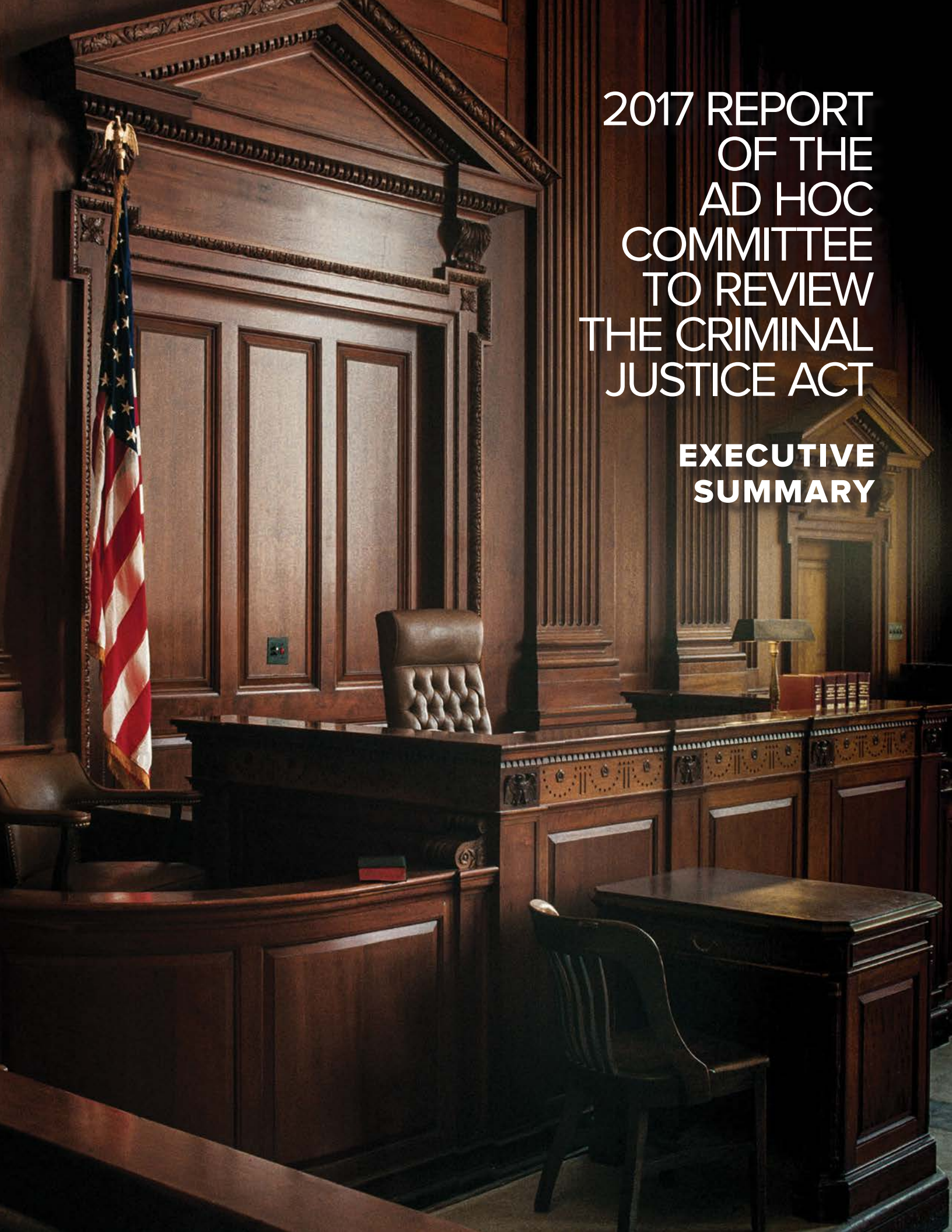

2017 REPORT OF THE AD HOC COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT

EXECUTIVE SUMMARY

Ad Hoc Committee to Review the Criminal Justice Act

Hon. Kathleen Cardone, Chair
U.S. District Court for the
Western District of Texas

Reuben Camper Cahn
Executive Director, Federal
Defenders of San Diego, Inc.

Hon. Jeffery S. Chip Frensley
Former National CJA Panel
Attorney District Representative

Hon. Dale S. Fischer
U.S. District Court for the
Central District of California

Hon. John M. Gerrard
U.S. District Court for
the District of Nebraska

Hon. Mitchell S. Goldberg
U.S. District Court for the Eastern
District of Pennsylvania

Professor Orin S. Kerr
George Washington
University Law School

Neil H. MacBride
former US Attorney for the
Eastern District
of Virginia, currently
a partner at Davis Polk
& Wardwell, LLP

Hon. Edward C. Prado,
Chair Emeritus
U.S. Circuit Court of Appeals
for the Fifth Circuit

Katherian D. Roe
Federal Public Defender for
the District of Minnesota

Dr. Robert E. Rucker
Assistant Circuit Executive
For Court Policy and Research
U.S. Circuit Court of Appeals
for the Ninth Circuit

Hon. Reggie B. Walton
U.S. District Court for
the District of Columbia

NOTICE

No recommendation presented herein represents the policy of the Judicial Conference of the United States unless approved by the Conference itself.

OCTOBER 2017

Preface

The Sixth Amendment to the Constitution guarantees individuals accused of crimes the assistance of counsel—a skilled and devoted lawyer by their side advocating for their interests. The right to counsel is the foundation of an adversarial system of justice that is truly fair to all, as opposed to one that is stacked against those without money and influence. For the past two years we, along with 10 others, have had the honor of serving on a committee appointed by Chief Justice John G. Roberts, Jr. to study and report on the program that is responsible for delivering that fundamental right to roughly 250,000 people every year in federal courts throughout the country.

That program, with an annual budget of over a billion dollars, has been overseen by judges since its inception more than half a century ago. When Congress mandated the creation of a federal system of public defense by passing the Criminal Justice Act in 1964, the judiciary was considered to be a temporary home for the fledgling program. Over the years, with support from the judiciary, that program has grown and matured tremendously, but is still under the judiciary's control and, as a result, unable to fully accomplish its specific mission.

The needed course of action is clear: Congress should create an autonomous entity, not subject to judicial oversight and approval. Our recommendation echoes the conclusion reached nearly 25 years ago by the only other committee to comprehensively review the Criminal Justice Act, which our Chair Emeritus the Honorable Edward C. Prado led. The call for independence in 1993 was highly controversial and ultimately rejected. While it is not without controversy today, much has changed in the intervening decades.

Today, a preponderance of defense attorneys, federal judges, and outside experts believe the time has come to create an independent entity with the same mission as frontline defenders. The judiciary as a whole and individual federal judges were never well suited to the role Congress gave them. There were problems from the start, and those problems—the result of a cumbersome administrative structure that fails to elevate the expertise of defense attorneys, meet their needs, or preserve their

independence—have only worsened over the years while the number of defendants in federal court who cannot afford to hire their own attorney has increased significantly.

Talk of administrative flaws might sound like a merely bureaucratic or even trivial matter. It is not. Genuine independence is crucial to providing a high-quality defense—not just in some cases but in all cases. It must be the standard of practice in federal courts nationwide. Under the current administrative structure too many attorneys are compromised—if not hamstrung—by the lack of financial resources, training and guidance, and latitude to mount a skilled and vigorous defense of their clients in federal court. When the defense is undermined in these ways, the innocent are more likely to face wrongful conviction and the guilty are more likely to face harsher punishment, including execution. The failures that play out tragically in individual lives are systemic.

We can do better. Over the course of the past two years at hearings around the country we met scores of judges, attorneys, and others with a deep commitment to justice in the federal courts. Many of them referred to our system as "the gold standard," and called on us to make it shine in practice; not just on paper. A fully independent entity governing the provision of public defense in the federal courts is the goal, one that we must move steadily toward by educating members of Congress and the public about why independence matters. It is our sincere hope that this Committee's report sparks and guides a process that achieves this goal.

While it will take action by Congress to realize the original and full intent of the 1964 Criminal Justice Act, the transition to independence can begin now. This Committee has outlined interim steps the judiciary can take on its own to confer greater authority and autonomy to members of the defense community, changes that raise the quality of defense in individual cases.

On behalf of the entire Committee, we wish to thank Chief Justice Roberts for the honor of being selected to serve and for entrusting us with a challenging assignment. It was difficult because of its scope and also because we had to collect our own data since much of the data we sought to evaluate this billion-dollar-plus government program was lacking. That too is something to remedy beginning now. Reviews such as ours are infrequent, but we need much better data to effectively manage a system that the public funds and that so many Americans rely on for justice.

Kathleen Cardone

Honorable Kathleen Cardone
Chair

Edward C. Prado

Honorable Edward C. Prado
Chair Emeritus

Introduction

This Committee was tasked to study one of the most fundamental of rights in America, the right of an accused person to legal counsel. Enshrined in the Constitution under the Sixth Amendment, the right to assistance of counsel is a pillar of our adversarial system of justice and our government. "If we are to keep our democracy," Judge Learned Hand cautioned in 1951, "there must be one commandment: Thou shalt not ration justice." He was speaking on the occasion of the New York Legal Aid Society's 75th Anniversary, yet it would be more than a decade before the Supreme Court's 1963 landmark ruling in *Gideon v. Wainwright*, compelling states to provide counsel at government's expense to criminal defendants who cannot afford to hire an attorney.[1]

The effort to make such a fundamental right real in practice—not to some, but to all—has been waged in the halls of justice by jurists committed to the letter of the law and the principles that underlie it. Their compelling legal arguments are captured in a chain of court decisions before and after *Gideon*. These rulings emphasize that representation per se is not enough. Writing in *MacKenna v. Ellis* in 1960, for example, the 5th Circuit Court of Appeals stated that an accused person is entitled to "effective, wholehearted assistance of counsel and to the undivided loyalty" of his representative."[2] The Court deemed such skill, dedication, and independence to be "essential to due process."[3]

Chief Justice of the United States John G. Roberts, Jr. tasked this Committee with studying the current quality of public defense in federal courts nationwide provided under the auspices of the Criminal Justice Act—groundbreaking legislation passed in 1963 and expanded in 1970. That the United States has a fully developed system of public defense at the federal level is evidence of considerable progress in making the Sixth Amendment right to counsel real in practice. But this Committee

The effort to make such a **fundamental right** real in practice—not to some, but to all—has been waged in the halls of justice by jurists committed to the letter of the law and the principles that underlie it.

1 *Gideon v. Wainwright*, 372 U.S. 335 (1963).

2 *MacKenna v. Ellis*, 280 F.2d 592, 595 (5th Cir. 1960), *modified*, 289 F.2d 928 (5th Cir. 1961).

3 *Id.*

The Committee's Review Process

To assess the quality of representation for indigent defendants in federal courts nationwide, this Committee held seven hearings around the country that drew 229 witnesses, nearly all of whom also submitted in-depth written testimony that totaled more than 2,300 pages. Federal defenders, panel attorneys, prosecutors, and judges from 78 of the 94 federal court districts—83 percent of all districts—testified before the Committee. Witnesses also included former public defense clients, circuit court judges, magistrate judges, nationally recognized advocates, representatives of the American Bar Association and other key professional groups, noted academics, and subject matter experts. The Committee conducted its own survey of panel attorneys to begin filling the glaring gap in data about their work, and reviewed hundreds of pages of reports and studies produced by others. Committee Members met 12 times in addition to the hearings and, in meeting time alone, spent more than 200 hours working together to plan the review, organize and assess the overwhelming amount of information collected, discuss findings and recommendations, and produce this report.

was not formed to rest on the laurels of history, and by the standard articulated in *MacKenna v. Ellis* justice continues to be rationed in federal courts around the country. While it has been decades since people charged with crimes—in many cases facing life-altering punishments—faced prosecutor, judge and jury alone, representation by a skilled and devoted advocate with sufficient resources to mount a vigorous defense is far from guaranteed. Indeed, the quality of defense appears to be highly uneven across the country and from case to case within districts.

Fully 90 percent of defendants in federal court cannot afford to hire their own attorney. Justice in their cases, and indeed the future course of their lives, depends on the quality of the system that provides lawyers to represent them. The subject of the Committee's Report is the examination of that system's successes and failures, as well as a course of action for improving it—findings and recommendations presented in brief in this Executive Summary.

Before committing the significant time and effort required to undertake this study, most Committee members were unaware of the depth and scope of the problems hindering administration of the Criminal Justice Act across the country and believed that small changes or gradual shifts in policy and practice would suffice.

Precisely because the current structure emphasizes local control, most people are only aware of what happens in the courtrooms where they practice. Such limited perspective is hardly new. Two years before Congress passed the Criminal Justice Act, editors from the *Harvard Law Review* researched the existing ad hoc approach to public defense.[4] Looking across the country in 1962–1963 they saw glaring problems, yet the individual lawyers and judges interviewed for that study—fully 93 percent of

[4] Bruce J. Havighurst & Peter MacDougall, Note, *The Representations of Indigent Criminal Defendants in the Federal District Courts*, 76 Harv. L. Rev. 579 (1963).

them—believed the system provided "adequate" or "very adequate" representation to indigent defendants in federal court.[5] Because those lawyers and judges were enmeshed in the system they failed to see its weaknesses.

Thanks to decades of leadership by the judiciary, Congress, defenders themselves, and others, the system of public defense at the federal level is a vast improvement on the ad hoc services that predated the Criminal Justice Act. But it is no less important today than it was in 1962 to take stock of what is happening in courts around the country.

It was only in studying the federal defender system as a whole and hearing from witnesses across the country that the members of this Committee have come to the unanimous conclusion that despite the best efforts of all parties involved in delivering effective representation under the Sixth Amendment, the current structure for providing public defense results in disparities in the quality of representation that have serious consequences for some defendants. The Committee hopes its report illuminates the scope and nature of these problems and underlying structural flaws from which they arise—and makes a persuasive case for meaningful change. ●

5 *Id.* at 588

Establishing a System of Public Defense in the Federal Courts

Although defendants in federal court have been guaranteed representation, regardless of ability to pay, since the 1938 Supreme Court ruling in *Johnson v. Zerbst*, for almost three decades there was no national system for appointing lawyers or pool of money to pay them. Few legal aid societies existed at the time, so federal judges had to find attorneys in private practice willing to work on a pro bono basis. Because seasoned trial attorneys were rarely interested in these cases, young lawyers, often with no criminal law or trial experience, represented the vast majority of indigent defendants.6 Attorneys were obliged to use their own resources to pay for all defense expenses, including expert witnesses, investigators, and other services. In 1963 an Alabama district court, ruling in *United States v. Germany*, found that burden ultimately denied the accused a full-throated defense as required under the Sixth Amendment.7

Even before *Johnson v. Zerbst,* the Federal judiciary had been calling for a formal system of indigent defense. As early as 1937, the Judicial Conference of the United States recommended establishing defender offices where caseloads justified them,[8] and repeated that recommendation for years to come.[9] Once again judges were out in front, working to make the Sixth Amendment right a reality in practice. And

6 *Id.* at 582-583

7 *United States v. Germany*, 32 F.R.D. 343, 344 (M.D. Ala. 1963).

8 Rep. of the Judicial Conf. of the U.S. 8-9 (Sept. Sess. 1937), *available at* http://www.uscourts.gov/sites/default/files/1937-09_0.pdf.

9 Robert J. Kutak, *The Criminal Justice Act of 1964*, 44 Neb. L. Rev. 703, 711 (1965).

they were not alone. Several U.S. Attorneys General, some members of Congress, and the American Bar Association repeatedly called for a legislative solution to the Sixth Amendment crisis. In the end, it took a federal commission—the Committee on Poverty and the Administration of Justice—appointed by Attorney General Robert F. Kennedy to persuade Congress to act.

The Allen Committee, named for its chair Professor Francis A. Allen, concluded that the ad hoc system of providing counsel to indigent federal defendants failed both defendants and the criminal justice system as a whole.[10] When the Committee's report was delivered to Congress on March 6, 1963, lawmakers were already primed to receive the findings. In his final State of the Union address on January 14, 1963, President John F. Kennedy had called on Congress to protect the right to counsel regardless of a defendant's financial circumstances.

Congress passed the Criminal Justice Act on August 7, 1964, outlining a system to provide defendants without resources legal representation at every stage of the court proceeding. Even though the Act applied only to federal courts, its national scope made it a watershed for public defense, especially coming on the heels of the Supreme Court's 1963 decision in *Gideon v. Wainwright*.

Because Congress was divided at the time about whether or not to create federal defender offices, the Act initially outlined a system in which federal judges would appoint counsel drawing from a local "panel" of private attorneys who would be paid at set rates for work in and out of court up to a fixed maximum. The statute also provided compensation for experts, investigators, and others services up to a fixed amount. The Judicial Conference of the United States and its allied agency, the Administrative Office of the United States Courts, were tasked with the responsibility of building and overseeing this new national system of public defense.

A few years later at the request of Congress, the Department of Justice and the Judicial Conference commissioned Professor Dallin H. Oaks to revisit the idea of creating institutional defenders. Submitted to Congress in 1969, the Oaks Report found "a demonstrated need for some type of full-time salaried federal defender lawyers."[11] Congress amended the Criminal Justice Act in 1970 to create the current hybrid system of institutional defenders and private attorneys. Today, 91 of the 94 judicial districts have a Federal Defender Office whose staff are federal employees or a nonprofit Community Defender Office that works under contract with the federal government.

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[10] The Allen Committee, *Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice*, submitted to the Attorney General on February 25, 1963 [hereinafter Allen Committee]. (See e.g. page 10, discussing the vital role that a strong defense plays in the health of our adversarial system, and stating the Committee's finding that the "system was imperiled" by the large number of defendants unable to afford or adequately fund "a full and proper defense.")

[11] Dallin H. Oaks, THE CRIMINAL JUSTICE ACT IN THE FEDERAL DISTRICT COURTS, Subcomm. on Constitutional Rights of the S. Comm. on the judiciary, 90th Cong., 2d Sess. 11 (Comm. Print 1969) [hereinafter Oaks Report].

Under-Resourced and Unduly Constrained

It was beyond the scope of this Committee's inquiry to review actual cases and their outcomes, which would have been the best measure of quality of defense. In fact, given the paucity of government data such a review was simply impossible. But there are compelling proxy measures of quality that this Committee considered. If attorneys lack the resources and training to provide a zealous defense; if their caseloads are overwhelming; if they lack the genuine independence needed to make the best decisions on their clients' behalf; then the quality of representation they provide is bound to suffer—not in every case but in far too many cases. This Committee found troubling signs that many panel attorneys in particular are indeed ill-equipped and insufficiently compensated; often without the resources or knowledge to hire experienced investigators, expert witnesses, and interpreters when a case requires such services; and lacking access to the level of training and guidance that both institutional public defenders and prosecutors have readily available.

In addition, both panel attorneys as well as institutional defenders are unduly constrained by the nature and degree of judicial oversight built into the Criminal Justice Act—and recent changes in Judicial Conference policy have neither clarified nor simplified the oversight burden on judges, constraining them as well.

On the whole, the judiciary has had the best intentions in administering the Criminal Justice Act, and individual judges and administrative leaders have been careful stewards of a system created to protect a crucial right. But they are operating within a fundamentally flawed administrative structure. Tasking—and indeed burdening—federal judges with the responsibility for managing the provision of public defense creates conflicts of interest and other serious impediments to genuine justice.

Those structural problems include giving the judiciary control over the defense budget; giving individual judges sole authority to appoint counsel and determine staffing levels at federal defender offices; and letting judges decide what, if any,

If attorneys... lack the **genuine independence** needed to make the best decisions on their clients' behalf, then the quality of representation they provide is bound to suffer—not in every case but in far too many cases.

resources attorneys may or may not use in defending their clients and what constitutes fair compensation for their legal services. The following sections explore these administrative obstacles to a full and effective defense in greater detail.

Inadequate Compensation and Guidance for Panel Attorneys

Nationwide, an estimated 10,000 to 11,000 attorneys in private practice—many of them solo practitioners—stand ready to represent indigent defendants in federal court. Yet these frontline defenders are not adequately compensated. In fiscal year 2017, the pay rate for panel attorneys in non-capital felony cases was $132 per hour. This is far less than the prevailing rate for criminal defense work and even less than the $144 per hour that Congress has authorized to pay under the statute.

When the high cost of living in some cities is considered, along with high overhead expenses, the effective rate of compensation for panel attorneys is arguably lower than the original rates authorized by Congress in 1964. Although a sizable increase in compensation has been needed for years—and the judiciary's official policy is to seek the full rate authorized by Congress—the judiciary has typically requested only minor increases that are less than the authorized amount as a way to limit its overall budget request to Congress.

Inadequate Compensation

Fiscal Year	Paid Rate	Maximum Authorized Rate*	Judiciary's Request to Congress	Rate Approved By Congress
2002	$75/$55 (in-court/out-of-court)	$113	$113	$90
2005	$90	$125	$92	$90
2008	$94	$133	$113	$100
2011	$125	$141	$141	$125
2014	$125	$141	$126	$126
2017	$129	$146	$137	$132

*The assumed rate at the time the judiciary submitted its budget request to Congress.

Not only are hourly rates unrealistically low, panel attorneys aren't even guaranteed payment-in-full for the services they provide. Many witnesses told the Committee that so-called "voucher cutting" by district court judges who have the responsibility for approving requests for payment is a common occurrence—apparently more so in some districts and among some judges. In addition to ad hoc cuts, judges in some districts compare vouchers for similar types of cases or between co-defendants in the same case and average the amounts, paying everyone the same as if the work involved in defending different individuals was exactly the same. These views are supported by quantitative data collected in surveys of panel attorneys that this Committee conducted as part of its review process, data that indicates

unwarranted voucher cutting is prevalent throughout the country.

Judges are not required to provide a reason for cutting a voucher, and often don't. Panel attorneys typically lack an effective, or sometimes any, recourse for appealing the judge's decision. Some panel attorneys testified to the Committee that they are reluctant to challenge voucher cuts, fearing reprisal by the judge within the context of the ongoing case or when submitting vouchers in the future.

The phenomenon of cost-cutting also encompasses refusal by judges to approve expenditures for non-legal services. These can be essential to mounting an effective defense, especially when counsel is a solo practitioner, as are many panel attorneys. These services include the assistance of a skilled investigator, expert witnesses, and interpreter. Among panel attorneys surveyed by the Committee, 60 percent reported using expert services in just 1 out of 10 cases or less; and only 12 percent reported using these services in more than half their cases. In some districts, as little as two percent of cases handled by panel attorneys involved the use of experts. Judicial oversight is not the only source of this problem; it is also true that some panel attorneys do not appreciate the value of expert services, know where to find needed experts, or simply want to log more billable hours themselves.

Discouraged by the prospect of voucher cutting and the related phenomena described above, many panel attorneys have resorted to "self-cutting," in which they deliberately do not bill for reimbursable hours or request services they suspect judges will not approve. When these self-cuts are combined with cuts by judges, the effect is systemic undermining of the defense.

The judiciary as a whole is not unsympathetic to the needs of the defense. Most judges are committed to protecting the integrity of our adversarial criminal justice system. At the same time, some judges also feel the need to cut costs, especially in the wake of the 2013 Congressional budget sequestration. More significantly, when judges do not fully appreciate the time, resources, and tactical decisions involved in mounting a vigorous defense they are more likely to conclude that vouchers are excessive in amount or that services are unnecessary. Fundamentally, judges should not be in a position where they have to be experts in defense in order to fairly compensate and reimburse attorneys.

Even when panel attorneys are paid in full, the requirement for judicial review and approval of vouchers often results in payment delays. There are efficient remedies to this particular problem. Delays in payment are less common in districts where judges can rely on an initial review and recommendation by a supervising panel attorney or the local federal defender office. This should be common practice. Similarly, case budgeting attorneys have been helpful in preventing both voucher cutting and delays in payment, but they too are not available everywhere.

In addition to being insufficiently compensated, most panel attorneys lack access to training and guidance. As a result, they are behind the curve, especially in complex and quickly changing areas of practice such as electronic discovery. The

Department of Justice's expenditures on training and training facilities for prosecutors exceeds the entire budget of the Defender Services Office (DSO). Lack of resources limits the amount of training DSO can provide. Moreover, panel attorneys from rural areas testified that the cost and difficulty of traveling to attend a national or regional training is a real barrier. While learning occurs organically in the context of a defender office—and these offices have considerable expertise to share—staff shortages and other fiscal constraints limit the amount of training institutional defenders can provide to panel attorneys in their district.

Destabilizing Defender Offices

Panel attorneys are not the only defense practitioners unfairly hampered in their work as a result of judicial oversight. The extraordinary authority and latitude given to individual circuit court judges to appoint and remove federal defenders, set staffing levels at federal public defender offices, and even to create or dissolve both federal and community defender offices, leads to vast discrepancies in organizational capacity and, arguably, in the quality of defense. A 2013 work-measurement study by the Judicial Resources Committee was instrumental in revealing that many defender offices are severely understaffed.

The fact that there are Federal Defender Offices or Community Defender Offices serving 91 of the 94 judicial districts, is one of the **great achievements** of the Criminal Justice Act.

Several federal public defenders testified to the Committee that the nature of the appointment cycle—a four-year term with no presumption of reappointment—creates a destabilizing environment in which they feel hamstrung as managers of their offices and, in some instances, beholden to the judiciary. Some federal defenders told the Committee they were reluctant to ask for staff increases, even when desperately needed, fearing such requests would negatively affect their prospects for reappointment. Several defenders even said they felt pressure to base hiring and budgeting decisions on the preferences of individual judges, rather than the best interests of their indigent clients, to bolster their chances of reappointment.

The fact that there are Federal Defender Offices or Community Defender Offices serving 91 of the 94 judicial districts, is one of the great achievements of the Criminal Justice Act—growth that would not have happened without judicial leadership. These institutional defenders raise the quality of defense in their districts through their own practice, by the example they set, and in some instances, through guidance they provide to less experienced panel attorneys. Still, in one of the three districts without a defender office, the Committee heard testimony that inexperienced panel attorneys are routinely assigned to defend clients outside their areas of expertise. Individual judges should not determine whether to establish institutional defenders offices in these three districts, or whether the defender offices that currently exist continue to operate.

The judiciary exerts control over defender offices in other ways as well. The Administrative Office of the U.S. Courts (AO) controls the information systems these offices rely on to manage cases, which not only reduces efficiency but also puts

confidential client information at risk of disclosure. Even ad hoc policy decisions can have a profound effect. The AO recently prohibited public defenders from representing clients in non-capital clemency petitions, despite the fact that these attorneys have knowledge and experience that would be of tremendous benefit to individuals facing an important determination that relates directly to their criminal conviction.

Troubling Deficiencies in Capital Habeas Cases

This Committee explored several specific areas of defense practice—all of which are addressed in the full report—but one area stands out as especially troubling: the current state of public defense in capital habeas cases. The underlying problems in these cases, which concern possible constitutional violations or wrongful convictions, are not dissimilar to those already discussed, but the potential consequence of inadequate representation is plainly dire.

The rate of compensation for panel attorneys in habeas cases, $185 an hour, is higher than the rate for non-capital felony cases but in no way sufficient. Moreover, the presumptive cap on expert services has not risen since 1996, when it was instituted. Because capital habeas cases often require thorough re-examination of the original trial—what counsel did and failed to do—the current cap is unrealistically low.

Separately, many of the federal judges presiding over these cases are not familiar with the nature of capital habeas representation, which can inadvertently hamper the quality of defense. For example, if a judge doesn't recognize the need for in-depth investigation to mount an effective challenge, that judge may not approve necessary expert expenses. Similarly, voucher cutting in these cases is a widespread concern because many judges don't grasp the extent of work required to submit an effective and complete habeas petition. Such variation among individual judges, coupled with differences in policies among the circuit courts, leads to serious discrepancies in the quality of defense available to capital habeas defendants across the country. In addition, few defense attorneys are qualified to handle these cases, and the combination of below-market rates and prospect of dramatic voucher cutting creates a financial disincentive to accept cases.

The short statute of limitations for capital habeas petitions, 12 months, creates other problems. Frequent delays in appointing counsel limit the time attorneys have to prepare a petition, and some judges have responded negatively to attempts to expedite appointments. The limited time frame combined with heavy caseloads means that habeas attorneys miss deadlines, sealing their clients' fates. Recently, nine defendants in Texas were scheduled for execution because their attorneys failed to file habeas petitions on time.[12] Since the passage of the Antiterrorrism and

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[12] Dick Burr, Texas Habeas Assistance & Training Project, Public Hearing – Birmingham, Ala., Panel 3, Tr., at 2. (*See* Lise Olsen, [Texas Death Row] *Lawyers' Late Filings can be Deadly for Inmates: Tardy Paperwork Takes Away Final Appeals for 9 Men, 6 of Whom Have Been Executed,* Hous. Chron., Mar. 21, 2009)

Effective Death Penalty Act of 1996, states have had the ability to apply for "fast-track" measures that would shorten the statute of limitations for capital habeas cases to six months and aggravate existing problems.

To address these widespread problems, some Federal Defender Offices created Capital Habeas Units (CHUs) that serve their entire circuit. These specialized units are effective in ensuring timely, high quality representation and in controlling costs because of their economies of scale.[13] Despite their demonstrated effectiveness, CHUs were prohibited in some circuits until recently, and even today some circuit courts restrict the creation of a CHU and its staffing.

Persistent Data Deficit

The lack of data hamstrung this Committee, just as it did its predecessor a quarter-century ago.

Twenty-four years ago, the last time an independent committee was tasked with reviewing the quality of public defense in the federal courts, that body was criticized for the lack of data supporting its findings and recommendations, despite the fact that at the time such data did not exist. It still doesn't exist. The kind of comprehensive approach to data collection needed to effectively manage and evaluate a billion-dollar-plus government program is not taking place.

The lack of data hamstrung this Committee, just as it did its predecessor a quarter-century ago. Much of the data that the Committee sought out to complete its review was unavailable, nonexistent, or inaccessible. The Administrative Office of the U.S. Courts doesn't even maintain a list of all practicing panel attorneys.

With limited government data to rely on, the Committee embarked on its own effort to gather data. Through significant effort on the ground, the Committee created a master list of panel attorneys in each and every district—and then surveyed them. As a result, the most extensive effort ever to collect data on the administration of the Criminal Justice Act was undertaken by this Committee. Moving forward, it is imperative that government assume this responsibility, use all available tools—including full implementation of the electronic vouchering system (eVoucher)—and develop data collection protocols when none exist. ●

[13] Stephen Bright, President, Southern Center for Human Rights, Public Hearing – Miami, Fla., Panel 4, Tr.,at 8.

Stifled Under Layers of Bureaucracy

The federal program charged with ensuring representation for indigent defendants in federal courts nationwide is deeply enmeshed in the Judicial Branch of government. The Judicial Conference of the United States (JCUS), the governing and rule-making body of the judiciary, has ultimate authority. JCUS is composed of judges from both appellate and district courts and is chaired by the Chief Justice of the United States.

Within JCUS, the Defender Services Committee is nominally tasked with developing relevant policy, but the Executive Committee can withdraw any portion of that policy-making power at any time. Most notably, in 2013 an effort to "enhance coordination and oversight" of the judiciary's own resources resulted in the Executive Committee stripping the Defender Services Committee of the power to determine staffing and compensation in federal defender organizations. Additionally, the JCUS Budget Committee controls funding priorities through its central role in the budgeting process.

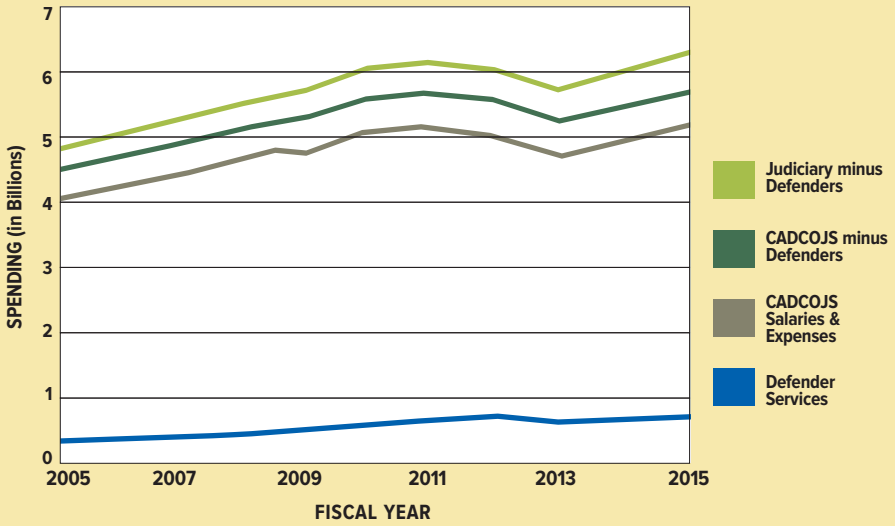
The responsibility for implementing policy falls on the Administrative Office of the U.S. Courts (AO). Up until 2013, the AO included the directorate-level Office of Defender Services, which directly administered the federal system of public defense. A casualty of the 2013 reorganization mentioned above, this office was demoted and renamed Defender Services Office (DSO), and now has much less autonomy and flexibility. In addition to a greater level of micromanagement and bureaucratic supervision that has resulted, the shift was demoralizing for many defenders, a sign in their view that defense work is a service to the courts.

Individual defenders have limited direct access to these entities that exert considerable influence over their day-to-day work. For example, both the Defender Services Office and the Defender Services Advisory Group, composed of defender office and panel attorney representatives, must receive approval from the AO to raise crucial issues for discussion at Defender Services Committee meetings.

Although defender services is a separate line-item constituting approximately 16 percent of the judiciary's annual budget, defenders cannot advocate for funding before Congress. The Defender Services Committee has little influence over the Chair of the Budget Committee and the Director of the AO who represent the judiciary in Congressional budget hearings.

It has been stated to Congress that defender services represent an increasing share of the budget. In fact, most of the increase is related to the growing cost of operating the courts, as set out in the chart on page 14. Although the need for defenders is greater than ever—the result of a large and growing number of federal defendants who can't afford counsel—the rate of increase of the overall budget since 2005 has outpaced the budget for defender services.

Cost of Defender Services Grew at a Slower Rate than the Judiciary's Overall Budget



Note: The judiciary's budget includes the Supreme Court Salaries and Expenses, Supreme Court Care of Building and Grounds, Court of Appeals for the Federal Circuit and Court of International Trade. "CADCOJS" is the total combined costs for the Courts of Appeals, District Courts and Other Judicial Services. CADCOJS Salaries and Expenses are just those specific expenses of the Courts of Appeals, District Courts, and Other Judicial Services. Source: Administrative Office of U.S. Courts THE JUDICIARY FY07–FY17 CONGRESSIONAL BUDGET SUMMARY.

Sequestration and the Fallout

The 2013 Congressional budget sequestration devastated many public defender offices, cutting funding by 10 percent resulting in staff reductions of 30 to 50 percent.[14] It has taken years for these offices to return to prior staffing levels. For a full year, panel attorneys were paid at a reduced rate; a pay-cut for which they have never been compensated. Additionally, there is a widespread belief among panel attorneys who testified before the Committee that the cost-cutting mentality evident during sequestration sparked a rise in voucher cutting by judges that continues today. Lack of government data on voucher review and approval makes it impossible to evaluate the accuracy of this perception.

Sequestration engendered a widespread sentiment among the defender community that the judiciary was unable to fully protect the public defense function. Frustrated and concerned, defenders by-passed the judiciary and appealed directly to Congress for emergency funding which they then received. Many experts view their success in the midst of this fiscal crisis as evidence that the federal defense community is now mature enough to advocate for itself, independent from the judiciary.

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[14] Ron Nixon, *Public Defenders Are Tightening Belts Because of Steep Federal Budget Cuts* N.Y. TIMES (Aug. 23, 2013).

The Case for Independence

The Criminal Justice Act was the product of considerable debate and compromise between the U.S. House of Representatives and U.S. Senate. But one contentious issue was not debated on the floor of Congress — where to situate this new public defense program. The Attorney General was the nation's top prosecutor, so the Department of Justice was out of the question. And no other Executive Branch agency seemed well suited to nurture a fledgling criminal defense program. As the *Wall Street Journal* reported in August of 1964, "the Judicial Conference privately urged the [Johnson] Administration and Congress to find someone else to run the program."[15] Even from the beginning it was understood that the mission and practice of the public defense function was a poor match with the goals and expertise of the judiciary. But with nowhere else to put the program, "the judges got the job."[16]

As early as 1969, Chief Justice Warren E. Burger lamented that Congress had not created a separate entity to administer the program. He believed judges should maintain a "real and an active interest," but felt "the governance of a public defender or a legal aid system should be insulated from the courts."[17] By 1970, when Congress was considering amendments to the Criminal Justice Act that would give judicial districts the option of creating defender offices, many lawmakers shared Chief Justice Burger's view. A Senate Committee report cast the judiciary as a temporary home for the program, acknowledging "the need for a strong independent administrative leadership," and called upon Congress to review such

A Senate Committee report cast the judiciary as a **temporary home** for the program, acknowledging "**the need for a strong independent administrative leadership**," and called upon Congress to review such prospects "until the time is right to take the next step."

15 John J. Haugh, *The Federal Criminal Justice Act of 1964: Catalyst in the Continuing Formulation of the Rights of the Criminal Defendant*, 41 Notre Dame L. Rev. 996, 1005, n.68 (1966).

16 *Id.*

17 *Proceedings at the1969 Judicial Conf., U.S. Court of Appeals, Tenth Circuit: Minimum Standards for Criminal Justice*, 49 F.R.D. 347, 374 (1969).

prospects "until the time is right to take the next step."[18]

Even while the judiciary continued to oversee implementation of the Criminal Justice Act, Supreme Court rulings made clear that independence of counsel is more than an aspirational ideal—it is a "constitutionally protected" principle.[19] In *Polk County v. Dodson* (1981), the Supreme Court again underscored that the State has a "constitutional obligation to respect the professional independence of the public defenders whom it engages.... It is the independence from governmental control as to how the assigned task is to be performed that is crucial."[20]

This same line of legal reasoning even predates passage of the Criminal Justice Act. In 1958, Judge E. Barrett Prettyman observed that:

> The constitutional right of an accused to the assistance of counsel might well be destroyed if counsel's selections upon tactical problems were supervised by a judge. The accused is entitled to the trial judgment of his counsel, not the tactical opinions of the judge. Surely a judge should not share the confidences shared by client and counsel. An accused bound to tactical decisions approved by a judge would not get the due process of law we have heretofore known.[21]

These constitutionally protected principles—that an advocate must act with professional independence seeking solely the best interests of the client—do not compel that a system providing counsel be designed in a particular way, but that these principals should inform the design. And when aspects of a public defense system compromise an advocate's independent professional judgment, they are particularly troubling and must be carefully examined.

After two years of study, this Committee unanimously believes that the federal defense program should be governed by an independent entity with the same mission as frontline defenders. Current governance of the program by the Judicial Conference of the United States and management by the Administrative Office of the U. S. Courts, with their different missions and competing budgetary needs, has led to fundamental fissures and inequities in a system that nearly 250,000[22] people each year depend upon for effective representation in federal court.

The Criminal Justice Act had flourished under the judiciary in its infancy, and the Committee recognizes that without judicial assistance the program may not have been primed to govern itself. At this time, however, independence is not

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18 S. Rep. No. 91-790, at 18 (1970).

19 *Strickland v. Washington*, 466 U.S. 668, 689 (1984)

20 *Polk Cty. v. Dodson*, 454 U.S. 312, 321-22, 327 (1981) (J. Burger concurring).

21 *Mitchell v. United States*, 259 F.2d 787, 793 (D.C. Cir. 1958)

22 U.S. Federal Courts, Federal Judicial Caseload Statistics, Criminal Justice Act – Judicial Business 2016 http://www.uscourts.gov/statistics-reports/criminal-justice-act-judicial-business-2016, (last visited July 26, 2017) (This is the number of CJA representations for 2016).

only possible, it is necessary to continue progress toward a day when every criminal defendant in federal court has a skilled, independent, and properly resourced advocate.

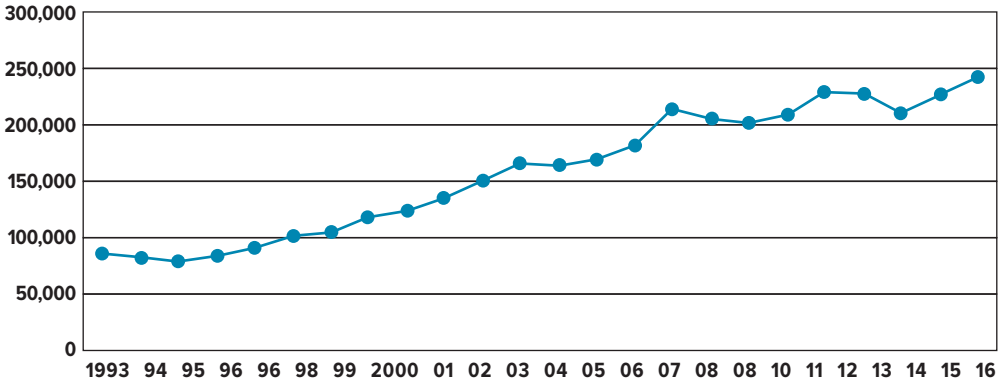
This Committee's recommendations have important historical precedent. The first and only other comprehensive review of the Criminal Justice Act concluded in 1993 that the federal defense program required greater administrative independence. Under the leadership of Judge Edward C. Prado, who also serves on this Committee, the "Prado Report" recommended that the Criminal Justice Act be amended to create a "Center for Federal Criminal Defense Services" responsible for the administration of the Criminal Justice Act program.[23] As the Prado Report stated:

> A public defender system, whether staffed by institutional defenders, part-time panel attorneys, or a combination of both, is not effective simply because no one goes unrepresented. Such a system is effective when it ensures that each defendant has an independent, competent, and vigorous advocate, dedicated solely to the interest of the individual client and free from any improper personal or institutional conflicts of interest.[24]

The first and only other **comprehensive review** of the Criminal Justice Act concluded in 1993 that the federal defense program required **greater administrative independence.**

The Judicial Conference did not act on this core recommendation in the Prado Report. Given widespread voucher cutting, arbitrary staffing caps on defender offices, court influence over some defender offices, budgeting decisions by the Judicial Conference in 2013 during sequestration, and other problems—coupled with dramatic growth in the number of indigent defendants prosecuted in federal court—the need for independence is even greater today than it was in 1993.

Growing Number of Indigent Defendants Prosecuted in Federal Court



23 Comm. to review the criminal justice act program, cr-cjarev-mar 93, report of the judicial conf. comm. to review the criminal justice act, 75 (1993) [hereinafter Prado Report]. (A committee established by Chief Justice William H. Rehnquist pursuant to the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089. Judge Edward C. Prado was selected as Chair. The Prado Committee's report, issued in 1993, included several recommendations, including recommendations to enhance the independence of defense services in the federal criminal system.)

24 *Id.*at 46.

Views have changed considerably since the Prado Report. Many federal judges now support the creation of an independent entity to oversee public defense in the federal courts. As Judge John Gleeson, a former chair of the Committee on Defender Services and author of the 2005 Gleeson Report told the Committee, "I think there should be fundamental structural change. I think wresting the obligation, the responsibility to deliver indigent defense away from the judiciary is a good idea. We've just gotten used to the fact that it's in the judiciary. It doesn't make a whole lot of sense. I'm not sure if we had a blank slate and we were divvying up responsibilities now and that was on the table we would take it. I would take it out of the judiciary and find a really good defender general."[25] Likewise, a consensus of federal and community defenders supports such a change. The Defender Services Committee, panel attorneys, relevant professional associations, and academics who study public defense have all voiced support for the creation of such an entity.

The Judicial Conference Committee on Defender Services (DSC) met with this Committee during the course of our review and concluded that not only would DSC support a recommendation for independence, but that the only recommendation it would not support would be to maintain the status quo. Realizing that it will take Congressional action to create such an independent entity, DSC later submitted a letter outlining important steps the judiciary can take in the interim.[26] This guidance significantly informed the slate of interim recommendations this Committee developed, which are discussed in brief below.

A March 25, 2016, letter from federal and community defenders to Judge Cardone as Chair of this Committee reported on the results of an on-line poll of defenders, with a 94 percent response rate.[27] Of those who responded, 84 percent believed that defense attorneys themselves must have significant authority to govern and manage the program at both the national level and within districts. Their specific minimum requirements outlined in the letter are reflected in this Committee's interim recommendations.

In a letter dated July 6, 2016, from Defender Services Advisory Group's Panel Attorney District Representatives conveyed the consensus view that judges should have very little control and oversight of the program.[28] In particular, judges should have no role in the voucher review process, in establishing compensation rates for panel attorneys, or even in appointing counsel. Their views are also incorporated into the Committee's interim recommendations.

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25 Judge John Gleeson, E.D.N.Y., Public Hearing – Miami, Fla., Panel 3, Tr., at 40

26 Letter from the Judicial Conf. of the U.S. Comm. on Defender Serv. to the Honorable Kathleen Cardone, Chair, Ad Hoc Comm. to Review the Criminal Justice Act Program (July 22, 2016).

27 Letter from the Federal and Community Defender Offices to the Honorable Kathleen Cardone, Chair, Ad Hoc Comm. to Review the CJA Program (Mar. 25, 2016).

28 Letter from the CJA Panel Attorney District Representatives (PADRs) to the Honorable Kathleen Cardone, Chair, Ad Hoc Comm. to Review the CJA Program (July 6, 2016).

In the ABA's Ten Principles of a Public Defense Delivery System,[29] independence is the first principle. Professor Norman Leftstein,[30] Dean Emeritus of the Indiana University Robert H. McKinney School of Law and someone who has studied public defense systems for decades, reminded the Committee that "[I]t is the first principle for a reason: unless you have independence, the other principles vital for genuinely successful public defense programs are usually difficult to achieve."[31] Professor Lefstein also highlighted a 2009 report from the National Right to Counsel Committee that urged states to "establish a statewide independent non-partisan agency headed by a board or commission responsible for all components of indigent defense services."[32] While the recommendation was addressed to states, its reasoning applies to the federal system as well. As Professor Lefstein said,

> It is exceedingly difficult for defense counsel always to be vigorous advocates on behalf of their indigent clients when their appointment, compensation, resources, and continued employment depend primarily upon satisfying judges or other elected officials. At a minimum, judicial oversight of the defense function creates serious problems of perception and opportunities for abuse.
>
> What is needed are defense systems in which the integrity of the attorney-client relationship is safeguarded and defense lawyers for the indigent are just as independent as retained counsel, judges, and prosecutors.[33]

In its own study of the Criminal Justice Act program in the fall of 2015, the National Association of Criminal Defense Lawyers (NACDL) listed "seven fundamentals of a robust federal indigent delivery system." The first fundamental called for independence, since "control over federal indigent defense services must be insulated from judicial interference."[34] A new structure under independent administration could incorporate the sixth fundamental on NACDL's list: "greater transparency."[35]

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29 ABA Ten Principles Of A Public Defense Delivery System (Feb. 2002), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf (last visited April 26, 2017).

30 Norm Lefstein, Prof. of Law & Dean Emeritus, Robert H. McKinney Sch. of Law, Ind. Univ., Public Hearing — Minneapolis, Minn., Panel 3, Writ. Test., at 2–3.

31 Written Testimony of Norm Lefstein, Prof. of Law & Dean Emeritus, Robert H. McKinney Sch. of Law, Ind. Univ., Public Hearing #7 — Minneapolis, Minn.: *Hearing Before the Ad Hoc Comm. to Rev. the Crim. Just. Act Program*, Panel 3: Views from a Mixed Panel 2-3 (May 16, 2016), *available at* https://cjastudy.fd.org/sites/default/files/hearing-archives/minneapolis-minnesota/pdf/normlefsteinminneapoliswritten-testimony-done.pdf.

32 Norm Lefstein, Prof. of Law & Dean Emeritus, Robert H. McKinney Sch. of Law, Ind. Univ., Public Hearing — Minneapolis, Minn., Panel 3, Writ. Test., at 4 (quoting Justice Denied at 186)

33 Leftstein, *supra* note 27, at 4 (quoting Justice Denied at 186).

34 Nat'l Ass'n of Criminal Def. Lawyers (NACDL), *Federal Indigent Defense 2015: The Independence Imperative* 9 (2015) *available at* www.nacdl.org/federalindigentdefense2015 [hereinafter NACDL Report].

35 William Leahy, Director, N.Y. State Office of Indigent Serv., Public Hearing – Minneapolis, Minn., Panel 1, Writ. Test., at 4.

In written testimony to the Committee, William Leahy, Director of the New York State Office of Indigent Legal Services and former Chief Counsel of the Massachusetts Committee for Public Counsel Services, described judicial control and management of the defense function as "relics of a bygone age; perhaps understandable when public defense was in its infancy and was thought to require judicial oversight; but for a long time now neither appropriate nor tolerable."[36]

Clearly, the Prado Report's call for independence nearly 25 years ago has garnered widespread and vocal support today. ●

[36] William Leahy, Director, N.Y. State Office of Indigent Serv., Public Hearing — Minneapolis, Minn., Panel 1, Writ. Test., at 4.

Recommended Course of Action: Create an Independent Defender Commission

National Structure and Administration

This Committee unanimously recommends that Congress create an independent Defender Commission within the judicial branch of government, but outside the oversight of the Judicial Conference. The Commission would have sole authority to set policy and practices related to the provisions of federal defense. Specifically, the Commission would have the power to:

1. **Establish general policies and rules as necessary to carry out the purposes of the CJA**
2. **Appoint and fix the salaries and duties of a director and senior staff**
3. **Select and appoint federal defenders and determine the length of term**
4. **Issue instruction to, monitor the performance of, and ensure payment of defense counsel**
5. **Determine, submit, and support annual appropriations requests to Congress**

6. **Enter into and perform contracts**
7. **Create and oversee a system for litigation funding for CJA counsel, including the review of attorney, expert, and investigator fees**
8. **Procure as necessary temporary and intermittent services**
9. **Compile, collect and analyze data to measure and ensure high quality defense representation throughout the nation**
10. **Rely upon other federal agencies to make their services, equipment, personnel, facilities and information available to the greatest practicable extent to the commission in execution of its functions**[37]
11. **Perform such other functions as required to carry out the purposes of and meet responsibilities under the CJA**

Decisions about the provision of defense services should be made and implemented by those with direct experience and responsibility for the defense function — promoting best practices — and there should be no internal conflict of interest created when requesting funding from Congress.

Modeled after the United States Sentencing Commission, this entity would have seven voting members appointed by the President and confirmed by the Senate. While voting members could include federal judges, they must not constitute a majority. [38] Additionally, no more than four board members shall serve from any political party. For the initial board, the Committee recommends that the Chief Justice of the United States, as well as the Defender Services Advisory Group, which currently represents defenders and advises the Defender Services Committee, prepare a slate of candidates from which the President may select. For subsequent boards, a slate of candidates would be prepared by the Chief Justice and the equivalent of the Defender Services Advisory Group to the new commission.

Voting members should have a minimum five years of experience in, as well as a demonstrated interest in and a commitment to, high quality indigent criminal defense. To prevent conflicts of interest, no voting member should be employed by

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[37] The Committee bases this recommendation upon the enabling statute for the U.S. Sentencing Commission, which is housed within the same building as the AO and uses services provided by the AO but is not within AO governance. The statute for the Sentencing Commission reads, "28 U.S.C. § 995(c) Upon the request of the Commission, each Federal agency is authorized and directed to make its services, equipment, personnel, facilities, and information available to the greatest practicable extent to the Commission in the execution of its functions." Any statute creating a defender commission should contain the same assistance for the new commission to execute its duties.

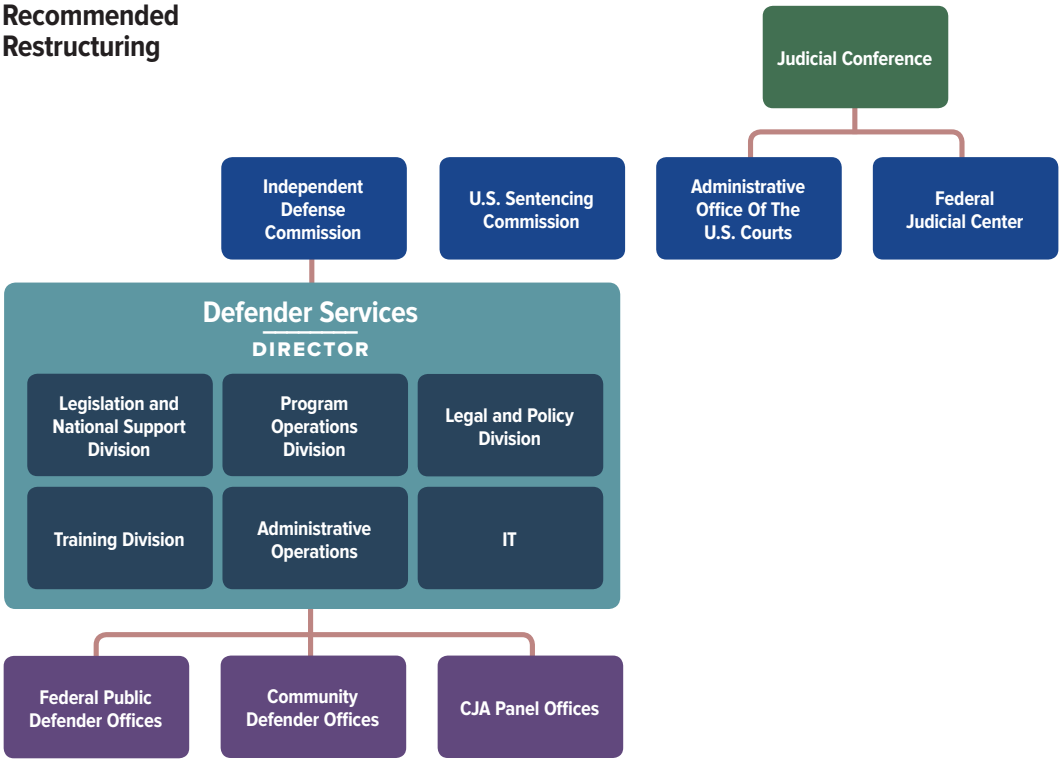
[38] One Committee member, Professor Orin Kerr, believes the committee should be comprised of all judges selected by other district court judges. Please see statement in appendix.

the Department of Justice, work as a state or federal prosecutor, or serve as a chief or assistant federal defender or as an active member of a CJA panel.

To ensure full representation of the federal defense function before the commission, three non-voting members should be appointed, respectively, from a Federal Defender Office, a Community Defender Office, and a CJA panel.

The Committee recommends that members of the commission be appointed for staggered three-year terms and remain in office until their vacancy is filled to provide continuity of leadership. Members should be limited to two full terms to ensure fresh perspectives. Compensation for voting members of the commission should not exceed the daily rate at which judges of the U.S. Courts of Appeal are compensated.

Recommended Restructuring



Local Structure and Administration

The Committee recognizes that federal and community defender offices are integral to raising the quality of representation by establishing best practices and providing training and other resources for panel attorneys, while striving for cost-effective administration. For this reason, every judicial district should require the appointment of a CJA Panel Attorney Administrator and any necessary staff to manage the panel and review vouchers. This administrator may reside within a local defender office, with appropriate firewalls to prevent conflicts, or in a separate office, but must not be employed or supervised by the courts. These broad recommendations leave considerable room for local control and decision-making to meet a jurisdiction's specific circumstances and needs.

Each district is encouraged to create boards that are **representative** of and **responsive** to local needs.

Defender offices and panel administration should be overseen by a local board consisting of an uneven number of members (three minimum, seven maximum), each with a demonstrated knowledge of and commitment to indigent defense. Initial boards shall be appointed through a collaborative process involving the local district courts, Community and/or Federal Defender Office, and CJA panel attorney district representative, in consultation with the national structure outlined above. Local bar organizations or other interested stakeholders may also participate in the appointment process. Each district is encouraged to create boards that are representative of and responsive to local needs. While judges will be involved in the initial appointments, boards should be self-perpetuating, and judges may not serve as board members. Board members, who should serve without compensation, may be asked to serve for five-year staggered terms and remain on the board until their vacancy is filled. As is currently the case with some defender offices, multiple districts may be governed by a single board, or a district may choose to have a board in each division, depending on caseload and/or geography.

Local boards should collaborate with leadership of the defender office to develop a defense delivery plan and appoint a panel administrator to be approved by the independent national defense commission. Like the current CJA plans, these plans would address the recruitment, selection, retention, and removal of panel attorneys, and would incorporate best practices as outlined in the CJA Model Plan. Local boards, defenders, and panel administrators also would collectively develop a system for voucher review as well as an appeal process for those attorneys whose vouchers are cut for reasons other than clerical error.

Additionally, no district shall be without access to a case budgeting attorney to help panel attorneys plan expenses and seek reimbursement in all cases, not just extended or complex ones. Case-budgeting attorneys will no longer be employed by the courts but by local boards within the panel administration office or by the independent national commission. In districts with high caseloads or a history of large, complex cases to support such a position, the local CJA plan should provide sufficient resources to employ a case budgeting attorney for the district. Otherwise, multiple districts may work with a single case budgeting attorney. Local boards should work in consultation with the national defense commission to implement a solution that meets local needs.

Benefits of the Recommended Restructuring

Creating a new, independent entity within the judiciary that can continue to make use of resources available through the Administrative Office of the U.S. Courts would control costs and be least likely to disrupt the ongoing provision of representation for defendants in federal courts.

As discussed above, the benefits of independence are myriad. Defenders

themselves would be in a position to persuasively advocate before Congress for the funding needed to adequately compensate panel attorneys and staff defender offices. Panel attorneys would no longer refrain from requesting expert services for fear of undermining their client's defense, violating attorney-client privilege, or simply annoying judges.

This structure is ideally suited to spreading best practices and delivering training, both of which are required to provide a consistently high quality of defense. Furthermore, the problems created by the judiciary's oversight of one side in our adversarial system of justice would no longer exist. Once created, this new Federal Defense Commission should review its own structure and functioning every seven years to determine whether additional changes or increased independence is required.

To those who argue that independence would imperil federal funding for public defense, subjecting this crucial public service to political whims, the Committee points out that the program is already a separate account in the judiciary's appropriation and Congress has always had the authority to underfund or defund the program as it chooses. Equally important, as seen during sequestration in 2013, defenders have proved themselves to be able advocates, and Congress has demonstrated an understanding of the importance of funding an effective system of public defense.

Finally, the Committee believes that judges' support for the defender program derives primarily from principles, not self-interest or obligation. As a result, the Committee fully expects that the judiciary as a whole and many individual federal judges—including those who will serve on the proposed commission—will act as allies in support of vibrant defense under this new administrative structure.

That two very different committees nearly twenty-five years apart have come to the identical conclusion reinforces the need for an independent entity to oversee public defense in the federal courts. While the Prado Report led to significant reforms, the core issue of independence was left unaddressed. As a result, the majority of the problems identified by the Prado Committee remain problems today and in some cases have worsened, as they stem from the lack of independence. Congress viewed judicial implementation of the Criminal Justice Act as the initial phase. The independence recommended by this Committee is a long overdue next step. ●

That two very different committees nearly twenty-five years apart have come to the **identical conclusion** reinforces the need for an independent entity to oversee public defense in the federal courts.

Interim Recommendations of the CJA Review Committee

OCTOBER 2017

The CJA Review Committee unanimously recommends that Congress create an independent Federal Defender Commission within the judicial branch of government, but outside the oversight of the Judicial Conference. The Commission would have sole authority to set policy and practices related to the provisions of federal defense.

The Committee realizes that the creation of an independent Federal Defender Commission cannot be implemented immediately. While Congress weighs the merits of this recommendation and determines how best to proceed, the judiciary can and should take important steps to give defenders more authority and autonomy. While most of the actions outlined below constitute interim recommendations—and will be moot once a Federal Defender Commission is created—some are useful guidance even to a fully independent entity.

Structural Changes

1. **The Defender Services Committee (DSC) should have:**
   - **Exclusive control over defender office staffing and compensation.**
   - **The ability to request assistance of JRC staff on work measurement formulas.**
   - **Control over development and governance of eVoucher in order to collect data and better manage the CJA program.**
   - **Management of the eVoucher program and the interface with the payment system.**
   - **Exclusive control over the spending plan for the defender services program.**
2. **For any period during which AO and JCUS continue to have authority over the budget for the CJA program, when either the Budget or Executive Committee disagree with the budget request by the DSC, the matter should be placed on the discussion calendar of the full Judicial Conference.**
3. **The composition of the DSC should include the co-chairs of the Defender Services Advisory Group, both as voting members.**
4. **Defender Services Office (DSO) must be restored to a level of independence and authority at least equal to what it possessed prior to the reorganization of the AO. In particular, DSO should be empowered to:**
   - **Exclusively control hiring and staffing within DSO.**

- Operate independently from the AO Department of Program Services or any other department that serves the courts.
- Retain exclusive control with NITOAD over defender IT programs.
- Retain ultimate discretion with DSC in setting the agenda for DSC meetings—no requirement of approval from other AO offices.

5. DSO should be made a member of the AO Legislative Counsel to consult on federal legislation

6. Representatives from DSO should be involved in the Congressional appropriations process.

Compensation and Staffing for Defenders and CJA Panel Attorneys

7. The annual budget request must reflect the highest statutorily available rate for CJA panel attorneys.

8. To provide consistency and discourage inappropriate voucher cutting, the Judicial Conference should:

   - Adopt the following standard for voucher review –

     vouchers should be considered presumptively reasonable, and voucher cuts should be limited to mathematical errors, instances in which work billed was not compensable, was not undertaken or completed, and instances in which the hours billed are clearly in excess of what was reasonably required to complete the task.

   - Provide, in consultation with DSC, comprehensive guidance concerning what constitutes a compensable service under the CJA.

9. Every circuit should have available at least one case budgeting attorney and reviewing judges should defer to their recommendations in reviewing vouchers and requests for expert services.

10. To promote the stability of defender offices until an independent Federal Defender Commission is created: Circuit judges should establish a policy that federal defenders shall be reappointed absent cause for non-reappointment.

11. A federal public or community defender should be established in every district which has 200 or more appointments each year. If a district does not have a sufficient number of cases, then a defender office adjacent to the district should be considered for co-designation to provide representation in that district.

12. The Judicial Conference should develop a policy in which judges defer to DSO recommendations and accepted staffing formulas when setting staffing levels.

13. Circuit court judges should implement DSO staffing formulas when approving the number of assistant federal defenders in a district

14. Modify the work measurement formulas to:

    - Reflect the staff needed for defender offices to provide more training for defenders and panel attorneys.
    - Support defender offices in hiring attorneys directly out of law school or in their first years of practice, so that the offices may draw from a more diverse pool of candidates.

15. Every district should form a committee, or designate a CJA supervisory or administrative attorney or a defender office, to manage the selection, appointment, retention, and removal of panel attorneys. The process must incorporate judicial input into panel administration.

16. Every district should have an appeal process for panel attorneys who wish to challenge any non-mathematical voucher reductions.

    - Every district should designate a CJA Committee that will determine how to process appeals.
    - Any proposed reasonableness reduction shall be subject to review by the designated CJA review committee that will issue a recommendation to the judge.

Standards of Practice and Training

17. DSO should regularly update and disseminate best practices.

18. DSO should compile and share best practices for recruiting, interviewing, and hiring staff, as well as the selection of panel members, to assist in creating a diversified workforce.

19. All districts must develop, regularly review and update, and adhere to a CJA plan as per JCUS policy. Reference should be made to the most recent model plan and best practices. The plan should include:

    - Provision for appointing CJA panel attorneys to a sufficient number of cases per year so that these attorneys remain proficient in criminal defense work.
    - A training requirement to be appointed to and then remain on the panel.
    - A mentoring program to increase the pool of qualified candidates

20. FJC and DSO should provide training for judges and CJA panel attorneys concerning the need for experts, investigators and other service providers.

21. FJC and DSO should provide increased and more hands-on training for CJA attorneys, defenders, and judges on e-discovery. The training should be mandatory for private attorneys who wish to be appointed to and then remain on a CJA panel.

22. While judges retain the authority to approve all vouchers, FJC should provide training to them and their administrative staff on defense best practices, electronic discovery needs, and other relevant issues.

23. Criminal e-Discovery: A Pocket Guide for Judges, which explains how judges can assist in managing e-discovery should be provided to every federal judge.

Capital Representation

24. Remove any local or circuit restrictions prohibiting Capital Habeas Units (CHUs) from engaging in cross-district representation. Every district should have access to a CHU.

25. Circuit courts should encourage the establishment of CHUs where they do not already exist and make Federal Death Penalty Resource Counsel and other resources as well as training opportunities more widely available to attorneys who take these cases

26. Eliminate any formal or informal non-statutory budgetary caps on capital cases, whether in a death, direct appeal, or collateral appeal matter. All capital cases should be budgeted with the assistance of CBAs and/or resource counsel where appropriate.

27. In appointing counsel in capital cases, judges should defer to recommendations by federal defenders and resource counsel absent compelling reasons to do otherwise.

28. Modify work measurement formulas to:

    - Dedicate funding—that does not diminish funding otherwise available for capital representation—to create mentorship programs to increase the number of counsel qualified to provide representation in direct capital and habeas cases.
    - Reflect the considerable resources capital or habeas cases require for federal defender offices without CHUs.
    - Fund CHUs to handle a greater percentage of their jurisdictions' capital habeas cases.

29. FJC should provide additional judicial training on:
    - The requirements of § 2254 and § 2255 appeals, the need to generate extra-record information, and the role of experts, investigators, and mitigation specialists.
    - Best practices on the funding of mitigation, investigation, and expert services in death–eligible cases at the earliest possible moment, allowing for the presentation of mitigating information to the Attorney General.

Defender Information Technology

30. Adequately fund and staff NITOAD in order to control and protect defender IT client information, operations, contracts, and management.

Resources: Litigation Support and Interpreters

31. Increase staff and funding for the National Litigation Support Team, as well as increased funding for contracts for Coordinating Discovery Attorneys to be made available throughout the United States.

32. Create new litigation support position(s) in *each district* or at the circuit level, as needed, to assist panel attorneys with discovery, evaluation of forensic evidence and other aspects of litigation.

33. Develop a national policy requiring the use of qualified interpreters whenever necessary to ensure defendants' understanding of the process.

Legislative Changes

34. Amend 18 U.S.C. § 4285 to permit courts to order payment of costs in the limited circumstances where the defendant is unable to bear the costs and the court finds that the interests of justice would be served by paying necessary expenses.

35. Congress must amend the Criminal Justice Act to eliminate circuit court review of attorney and expert fees exceeding current statutory caps.

For additional information about the work of the CJA Review Committee visit:

https://cjastudy.fd.org