, done both, I can do maybe twenty prosecutions at one time, but it's very different to have the same number of individuals that you're representing. Could asking for parity maybe result in defenders having to actually handle more cases than what they handle now, which would make it more difficult for them to carry out their Sixth Amendment obligations?

Madhuri Grewal: That's a great question. Could our recommendation on parity backfire essentially? The recommendation on parity is really for funding. It's really aimed at legislators because . . .

Judge Walton: But the legislator who doesn't understand the difference between the functions could say, "If the prosecutor can handle twenty cases at one time, why can't a defense lawyer do the same?"

Madhuri Grewal: That's right. That's a great point. We are nowhere near parity in terms of funding for prosecution versus what is allocated to public defenders, both what goes to states and what's happening at the federal level. That recommendation is really aimed at even trying to get us closer to the amount of funding that prosecutors are receiving. I think once we get to even something close to parity, we might get those sorts of questions.

Right now, with the current level of funding that defenders are receiving, as compared to what's going to DOJ and what's being allocated to states for law enforcement and prosecution, there's no way that we would . . . I think that's an argument that's far in the future because we're still at a point where we're just trying to get . . . we're basically at 1% to their over 50%. I don't know the numbers off the top of my head, but it is so drastically different that that's really what that recommendation is aimed at.

Judge Walton: Thank you.

Judge Prado: Our chair had another meeting that she had to attend, so she apologizes for having left. Is there anyone else? Dr. Rucker, do you have some questions?

Dr. Rucker: If I may just ask two or three questions for Judge Stengel?

Judge Stengel: Sure.

Dr. Rucker: Not just as your role as a member of the JRC, but just as a judge, would you be willing to give up review of vouchers, or do you think that should stay within the judiciary and that the judges should do that?

Judge Stengel: I don't know that I would. I think there's a cost issue in all of these. That's the reality of providing public funding for indigent defense. There's got to be

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some control. I think somebody has to review the expenditure at some level. I've heard some of the comments today, and it's really out of my jurisdiction, but when you talk about independence of the defender function from the judiciary, I wonder if there is a better advocate for the defender function than the judiciary in our system.

A trial judge—I've been a trial judge for twenty-five years—I think has a strong appreciation for the vital contribution of the public defenders, the federal defender into the process. Not simply because it makes my job easier than dealing with somebody unrepresented, but because it affirmatively advances the interest of a just result taking place.

Having been through, fortunately, a very short stint in the political system, having to run for judge in a state that elects its judges, I don't know how I would feel about the defender community pitching its need for funding to certain elected officials in certain jurisdictions. Some places I think they'd be enormously receptive, other places maybe not so much.

I think that request for funding, when made to or through the judiciary, is made to and through a very receptive audience that respects the function and understands the need for a robust defense in every case. That would be my view just as a judge, not as a JRC chair about that. I think in terms of the review of vouchers, I think at some point along the line, if there's public money being used, somebody has to review how that's being used.

Katherian Roe: Can I just follow up on that, Dr. Rucker? I totally understand that argument that there has to be oversight because these are public funds, but, and I say this, the prosecution does the same thing. They expend public funds and there's oversight, but it's not judicial oversight. I would say the same thing about being an advocate. My guess is that most judges, maybe yourself included, would say that you would be one of the strongest advocates for the prosecution function, that they do excellent work, that they're part of the justice equation, that they make a difference. The same as the defense, but yet the oversight is not judicial.

Judge Stengel: I would go back to that argument that the defender community may be in a better position to seek its funding through a channel that respects and protects that function as is vital to the system. I think with certain members of the legislative branch, if you approach them with a request for X amount of dollars for the prosecution function, that resonates with them, and that's community protection and that's where they want money spent. If you approach them for a certain amount of money to defend somebody who's committed what appears to be a very heinous crime, I don't know that you have that level of sympathy for the defense function in all areas of the political realm. I think that sits more squarely and more solidly, and there's a greater level of responsibility toward that function in the judiciary.

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Katherian Roe: Thank you. Thank you, Dr. Rucker.

Dr. Rucker: One more question then. One of the things that we've heard is that there'd been complaints about delays in payments of vouchers and also a cuts in vouchers at the circuit level. Do you see much value added in having these vouchers, excess vouchers go up to the court of appeals for review, to judges who don't know much about the case, who have not anything litigated before them on the case?

Judge Stengel: I think all I can say about that is that's a great question. That's a pretty hot issue right now. I think it's entirely possible for a court of appeals judge to review a voucher and ask legitimate and responsible questions about the expenditure. That's where they go right now. I don't know that I want to express an opinion as to whether that's good, bad, or indifferent. I know that I look at my vouchers very carefully. If my feeling is that's what it costs, that's what it costs.

Judge Fischer: Dr. Rucker, can I . . . I hate to interrupt.

Dr. Rucker: That's okay. Thank you.

Judge Fischer: Can I chime in? I think the general sentiment right now is that the circuit judge can reduce, but not increase. Based on what you said, do you have a thought about whether the circuit judge should also have the ability to increase the voucher if the district judge has reduced it?

Judge Stengel: I would think so.

Judge Prado: Anybody else? Mr. Cahn?

Reuben Cahn: One quick question for you. This is in your JRC hat, but bearing on this issue, it always seemed to be a curious thing that in an enterprise, you'd have the highest value employees essentially reviewing bills. I'm wondering if the JRC, if anyone's ever considered asking the JRC to study the amount of time and effort that judges put in to this effort and whether or not it really makes sense.

Judge Stengel: We haven't. I don't think that's a bad idea. I think that's worth considering. We don't do work measurement for appellate judges right now. We don't have a weighted case load mechanism. That may be something that would tie into that.

Judge Prado: Anyone else?

Chip Frensley: Judge Stengel, I just wanted to . . .

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Judge Prado: [CROSSTALK].

Chip Frensley: Not yet. I just wanted to follow up on what Dr. Rucker asked with respect to the role of the judges in the voucher review. I am curious. I certainly understand the perspective and, as Ms. Roe indicated, it's public money. Somebody's got to perform an oversight function. Certainly, within the defender community, the individual defenders are charged with overseeing the budgets of their office and their federal employees who have the confidence or the system to perform that function.

I'm curious if you have any thoughts about whether or not it would be problematic for that voucher review function to be placed unto the responsibility of somebody else, be it the defender or someone within the defenders office or some of the other models we've heard, like a supervisory attorney or some other professional person, performing that function instead of the judges.

Judge Stengel: I think it probably stems from the fact that we have the appointment power for the CJA attorney and we have some responsibility to look at the cost of that appointment to the system. When somebody comes to us for a request for an investigator or a psychologist or an interpreter, I think we have to look at whether that's necessary in the case. I think the benefit of the doubt certainly goes to the defendant and to the person requesting that money.

I think that the approval of the voucher, it may make sense for the person who's actually responsible for the appointment to do that approving and maybe not delegate that out of the defenders office, who probably has a great amount of work to do in other areas. I just think that that probably emanates from the appointment power.

Chip Frensley: Thank you.

Judge Prado: Anyone else? If this committee thinks it's difficult talking about resources for defense, you should see Judge Stengel and I, having to figure out resources for senior judges, now that gets really hot.

Judge Stengel: It was.

Judge Prado: Judge Stengel, Professor Lollar, Ms. Grewal, thank you very much for your time here. If you have anything else you want to add afterwards, any after thoughts on your way home, or after you leave here that you wish to amend or add to your testimony, please get us some written information on that. We welcome any further comments that you might have. Thank you very much for your time

Judge Stengel: Thank you for inviting us. Thank you.

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Prof. Lollar: Thank you.