Ad Hoc Committee to Review the Criminal Justice Act
Public Hearing # 1–Santa Fe, New Mexico
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Transcript: Panel 4—Views from the Field

Judge Cardone: All right, let's get started again. Um, this panel is used from the field. We have on our, uh, Committee members for this panel are Mr. Neil MacBride; Mr. Reuben Cahn; Ms. Katherian Roe; and the Honorable Judge John Gerrard. Uh, for our actual panel participants, we have Teresa Duncan, New Mexico Criminal Defense Lawyers Association; Professor Barbara Creel, Law and Indigenous Peoples Program at the University of New Mexico; and E. Gerry Morris, president of NACDL. Uh, we will start with you, Ms. Duncan, and your opening statement.

Teresa Duncan: Thank you. Um, I know that you all read the written statement I provided to you and so I am not going to repeat that. Um, I just like to tell you a little bit about New Mexico Criminal Defense Lawyers Association first. We are the only criminal defense lawyer, local criminal defense lawyers association in New Mexico. We are a voluntary professional association of both private lawyers and public defenders, state and federal. Really our goal is to empower our members to represent their clients as effectively as possible. We have approximately 600 members in the state of New Mexico. Most if not all of the state public defenders are members of our organization. Many federal public defenders also are members of NMCDLA and participate in our different activities. Um, of the 100 Albuquerque panel members, approximately 66% are members of NMCDLA. For the panel members in Las Cruces, there are thirty-five of them. I believe the percentage is lower. It is about 46%, um, in the, in the southern part of the state.

We provide a variety of services to our members. We provide training approximately eight times a year, eight different seminars. We stagger them around the state. We are a pretty widespread state, a lot of rural communities and so we try to make our training available to as many people as possible. We do a lot of training in Albuquerque and Las Cruces which are two centers, and also Santa Fe, Roswell, Farmington, so throughout the state. Um, our training is really balanced between state and federal practice, so occasionally I think once every couple of years, we will do training that is solely federal practice and then for each of our, our, um, regional training programs, we tend to have both federal and state topics.

Uh, we also provide a brief bank for our members which includes, um, briefs, motions submitted by our members. Those include both federal and state pleadings. I don't think that we break out federal pleadings in the brief bank. I think it's more of a topic whether it is a motion to suppress, child sex crimes, um, drug crimes, that sort of thing.

We provide a strike force for our members who find themselves, um, at the, uh, with the judge not being particularly pleased at something that they are doing. It happens more often in state court where we run into these, again rural communities where lawyers have, um, there's few lawyers in the community. They have multiple cases and they end up . . . can't be in two courtrooms at once, and you know, that becomes a problem, and so we will step in to represent them.

Um, you know, one of the things that, that I would like to emphasize today as we talk is NMCDLA is very, very eager to work with the Federal Defender Organization with the training division and with this Committee to assist in improving CJA representation in New Mexico, um, whether it is to work more closely with the federal defender and training to meet our CJA plans for our requirement every year to act as an intermediary with the court on CJA issues. We have members of NMCDLA in our board, in our leadership who are federal practitioners but are not CJA members who would be willing to, to meet with CJA members to learn those concerns and then to meet with the judiciary in a way that may, um, allow more openness than a CJA lawyer would be willing to do if face-to-face with a particular judge.

I wanted to address the issue of training and also resources in the context of what Mr. Williams brought up this morning about client-focused sentencing. I mean, we know that federal cases do come to sentencing and over 90% of those cases and that I, I could not agree more than being bound by the Sentencing Guidelines does our clients a huge disservice and that we as a community could use a lot more training on client-focused representation on learning how to understand our clients and how to get the court to understand our clients. New Mexico is an incredibly diverse state; we are very fortunate in that way. But there are some gaps in training and, uh, I met with several CJA lawyers prior to coming here today to sort of get a sense of what was working and what wasn't working, and unanimously, one of the things that CJA lawyers have a concern about is a lack of cultural awareness given the diversity of cultures in the state. Um, so a lack of just general training and also a lack of training from people from within those communities, it is something that we desperately need, um, in having relationship with our clients to build our cases and then also to explain, um, or to introduce the judiciary to our clients and deciding sentencing. And I think the problem, it's a problem both of training and also of resources, and the resources are in part that, you know, the CJA panel would like to have a lot more service providers from within local communities. Um, so right now, I know for myself I have some cases up with the Navajo nation. I am using an investigator who has experience in that area but he is not a member of that community. And so, although I appreciate his work, I would definitely benefit working with someone

local who I think would know the people there, would know the cultural issues that I don't know and could help educate me, and I think would definitely serve my client much better.

Um, the other part of it with resources is educating the judiciary in the amount of time it takes for us to build trust with some of our clients. Um, we, that sort of two issues, there is the cultural differences and there is also just the time. So we used to have a, um, detention facility in downtown Albuquerque so, you know, most of us from Albuquerque could just walk across the street and go visit our clients. Our clients are now being detained in facilities around the state that are, um, I think the closest ones are half an hour from Albuquerque and the other two are an hour from Albuquerque so every time we go to see our client, we are billing, we are billing an hour to two hours of travel time, and for me, I visit my clients quite a bit and sometimes, it is for a very short period. I have, some discovery, I just need to sit down and show my client what it is, I don't want to mail it to them, I want to sit down and say, here this is what I need you to do with the discovery, and so I will travel for two hours for meeting with my client that lasts thirty minutes. And that can be a concern, but in my opinion as a defense lawyer practicing for thirteen years, fifteen years, um, that is absolutely critical to, to preparing my defense and then to sitting down with my client at the end of the case and asking them to trust me to make a hard decision about whether or not to enter into a plea. And without doing that, that groundwork of just regularly going out to visit my client, I, I just, I don't think I would be as successful, um, in developing the relationship with my client and getting them to provide me the information that I need to do, um, effective representation.

Um, so I think that those are really my two points to make, um, in the opening statement. One, I would really like to see more resources towards training, developing community relationships among CJA lawyers and community members, and also just to offer NMCDLA as a partner in improving training and also communication with the court in New Mexico. Thank you very much.

Judge Cardone: Professor Creel.

Prof. Creel: Good morning! Welcome to Indian country. I want to thank your Honor for inviting me to speak, um, your Honors at the table, um, and also Autumn Dickman for coordinating this testimony today. I'm Barbara Creel. I'm an enrolled member of the Pueblo of Jemez, one of the nineteen Pueblos and among the twenty-three Indian nations in the state of New Mexico. I am a former assistant federal public defender and I teach in the Southwest Indian Law Clinic where I represent Native Americans in tribal, state and federal court. I have worked with natives who bring their cases before the federal court under section 25 U.S.C. section 1303, Indian

federal habeas corpus, and I have worked in and among the CJA panel both as an attorney in the federal defender's office and, um, as a practicing attorney and a law professor.

And I want to thank you for asking for information on the Indian country community, um, in representation of Native Americans. This is a really important issue not just to me especially as I studied the right to counsel for, um, Indians in tribal and federal court but for the administration of justice, um, in general in the United States. Indians are hailed into federal court differently than any other race in the American system. They are [INAUDIBLE] from the Indian reservations into federal court many miles away to face, uh, allegations, prosecution, and sentencing under a foreign system. This fortunately is countered by access to justice under the Criminal Justice Act whether it be a federal defender or a panel attorney. Unfortunately because of the gaps in the culture, there is also a gap in justice.

My comments focus on the need for training of federal defenders and the CJA panel in general on cultural issues, cultural competency and literacy but also the substantive underlying law in federal Indian law and the intersection with criminal law. This is important to protect natives' rights in federal court because although they get an assistant defender, much of what has come before in the case happened in tribal court where they aren't entitled to an attorney as a matter of constitutional guarantee, um, or even statutory right.

In tribal court, you have a right to access an attorney, to have an attorney if you can afford one, unless you are a non-Indian appearing in tribal court under the Violence Against Women Act, Special Domestic Criminal Jurisdiction. This is a huge disparity among races. Um, not all tribes can afford to provide defenders and when they do, they might be a tribal advocate and a non-law-trained defender. The tribal advocate that I worked with at the Warm Springs Indian Reservation in Oregon was invaluable. She was helpful in every way. Um, as Ms. Duncan was saying, someone who knew the community knew the, the geography, knew where to find witnesses and knew the culture. Um, it was so essential to my investigation and putting on, um, jury trials which we did regularly in that tribal court. What they couldn't do is protect natives, um, who appear in tribal courts without an attorney from the overreaching that might happen in investigation by the FBI or the BIA or other tribal police. When the investigation is initiated on the reservation, it's unclear which laws apply and that justice gap allows for, um, Miranda rights and Sixth and Fifth Amendment rights to counsel to be obliterated before the case comes to the federal court. Um, these particular instances are documented in cases like the *United States v. Dougherty* and *United States v. Swift Hawk* out of South Dakota where the judge was admonishing, um, all of

the people, all of the federal agencies involved for knowing that, um, the Sixth Amendment right to counsel applied but there were some questions about when, when persons were given the right, their Miranda warnings and, and, um, when the right to counsel triggered.

There is also a need for robust diversity in the federal court system. When I testified before the Indian Law and Order Commission, Judge Martha Vazquez of United States District Court of New Mexico said that scarcity is a problem. She is credited for being the only um, person in the federal court system that we know of that held a trial in Indian country to allow access to the witnesses and family members and the community to be available, um, both to testify, um, for the defense and the prosecution. But she also said that there is a problem with Native Americans being just defendants in the courtroom because, um, and I would agree with that, that as an Indian woman being the only native in the system that I knew of, um, was the real problem because the culture within the federal system, already being taken out of, um, the Indian reservations under the Major Crimes Act, Indians are seen as the smallest body, um, that hails back to, um, some stereotypes and it impacted the access to justice both in bail release hearings and, um, throughout the evidence portion, and even into sentencing.

Natives need to be able to be known and understood both, um, as people, um, who are competent and can appear in court in other capacities as judges, as defenders, as prosecutors, um, as pretrial services officers, as bailiffs, and not just, um, the criminals as they are seen. There is a need for specialized training in representing Native Americans that would encompass basic federal Indian law and jurisdiction but also the special nuances of the regional areas. The 566 tribes are very different. The Pueblos being different from the Navajo and the Mescalero Apaches even in, in and among New Mexico. Um, also, specialized training in Indian country cases to include all of the § 3553 factors in sentencing, um, because it's rare that a native's background isn't part of the reasons he or she is held before the court. So, the nature and circumstances of the case on the reservation and the history, background, and characteristics of the Indian individual are really important but, um, the federal defender can always access those cultural aspects that might be appropriate in both defense and sentencing litigation without the help of training and access to people within the community that are willing to help.

I know the Committee will have questions and I'm happy to answer, um, and I hoped I have raised some issues also today that you haven't thought about before. Thank you.

Judge Cardone: Mr. Morris.

E. Gerry Morris: Thank you. Thank you very much for giving me the opportunity to address you, and the National Association of Criminal Defense Lawyers, certainly welcomes the opportunity to provide input. I know that you have all received the report that we have issued and I know you will have questions about that.

Let me give you a little bit of information about my background. It might give you some idea where I might be of help. I have just finished my 38th year as a criminal defense lawyer, uh, looking forward to several more. I have, I have a state and a federal practice. My practice is . . . federal practice . . . is primarily in Western District in the Austin Division. There is a lot of discussion yesterday about the Austin Division. As I travel around, I seem to be called upon frequently to try to explain in rational terms why we do things that we do in Texas. I do that a lot with limited success but I will certainly attempt to again if, if you have questions. Um, I have been president of my local criminal defense bar association, my State Bar Association, Texas Criminal Defense Lawyers Association. I am now president of the National Association. In addition to that, I have been involved in indigent defense reform.

Um, most recently and this may be of interest to you, uh, I have been a somewhat instrumental part of the effort to establish a fairly unique system of assigned counsel in Travis County, Austin, Texas in the state system. Um, it's patterned after the pilot program in San Mateo, California that some of you may be familiar with. Uh, the only three that I know of that are up and running are San Mateo, Lubbock, Texas and Austin.

Um, just to give you a brief overview and then I will get back to what's at hand here, they have a non-profit organization that's managed by defense lawyers that determine who receives court appointments, how they are compensated within some statutory limits, uh, determines the qualifications of lawyers who will receive the appointments, um, provides expert assistance, encourages them to use expert assistance, provides investigators and generally requires CLE set standards for areas of CLE that the lawyers must complete, and we generally manage the private lawyers who take court appointments. The equivalent would be of course, the CJA panel. Um, the National Association Criminal Defense Lawyers is, we have about 90 to 100 direct members, uh, through our affiliated state associations. We represent a total of about 40,000 criminal defense lawyers. Our mission is to ensure that each person or each entity accused of criminal offense in any court receives adequate representation regardless of their financial status.

Uh, for the last twenty-five years, we have been particularly involved in indigent defense reform and that effort escalated in the last few years. Uh,

we of course like every organization that has examined it are distraught about the, the state of indigent defense in the state courts. But the federal, the federal defender service, the federal defense system has always been held as the gold standard. It has always been the system that the state organizations looked up to. It provides quality representations in federal courts. The representation provided by the institution of public defenders is second to none. CJA panels, we discussed some of the issues. We think that can be elevated to the same level.

We adhere to and support the ABA Ten Principles of a robust criminal defense, indigent defense system. Um, number one in that of those principles is independence of the defense function. Number two is that any good system must have a robust both institution public defender system, as well as involvement by the private bar. Um, although generally the, the federal system has been held to be the gold standards, there were many that, we're concerned about the lack of independence from the judiciary.

Um, those problems became very manifest in 2013 with the sequester crisis, you know, they named it a crisis, because it was. Um, during that crisis, there was a feeling in, among the defender, uh community that when money got tight, that the Judiciary looked after itself more than the defenders and that uh, the defenders who had long relied upon the Judiciary to be their advocates for Congress, for funding were let down. Uh, a lot of defenders came to us and said, "will you help us?" and we took active steps in Congress. Uh, the defenders also did, there was uh, uh, bipartisan group in Congress who very much supported the defenders in their, in their budget fights. Uh, we also formed the committee, the task force that produced the report that you have. We, we noted that uh, the last comprehensive study of, of the federal indigent defense system took place more than twenty years ago. Even though when the system was set up in 1970, um, the main part was set up, uh, the, the thought was it would be reviewed every seven years or so. We felt that it was important that we undertake a review and that review becomes comprehensive and also be from the standpoint of the defender and that's what we did.

Um, the methodology that we used was we did some 130 uh, interviews with defenders uh, people employed by the public defenders' offices, CJA panel members, court personnel, AO personnel, all the stakeholders in the uh, in the system. As you know, many of those interviews were anonymous. Many of the people that we spoke to, spoke to us on the condition of anonymity. Our task force also reviewed um, I couldn't get an estimate how many volumes and materials, but quite a few. I know the task force members personally, they were very dedicated to this task. Um, after the review, after considering all the evidence, all the interviews, we

came up with what I think is a fair assessment of the state of the federal defense system and we also came up with some recommendations.

Key finding of a recommendation and key, the key issue that that concerns us, is the lack of independence of the, of the federal criminal, indigent defense system from the Judiciary. And let me talk about that just for a minute. I know you have questions about it but we're, what is our concern there? Why, why did the ABA in 2002 make that their first principle that the system should be independent, should be independent? Why did the committee, Senate Committee, in 1970 uh basically state it would be wrong for the judiciary to control the indigent defense function? They set it up merely in all measure. But why, why did the Prado Commission conclude that the function should be moved out of the AO uh, not only remain in this judiciary but is, as an independent agency. What is the problem? Well, the problem is that they are, they are very distinct functions within the criminal justice system as pre-existing functions. There's a prosecution, the, the judiciary, and the defense. Those functions have different objectives. The sole objective of the criminal defense lawyer is to provide the best defense for his or her client that they can. We looked at the decisions that we make from that prospective. We view the criminal justice system through that lens. Um, part of it is the job description, might be a big part of it is, we're tasked constitutionally and certainly by uh, by other legal precedent with that job to put our client first, uh so decisions for instance, I will touch on a few of them uh, for instance about whether or not we, we hire an expert, that's not primarily you know, in the first instance, an economic decision with us. That is a decision based upon what we think is in the best interest of our client and frankly that decision may turn out to be a dead end. But it was something that we needed to explore. Uh, we heard that the setting through uh, both days of testimony, we've heard reference made to judges thinking well, that particular expert is not uh necessary, well what is the basis of that decision? Where does that decision come from? That decision comes from the judges' role as a judge. Ah, that role is very different and in addition to the role, let me, let me suggest to you that we are different, that there's something about criminal defense lawyers. They are different from prosecutors and from judges. Uh, they made that, difference may develop later in their career but we are different. I can no more explain to you why I look at things the way I do, than I can explain to you why I'm left-handed. I just do, but I can tell you that I do look at things differently.

So, and I will elaborate on this uh more as I go along but that, that was the main finding that was our main concern is this lack of independence. Um, and when I say independence, I'm talking about independence of function, not necessarily independence, in a float, in an organizational chart, although that may affect function. But we're, we're talking about the independent ability to make decisions that are in the interest of our clients

and if those decisions are reviewed, uh for voucher cutting or for appropriateness of a request, that those be reviewed by someone who looks at those through the same lens that we do. And if that is denied, that request, or that voucher, that that person will sit down with us and explain from the perspective of the defense function why that decision was made.

Um, several years ago, we had a lawyer that decided that Title 18 have been wrongfully enacted and he filed numerous motions for that effect. I would have cut his voucher uh, if that would have come to me. But there are other things that may sound as, as wild to other members of this three, three-part process I'm talking about that that eventually have borne fruit. But again, I think it's important to look at it from the defense function.

We developed in our report ah, seven fundamentals of a robust in federal indigent defense system. Control over federal indigent defense services must be insulated from the judicial interference. I've touched on that briefly. The federal indigent defense system must be adequately funded, and I will come back to that in a moment. Indigent defense counsel must have the requisite expertise to provide representation consistent with the best practices in the legal profession. I think gone are the days when it would be adequate, I will use that word for a judge to look over the roster of the lawyers that are licensed to practice in his or her division, and say well, you know, I want to get over, so, so, we will do this case, I'm sure they will do a good job. They do a good job on the environmental cases that they brought to me. Uh, the, the federal indigent, federal criminal defense has just become too complicated, too specialized. The lawyers that handle those cases should have expertise and training in that area of the law. Um, it must, the training must be comprehensive, ongoing, and readily available. We're talking about that uh, this morning. Decisions regarding vouchers, payments to panel attorneys must be made promptly, by the entity outside of the judicial control. I touched on that when I was speaking about independence. The inherent conflict that we've, we've talked about, uh, so I won't go into any depth with my opening remarks. Inherent conflict is there, uh, if the lawyer who regularly practices in, in your court or in a court, uh, has to go to the judge who has heard the case, uh, who there may be an opportunity or maybe an occasion that arises in trial or pretrial where that lawyer is in opposition to the judge on some ruling, um, may forcefully be in opposition, may, may put forth some, um, defense. That the judge, he might not think, has merit but there may be a very good reason from the defense lawyer's standpoint from putting forth that defense. It is simply a chilling effect on the, the function of the defense counsel to know that they are going to have to go to that same judge, or to any judge, frankly, uh, to justify their, their voucher. Um, the federal agent defense system must include greater transparency. Yeah, I, I have read this reports several times and let me tell you, the hardest thing for me to figure out from reading this report is how the decisions get made

in the judiciary that affect indigent defense. I assume there is somebody somewhere that can tell me, probably has command of it, I don't yet, how a budget request is initiated, uh, that affects public federal defender's office, what committees that goes through, how it eventually gets to Congress and who presents it to Congress. Um, and as we, as we document that report and as we discussed here, that has changed. Uh, 2012, uh, there was a drastic change in how that, how that, um, system operates. And there needs to be greater transparency into how, as to how those decisions are made, funding being one of them, um, policy decisions in general affecting federal indigent defense. And lastly, a comprehensive independent review of this program, um, CJA program must address the serious concerns addressed in this report and that is your Committee.

We of course formulated this, this recommendation before this Committee was formed and we're, we're pleased to see that that, that is taking place. These are radical concepts. There is nothing in here that, that is groundbreaking. Most of it is reformation in some, in some respect of the ABA Principles. Um, this is, this is not new stuff.

Further reflections on how the, how the reports was put together: One thing that we discovered, um, was, to put it bluntly, the fear exists among the federal criminal defense bar, uh, before speaking out about their concerns about indigent defense primarily with the CJA panel with some, with the public defender's offices also. Rightly or wrongly, the perception is that if they speak out, if they request experts that they think the judge won't approve or will be unfavorable on, if they submit vouchers that challenge the, the statutory limit, that that will be viewed unfavorably by the judge and somehow, that will impact either their practice or to the ultimate result, to their cases. They want to get along. Uh, voucher cutting is an issue. We documented some cases in our report. There is, I guess, what I would call a de facto voucher cutting that is widespread. We know it is not going to get approved so we are just not going to bother to submit it. Um, factors such as, um, voucher cutting or not allowing billing for visitation of clients in remote detention areas, um, discouraging, and I am not sure, I, I have some insight to how this happens, but I think this obviously does happen discouraging the use of investigators. Um, we think that that this is somewhat a product of this culture that has grown up of fear, or apprehension, or whatever we want to call about swimming upstream in the system. Um, independence we think at a minimum should mean that the judges should not be involved in selection, saying staffing levels and funding the Federal Defender Organizations. Um, these appointment, the selection of who is on the CJA panel to help with appointment of private attorneys to represent defendants and the payment of those attorneys.

Um, and let me, let me do this. I was, uh, very interested in, in um, Mr. Frensley's questioning the other day, make your case for why, um, a particular aspect of the system ought to be changed. Let me throw this out for, for consideration either with this panel or, you know, later on in your discussions. Given the distinct position that the defense or distinct role that the defense plays as opposed to the other two stakeholders in the system, um, given the recommendation of the Senate Committee, given the ABA, um, guidelines, given the findings of Prado Committee, why should the judges be involved in these processes? What is the reasoning why a judge should be involved in staffing a public defender's office? Why is it that a judge should be involved or the circuit should be involved in selecting the public defender? Why should a judge, be involved in determining who is on the CJA panel and in determining the payment? Um, what is the, what is the interest being served? And I am not suggesting that that interest is somehow is nefarious. What I am suggesting is that it is an interest that is not in line with the defense function, that is more than likely perhaps in line with function with one of the other, um, interests of the stakeholders.

Um, let me address with you, and I am about to wrap up with this part of it, the issue that I said I'd come back to the funding and this ties in with the placement of indigent defense function within, within the federal government. Um, there is consensus that the defense function among defenders that the defense function should be independent. There is not a consensus—although, the majority believes, according to our work—that the defense function should be removed from the AO and should perhaps be, um, structured as was the recommendation of the Prado Commission, not only left in the judiciary, we have to fit it somewhere in the organization tree but as an independent organization like the Sentencing Guideline Commission or the, um, Federal Judicial Center, um, but the fear in doing that, that was that, those that don't agree with that move. First of all, they all agree that at minimum, AO . . . the Defender Services Office should be re-elevated to its formal position within the AO, but those that don't agree that it should be an independent agency, are concerned about funding. They are concerned as one of the panelists said yesterday about becoming the next Planned Parenthood. Um, I don't share that fear. Perhaps, perhaps it is because my ox is not in that particular ditch. Uh, I don't draw a government check, but I do have some familiarity with the current attitudes in Congress about indigent defense. Um, we as an organization, we are there every day and we are talking to members and member staff. For instance, um, in the last six months, Senator Grassley has held committee hearing on the state of indigent, um, defense in, in misdemeanor courts in the United States. Uh, who would have thought a year ago such a hearing would have been held? During the sequestration, um, fights, as I said earlier, there was a bipartisan group of legislators that were very much in support of the defender function. There

are members in Congress that would favor a removal of defense function and placing it outside of the AO. Uh, I think that maybe, the fear is a bit unfounded but you never know until you start running the traps, until you start talking with people who, uh, who make those decisions in Congress.

Judge Cardone: I hate to cut you off but I am going to ask you to wrap it up because I know . . .

E. Gerry Morris: Yeah, I, I agree and I'm, this, this is the punchline. What I would urge this Committee to do is to determine what it believes to be the best practices, what is believes would be the best system for federal indigent defense without regard initially to whether or not it could be practically presented to Congress, whether or not it would pass, and then let them move into the second phase of, uh, getting support for it. That's all I have.

Judge Cardone: All right. Mr. Cahn.

Reuben Cahn: Let me start with you, Mr. Morris. Um, you know, one of the things and I highlighted the, the comments in your written testimony about the pervasive fear, um, and of course the things about fear, people who are afraid is they also won't tell you they are afraid and that's the reason they are not talking about this. And, you know, one of the problems we face as, as a Committee is not just coming up with what we think is happening and what you think is the best system but with getting evidence of the problems. And so, do you have any suggestions on how we can document both the fear that is preventing people from saying out loud what they believe to be true and documenting what they believe to be true about these things when they are not saying them to us, since we need this on the record? Can NACDL do anything to help us?

E. Gerry Morris: Well, they say what we can't do. We can't, uh, violate the confidence. We assured the people that talk to us that we, we are sure we wouldn't release their, their names. Um, it's possible. Um, I suppose that we could, we could go back and ask some of those if they would, individuals if they would agree to speak on the record. Um, it, uh, I don't know of, I don't know the mechanism of this Committee or the mechanism of this Committee would have. It could be that this Committee could, could talk to some people in closed session.

Reuben Cahn: Would NACDL be willing to consider reviewing its archives of material that it collected during the, the compilation of the report and producing some sort of anonymized version of this specific comment so that we could at least have access to that?

E. Gerry Morris: I'll, I'll discuss that with the task force and, and uh, with my executive committee and see if we can do that.

Reuben Cahn: Let me ask you another question about, you know, you, you talked in the abstract about structures that might be acceptable. Do you have a specific recommendation about how we, how would you structure indigent defense program if you were starting with a clean sheet of paper?

E. Gerry Morris: I, I don't have a specific recommendation. I have several specific, uh, things to consider. I think it is important that whatever, uh, structure that is ultimately put in place, if there is consensus among defenders, it is the correct structure. So, I think the next phase after you decide some general parameters would be to work in details. But for instance with the CJA panel, um, CJA panel I believe should be administered not by the court but by some sort administrative structure separate from the judiciary and separate from the public defender's office.

Reuben Cahn: Why on that latter part because there seems to be a fair amount of support for the idea that federal defenders can manage panels well?

E. Gerry Morris: I think there may be an inherent conflict there. Most of the cases I am involved with where there is a public defender, um, and there are CJA lawyers involved, the reason is because the, there is a conflict by defenders represented either another defendant that is indicted or cooperating individual. Uh, it may be that, um, that, that conflict would be serious enough and that is something of course Committee would have to think about if you would want to place the administrational panel, uh, with the separate administrator much as we have done with the state system in, in Austin.

Reuben Cahn: Ms. Duncan, can I put the same question to you or your organization, have a view of what you think the appropriate structure should be?

Teresa Duncan: I mean, it's hard for me to answer that question in kind of specifics. I will tell that we recently, um, had an overhaul of our state public defender system. For a long time, our state public defender was appointed by our governor and through the efforts of the criminal defense bar and generally in NMCDLA, we moved it, um, to independent organizations. Now, the law office of the public defender separate from both the courts and also from the executive. Um, in terms of taking it outside of the federal public defender office, I share Mr. Morris' concern about potential conflicts. I do think that, I'm not sure what percentage of the CJA cases that we get are because of conflicts with the public defender. Um, I know a lot of my cases are just individual defendants but perhaps the idea that was brought up early, for the earlier panel of some sort of a committee that includes multiple parties so that when you do have those issues of, uh, of a conflict, it's someone outside the Federal Defender Organization, um, who's looking over CJA work.

Judge Gerrard: Can I ask a follow-up, Reuben, with that? I want to ask specifically because I'm familiar with the, uh, um, San Mateo County, uh, model and I, and I was wondering, uh, is that at least a type of structure that, uh, that you think this Committee can be looking at as a model? And, and one of the reasons I ask is I believe the San Mateo Model County has a, when there is a conflict, they have a separate conflict office. I don't know if Austin does that or, um, but, but I want to ask you about, um, structure. Are, are you looking at a structure that would be similar, um, to that as far as the model?

E. Gerry Morris: This is me speaking and not NACDL but yes, and I'm, I'm very much involved in it.

Judge Gerrard: And we're looking at all kinds of alternatives, so I mean we want to drill down to what, what you are really looking at and if the answer is yes, I am going to be asking you why.

E. Gerry Morris: Now, I, I think, yes, and that's, and, why? Because I think, uh, it addresses, uh, all the concerns that we've talked about in the last day and a half. Uh, the, the lawyers are supervised. There are performance standards. There are minimum standards for them coming in to the panel. There is required CLE. There is performance evaluations that are done, uh, by experienced attorneys who actually observe them in court.

Judge Gerrard: How often are they done?

E. Gerry Morris: Uh, well they, they are done, um, it, it's ongoing. Um, you know, I, I couldn't give you frequencies. It's their three staff members that do it and we have four . . .

Judge Gerrard: So, it's every other year or so?

E. Gerry Morris: It's ongoing. We, and I'm, I'm on the committee that reviews complaints so we get complaints frequently. They are coming either from those reviews or from clients or from the courts sometimes. Yeah, I think it's a good system.

Judge Cardone: Mr. MacBride, oh, did you have a follow-up question?

Reuben Cahn: No, no, I was just saying but go ahead. [LAUGHING]

Judge Gerrard: I mean, I know you're familiar with the system too.

Reuben Cahn: Yeah, I know. I do have one question about system and then let me hand it over to Neil. If you can just tell me in a general way, to whom is that

system then accountable? I mean ultimately, we all serve somebody. Who, who watches them? Just the legislator and the budget committees?

E. Gerry Morris: No, there's, there is, uh, there is, the two levels of oversight, there is a, um, a, citizen's committee that has members from various stakeholders, uh, in the minority community and, and other communities that functions as an advisory committee to a nonprofit corporation. The nonprofit has a board and all of the board members are defense lawyers. Uh, ultimately, we have, uh, guidelines as far as minimum payments, maximum payments, or, um, presumptive maximum payments, and, and qualifications of lawyers, that are set by, uh, what we call the criminal, the Fair Defense Act. The judges get together and they say, we want lawyers to handle a particular type of case who have X amount of experience. Um, then my committee reviews those recommendations from the judges and we may raise them and we have raised them in, in certain instances. The funding, uh, comes partially from the state, partially from the county commissioners. Ultimately, we have had to make our case more often to the county commissioners as to whether the system is working, uh, or, or not and part of the pushback we had, uh, is that we excluded some of the lawyers that have been getting poor appointments for a long time from, from the, uh, eligibility. Those lawyers went to the commissioner to complain about it and we expected that. So we, we met those complaints with the commissioners.

Neil MacBride: Thanks, Judge Cardone. Um, first the question for, uh, for Mr. Morris and picking up on what Mr. Cahn was asking you. Um, I, I may have misunderstood you, Mr. Morris, but I thought you said you when you were discussing sort of structure issues in your opening statement, you, you said, with respect to the defender service, that has to fit somewhere within the organizational structure, uh, of the judiciary. And I just want to, uh, push back on that. Um, I'm looking at your, your prepared testimony which, which I thought was, was very well done and, and you quote from the legislative history from a Senate Committee report in 1970 where Congress was thinking out loud about various options and, and they conclude by saying, "it would be just as inappropriate to place direction of the defender system in the judicial arm of the U.S. government as it would be for the prosecutorial arm", and um, that struck me as being, you know, exactly right. I think it is matter of separation of powers. While defenders are not, you know, part of the executive branch like, like, prosecutors, they are certainly not part of the judiciary branch. And so, I just stepped down after four years as United States Attorney in the Eastern District of Virginia and if I woke up one day and somebody said by the way, you know, Judge Cardone here is going to be approving, you know, your, you know, your staffing and your and your investigations in national security cases, terrorism cases, organized crime cases, um, etcetera, you know, there would be a revolt. I can't imagine a prosecutor that would ever

agree to a system in which essentially their boss, even with a small b, is a judge. Likewise, I cannot imagine a judge ever agreeing to a system in which in some, you know, uh, way a prosecutor was signing off on something they do. So putting aside, you know, Realpolitik or the art of the possible, just is a matter of first principle, why would you ever agree that the defender service should be housed within the judiciary as opposed to some sort of an independent agency like the SEC or the, you know, the PCAOB or the CFPB? I mean, Congress has created, uh, no shortage of independent agencies in the last decade that are just housed floating, you know, outside the three branches of government?

E. Gerry Morris: I, I think when you take the political considerations out of it, the Senate's comments in 1970 were the better model, you know, what was, what was suggested there was something like a defender general's office. Um, I think the, Judge Prado certainly can tell you whether this is true or not. I think that perhaps the Prado Commission's, um, recommendation that they still, they still remain normally in the judiciary was more, um, in recognition of the politically practicalities, but I think that certainly, in a perfect world, it ought to be outside of the judiciary.

Neil MacBride: Okay, and then Professor Creel, I have a question for you. Um, you wrote in your prepared testimony that . . . , you wrote: "the Criminal Justice Act is founded upon parity between prosecution by the U.S. Attorney and the defense and the noble ideal of finances should not impact access to justice." I think that is exactly right, and I will say that when I was an U.S. attorney, I had long conservations with my counterpart, the federal defender in Virginia, and I always got the sense, um, that we never compared numbers, that we just had a whole lot more money in the bank, um, than he did.

Panel: [LAUGHING]

Neil MacBride: Um, and even with the caveat that there is a lot of things that we did where he was not "on the other side" in the way of the national security investigations that never resulted in the prosecutions. We defended the government, its civil defense attorneys in pragmatic challenges but in terms of sort of the, the common area of the venn diagram between our offices, I just had the sense that I had a whole lot more resources, uh, than Michael Nachmanoff did. And so, my question, this kind of jumped out in your testimony, but I am wondering if you are aware of any efforts by either, you know, the AO or any, you know, sort of outside entity, academic or, or otherwise, to try to do some apple to apple comparison of, uh, you know, of, of funding streams, of responsibilities of caseloads to try and compare, you know, in a typical district for example, sort of what on an apple to apple basis, what the U.S. Attorney's resources are versus what the corresponding FPD and CJA resources are in that, you know,

parallel symmetrical, um, sets of responsibilities just to see whether anecdotally, you know, is right and what is the gap and what does the data show. I am just curious of, if you are aware of that.

Prof. Creel: I am not aware of any studies that have, um, tried to look at apples to apples in terms of the funding pools of money for the U.S. Attorney's Office and Federal Defender Services. Um, and when I speak about parity, I am speaking about it in much broader terms, both the financial resources, um, but then how those financial resources get allocated with regard to Indian country and what specific necessities might be, um, imperative for parity. So, I thought really a lot about what you're asking at its core and went through what the U.S. Attorney's Office has in addition to the DEA and ATF and then FBI. In Indian country, what makes it even more desperate and, um, outlined some of the initiatives under the U.S. Attorney's Office that they are boasting about for their unprecedented crime and punishment initiatives to make up for the lack of justice, um, that has arisen on Indian reservations. And many of these issues come from social issues that come out in the criminal justice system, alcohol, um, the lack of treatment, um, it never gets talked about. Um, but that is the core of most of the cases that I saw of the Indian reservations and in, um, all of the other factors that we are taking about that lead to someone being in the federal criminal justice system. Um, the, the Tribal Law and Order Act asks for specifically, um, efforts after consultation with tribes into alternatives for incarceration and the U.S. Attorney's Office has not or the Department of Justice has not, um, I think paid enough attention that, they did a report on some of the easy things that they could do, but that is something that a defender service office could look into, um, if it was separate and distinct and had, had the funding that would provide initiatives that would keep, um, people out of jail and into programs that might be more helpful. Um, so the type of study that you are, you are looking for would be, um, a great asset, maybe could be requested through, um, the GAO that stun some excellent reports on, um, uh, specific questions from Congress.

Katherian Roe: Uh, Professor Creel, my question for you and again kind of just going into further the efforts in Indian country. Over the last several years as you know, the Department of Justice and Congress have had a number of initiatives, Tribal Law and Order Act, the Violence Against Women Act, um, all initiatives that either enhance tribal prosecutions or increase their jurisdiction, um, or increase the punishments for Indian people. And I was interested in the comments that you made earlier and perhaps you could give us some of your suggestions as to why it is important that there be training for whether it be CJA attorneys or assistant federal defenders in the inter-lap areas of the areas of criminal law that inter-lap or intersect, if you will, overlap, intersect with federal law, specially the dual sovereignty issue and the and double jeopardy issue in the use of the un-counseled

convictions. So those kinds of things, and what kind of training you think would be, would be positive especially in light of all the training money that has gone to the Department of Justice for those same issues to prosecute Indians but not to defend Indians.

Prof. Creel: Um-hum, um-hum. Um, because of the independence of the, the defense side, I think that, um, we lost out on, on the training. I have been approached by the Department of Justice to initiate trainings in Indian country and, um, have attempted to do some overviews of Indian law but there aren't any dispense-specific trainings. Um, the, the one that are held, um, with the Department of Justice include, uh, judges, prosecutors and police officers and um, we all know that, that is not effective defense training.

Um, so there is the, the criminal defense training that needs to occur but then it has to have the overlay of what is different in Indian country starting with the Major Crimes Act, the difference between the General Crimes Act and the Major Crimes Act. One of the major issues under this racialized law is, who is an Indian? Um, it rarely gets raised. Um, there is one case out of the Ninth Circuit, *United Sates v. Zepeda*, where the question came up almost inadvertently and then became, um, a real issue, um, challenging basic notions of, of whether the jurisdiction is proper over the person to, um, the, the more uh, complex issues of where is Indian country. In New Mexico, Indian country is defined differently than in Oregon or Oklahoma, and so, litigating that issue for jurisdiction basis. When the Indian person might be more appropriately punished under the tribal law and, um, treated might be helpful, um, versus federal court.

Um, there should be some coordination among the Indian nations on when, uh, in sentencing and mitigation, um, the kinds of, um, culturally appropriate treatments and punishments that might be more, um, deferred, um, than the federal Sentencing Guidelines. Um, again, I think that, um, there, there are so many different issues that haven't been explored in, um, the Indian individual as a defendant in federal court, um, that need to be brought out by these brilliant attorneys that need to think about these when they know the difference in, in Indian Law.

Um, one of my issues is the use of uncounseled convictions in the United States constitutional scheme that is contrary to, to all of our notions of justice within, um, the Sixth Amendment embodied in the Fifth Amendment but only gets applied to Native Americans because they are the only ones that come up to the federal court with prior uncounseled convictions. I sat in recently in a tribal court, also where they had a law-trained defense attorney and they were still being routinely, um, processed in the, the tribal court because of pleading guilty on the spot, no investigation, um, no discovery, no, um, exchange of motions because the

individual wanted drug treatment and if they got sentenced to thirty days or more, they could access drug treatment. Well, that's unconstitutional in our terms but that would come, a law-trained person, a prior conviction, when that person comes to federal court, um, that could both be the basis of a federal offense and the basis for, um, an upward departure under our own, uh, thinking in the U.S. Constitution and that's just not appropriate and, um, illegal and I think, um, completely discriminatory.

Katherian Roe: That could be used against them as an incriminating statement at trial.

Prof. Creel: Exactly.

Judge Gerrard: And I want to follow up on that, uh, Professor Creel because one of the things that we want to know and what we don't know and this is a unique

Prof. Creel: Exactly [LAUGHING].

Judge Gerrard: Yeah, this is a unique opportunity to do that and I want to know, um, what issues that you see or the, uh, most urgent in the interaction and I guess I'm talking macro, uh, now, between the tribal justice systems and the federal criminal justice system that, that the CJA, that the Criminal Justice Act can address? What recommendations we should be, be looking at? You know, what are some of those issues and what recommendations do you see that . . .

Prof. Creel: Right, I, I thought a lot about the scope of your review.

Judge Gerrard: Good, okay.

Prof. Creel: Um, and um, diversity is, is one. I think that's one of the first issues. Um, qualified counsel I think is different in Indian country, um, cases and that requires this training that we are talking about, um, availability of counsel on conflict cases, um, the excellent services of the federal defenders, um, don't always get spread, um, because of conflict cases need to be spread out among the panel attorneys who have this training. The coordination between the tribal case and the federal case is nonexistent unless there is someone within the federal defenders office who has gained access and cultivated relationships in, in and among . . .

Judge Gerrard: Tells us about that . . .

Prof. Creel: Um . . .

Judge Gerrard: Because that, that's an area that is of specific concern.

Prof. Creel: The, uh, investigators that I've worked with in, um, in the federal system are excellent in finding the information on the reservation and those, that information requires, um, a cultural literacy that is beyond just our, our regular law training or investigation training and that is you are entering a foreign nation. It, it requires a degree of diplomacy in understanding the group that you're working with and communicating. So, being able to find witnesses, find mitigation information, get documents from the Indian Health Service or the BIA schools might be different than finding it, um, in your local public school. Um, also, um, just knowing the family relationships and the background might be really helpful both in investigation and in, in mitigation.

Um, outside of the defenders office, I think that's much harder to find, um, and what I really want to focus on is the coordination both of training. There has to be something where, where all of the same trainings are available. I was thinking more of, through the, through the federal judiciary training center or this, uh, separate Defender Services Office could provide training on Indian country. They are routine in a regular, on the U.S. Attorney's side. I, I noticed for a webinar or a local live training, um, for Indian country prosecutors and just the general public. And what that promotes is this idea that Indians are criminals and, um, that there, it's sort of just this accepted idea because they, they are brought into federal court, they must have done something really serious.

What I found is that there are victims on both sides of the courtroom when I enter it and if that person who, um, is being charged, the defendant now, he had a background and history, um, that is the same as the, the person who, um, is being charged of the defendant now, he had a background in history that is the same as the person who is being labeled as the victim. It is just the matter of the, the timing of how these, um, incidences played out. There is, there is so much that can be learned, um, through cultural literacy and substantive training so it is not just, it's not just a humanitarian idea. There really are specific, um, ABA guidelines on how to approach, you know, different cultures. Um, we mentioned the use of interpreters yesterday and I am working in the state courts, to provide interpreters, um, a training system for certified interpreters in tribal languages and, um, like Mr. Morris said, we looked to the federal courts as our, our gold standard but there aren't any. And so, I think that, um, interpreters for tribal languages, um, are a requirement both in and outside of the courtroom.

Reuben Cahn: Let me ask you as a follow-up about the training with you, Professor Creel, and that is, you know, the training division within the Defender Services Office largely facilitates and coordinates training that is provided essentially by defenders to defenders. And so, my first question to you is

do you think sufficient expertise exists within the federal defender community to do the sort of training that you think is essential?

Prof. Creel: There are some excellent attorneys, um, maybe Attorney [LAUGHING] Jon Sands is, is sort of the lead person in the Ninth Circuit that, um, knows the Indian issues and there is, um, there is not enough diversity, people who come from native backgrounds or had studied Indian law. When I was in law school, we were recruited from the Department of Justice and told as Native Americans, you need to go to the U.S. Attorney's Honors Program and, um, outside of law school, I was told you need to become a U.S. attorney because that where all the power is. And the, the power is deciding who gets charged and, and how to protect Indian women and children and how it is being, being sold now. So there, there has not been a pipeline for training in this area even though the Major Crimes Act has existed since 1885. There just isn't the same kind of knowledge and it is because we are such a small portion of the population but when you look at the incarceration rates and the prosecution rates, um, there is really no, no good reason why Natives have been ignored in, in the training among federal defenders. Um we are talking about recruitment in the last panel and I think that the, the culture of elitism in federal court has to, has played some part in, um, the many attorneys that, um, and judges that I have worked with, um, don't know what they don't know and so assumed that bringing a criminal defense, um, or a degree of some sort from a specific school was enough to catapult them into being an excellent attorney or judge and um, there needs to be more, um, education in the judiciary and, and the bar, the bench and the bar in Indian, Indian law under the Major Crime Act.

Reuben Cahn: There in and I think, you know, pardon me. Understand that I am from California now and we just, you know, the case has gone to state court and on the federal court but have there been any efforts to coordinate with academic programs like yours at University of New Mexico or other universities, um, to, to jumpstart this sort of training?

Prof. Creel: Um, not enough. There is the University of Washington who provides an Indian law clinic or an Indian defense clinic in Tulalip and that was the key piece that allowed Tulalip to become VAWA Reauthorization of 2013 project, um, that would allow special domestic violence criminal jurisdiction over non-Indians, so you have to have both the defense that was law-trained and the, um, prosecutors. So, it, it, it can cut both ways. Um, I think that the training needs to happen and it should, it should involve the universities and, um, Indian law programs. I think that is an excellent idea.

Reuben Cahn: Ms. Duncan, I had a similar question for you but not about Indian law training but you talked about the training that your organization provides

and its willingness to coordinate at least with the federal defenders and with the, the Defender Services Office. Has there been any such coordination, any efforts to work with you in providing training in particular in the rural areas?

Teresa Duncan Um, so I don't think it has been particularly organized but we do work with the federal public defender, Stephen McCue, and with individual federal defenders to provide training to our membership around the state. So, as I mentioned, one of the members of our CLE committee is an assistant federal defender, a current assistant federal defender. Um, in preparing for this hearing, our, our CLE committee and our leadership has talked a lot about how do we incorporate these ideas into our, you know, next year's training so the, um, training with respect to Indian law, Indian country cases and obviously working with the university may be to bring in some different trainers who have more experience in those issues than, um, you know the usual people who are presenting. So, you know, I, I, we were not aware until preparing for this hearing there that our CJA plan required four hours of federal, um, training and so that's obviously something that we are going to focus on in 2016 and the years going forward and talking to the federal public defender and hopefully with the judiciary as well. Um, what, what does that mean? I mean what, what would qualify as federal training? Are there issues that are coming up consistently that any NMCDLA can help with? So, I hope that answers your question.

Neil MacBride: Thanks Judge. Uh, for Ms. Duncan, um, I chatted earlier with, with Mr. Morris about through the judicial oversight and I want to ask you question less about sort of structure but more of sort of day-to-day, how it plays out sort of in the real world and your experience, and the Committee has heard both in testimony and as well as, you know, submitted comments, sort of a litany of, of, um, you know, concerning anecdotes of, of CJA, uh, lawyers who are concerned that advocating a particular, you know, position or argument or motion could, could upset a, a judge, could even jeopardize their place on the panel, um, sort of I think the suggestion and I think we may have heard it even in the last panel of, of inadvertently or otherwise having to essentially provide privilege information, you know, to a judge as part of their review of, of vouchers. Um uh, you know, vouchers being cut or, or, or full vouchers not being submitted just because, you know, let's, let's not sort of, you know, essentially let's bid against ourselves before the judge, you know, bids against us. Um, we heard a lot of that and um, I think it has been almost entirely anecdotal. You know, one thing the Committee is, is very interested in is data in whatever fashion to try and, you know, put some, something concrete behind the stories we are hearing. Uh, I am just curious from your experience and, and from your colleagues. If your experience, your colleagues' experience, uh, have involved, you know, any sort of these, you know, suggestions of, of, um,

you know where the feeling was a judge, you know, sort of put the lawyer in, in a tough place in terms of, in a way that an AUSA will never, you know, appear before the judge being worried about that their motion is going to, you know ,result in, in um, you know, sort of economic resolve, but just curious if you could talk about what your experiences has been here.

Teresa Duncan: In talking to CJA members when preparing for the hearing, I heard sort of different, all across the spectrum really, attorneys who had filed really expert requests that were denied and didn't push it because of concern about how the judge was going to react to that, denied or pushing on the issue but then there are also attorneys who when their motions are denied and they feel that the experts are important to their case will push back, you know, through an ex parte communication with the judge. Um, so you know, there, there is, in New Mexico as there is across the country, some fear in, um, pushing issues for which they previously had been denied. I heard about mitigation specialists, mitigation investigations, um, the experience is not uniform. I, I, you know, some attorneys are getting requests funded, some are not, and I think that may be a function of how requests are being presented to the court or could also just be a function of differences in judges that some judges find particular experts to be relevant and others don't.

Um, so you know, I think it really comes back down to a training issue on both sides. I think for the, for the CJA lawyers to have a better understanding of how CJA works, what can be funded, what cannot be funded for judges to understand what it really requires for us to represent our clients and how, as Mr. Morris was saying, there are certain avenues that we may need to pursue which never get presented in the court which does not make it a waste of time. It was an important thing for us to pursue and I think about, um, you know, I recently did a capital case in investigating a client's mental health and their family history, you will engage experts who will, you know, point out to you maybe you should pursue this avenue and you need an expert then to go down that avenue and it may be at the end of it is a dead road, you know, a dead end, but it was important thing to investigate and open up other areas to present a full picture of your client.

Um, so I think, and one of the things that I would really recommend is some mechanism for CJA lawyers to be able to express, you know, to, to share their concerns, um, without that fear that somehow, they are going to be punished for it, and I don't know how that would function. Uh, and I think educating lawyers about how, how to present your expenses and requests to the court. So, another, we had a presentation by one of the magistrate judges a couple of years ago at one of our CLEs, and she was talking about some distrust among the judiciary of CJA billing. Where

you look at the docket and the docket says this hearing lasted for point, you know, for fifteen minutes and the CJA lawyer bills for an hour and a half and you know, the, the presumption was that the CJA lawyer is padding the bill. I know for myself, there are frequently times when I have a hearing at 9:30 and I sit in court until 10:30 and that's when my case gets called and so, I think that the difference between that person who is being viewed with suspicion in me as that I will tell the court this is when you set my case and this is when you called my case and at that time, I was sitting and talking to my client and talking to prosecutor, that sort of thing.

So, um, yeah, I just, I think education on both sides of the bench and some mechanism for CJA lawyers to share those concerns about that, that fear of reprisal, um, and you know, in preparing for this, there were lawyers among the panel who shared information with us again under the condition that it was anonymous. Um, and it's possible that some of those lawyers that we talked to would be willing to speak to the committee but, um, I think that there, there is a concern about raising those issues.

Judge Cardone: Ms. Roe.

Katherian Roe: Mr. Morris, I wanted to ask you about, um, one of the things that you commented on, on the issue of fear and, and just, uh, voucher cutting and one of the things that you talked about in your statement today was this voluntary or if you will, maybe involuntary voucher cutting, but essentially folks cutting their own vouchers in an effort to avoid further cuts or in an effort to avoid the court, um, looking dis-favorably upon them. Can you tell us a little bit more about what you, you learned about that?

E. Gerry Morris: Well in the report, I think we cited an instance where there were sort of a, a middle ground to that where the, where someone from the clerk's office called a lawyer and said, "don't you want to cut this voucher because you know if it goes to the court, he is not going to approve of this amount and if you want it to, to go through, um, cut this amount. If, if you want to, you know, take a long time to fight over this, that is your business." And, uh, that, that's one example. Some of the things that I bring to you, uh, I talked to a lot of lawyers in my position and they tell me about their experiences and I, I frequently hear that comment that, "I know what this judge will pay so there's no reason for me to go above that." And, uh, so, it, it is sort of, they figure out in the culture that particular court what the judge believes to be reasonable or what, what the judge will pay. And, and let me say that sometimes, it is not that much a function of reasonableness. It is a function of what that judge believes will be approved up the, up the chain.

Katherian Roe: For that type of case or . . .

E. Gerry Morris: Correct.

Katherian Roe: What, what a bank robbery is worth or some kind of reasoning like that?

E. Gerry Morris: Correct, um-hum.

Katherian Roe: Uh, have you had any, um, discussion during the report or with the individuals who worked on the report about, um, attorneys saying that they chose to make these voluntary cuts because they were concerned not only with whether or not the voucher would be paid but whether or not it will reflect poorly on them for future appointments?

E. Gerry Morris: You know, you're asking me if I have had any specific comments. I would have to go back and review all the materials but I can tell you that that that's, that's been presented to me as the general feeling that, that's another aspect of why they do this, is they don't want to appear to be, um, as I said earlier, swimming upstream and, and their concern that somehow, since that same judge may control, uh, the CJA panel that it will reflect on, impact their ability at cases in the future.

Teresa Duncan: If I could just add to that, um, we, we, that concern has been, was expressed at NMCDLA in getting ready for this hearing that, uh, especially seeking to go over the statutory maximum that, that would just, like you are milking the CJA system even though you did put in the work. Uh, and we have been talking as a community about how to fix that because, you know, obviously when someone comes in and under-bills and they spend way more hours on the case and they are informing the court and the court has now an unreasonable expectation of what the defense looks like for particular categories of cases. And so, I think that's a real, a real worry for all of us and I don't know how to address that, um, again whether that's just a conversation that we have between the CJA panel and the court, um, but, I worry about that. I worry that judges think that a robbery can always be done underneath the statutory maximum because there are so many people who are just billing under that to, to avoid making waves.

Judge Cardone: Can I have some follow-up question to Mr. Morris? Mr. Morris, do you know why Austin doesn't have a CJA panel?

E. Gerry Morris: Yes.

Judge Cardone: Can you tell us?

Panel: [LAUGHING]

E. Gerry Morris: Because the Judges won't approve of one.

Judge Cardone: And, and but, but do you know what, um, what the mindset is? I mean we have heard that other jurisdictions don't. I mean is, is there, uh, an articulable reason for that?

E. Gerry Morris: Yeah, in, in preparation for coming here today, I actually called someone who is involved in that system and on agreement that I wouldn't reveal who it is. He told me what system it is. Uh, everybody in Austin that is in the federal bar is just getting appointments, um, and, and sometimes they do. I get calls from lawyers all the time and in civil firms and they are saying I just got an appointment, what would I do? Um, but then the, the magistrates have kind of a smaller list that is informal. They just sort of pick lawyers that they know that they can call on to do for different types of cases. There had been discussion over the years of doing a formal CJA panel and there is apparently some tension between a philosophy that if you are going to practice in federal court, you need to pay your dues and represent indigent defendants and the philosophy that this needs to be, uh, a very well-run system that will place in the defense on the same footing as, as hard counsel with training and, and expertise and, and uh, so, it is, it is basically a battle of philosophies.

Judge Cardone: Do the CJA, I am sorry, do the attorneys that are appointed . . . these civil firm attorneys, do they do it literally pro bono? Do they not bill through the CJA? Do you know?

E. Gerry Morris: They do bill and, and I have been hired by civil firms to you know, they are concerned about you know affecting the systems so they, they would hire me or some of my colleagues to basically co-counsel with them on appointed cases.

Judge Cardone: And, but they, but then they also bill through the CJA?

E. Gerry Morris: Yes.

Judge Cardone: Okay, thank you. Your turn.

Judge Gerrard: Okay. [LAUGHING]]

Judge Cardone: [LAUGHING]

Judge Gerrard: There are a number of questions but, uh, again Mr. Morris, I have been involved in a couple of these larger studies in the, in the state system and you go back and you think, I wished I would have asked these questions,

now on the, uh, on the study that the NACDL performed. Uh, if I were to ask you, what would you do differently if you are starting the study now and the reason I ask that is because we are getting all, all sorts of, uh, anecdotal evidence, what, what you are going to get and I am not saying we are going to disbelieve that in, in whatever sense but, we have to make a case at some point in time to the judiciary and probably ultimately Congress, um, that is going to have to be supported by, by data, um, and um, I have not seen a lot of data that support at this point in time for, for those that would be, uh, skeptical or would, or would want to know, you know, for example, voucher cutting, how, how often? We know what happens, okay? What circuits does it happen in and which, which courts and we don't need to know specifically but is this happening 95% of the time or 40% of the time and um, I am very interested in knowing how to gather that data and what, are there roadblocks you run into or what would you do differently that, that you can help us with? Because we will have, you know, we have had people testify that, you know, voucher cutting just is not an issue in, in my district and in other ones, that is a huge issue, and other ones that is not an issue at the circuit court level and many places it is and so, how do we gather that data? What would you do differently?

E. Gerry Morris: Well the way, kind of to answer your question, the way we gathered the data was to ensure anonymity. Um, again I, I don't know enough about the workings of your Committee you know what your capabilities are in that, in that respect but there has to be some way to get the same people to talk to you, that talked to us. Uh, the . . .

Judge Gerrard: But how is that supported statistically? And I am just making observations. I am not being critical but you tell somebody I went out and interviewed 135 people and gave them anonymity and this is what they told us, what most people will do with that information?

E. Gerry Morris: Uh, I don't think the support is statistically. I don't think that, you know, that all the parameters that they would make a good statistical study were, were observed. I think if you want it to support statistically, then you would have to, uh, have some statistically valid model to, to reach out to these folks but then you would still run into the problem when they talk to you, so you had to again couple that with, with some assurance of anonymity. Um, you know, I noticed the reason the Prado Report was rejected it was because of lack of empirical data, um, and I, I think that is . . .

Judge Gerrard: It's true. [LAUGHING]

E. Gerry Morris: That is exactly what you are talking about. Uh, so I guess things I would do differently, I guess or things that I hope we can go back and then redo, I would like to be able to, to come to you and say, John Doe, or Jane Roe

had a voucher cut on x amount. Uh, we have cited one example of voucher cutting in our report because that lawyer was particularly upset about it. The judge had actually sought him out to handle the case. He handled the case, got a not guilty and his voucher was cut and, uh, so somehow when we are trying to build a model that we could get us a valid sample. The other thing is we very consciously viewed this as a two-step process as I was saying in my remarks. The first step was to gather information and come up with fundamental recommendations so the touchstones of what a system ought to be. We viewed very much it to be a second phase to determine how to enact or unable those, those touchstones um, and that, that would require us going back to the public defenders of CJA panels say alright, you know, this is what, what is going consist of. Where do we put this in, in, you know the judiciary or separate agency, you know, what do we have a max system or you know what do we come up?

Judge Gerrard: Can I end that and I don't want to interrupt. I am not sure we have that luxury. If we were to suggest an alternate system, um, I think we need to put some parameters as far as (A) what it would look like structurally, and (B) what it is going to cost?

E. Gerry Morris: Uh-hum.

Judge Gerrard: At least in some framework and I guess, that what I am asking.

E. Gerry Morris: You know, well, I guess the answer is at that point, it is very different process.

Judge Gerrard: You're going to step one but no necessarily the step two.

E. Gerry Morris Right.

Judge Cardone: Um, I want to ask you question, could each of you give us any reasons for keeping it under the judiciary. You know some says it is protection, you know, to be able to have uh the judiciary, uh fighting for them or protecting them as we talked about Planned Parenthood. I would each of you to give me, us, one, two, three, any reason that you think it should stay, uh, under the judiciary? We will start with you Mr. Morris.

E. Gerry Morris: Uh, I can give you the argument for why it should be under the judiciary. I can't say that I agree with it and I think it is valid argument. It is that, uh, there is a lot, some would feel that judiciary does provide cover for the defense function before Congress in getting appropriations. I think that is the only reason.

Judge Cardone: And you don't agree with it, why?

E. Gerry Morris: I, I think from what I have observed in the last two to three years, uh that there is great support in Congress for the defense function and that the experience during the sequestration was that the defenders went up and advocated on their own and did quite well with it. Uh, so I think, I think the, the defense function could do well, you know, a separate agency, advocating on its own.

Judge Cardone: And you don't think those winds could change?

E. Gerry Morris: Certainly, they could and, if we were to design the system with certainty that that would not happen, I don't think we were able to come up with the system. I think that's just an errant risk.

Judge Cardone: How about you Ms. Duncan?

Teresa Duncan: You know, it is hard for me to think of another reason why other than that coverage, to keep it under the judiciary. Um, you know our state experience of moving from, I mean moving our law office, the public defender to a separate entity, although not perfect, I think has really improved the independence of our state public defender. I think it is, so, yeah, I would say that, I do worry about the winds of public opinion. We have seen those changes here in the New Mexico in recent days, um but I think the independence and the public defender and defense, and defense counsel is critical to effective representation and I, I am concerned about, you know, keeping the defense function to the judiciary and impact it has on that independence.

Judge Cardone: Ms. Creel, Professor Creel.

Prof. Creel: I think that being under the administrative office of the court is, is, has been an important, um, factor in allowing the defense to be elevated to something that is critical to um prosecution in defense of parity but the, what I've heard in the last two day is that, that because of scarcity that the defense is always going to get, um, less than and so there has to be some independence outside of, it has to be well-funded. Uh, and make sure that it, it isn't, um, de-funded just because, um, we represent unpopular people.

Reuben Cahn: I would come back to the issue of voucher cutting and ask a question because one of the things that occurs to me as I listen to all of you talk is that, if we could somehow perfectly capture the statistical reality of voucher cutting, it might not be adequate. I'm starting to get this picture of the voucher cutting being the tip of the iceberg and the self-editing of request for experts and the self-editing of advocacy being, you know, what sits below the waterline, that's a bigger and more dangerous problem that

I'd like to know what you think about that, is that an accurate view. Is there any way you know to get that?

E. Gerry Morris: If, if I may, just to give you an example, you know, in our system in Travis County, the first month that we operated, we have one request for an investigator, uh, the, the Managed Assigned Counsel (MAC) system that hires investigators. We have staff investigators who are available to panel lawyers. The next month we had seventeen, uh, and the last report I saw, we have had now, hundreds of request for investigators in the nine months, the, they are keeping . . . the things been running. I think that reflects what you're saying there is, uh, uh, the, the other ten-elevenths of the iceberg there, that's, that's the cultural, um, issue among defense lawyers, uh, that I don't need an investigator, no need to ask for one anyway. We have actually had to, had to give them not so general nudge to, to change that culture. Um, and the other things at the tip of the iceberg is, I, I, I don't know that, that we're talking about a system where a voucher will never be cut again. I think what we're talking about is a system where someone looks at a voucher from a defense perspective and says, I'm going to cut your voucher because you didn't need that service that's ridiculous, what you did, um, or, its only so much money in the kitty and I'm cutting your voucher because we have two capital cases that are going to trial next month and we just have to have that money for those capital cases. So, uh, uh, both of those are examples, I think of, of how doing this from the defense perspective would create a different culture then the way it has been being done now.

Reuben Cahn: Ms. Duncan.

Teresa Duncan: I would say, you know, uh, uh, I think that the capital defense model is a good one just to use and looking at to the, the criminal defense overall. Um, and talking to capital federal capital defenders around the country the resources that are available to you for expert is what, very wildly, um, from district to district and so when I've gone this district is pretty good actually about giving the defense the support that they need but I've talked to other lawyers and other states who, their, their budgets for experts are just ridiculously low. And so, you know, I, I don't want to advocate for, you know, one size fits all approach but having some sort of, uniformity or discussion among the judiciary among the districts of what, what is required in the representation of, um, criminal defendants in the federal system would be helpful, because that it will elevate that and that means it helps criminal defense lawyer feel more confident in making requests in their own districts. Communication among defense lawyers, um, more formalized communication. I think would help a lot so, I think, we had the same experience here in New Mexico where someone litigates something or introduces as a kind of expert testimony into their case and then once that word gets out, other lawyers sort of jump on that and start

litigating those issues or using those experts in their case so, uh, one of the recommendations NMCDLA had was to, to figure out a system for sharing what's happening in our district courts, um, with the CJA panel who's, who's, uh, doing *Daubert* hearings on certain issues, um, no, you know, novel legal issues level, novel factual issues that sort of, um, sharing among lawyers. I think would really help, help with this issue.

Reuben Cahn: Ms. Creel.

Prof. Creel: I would add that the data for voucher cutting, I think exists at in the, in the courts, in the judiciary, um, collecting that information, from the judges when they, um, make, a, a, cut, I think would be, um, something that, that could be requested, uh, that might have chilling affect on, on the other, the other direction, but the data exists.

Reuben Cahn: I think one of things to be found is whether data should exist.

Prof. Creel: [LAUGHING] Well, it exists in its raw form when someone needs to collect it.

Reuben Cahn: Failure to collect it in anyway. . .

Prof. Creel: There you go.

Reuben Cahn: Of course, that was controlled by the judges who cut the vouchers.

Judge Fischer: Ms. Duncan, was there any analysis about the difference in the expense or the cost of the system when it changed, and, and why the, the vouchers go up plus for expert, goes up, how much did the structure cost or any other system?

Teresa Duncan: And you mean, in the state system?

Judge Fischer: Yes.

Teresa Duncan: If I could just speak to our Executive Director directly . . . do you mind? No.

Judge Cardone: Mr. MacBride, your turn.

Neil Macbride: Thanks, Judge Cardone, um, a question for each of the panelist um, sort of um, uh, uh, comparison uh, between CJA lawyers and AFPDs and a couple of data points just to set up the question. So Mr. Morris, in your, uh, in the task forces report, uh, from a few months ago, you guys included the anecdote from sequestration when at least a number of federal defenders in whatever fashion um, communicated to various

constituencies um, you know, "hey if you cut the federal defender budget, it's actually going to cost you more because judges are going to have appoint CJA lawyers and they're not as good, they're not as experienced, it's going to take them a lot more time, you know, we can do it better and more efficient." And, and you include that in there, I'm glad you did because I can tell you from um, my perspective is that, as a former U.S. attorney, I heard that a number of my colleagues around the country heard it. Pretty inside whether it's true or not, but we heard that, I think judges heard it, I know people on the Hill heard it, somewhat, sort, sort of data point number one.

Number two, the Committee's um, website, um, they point to the 2007 study by Harvard that, that compared outcomes between AFPDs uh, and CJA lawyers and uh, found um, in some fashion some uh difference in outcome where there were higher rates of you know, success, I'm using "air quotes", because they you know, defined it in certain ways but essentially you know, if, if, if you, if you have been charged with a crime basically anywhere the country, you, you would want an AFPD defending you rather than CJA.

So with those two um, just data points, um, I guess the question is um, you know, we all I think um, as a Committee are bought into the first principle that, that, that, the system was set up to be a hybrid system between CJA and FPDs, and, and I think the consensus continues to be until we see data that contrary to that as a good way to go forward so if in fact, there is some, um, even at the margins that, diminution or, or, or difference in, in training resources, um, experience between the two um, I, I guess the two questions are number one, um, at that, you know, put particularly that, well none of you are current uh, uh, FPDs, and I, I'm not sure Mr. Morris ever were, but is, is there any, is there any truth to that um, number one. And number two, if there is, um, it seemed to me that, that we as a Committee would want to make sure that we are making recommendations to provide you know, resources training and experience to CJA lawyers to across the board, you know, provide them the experience to, to um, you know, to, to so that there is sort of a you know, color blind or organization blind uh, outcome that if you're you know, unfortunate enough to be charged with the crime, they will be thrilled to get either an AFPD or a CJA lawyer you know, across the board, I would think that would be a good outcome, so just curious, you know, your, your thoughts on that.

E. Gerry Morris: I would think you couldn't paint with that broad of a brush. I don't think you could take uh, generic federal public defender office and say it is better than generic CJA lawyer. I think uh, that to the extent there are disparities in a particular jurisdiction that it would be useful for the Committee to look at why there is that disparity um, I would urge, I would suggest, that if there is disparity that the focus needs to be on elevating the

CJA panel to the level of the federal public defender. And the way that, the ways that it could be done, and we discussed a lot of them, you know, the training selection, uh, supervision, that sort of thing. Uh, but when, when it comes down to it, uh, there is no escaping the hybrid system, uh the, the nature of the federal practice, unless you want to help multiple federal public defenders in a division that . . . there is always going to be conflict because they were the rarest things in my practice is a single defendant federal indictment. Uh, because it doesn't happen that much, so there's always going to be conflicts.

Teresa Duncan: And I kind of speak to my experience here in New Mexico and we have, I mean an excellent federal public defender office and certainly um, many of the best federal criminal defense lawyers in our state are in that office um, but there are also some really great lawyers in the CJA Panel as well. I think that the big difference between um, the federal public defenders and CJA and the way they'll elevate CJA is, as Gerry was saying up to the level of federal codefenders two-fold well actually three-fold.

I think one is just a function of experience, the federal public defenders are in court, federal court all the time, I mean so they are constantly practicing their skills and um, you know, they're, they're incredibly familiar with federal criminal law whereas members of the CJA panel are cases that diverse we, you know, we just aren't in court as often as they are so we are having to re-educate ourselves. I think more frequently than they do.

The other part of it is resources. So one of the, the issues that come up here in New Mexico we are a border state. A lot of our federal criminal cases are illegal entry cases and that people who are crossing the border have a lot of their personal property on them when they are arrested and it is seized by the federal agencies. The federal public defender, I understand, in Las Cruces has the resources and the where with all to help their clients to get their property back so when their clients are finally released to go home, they've got money, they have their personal possessions. CJA lawyers, we don't have those kinds of resources and the judiciary has not been willing to fund it so if you're an illegal re-entry client with property, you're better off of the federal public defender, I mean for a lot of reasons but one of them is that you have a better chance of getting your property back so that when you're released, you'll, you'll have the resources to get home, and if you have a CJA lawyer, you're not going to have that.

Neil MacBride: Professor Creel, any thoughts?

Prof. Creel: I do think that attitude exists and I do think that there is an air of elitism in and in among the, the federal court systems that, that is very divisive. I think that's really unhelpful. Um, what we do, what I did have I worked

with excellent attorneys um, in the panel bar and in the federal defenders office.

In the district of Oregon uh, the federal defender trained the panel attorneys and so we had a regular um, continuing legal education course on particular issues that came out of the federal defenders' office, so there's sort of responsibility to channel, cha, train panel lawyers. Um, what, what you do have in a federal defenders system is a solidarity that is critical in this criminal defense work. Being able to go next door and talk to someone who is an expert in um, um, a § 2254 case um, in a death penalty case, in a motion's practice with this particular judge, is really vital to the um, the effective and adequate representation. And you don't have that um, outside in the panel in the same way that you do um, in, in the federal defender system. Also in and among your panel there is such a wide variety um, across the board of people with experience and those without. You might also have that in the federal defender system but it gets covered up because of the um, um, the insular way that the defender system works.

Um, so I think training has to happen across the board in and among the defender systems and um, that we should be responsible for making sure the panel attorneys have access to the same kind of um, training and solidarity that exists inside the federal defender office.

Katherian Roe: Ms. Duncan, one of the things that you are speaking about when you're talking about um, when we were all talking about reasonableness review, is the other issue that I wanted to, to ask you about is whether or not, uh you think that there is any, any effort on behalf of panel attorneys that, that you may have discussed this with any effort to choose their issues carefully. For instance, when we are talking about the difference between AFPDs and panel attorneys, I was thinking about the fact that AFPDs can raise an issue that's well settled in their circuit court and in the Supreme Court many times, continue to raise it without any fear that a judge will say under a reasonableness review that there is uh, that's frivolous or that they, they are not going to be paid for it and I, I was thinking in particularly about the *Johnson* case in which that issue had gone up to the Supreme Court even through the circuits gone to the Supreme Court, Supreme Court and, and a number of occasions had chosen not to fund the residual cost for vagueness but that kept coming up, when I was, and my thoughts are that, that may be one of the ways that panel attorneys make their decisions about their cases is that, to raise in issue, that has already been well-settled, is a perfect place for a judge to say that is not reasonable. You have any um, any conversation about that or any thoughts about it?

Teresa Duncan: Um, I, I did have some conversations with panel members about that um, and that, that is a real concern, uh, if we recognized that, that, there are issues that will eventually be one because we raised at the 100th time and finally it moves forward and I do think that, um, there is some push back from judiciary on funding that kind of work, uh, you know, some of this motions can just be filed, I mean some of them, that should have raised in the issues in the brief bank, sharing pleadings can really help with um, the cause of that but I do, I do, I do worry about that, um, I think it's something that when you exposed to capital training, you know, the, the capital defense lawyers will tell you that you raise every single thing. It does not matter, as long as it seems unfair to you even if every single case in the country, is against you, you keep raising it. Um, I would like to see more of that in the noncapital training, training parts and also I think just to educate the court on funding. Because I, I do worry about that, uh, I, I think it is true of legal issues, experts, investigators, in the all aspects of criminal defense, is this is going to seem frivolous because there's not a statistical probability that is going to move my case forward, or that I am going to win at this level.

Judge Gerrard: Yes um, going back maybe to the macro level again, I will ask Mr. Morris first but I would like the comment from, each of the three of you, um, you know, we are considering the number of different alternatives here and we may eventually recommend that they uh, defense function be removed from the judiciary, um, but even if we do that recommendation maybe rejected you know, one, once again and um, hopefully whatever recommendation is will be persuasive, and, and well thought out but um, if it were to be rejected either in whole or in apart, what suggestions uh, would you have, um, if the program remained either in whole or in part, you know, within the judiciary, maybe using the three areas on page five of your testimony, uh, Mr. Morris and, and in each of those three broad areas um, what, what suggestions would you have? I know you mentioned um, the Sentencing Commission, uh, the FJC, even the, uh, the San Mateo County model. I guess I am asking uh, because what we'll be putting together is uh, hopefully a broad framework in the details may have to be worked out later but we are really concerned about the broad framework what um, what suggestion to add?

E. Gerry Morris: Uh, suggestion, you mentioned some of them, would be uh, moving it within the judiciary to, to an independent status that would not be under control the judges. Uh, if it remains under the AO, of course, we would like to see the, the DSO re-elevated. And then this kind of all, the on the micro level uh, some of things we've talked about, uh, voucher approval appointment of experts, appointment of investigators, um, composition of the CJA panels there . . . there already jurisdictions where moves have been made to take those out from under the judiciary, and, and uh, and that

would be you know, a good half way measure to, to eliminate those inherit conflicts.

Judge Gerrard: You know, I understand, you're not advocating that but, but I'm . . .

E. Gerry Morris: Sure.

Judge Gerrard: You know, I'm, I'm looking at alternatives as we, as we move down the road.

E. Gerry Morris: So I, I can tell you the happiest people in Austin about the MAC system were the judges.

Judge Gerrard: Um, I believe that.

E. Gerry Morris: Yep.

Judge Gerrard: [LAUGHING], that's so.

Katherian Roe: And why do you say that?

E. Gerry Morris: Well, I say that because I, I've talked to each of them individually. They have told me that, but the reason that, they say that is that they didn't realize, how much of their time, it was taking to do that, how, how much of, uh, an inherit conflict it was, you know, they had somebody in their court or the trial that really irritated them, I mean, they came up with, with a voucher, you know, which is impossible to keep that from seeping in to their thinking. Uh, and of course, the, the problem that federal judges wouldn't have is, if voucher was cut, uh, there was generally a lot of dropping by chambers and whining about it, that, that took up a lot of time and I'm not talking about formal reviews which is, just informal contact with judge and that, but, first, I think first and foremost they, they really begin to worry about the inherit conflict. It was position that was putting them in, to, to have, uh, control over who got appointments and how much they were paid. And they also had uh, no effective way to know, to, to evaluate the lawyers to determine who would get appointments. They saw them in their court. It, this was just a slice of their overall practice. They had no idea what their uh, what the rest of the rest of the practice was like, how many other cases they had, you know, we have case law limits now, yeah, case limits now.

Judge Gerrard: Yeah, part of the push back that, that we would be get at least that we would have to answer is um, of course under a system like that, we would have the, in some sense the fox guarding the hen house and what, uh, I

guess to follow up on Mr. Cahn's question earlier what, what type of backup system, how do, how do we answer that, again as Committee.

E. Gerry Morris: The ultimate, the ultimate review of our system is by the county commissioners. The nonprofit organization has a contract, we are the contract defender for Travis County . . . um.

Judge Gerrard: So it would be, whoever was in control of that, if you are completely independent and that would be congressional oversight essentially or. . .

E. Gerry Morris: Possible, yeah. It is something like that . . . but I think the fox guarding the hen house, sort of that, that's a concern. What you have to do is pick the very best foxes that you can find.

Katherian Roe: And how, I am not sure of the size of that program, how many attorneys are involved?

E. Gerry Morris: 228 I think it is the last count, the last count I got.

Katherian Roe: And is there a public defender office also?

E. Gerry Morris: There is a specialized public defender office too. I mean, there's a mental health public defender and a juvenile public defender um, which uh, you know, they handle quite a few cases.

Judge Gerrard: And do you have also another conflict officer that completely then go to what would be the equivalent of our CJA panel?

E. Gerry Morris: It, it would go, the MAC is equivalent CJA panel, we don't view uh, lawyers within the MAC having codefendants as being a conflict, because they're basically independent contract.

Judge Gerrard: There is may if some of those systems do have the conflict office and then it goes to the MAC.

E. Gerry Morris: Right.

Judge Gerrard: Um, Ms. Duncan.

Teresa Duncan: Um, I, I guess the one recommendation that I would have is, for someone who does have that criminal defense experience, to be involved in the voucher system. You know, if, if it something whether there is a dispute or even non-dispute, to be able to talk to the judge or the judges about specific issues. So whether that someone within the federal public defender office, if it is a committee but, I, I do think that, that is, it's a piece that's missing that is good, its critical to have someone who knows,

who knows how it works to be able to look at some, look at particular entry and say yes this is reasonable, or you know arguing that the 18 U.S.C. as a whole, it should have never been enacted, it is not . . . Um, that I yeah, I think I, I, just, I think that any indigent criminal defense system has got to have oversight by the criminal defense lawyers of people who are experienced in indigent criminal, criminal defense.

Judge Gerrard: Professor Creel.

Prof. Creel: Uh, I want to tell the Committee that I've thought about this a lot um, not in terms of um, the voucher system and, and federal court specifically, but how to set up the defender system because tribes are creating justice systems that are um, patterned after the adversary system of the United States and state courts and so, it's always a question on who pays, and how they get paid, and so independence is, is critical, I agree. And I would agree with um, Mr. McCue yesterday that um, the system we have now is an anachronistic and that it was set up because that was the way it was set up, not because it was thoughtful. And having judges sign vouchers is uh, just inherently wrong, it should be if, if nothing else happens that, that should be removed out from under the judges whether the circuit or district judges.

Reuben Cahn: Let me ask, um, and this is more particularly for Mr. Morris. You know, assuming we end up, any of the changes we're talking about, as we talk about these big changes, they're really going to require action by Congress, they're statutory changes. And let's assume best case, everyone supports them and it goes forward, or we're talking years before they take place, so that being the case you, you surveyed the entire nation, you were looking at the entire system, are there districts that you see as models within the current statutory structure that we have to deal with and that we could move towards that change while we seek bigger change.

E. Gerry Morris: You know I had to get back to you with an answer on that. Uh, I think uh, I would want to talk with the task force and see if they have a recommendation along those lines.

Reuben Cahn: That be helpful if you could.

Judge Cardone: You will be invited to our next hearing. [LAUGHING].

Judge Cardone: Next representative is welcome to address, that's with that answer. [LAUGHING].

Reuben Cahn: So we can hold your feet to the fire.

Judge Cardone: [LAUGHING].

Reuben Cahn: [INAUDIBLE].

Neil MacBride: I think I know the answer to this question but just you know, so it's all in the record. Uh, for Mr. Gould. Um, obviously the current CJA hourly rate is $127 dollars an hour, the um, there have been a recommendation internally to raise it to $144, is there anybody on the panel who doesn't believe that CJA lawyer should be paid at least a $144 dollars? I take that as a no. [LAUGHING].

Neil MacBride: Is there anybody who thinks, um who has done either you know back of the cocktail napkin or more um, in a more involved analysis as to whether that $144 should be a good bit, you know should be somewhat higher reflecting you know current macro-economic factors and comparisons to you know other, other parts of the profession etcetera. Just curious if, if there is a few that that number actually needs to be north of $144?

E. Gerry Morris: Well, I, ran a law office for thirty-eight years and I am pretty, pretty well aware, I am painfully aware, I guess I would say how much it cost and I don't see, in order for someone to handle primarily CJA cases, they would have to have a lot of them and they would have to be stripped down operation to make ends meet at that level.

Teresa Duncan: And significantly lower than the going rate, for example in Albuquerque for a private criminal defense lawyer, I mean that's at least $100 dollars, more than $100 dollars less than what you would get paid in the private case.

Prof. Creel: I think you can look to the numbers, but more importantly look to the experience that we have been talking about that is required to defend someone in a federal case and that is, um, significantly more expensive more than $144 dollars an hour.

Judge Cardone: Ms. Roe?

Katherian Roe: I think you're going to do . . .

Judge Cardone: Oh, yes, okay. Uh, let me ask you, I will start with you at this time, Mr. Morris, uh, anything, uh, that you would like to tell us that you feel we should hear um, we would like to give you the opportunity.

E. Gerry Morris: Since it took a lot in the first half, I will make this short, independence, independence, independence.

Judge Cardone: All right. Ms Duncan?

Teresa Duncan: No. Thank you very much for the opportunity to speak with all of you.

Judge Cardone: I appreciate it and Professor Creel.

Prof. Creel: Yes, thank you. Um as happens in Indian country, uh, things progressed without paying attention to the Indian individual that might be coming up before federal courts, and what has happened in this unprecedented movement towards crime and punishment on the reservation under the Tribal Law and Order Act of 2010 and the Violence Against Women Act in 2013, is appropriate for the trust responsibility of the federal government, but has left behind the Indian individual who is subjected to the federal courts in sentencing. Uh, what I would request, uh, that you walk away with is thinking about that Native American criminal defendant, not just in federal court but in tribal court. And tribal law's important because it is the appropriate place for this crimes should be adjudicated. But also, federal attorneys need to know tribal law because of federal habeas review. And there aren't, I don't know any attorneys that are experts in 25 U.S.C. § 1303 have litigated the number of cases where, where addressing the rights under the Indian Civil Rights Act of the Indian individual in federal court, and that requires a depth of knowledge that needs to be present among the federal bar, those practicing in representing native Americans. Thank you.

Judge Cardone: All right. It is about 1:15, we are going for a break for an hour. We will resume at 2:15 so everyone has an hour and for those who are watching, we'll be back.