

REPORT OF THE COMMITTEE  
TO REVIEW THE  
CRIMINAL JUSTICE ACT

January 29, 1993

**NOTICE**

NO RECOMMENDATION PRESENTED HEREIN REPRESENTS THE POLICY OF  
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## MEMBERS OF THE COMMITTEE

**EDWARD C. PRADO** of San Antonio, Texas, appointed by the Chief Justice to chair the Committee to Review the Criminal Justice Act, has served as United States District Judge in the Western District of Texas since 1984. As United States Attorney in the Western District of Texas from 1981 to 1984, he served on the Attorney General's Advisory Committee and on the U.S. Bureau of Prisons Advisory Corrections Council. He also served as a State District Judge (1980), an Assistant Federal Public Defender (1976-1980) and Assistant District Attorney (1972-1976) in the San Antonio area. Judge Prado received his Juris Doctor from the University of Texas School of Law in Austin in May 1972. He has served since 1987 on the Judicial Conference Committee on Defender Services.

**ROBERT ALTMAN** of Atlanta, Georgia, is a graduate of the University of California and University of Minnesota Law School. He served as the Executive Director of the federal community defender organization for the Northern District of Georgia from 1980 to 1984 and has been in private practice since 1984. Mr. Altman served as a member of the Board of Directors of the Federal Defender Program from 1985 through 1991 (President 1990-1991); as a member of the Atlanta Bar Association Blue Ribbon Commission on delivery of indigent defense services in Fulton County, Georgia; and as an instructor, National Institute of Trial Advocacy at Emory University. Mr. Altman also serves as a part-time judge, having been appointed as Judge *Pro Hac Vice* of the Municipal Court of the City of Atlanta in May 1988, and is a Criminal Justice Act "panel" attorney.

**J. VINCENT APRILE, II** of Louisville, Kentucky, joined the Kentucky Department of Public Advocacy in June 1973 and, since 1982, has served as its General Counsel. A graduate of Bellarmine College, the University of Louisville Law School, and George Washington University's National Law Center, Mr. Aprile is a member of the Board of Directors of the National Legal Aid and Defender Association and previously served on the Board of Directors of the National Association of Criminal Defense Lawyers. He is the Chair of the editorial board of *Criminal Justice*, the magazine of the Criminal Justice Section of the American Bar Association. He was an adjunct law professor at the University of Louisville for eight years and is presently a faculty member of the National Criminal Defense College at Mercer Law School in Macon, Georgia. Mr. Aprile served on the Judicial Conference Federal Courts Study Committee from 1988 to 1990.

**JUDY CLARKE** received her J.D. from the University of South Carolina Law Center in Columbia, South Carolina in 1977. In October 1992 she rejoined the federal defender program and relocated to Spokane, Washington to serve as Executive Director of the federal community defender organization in the Eastern District of Washington, after spending one year as a partner in the San Diego office of McKenna & Cuneo. She previously served as Executive Director of the federal community defender organization for the Southern District of California from 1983 to 1991, having joined that organization in 1978 as a Trial Attorney. Ms. Clarke has been actively involved in developing training programs for lawyers and has extensive teaching experience throughout the country in subjects related to federal criminal defense. She served for three years as Vice Chair for Continuing Legal Education of the American Bar Association's Criminal Justice Section, and is on the Board of Regents as well as a faculty member for the National Criminal Defense College. She is presently an officer of the National Association of Criminal Defense Lawyers and has served on the Association's Board of Directors since 1985.



**MICHAEL J. DAVIS** of Lawrence, Kansas, is a professor of law at the University of Kansas School of Law. He has served on the faculty of the University since 1971 and was its dean from 1980-1989. He was legislative assistant to The Honorable Louis Stokes, United States House of Representatives, from 1969 to 1971, and Associate Director of Planning and Research with the Legal Services Program, Office of Economic Opportunity, in Washington, D.C., 1968-1969. He received his J.D. from the University of Michigan Law School in 1967. Professor Davis is the author of numerous articles, presentations and lectures. He is a member of the Kansas Bar Association Section on Legal Education and Admission to the Bar, the American Bar Association; the Kansas Board of Law Examiners; and served on the Board of Directors of the Douglas County Legal Aid Society for 11 years.

**EDWARD S. G. DENNIS, JR.** of Philadelphia, Pennsylvania, joined the law firm of Morgan, Lewis & Bockius as a senior partner in litigation on September 1, 1990. He was deputized as Special Counsel to the Pennsylvania State Attorney General in December 1992. Appointed by President Reagan, he served as Assistant Attorney General of the Criminal Division of the United States Department of Justice from 1988 to 1990. From 1983 to 1988, he served as United States Attorney for the Eastern District of Pennsylvania. He is a graduate of the United States Merchant Marine Academy and the University of Pennsylvania Law School. He clerked for Judge A. Leon Higginbotham of the United States District Court for the Eastern District of Pennsylvania. Mr. Dennis served on the Judicial Conference Federal Courts Study Committee from 1988 to 1990.

**ROBINSON O. EVERETT** of Durham, North Carolina, assumed the office of Chief Judge of the United States Court of Military Appeals on April 16, 1980. His term expired on September 30, 1990, at which time he became a Senior Judge on that court. He is a tenured professor at the Duke University School of Law. He first joined the Duke faculty in September 1950 as an assistant professor, having graduated magna cum laude from Harvard Law School. He then served on active duty with the Air Force during the Korean War and was assigned to the Judge Advocate General's Department. He was engaged in private law practice in North Carolina from 1955-1980; and since rejoining the Duke law faculty on a part-time basis in 1956, he has served continuously on that faculty. Judge Everett published a textbook, *Military Justice in the Armed Forces of the United States*, and he has written numerous articles on military law, criminal procedure, evidence, and other legal topics. He is a life member of the American Law Institute and the National Conference of Commissioners on Uniform State Laws; is an American Bar Fellow; and was a director of the American Judicature Society. He has held various positions in the North Carolina State Bar, American Bar Association and Federal Bar Association.

**THOMAS W. HILLIER, II** of Seattle, Washington, has been Federal Public Defender in the Western District of Washington since 1982. He was an associate in a private firm, practicing criminal defense exclusively, from 1978 to 1982; prior to which he served as staff attorney in the office of the Federal Public Defender in the Western District of Washington and in the Spokane County Public Defender's office, from 1973 to 1978. Mr. Hillier graduated from the Gonzaga University School of Law in Spokane in 1973. He chairs the Legislative Subcommittee of the Federal Defender Advisory Committee and has testified before House Committees and the Sentencing Commission on numerous occasions. He regularly speaks to various groups on a wide range of issues involving federal criminal law, as well as teaching at federal defender training seminars. He administers the Ninth Circuit Criminal Justice Act Appellate Panel for the Western District of Washington and co-administers the local Criminal Justice Act panel.

**GEORGE H. REVERCOMB** of Washington, D.C., has served since 1985 as a United States District Judge for the District of Columbia. He previously served a 15 year term on the Superior Court of the District of Columbia. He was Associate Deputy Attorney General in the Department of Justice in 1969-1970, and engaged in the private practice of law in Virginia, West Virginia and the District of Columbia from 1955 to 1969. Judge Revercomb graduated from Princeton University (1950) and the University of Virginia Law School (1955). He is a member of the American Bar Association (Judicial Administration Division), and is a Fellow of the American Bar Foundation. Judge Revercomb also serves on the Judicial Conference Committee on Defender Services.

## **REPORTER**

**CHARLES J. OGLETREE, JR.** of Cambridge, Massachusetts, is an Assistant Professor at Harvard Law School and the Director of the Law School's Criminal Justice Institute and its Trial Advocacy Workshop. Before joining the faculty on a full-time basis, he served as a visiting professor from 1985-1989 while in the private practice of law as a partner in the Washington, D.C. firm of Jessamy, Fort & Ogletree. He served in the District of Columbia Public Defender Service from 1978 to 1985 holding positions of staff attorney, Training Director, Trial Chief and Deputy Director. Professor Ogletree is a 1975 graduate of Stanford University and received his J.D. from Harvard Law School in 1978. He is a Council Member of the American Bar Association's Criminal Justice Section; Member of the Association of American Law Schools' Committee on Clinical Legal Education; and Defender Committee Board Member of the National Legal Aid and Defender Association. Professor Ogletree has published numerous articles on the criminal justice system and belongs to various other professional and civic organizations.

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The Committee to Review the Criminal Justice Act gratefully acknowledges the efforts of the individuals and organizations that contributed their time, energy and resources to the Committee's study. We thank all those who testified at our public hearings, submitted letters and statements concerning the issues being studied, and generously gave us the benefit of their expertise and experience in the provision of services under the Criminal Justice Act. Without their invaluable assistance, this Report would not have been possible.

## INTRODUCTION

In 1964 Congress established within the judicial branch a program which for the first time in the history of the country provided compensation and expense reimbursement for attorneys appointed to represent individuals with limited financial means in federal criminal proceedings. The goal of the enabling legislation, the Criminal Justice Act of 1964 (18 U.S.C. § 3006A), was to ensure the Sixth Amendment right to effective assistance of counsel and equal access to justice in the federal courts. Congress had been considering such legislation since the late 1930s.

In 1991, 24 years after the last major study of the Criminal Justice Act (CJA) by Professor Dallin H. Oaks, the Committee to Review the Criminal Justice Act was established to conduct a comprehensive analysis of the CJA program and to recommend appropriate legislative, administrative and procedural changes. This nine-member special Committee of the United States Judicial Conference was appointed by Chief Justice William H. Rehnquist pursuant to the Judicial Improvements Act of 1990 (Pub. L. No. 101-650), as amended, which requires that the Judicial Conference report be transmitted to Congress by March 31, 1993. The Committee is composed of federal judges, present and former federal and state defenders, law professors, and private attorneys familiar with federal and state criminal law practice.

In its 29 years, the CJA program has developed into an effective program for implementation of the Sixth Amendment right to counsel. The Committee has been impressed with the commitment, diligence, and innovation with which the federal judiciary has administered the CJA program. Under the guidance of the Judicial Conference and its Committee on Defender Services, attorneys in more than 50 federal defender organizations in over one half of the federal districts have provided a consistently high level of representation to their clients in the federal courts. In addition to attorneys employed by federal defender offices, private "panel" attorneys, providing counsel on an hourly basis, represent approximately one half of the persons found eligible for representation under the CJA.

However, even with these evident successes, the CJA program suffers from the consequences of increased demand and strain. Since its inception in 1964, the number of CJA appointments has risen from 16,000 to approximately 80,000 per year. During the same 29-year period, the annual resource needs of the program have grown from about \$1 million to at least \$295 million for Fiscal Year 1993. The years between 1964 and 1993 have also seen an expansion of federal criminal jurisdiction; an explosion of drug cases; a dramatic increase in the length and complexity of federal cases (with many cases involving dozens of defendants and consuming months in trial); the introduction of the sentencing guidelines and mandatory minimum terms of incarceration, speedy trial legislation, the Bail Reform Act and other legislation resulting in time and resource consuming complexity; a rise in criminal appeals; increasing numbers of death penalty

cases in federal courts requiring an intense concentration of resources; and a new era of budgetary constraints. The management needs of this large and complex program have outgrown what can properly be expected through even the highly conscientious efforts of the Judicial Conference and the Defender Services Committee.

This Report describes the directions and positions taken by the CJA Review Committee following the completion of a 16-month information gathering and assessment period. The record of the public hearings held by the CJA Review Committee, together with numerous letters, comments, statements and surveys received and reviewed by the Committee during its study, overwhelmingly supports the conclusion that, in order to continue the provision of adequate representation, the program requires reform and more focused management. Indeed, when Congress authorized the establishment of federal public and community defender organizations in 1970, the report of the Senate Judiciary Committee expressed the "desirability of eventual creation of a strong, independent office to administer the Federal defender program." That step was deferred, however, in order to give Congress the opportunity to review the operations of the program over the next "few" years.

The Committee believes that significant management improvements, budgetary efficiencies and overall enhancement of the level of representation, especially on the part of panel attorneys, provided under the CJA can be achieved by implementation of the recommendations found herein. Following issuance of an Interim Report by the Committee in August 1992, interested persons and organizations submitted responses to the Interim Report and the Committee revised portions of its Report based on the input received. A large number of recommendations are enthusiastically supported by judges, panel attorneys, Federal Public and Community Defenders and others with experience and expertise in the criminal justice system. After the Interim Report was released, concerns were expressed that some of the recommendations in the Committee's Report were critical of the judiciary and that implementation of some of its recommendations would erode the power of Article III judges in an era punctuated by diminution of judicial discretion in the area of criminal sentencing. To the contrary, the Committee recommends that the CJA program remain within the judicial branch of the government. In addition, the Committee believes that removing much of the judges' responsibility under the CJA will relieve them of the administrative burden of an ever-growing appointed counsel program and will allow them to focus even more on the rapidly increasing demands of the federal court caseload.

The Report also serves as a beacon for future generations in that its recommendations are far-reaching enough to ensure that substantial revisions to the CJA will not be needed in the near future. Indeed, if the Committee's recommendations are adopted, the Criminal Justice Act could serve as a model on the state level and possibly for other nations. Persons with limited financial means will receive prompt, competent, and cost-effective representation that will benefit the entire system.

The importance of the issues before the Committee cannot be doubted. The Criminal Justice Act is the primary vehicle for ensuring the Sixth Amendment right to counsel in the federal courts. Deficiencies in the CJA program undermine the vitality of the Constitution and those democratic values designed to render poverty inconsequential in the federal criminal justice system. Congress, the judiciary and the bar have a preeminent interest in assuring that the CJA program fulfills our societal commitment to equal justice in the federal courts of the United States.



## THE HISTORY AND DEVELOPMENT OF THE PROVISION OF DEFENSE SERVICES IN THE FEDERAL COURTS\*

The right of representation for an individual accused of a crime is founded in the Sixth Amendment to the Constitution of the United States: "In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence."

In 1938 the Supreme Court addressed the right of representation in the federal courts:

This is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty...[the Sixth Amendment] embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty....The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel.\*

The fundamental responsibility of the government to provide counsel for the financially disadvantaged was further emphasized by the Supreme Court in 1963:

[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.\*

The importance of the right to counsel has been reemphasized by the Supreme Court many times over the years.\*

Authority for the appointment of counsel in federal criminal proceedings has historically rested in the judiciary. Prior to enactment of the Criminal Justice Act, federal judges bore the responsibility of ensuring the adequacy of the defense of those unable to retain a lawyer. They did so without benefit of any scheme, structure, or authority for the compensation of counsel or even the reimbursement of expenses necessary to an adequate defense. Complete reliance was placed upon the professional obligation of lawyers to provide *pro bono publico* services. Securing attorneys represented an administrative burden for the federal judiciary and substantial economic sacrifice was often imposed upon counsel.

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\* In this Report, numerical notations refer to footnotes; letter notations refer to endnotes located at the end of the Report. Endnotes are used for citation to source material and for inclusion of more lengthy, supplementary material related to the text of the Report.



In the late 1930s concerns over the effectiveness of such a system began to increase. The primary focus appropriately settled not upon the special problems faced by the federal bench and bar but, rather, upon the adequacy of representation under such a system, the threat to our societal guarantee of equal access to justice, and the threatened collapse of confidence in our system of justice. While the fundamental obligation of the federal government was clearly and unmistakably indicated, no systematic provision for representation of financially disadvantaged persons was created.

As early as 1937 the Judicial Conference of the United States adopted a resolution calling for the appointment of public defenders in those districts in which the amount of criminal litigation justified the presence of such an office. At almost yearly intervals, the Conference repeated this or similar recommendations. Legislation to provide legal counsel for impecunious defendants in the federal courts on a systematic basis was sponsored or endorsed by the American Bar Association, the Department of Justice, and the Judicial Conference beginning in the late 1930s. Concurrently, every Attorney General of the United States urged enactment of legislation for the representation of the financially disadvantaged defendant. In 1959 Warren Olney, III, Director of the Administrative Office of the United States Courts, testified before Congress that:

[n]otwithstanding the clarity and finality of [the constitutional] declaration of providing legal counsel in criminal cases, we have been attempting to meet the need by asking or requiring private persons in the legal profession to undertake the defense of the indigent and to meet this community responsibility without compensation and, for the most part, at their own personal expense. The unfairness of this to the lawyers involved is altogether evident. But there is good reason for believing that it may have been or at least is very likely to become unfair to the indigent defendant as well.<sup>4</sup>

In 1961 the Attorney General of the United States announced the appointment of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice. Chaired by Professor Francis A. Allen of the University of Michigan Law School, the Committee's mandate was to study the system of federal criminal justice with the purpose of identifying problems faced by persons of limited means charged with federal crimes and problems created for the system of federal justice by the presence of such persons in its courts. This nine-member Committee spent approximately two years studying alternative systems for providing representation for financially disadvantaged defendants in the federal system and the problems associated with the dependence upon a system of *pro bono* representation.

In February 1963 the *Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice* (hereinafter *Allen Report*) was submitted to the Attorney General of the United States. While its report offered neither a definitive

statement nor complete resolution of problems, the Allen Committee did identify fundamental deficiencies and offer innovative and responsible systemic legislative proposals. The *Allen Report* began by characterizing the obligation of the government:

The essential point is that the problems of poverty with which this Report is concerned arise in a process *initiated* by government for the achievement of basic governmental purposes. It is, moreover, a process that has as one of its consequences the imposition of severe disabilities on the persons proceeded against....When government chooses to exert its powers in the criminal area, its obligation is surely no less than that of taking reasonable measures to eliminate those factors that are irrelevant to just administration of the law but which, nevertheless, may occasionally affect determinations of the accused's liability or penalty.'

Among the *Allen Report's* recommendations was the need for prompt enactment of legislation to guarantee the proper defense of defendants in the federal courts who are financially unable to obtain adequate representation. Fundamental to this legislation, the Committee found, was "that the legislation should define persons eligible for appointment of counsel and other defense services at government expense as persons "financially unable to obtain adequate representation." The Committee's position was that the terms "indigent" or "indigency" should be avoided for eligibility determination since it looked on poverty as "a relative concept with the consequence that the poverty of accused must be measured in each case by reference to the particular need or service under consideration." '

The Allen Committee also found that the principle of adequate compensation for lawyers performing defense services was an indispensable element of federal legislation providing for a system of adequate representation. In addition, the Committee recommended that any legislation should also authorize the utilization of services essential to the proper conduct of the defense, including investigatory services, the assistance of experts, the availability of transcripts, and reimbursement to attorneys for expenses.

The *Allen Report* identified six salient features required to be included in any legislation providing for adequate representation in the federal courts: 1) the principle of local option, 2) the early appointment of counsel, 3) the identification of persons eligible to receive defense services by reference to "financial incapacity" rather than "indigency," 4) the provision of essential defense services other than counsel, 5) the provision of essential defense services to persons with some, but inadequate means, and 6) the principle of adequate compensation for attorneys performing defense services.

Included in the *Allen Report* was a draft of proposed legislation. The proposed legislation was transmitted to Congress by President Kennedy on March 8, 1963. The support of the executive branch for legislation in this area had been underscored by

President Kennedy in his State of the Union address on January 14, 1963: "The right to competent counsel must be assured every man accused of crime in a Federal court regardless of his means."

In 1964, the Criminal Justice Act, the embodiment of the Allen Committee recommendations, was passed by Congress and signed into law by President Lyndon Johnson, to become effective August 20, 1965. As enacted, the CJA gave effect to four important principles:

1. In order to be eligible for appointed counsel or other defense services, a person accused of a Federal crime (other than a petty offense) need not be destitute or indigent; he need only be financially unable to obtain adequate representation. If he is able to pay part of the cost of his defense, he will be required to do so, and only the balance will be provided.

2. The interests of justice and adequate representation require that appointed counsel be compensated and reimbursed for their out-of-pocket expenses.

3. In order to assure an adequate defense, eligible defendants should also be provided with necessary defense services other than counsel.

4. Each federal district court and court of appeals would devise its own plan for furnishing representation to eligible defendants, utilizing either representation by private attorneys, representation by attorneys furnished by a bar association or legal aid agency, or a combination of those alternatives.

Even as it passed the Criminal Justice Act, Congress remained concerned over the lack of a complete resolution of certain significant problems and its own decision to defer adoption of a number of innovative but controversial proposals. Chief among those issues, unresolved at the time of the passage of the Act, was the recommendation for the creation of federal defender organizations. Congress wished to have the benefit of an evaluation of its initiatives, and the profound changes which they brought to the federal criminal justice system, before taking further action.

In 1967 the Department of Justice and the Judicial Conference of the United States commissioned Professor Dallin H. Oaks of the University of Chicago Law School to conduct such an evaluation. The *Oaks Report*<sup>\*</sup> made recommendations for statutory amendments and changes in the administration of the Act in nine major areas:

1. Education: copies of the Act and summaries of the essential provisions of the district plans should be circulated to all panel counsel who take appointments; the process should be repeated if the Act is amended or if guidelines are issued; local education efforts should supplement these distributions.

2. Eligibility: determinations should be standardized by issuing guidelines; the Act should be amended to permit the eligibility determination to be delegated to some federal court official such as a clerk; district court plans should be clarified to excuse counsel from reporting discoveries of income ineligibility if it could lead to the defendant's prosecution; changes should be made to perfect techniques to extend the benefits of the Act to defendants of some means who still lack enough resources for an adequate defense.

3. Appointment: the skill and experience of an attorney should be matched to the complexity and gravity of a case; panels should be reviewed and updated at least annually; panel membership should be limited to lawyers reasonably qualified to defend a criminal case in federal court; counsel should be appointed early in the case and should follow through the whole case.

4. Public Defender alternative: the Act should provide for the option of a full-time salaried federal defender; a mixed system should be mandatory when a defender option is used; the defender option (full-time salaried public defender or local defender grantee agency) should be limited to districts where there are a minimum of 300 CJA cases annually, but geographical considerations should also be weighed.

5. Administration: CJA district court administrative officers should be authorized.

6. Attorney compensation: attorneys should be compensated for time spent advising or representing a client before a formal charge or appointment and they should be compensated at court rates for the time spent in court waiting for appointments; the ceiling before circuit approval is required should be raised from \$500 to \$2,000; the statutory maximum for felonies should be raised from \$500 to \$1,000; the hourly rate should be raised from \$10 to \$15 for out-of-court time and from \$15 to \$20 for time spent in court.

7. Expenses/Services: the categories of reimbursable expenses and necessary services should be broadened; the Act should be amended so that subsection (e) services may be obtained up to \$150 per expert without advance court approval; retained and appointed counsel should be made aware of subsection (e); the \$300 ceiling should be eliminated; information given to obtain court approval for subsection (e) expenses should not be available to prosecutors.

8. Coverage: the Act should be interpreted to cover all post-trial motions not in the nature of a collateral attack; a separate maximum should be set for post-trial motions; probation revocation hearings should be included under the Act with a separate maximum compensation; the Act should include representation under the Narcotic Addict Rehabilitation Act and 18 U.S.C. § 2255; the Act should allow compensation for attorneys



who have furnished legal services to a defendant in advance of a first court appearance or before counsel is appointed; petty offenses and parole revocation proceedings should not be covered by the Act.

9. Law Students: subsection (e) should be interpreted to include payment of law students for investigation and research.

As a result of the *Oaks Report*, Congress amended the CJA in 1970. The amendments included a provision for establishment and support of Federal Public Defender and Community Defender Organizations as options for the district courts' plans; raised the hourly rate of compensation to \$30 in court and \$20 out of court, and the maximums allowed for panel attorneys; and expanded the types of cases for which counsel would be provided.

Once again, having produced important and innovative change, Congress expressed the need for ongoing review. Of particular concern, in connection with the Amendments of 1970, was the appropriateness of not only continuing the judiciary's historic oversight of the appointed counsel program but, even more significantly, placing the new institutional defense function under its supervision.

The committee recognizes the desirability of eventual creation of a strong, independent office to administer the federal defender program. It considered as a possibility the immediate establishment of a new, independent official - a "Defender General of the United States." It also considered establishing a special directorate for defender programs within the Administrative Office of the U.S. Courts.<sup>3</sup>

It was clear that the situation was not ideal. Our system of justice is predicated upon the assumption that the product of vigorous adversarial competition between two independent and equal forces, the prosecution and defense, before a fair and impartial judiciary, will best assure the emergence of truth, the triumph of justice, and the resulting faith of society in its government and institutions. It was one thing for trial judges to assume the responsibility for the appointment of counsel who only occasionally were asked to take such assignments or who appeared infrequently in federal court. Quite another matter was the vesting in the federal judiciary of elements of control over an institutional defender whose practice was exclusively before the federal courts. While Congress considered establishing an independent office to administer the CJA program, it opted to postpone such action:

The committee, however, does not recommend founding an independent official at this initial state. Such a step would be premature until Congress has had a opportunity to review the operations of the defender program over the course of a few years. Nor does it recommend placing the overall

direction of these programs in the administrative office. Clearly, the defense function must always be adversary in nature as well as high in quality. It would be just as inappropriate to place direction of the defender system in the judicial arm of the U.S. Government as it would be in the prosecutorial arm. Consequently, the committee recommends that the need for a strong independent administrative leadership be the subject of continuing congressional review until the time is ripe to take this final step.<sup>1</sup>

Despite the intent of Congress to conduct continuing reviews, the CJA program has not undergone a comprehensive review since the *Oaks Report* in 1967<sup>2</sup> and direction of the defender system remains "in the judicial arm."

The CJA, in the meantime, has been amended several times.<sup>3</sup> In 1974 the Act was made applicable within the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit rather than applying to all the courts in the District of Columbia. Many of the powers vested in the judicial councils of the circuits, including the selection and compensation of Federal Public Defenders (FPDs) and the number of attorneys authorized for hire by FPDs, were transferred to the courts of appeals in 1982 in order to insulate the determinations from district judges before whom the FPDs regularly appeared.<sup>3</sup>

The first increase in rates for hourly fees and the maximums since 1970 came in 1984. The Act was extensively amended in 1986 substituting reference to services necessary for "adequate representation" to those necessary for an "adequate defense;" striking out provisions relating to persons charged with juvenile delinquency or subject to revocation of parole; substituting a provision that private attorneys shall be appointed in a substantial proportion of the cases for a provision that each plan had to provide for private attorneys; adding a provision that authorized the Judicial Conference to set a higher maximum hourly rate, not to exceed \$75, for a particular circuit or district within a circuit, to develop guidelines for determining such maximum hourly rates, and to annually increase maximum hourly rates based on federal cost of living increases; allowing the chief judge of the circuit to delegate voucher approval authority; providing for the continuation in office of a Federal Public Defender whose term had expired until

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<sup>1</sup> The Government Accounting Office did conduct one limited review: *Report to the Congress by the Comptroller General of the United States; Inconsistencies in Administration of the Criminal Justice Act, February 8, 1983*. One of the recommendations of that report was: "To improve the implementation of the act, the Judicial Conference of the United States, the policy-making body of the judiciary, needs to provide better guidance and establish appropriate procedures and policies for district courts to follow."

<sup>2</sup> The Criminal Justice Act, as amended, is included with this Report as Appendix L.

<sup>3</sup> Authority for approving CJA plans and providing for representation on appeal was not transferred, leading to a somewhat anomalous result that district judges are still involved in those determinations.



appointment of a successor or for one year; providing for malpractice and negligence coverage for federal defenders; authorizing continuing legal education and training of panel attorneys; extending the provisions of the Act to the Northern Mariana Islands; and raising case maximums. In 1987 the Act was amended to add coverage to include a person charged with a violation of supervised parole or modification, reduction or enlargement of a condition, extension or revocation of a term of supervised release. Most recently, in 1988, amendments expanded coverage for representation before the United States Parole Commission.

## **THE CJA PROGRAM TODAY**

During Fiscal Year 1991 there were approximately 78,600 representations reported to have been provided pursuant to the provisions of the CJA. Funding for the CJA program exceeded \$162,000,000.

The statute provides that representation shall be provided for any financially eligible person who:

- o is charged with a felony or with a Class A misdemeanor (defined in 18 U.S.C. § 3559);
- o is a juvenile alleged to have committed an act of juvenile delinquency (defined in 18 U.S.C. § 5031);
- o is charged with a violation of probation;
- o is under arrest, when such representation is required by law;
- o is charged with a violation of supervised release or faces modification, reduction, or enlargement of a condition, or extension or revocation of a term of supervised release;
- o is subject to a mental condition hearing under Chapter 313 of Title 18, United States Code (offenders with mental disease or defect);
- o is in custody as a material witness;
- o is entitled to appointment of counsel under the Sixth Amendment to the Constitution;
- o faces loss of liberty in a case, and Federal law requires the appointment of counsel; or
- o is entitled to the appointment of counsel under 18 U.S.C. § 4109 (relating to transfer of offenders to and from foreign countries).

In addition, upon a determination by the United States magistrate or court that "the interests of justice so require," representation may be provided for any financially eligible person who:

- o is charged with a Class B or C misdemeanor, or an infraction for which a sentence to confinement is authorized (defined in 18 U.S.C. § 3559); or
- o is seeking relief under 28 U.S.C. §§ 2241, 2254, or 2255 (relating to *habeas corpus*).

The authority for the appointment of counsel in a case is vested in the presiding judicial officer. The CJA also provides that counsel for a person who is financially unable to obtain investigative, expert or other services necessary for adequate representation may request them in an *ex parte* application to the presiding judicial officer.

The CJA requires that each district court formulate a plan for furnishing representation for any person financially unable to obtain adequate representation. The CJA plan must be approved by the judicial council of the applicable circuit. The Act requires that the plan provide for representation by private attorneys in a "substantial proportion" of cases and, in addition, may provide for representation by attorneys furnished by a bar association or a legal aid agency, or, for qualifying districts, by attorneys furnished by a federal defender organization.

### **Federal Defender Organizations**

Any district or part of a district, or two adjacent districts or parts of districts, whether or not in the same circuit, in which at least 200 appointments of counsel are required annually, may establish a federal defender organization.

The CJA provides for one of two types of federal defender offices for a district which chooses to establish an organization. A district court may choose either a Federal Public Defender or a Community Defender Organization.

When a district court is considering the establishment of a federal defender office a feasibility study will generally be conducted by the Defender Services Division of the Administrative Office of the United States Courts (AO). The Division obtains data on the number of appointments made at each court location within the district, ensures that the threshold of 200 appointments has been met, and determines the present cost per case and the number of multi-defendant cases which, due to potential conflicts of interest, would require utilization of panel attorneys in addition to a defender organization. The Division often contacts various individuals in and around the district for information. This may include the judges of the court, the clerk of the court, the chief probation officer, the United States Attorney and staff, bar association members, panel attorneys, and nearby Federal Public and Community Defenders who may be familiar with the district. The Division projects the costs of establishing a defender office considering factors such as the ideal office location, whether there are a sufficient number of cases to employ full-time

staff, and the costs of renting space. The Division reports to the district the results of the study of appointments, a projected budget for the defender office and a recommendation as to whether establishment of a defender office seems feasible.

Excluding Death Penalty Resource Centers, a total of 47 headquarters and 48 branches of federal defender organizations, serving 54 out of 94 judicial districts, are presently established or authorized.

In some districts, in addition to representing clients, defender organizations also recruit, advise and train panel attorneys and administer the CJA panel, relieving the court of administrative burdens related to determining panel attorney availability for appointments and reviewing CJA compensation vouchers.

### **Federal Public Defenders**

Federal Public Defender Organizations are entities of the federal government. Office personnel are federal employees within the judicial branch. Funds for the operation of the offices are administered and disbursed by the AO. The Federal Public Defender (FPD) is appointed by the court of appeals of the circuit for a term of four years, subject to earlier removal by that court for incompetency, misconduct in office, or neglect of duty. The incumbent may be reappointed for an unlimited number of four-year terms.<sup>4</sup> Compensation for the FPD is fixed by the court of appeals of the circuit at a rate not greater than that of the United States Attorney in the same district. Each FPD appoints all other employees of the office. Staff salaries are fixed by the FPD at rates which may not exceed those of comparatively qualified personnel in the United States Attorney's office. The size of the attorney staff is determined by the court of appeals. Attorneys within a defender office may not engage in the private practice of law. The size and composition of the non-attorney staff is subject to the approval of the Director of the AO. The Federal Public Defender Organization submits to the AO reports of its activities, financial position, and proposed annual budget. There are currently 40 Federal Public Defender Organizations providing defense representation in 46 federal districts.

### **Community Defender Organizations**

Community Defender Organizations (CDOs) are non-profit legal services organizations established and administered by any group authorized by the CJA plan for

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<sup>4</sup> The Ninth Circuit views the statutory term limitation and absence of language in the Act regarding reappointment as suggestive of congressional intent to limit Federal Public Defenders to one term. That court has resolved the question by declaring the position vacant upon the expiration of the term, even when the incumbent seeks an additional term. The incumbent's application is considered on the same basis as other applicants in an open merit selection process. (See Letter to CJA Review Committee from Chief Judge J. Clifford Wallace, United States Court of Appeals for the Ninth Circuit, dated November 6, 1991.)

a district to provide representation and receive compensation. A CDO may be created for purposes in addition to providing criminal defense services under the CJA. It may also be a branch of a parent organization. The CDO operates under the supervision of a board of directors and is incorporated under the laws of the state in which it functions. The organization is not created by the federal government. The CDO may be funded by grants from the judiciary or it may submit vouchers and receive payment in the same manner as private panel attorneys on a case-by-case basis. CDOs which receive grants administer and disburse funds for salaries, rents, and other organizational expenses. The chief attorney of a CDO is selected by the organization and there is no fixed term of office. The terms and conditions of the chief attorney's employment, including compensation, are determined by mutual agreement between the organization's board of directors and the attorney. The employees of CDOs have whatever employee benefits, rights and job security arrangements the employer adopts, subject to the review and approval of the Defender Services Committee of the Judicial Conference. The Grant and Conditions document which a CDO must sign each year requires that personnel policies and other terms of employment shall be in writing. The size and composition of the staff is determined by the CDO subject to the review and approval of the Defender Services Committee. The CDO is subject to state wage and hour laws, corporation regulations and tax provisions. There is no statutory prohibition relating to the private practice of law. Excluding Death Penalty Resource Centers, there are currently nine CDOs providing representation in ten federal districts.

### **Panel Attorneys**

In districts without a federal defender organization, all CJA representation is provided exclusively by private attorneys. In districts with a federal defender office, private attorneys provide representation in multi-defendant and other cases in which representation by the federal defender could potentially create a conflict of interest, as well as in a percentage of the remaining cases. In Fiscal Year 1991 it is estimated that panel attorneys were appointed 40,000 times, including all appointments in 40 districts in which there was no federal defender. At the same time, over \$78,000,000 in payments to panel attorneys were made.

The pool of attorneys from which the presiding judicial officer chooses an attorney is called the panel. The character of this panel varies greatly from district to district.

Some districts require all attorneys who are admitted to practice law in that district to be members of the panel. In other districts the panel is composed of a very select group of criminal litigation specialists who must meet certain criteria for panel membership. Some districts have systems in place to ensure an objective rotational system while others base an assignment decision on personal knowledge of an attorney's ability

and skill level. In some districts the federal defender office assigns cases; in some districts an employee of the court is given the responsibility.

The CJA was amended in 1986 to authorize the Judicial Conference to approve increases of maximum hourly attorney compensation rates in accordance with Federal Pay Comparability Adjustments<sup>5</sup> and to make pay cost adjustments to attorney compensation rates in those districts and circuits in which the statutory rates are inadequate. The CJA currently provides for hourly compensation rates of \$60 for in-court time and \$40 for out-of-court time, and for pay cost adjustment rates of up to \$75 per hour. These rates can be increased to reflect Federal Pay Comparability Adjustments. The need for these compensation adjustments has been supported by survey results which reveal that the \$60/\$40 rates are significantly below those otherwise available to private attorneys and are insufficient in many districts to cover even basic overhead costs. Accordingly, the Judicial Conference has approved pay cost adjustments to hourly attorney compensation rates in 88 (of 94) judicial districts where justification for a pay cost adjustment was demonstrated.

Because of insufficient funds, rate adjustments have been implemented in only 16 districts. During the past two fiscal years, funding shortfalls have led to the suspension of all payments for compensation of panel attorneys for a period of weeks. During the current fiscal year, absent supplemental funding, it has been projected that payments to panel attorneys at existing compensation rates would cease after mid-March 1993.

### **Appellate Representation**

CJA plans must also provide for representation at the appellate level. Some districts require that an attorney appointed at the trial level continue to provide representation on appeal. Other districts allow for a separate appointment for circuit court matters.

The need for qualified representation is evident as the increase in cases appealed continues to grow. Criminal appeals from the federal district courts increased 10% in 1991 over the 1990 level. Drug-related appeals, which accounted for 55% of all criminal appeals filed, increased approximately 5% over 1990. Appeals of sentencing guidelines cases continued to rise, up 15% from 1990 to 1991; appeals relating only to the sentence imposed increased 23% from 1,869 in 1990 to 2,297 in 1991.

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<sup>5</sup> The Judicial Conference is authorized to raise the maximum hourly rates up to the aggregate of the overall average percentages of the adjustments in the rates of pay under the General Schedule made pursuant to 5 U.S.C. § 5303. This is similar to the cost-of-living increases which federal employees receive.



## Death Penalty Resource Centers

Death Penalty Resource Centers (DPRCs) provide advice and support to individual attorneys who are representing clients in federal capital *habeas corpus* proceedings. DPRCs operate as Community Defender Organizations and receive CJA funds through grants. The first Death Penalty Resource Centers were established in 1988. There are currently 19 centers. Because each DPRC serves an entire state, more than 50 districts are presently receiving support from these centers.

While the services vary somewhat from state to state, they generally include the following:

- o Providing expert legal consulting to attorneys appointed to represent capital defendants at the federal *habeas corpus* level;
- o Providing direct representation in some cases;
- o Training court-appointed counsel in federal *habeas corpus* capital cases;
- o Developing brief banks, pleadings and memoranda of law;
- o Developing lists of experts for capital federal *habeas corpus* cases such as interpreters, investigators, psychiatrists and psychologists;
- o Conducting legal research for specific cases;
- o Monitoring the status of death penalty cases pending in the districts they serve; and
- o Recruiting attorneys to represent death-sentenced federal *habeas corpus* petitioners.

DPRCs engaged in direct representation in 141 death sentence federal *habeas corpus* cases in Fiscal Year 1991 and provided assistance and expert advice to attorneys in 529 additional cases. In the following year there was a 26.4% increase in total caseload, with 175 direct representations and 672 consultations. For the current year, the judiciary projected a total caseload of 1,153, an increase of 36.1%.

The DPRC program is relatively new and the structure of the individual organizations varies from state to state. Some DPRCs are affiliated with law schools or state public or appellate defenders, and others are separate private non-profit organizations. DPRCs also differ from the traditional Community Defender Organizations with respect to their non-federal CJA funding. Some receive funds directly from the

states, others from private foundations and some through Interest on Lawyer's Trust Account (IOLTA) programs. Many also receive in-kind services such as space, utilities, law student assistance and other forms of volunteer staff. The services of two experienced capital litigators are funded by the CJA program to provide expert assistance, on a contract basis, in individual federal capital cases, including the recruitment of counsel for such cases.

### **Investigative, Expert and Other Services**

The CJA provides that counsel for a person who is financially unable to obtain investigative, expert or other services necessary for adequate representation may request them in an *ex parte* application to the presiding judicial officer. In Fiscal Year 1991 \$7,980,000 was spent to provide such services.

### **Transcripts**

Counsel appointed under the Criminal Justice Act may request authorization from the presiding judicial officer for the procurement and payment of transcripts of proceedings necessary for an adequate defense. Expenditures of \$5,000,000 in Fiscal Year 1991 were made for such transcripts.

### **The Voucher Process**

In order to receive compensation and expense reimbursement for a case, a panel attorney, and those providing expert and investigative services, must submit a claim which specifies the hours spent on the case and the expenses incurred. Over 42,000 claim vouchers were processed in Fiscal Year 1991.

Expert and investigative vouchers are submitted to the attorney. In most instances those vouchers and the attorney's voucher are then submitted to the presiding judicial officer in the case. Paragraph 2.21 of the *Guidelines for the Administration of the Criminal Justice Act, Volume VII, Guide to Judiciary Policies and Procedures (CJA Guidelines)* declares that the voucher shall be submitted within 45 days after the final disposition of the case, unless good cause is shown. The presiding judicial officer must approve the claim before payment can be made. There are no guidelines as to the time in which the presiding judicial officer must review and approve, modify, or disapprove the claim. In addition, while Paragraph 2.22(D) of the *CJA Guidelines* states that the judicial officer may wish to inform the attorney when less than the amount claimed has been approved and

the reasons for the reduction, there is no requirement that the judicial officer do so.<sup>6</sup> Although most claims are processed only after the completion of the representation, the *CJA Guidelines* allow for interim payments in extended or time consuming cases.

The CJA provides that the presiding judicial officer may approve attorney compensation up to a maximum of \$3,500 for felonies, \$2,500 for appeals, \$1,000 for misdemeanors and \$750 for other representations and for expenses reasonably incurred. In extended or complex cases, attorneys may receive compensation in excess of these general case compensation maximums when the presiding judicial officer certifies that such excess payment is necessary to provide fair compensation and the payment is approved by the chief judge of the circuit or an active circuit judge to whom excess compensation approval authority has been delegated. The number of payments in excess of the attorney case compensation maximums during Fiscal Year 1991 was 9,198, an increase of approximately 28.7% compared to the 7,149 total for Fiscal Year 1990.

The presiding judicial officer may approve payments to persons providing investigative, expert and other services up to a maximum of \$1,000 if counsel received prior approval to obtain the services through an *ex parte* application and the presiding judicial officer finds that the defendant is financially unable to obtain services necessary for adequate representation. If services are obtained without prior approval, the maximum compensation allowable is \$300. In the interest of justice, the court may allow compensation above the \$300 maximum upon a finding that timely procurement of necessary services could not await prior authorization. Compensation in excess of the general maximum may be paid to persons providing investigative, expert and other services if the presiding judicial officer determines that the amount is necessary to provide fair compensation for services of an unusual character or duration and the amount of the excess payment is approved by or on behalf of the chief judge of the circuit.

The processing of payments to attorneys and others who provide services under the CJA is decentralized and automated by a computer network system. Once a voucher has been approved the circuit or district clerk's office enters the information into the system locally, leading to a check being disbursed by the AO within approximately a week.

### **Oversight of the CJA Program**

The Criminal Justice Act widely distributes the oversight responsibilities and authority for the administration of the federal defender and assigned counsel program.

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<sup>6</sup> In August 1992, the Ninth Circuit adopted a general order requiring that no judge reduce a CJA claim without providing the lawyer notice and reasonable opportunity to offer a written response.

Today the following organizational entities within the judiciary bear a portion of the responsibility for the administration of the CJA program:

- The Judicial Conference of the United States
- The Judicial Conference Committee on Defender Services
- The Administrative Office of the United States Courts
- The Administrative Office's Defender Services Division
- The Courts of Appeals
- The Judicial Councils of the Circuits
- The District Courts

### **Judicial Conference**

The Judicial Conference of the United States is the principal policy making body of the federal judiciary. Chaired by the Chief Justice of the United States, the Conference is composed of the chief judges of the 13 courts of appeals, a district judge from each of the 12 geographical circuits, and the chief judge of the Court of International Trade. The 27-member body meets each March and September to consider administrative and policy issues affecting the federal court system and to make recommendations to Congress regarding legislation involving the judicial branch.

The Conference accomplishes much of its work through the committee system. The Conference's Committee on Defender Services is charged with ensuring the successful implementation and operation of the Criminal Justice Act.<sup>7</sup> Several years ago the Judicial Conference delegated to the Defender Services Committee the authority to approve funding for federal defender organizations, but the Judicial Conference retains the ultimate authority to promulgate guidelines or policies concerning the appointment and compensation of attorneys under the Act. The Defender Services Committee also makes recommendations for amendments to the *CJA Guidelines*. Once adopted by the Judicial Conference, those non-binding *Guidelines* serve as a reference source for judges and attorneys on matters such as allowable compensation, interim payments and obtaining expert and investigative resources. The *Guidelines* also include a copy of the Act, relevant forms and a model district CJA plan.

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<sup>7</sup> Following the passage of the CJA in 1964, the Judicial Conference created an ad hoc Committee to oversee the implementation of the new statute and the development of appropriate structures, procedures, policies and controls. The Committee's status was subsequently changed from "ad hoc" to "standing," and in 1986 its name was changed to the Committee on Defender Services (also referred to in this Report as the Defender Services Committee). It has continued to be the primary body charged with national policy formation for and fiscal and administrative supervision over the program.

## **Committee on Defender Services**

The Chair and members of this Committee are circuit, district and magistrate judges\* appointed by the Chief Justice of the United States in his capacity as presiding officer of the Judicial Conference. Typically, each judge serves two three-year terms. The Committee reviews individual budget and grant requests and approves funding for federal defender organizations. It formulates policies and funding priorities and monitors the expenditure of funds appropriated for the program. It makes legislative and policy recommendations to the Conference. The Committee meets twice annually and presents its recommendations to the Judicial Conference at the Conference's semi-annual meetings. The Committee is staffed and counseled by the Defender Services Division of the Administrative Office of the United States Courts.

## **Administrative Office of the United States Courts**

The Director of the Administrative Office of the United States Courts is, by statute, responsible for overseeing the expenditure of funds appropriated by Congress for the administration and operation of the federal circuit and district courts and the various programs and activities placed under their supervision. The Judicial Conference has delegated to the Director limited authority to approve funding modifications for federal defender offices and requests for authorization for certain travel. The Director, Deputy Director and the Assistant Director for Court Programs supervise the Defender Services Division.

## **Defender Services Division**

The Defender Services Division functions as the administrator of the federal defender and appointed counsel program. It oversees the implementation of the program and provides policy, legal, management and fiscal advice to the Defender Services Committee, the Director of the AO, judicial officers and employees, private attorneys and federal defenders and their staffs.

## **Courts of Appeals**

The courts of appeals appoint the Federal Public Defender to a four-year term in those districts which have been authorized such organizations. The Act provides that they do so after considering the recommendations of the judges from the district court in which representation is to be provided. The circuit court also fixes the Federal Public Defender's salary at a level which cannot exceed that of the United States Attorney for

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\* There have been no appointments to the Committee of individuals who are not judges.



the same district, and approves the number of full-time attorneys which the FPD may use in the organization.

### **Judicial Councils**

Each judicial circuit has a judicial council, composed of the chief judge of the circuit and an equal number of circuit and district judges of the circuit,<sup>9</sup> which makes orders for the effective and expeditious administration of justice within its circuit. The Criminal Justice Act provides that CJA plans formulated by the district courts in each circuit must be approved by the judicial council of the circuit. It further provides that prior to approving the CJA plan for a district, the judicial council shall supplement the plan with provisions for representation on appeal.

### **District Courts**

The district courts are given the primary authority for the formulation and implementation of a plan for furnishing representation under the Act. The district courts determine, subject to the approval of the judicial council of their circuit, whether to rely exclusively upon the appointment of private panel attorneys or to seek the creation of a federal defender organization. If the district court determines that it desires a defender organization and it qualifies for one, it then decides which of the two models, Federal Public Defender or Community Defender Organization, it wishes to establish. The district court retains exclusive authority over the appointment of counsel (including those appointments which are to be assigned to the federal defender organization) and the compensation and reimbursement of expenses of CJA panel attorneys. In the absence of conflict, counsel appointed at the district court level is generally reappointed for proceedings before the court of appeals.

### **Funding for the CJA Program**

Congress appropriates funds for the implementation of the CJA through a separate, "no-year" appropriation within the overall budget of the federal judiciary. Funds remaining at the end of the fiscal year are available until they are spent. This authority, reserved for few accounts in government, was intended to provide a degree of flexibility because of the difficulty of accurately predicting expenses necessary for an adequate defense.

The total of \$162,261,000 in appropriated funding available to implement the CJA in Fiscal Year 1991 included \$132,761,000 initially approved by Congress; a \$21,500,000

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<sup>9</sup> The statutory provision establishing judicial councils of circuits was amended in 1990 to equalize circuit and district judge membership; previously, circuit judges held a majority position. Pub. L. 101-650, 104 Stat. 5120 (Dec. 1, 1990).

carry over from Fiscal Year 1990; and an \$8,000,000 transfer from the Salaries and Expenses account for Courts of Appeals, District Courts, and Other Judicial Services. However, even with the supplemental funding, there was not sufficient funding to cover full fiscal year operations. Payments to panel attorneys, experts, and investigators were suspended in the second week of September 1991 in order to avoid an estimated \$5.5 million deficiency in the Fiscal Year 1991 appropriation. As a consequence, there was no unobligated balance available for use in Fiscal Year 1992.

The distribution of Fiscal Year 1991 obligations is listed below.

Federal Defender Organizations	\$ 70,079,000
FPD \$47,912,000	
CDO \$22,167,000	
CJA Panel Attorneys	78,532,000
Investigative, Expert & Other Services	7,980,000
Transcripts	5,000,000
General Administrative Expense	<u>800,000</u>
<b>TOTAL</b>	<b>\$162,391,000</b>

In Fiscal Year 1992 Congress originally appropriated \$190,621,000 in funds for the CJA program. On June 17, 1992, payments to panel attorneys and other service providers were again suspended due to the depletion of funds. Payments resumed after five weeks when \$24,500,000 was borrowed from other programs in the judiciary. The transfer was approved by the Executive Committee of the Judicial Conference with the expectation that a pending supplemental appropriation request of \$31,250,000 would be enacted quickly and used to repay the accounts and to meet panel attorney payments through the end of the fiscal year. Because the supplemental appropriation was not approved until late September it became necessary to effect a significant reduction in other judicial services, including a period during which drug, alcohol and pretrial services treatment programs, electronic monitoring for home confinement, and mental health treatment were limited.

The judiciary's Fiscal Year 1993 budget estimate for Defender Services totalled \$303,846,000. Congress has thus far authorized approximately \$215,000,000. The Senate Report accompanying its appropriation's bill recommended that the funds be restricted so as to preclude implementation of additional "pay cost adjustments" (increases to \$75 per hour for panel attorney compensation) and suggested that the Judicial Conference reconsider the pay cost adjustments already implemented.<sup>1</sup>

Funding for DPRCs in Fiscal Year 1991 was set at approximately \$11,500,000. The judiciary requested an additional \$3,500,000 for 1992, but Congress maintained the 1991 level of appropriation. In 1993 an increase of \$8,500,000 was requested; Congress did not specifically refer to a particular funding level for DPRCs in the \$215,000,000 authorized for defender services.

## Representation in Federal Courts

One reason for the rising cost of the CJA program is the increase in the number of persons represented by appointed counsel. The growing CJA caseload and the consequential increase in CJA costs is attributable in part to the rise in federal prosecutions of what were traditionally state cases.<sup>1</sup> During Fiscal Year 1991 there were reported to be an estimated 78,594 representations in the United States Courts pursuant to the provisions of the CJA. This is 12.0% greater than the 71,608 appointments reported in Fiscal Year 1990 and 12.4% greater than the 69,954 appointments reported in Fiscal Year 1989.

As the following tables reveal,<sup>1</sup> the appointments are almost evenly divided between federal defenders and panel attorneys, while the federal defender organizations currently operate at lower cost.

Table 1

### CJA Appointments and Funding Distribution by Fiscal Year

	<u>FY 89</u>		<u>FY 90</u>		<u>FY 91</u>	
	<u>% of</u>	<u>% of</u>	<u>% of</u>	<u>% of</u>	<u>% of</u>	<u>% of</u>
	<u>Appts.</u>	<u>Funds</u>	<u>Appts.</u>	<u>Funds</u>	<u>Appts.</u>	<u>Funds</u>
Panel Attys.	48.5	57.2	47.8	53.4	50.9	53.4
FDO	<u>51.5</u>	<u>42.8</u>	<u>52.2</u>	<u>46.6</u>	<u>49.1</u>	<u>46.6</u>
Total	100.0	100.0	100.0	100.0	100.0	100.0

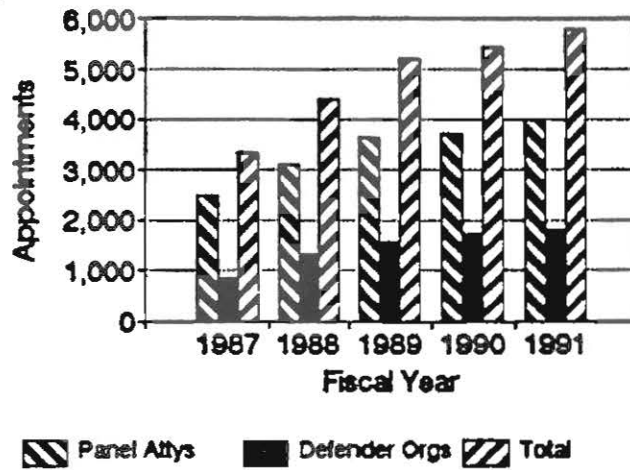
Table 2

### Cases Opened by Fiscal Year

	<u>FY 89</u>	<u>FY 90</u>	<u>% Change</u>	<u>FY 91</u>	<u>% Change</u>	<u>% Change</u>
			<u>FY 89-90</u>	<u>Est.</u>	<u>FY 90-91</u>	<u>FY 89-91</u>
Panel Attys.	33,952	33,552	-1.1	40,031	+19.3	+17.9
FDO	<u>36,002</u>	<u>36,608</u>	<u>+1.7</u>	<u>38,563</u>	<u>+ 5.3</u>	<u>+ 7.1</u>
Total	69,954	70,160	+0.3	78,594	+12.0	+12.4

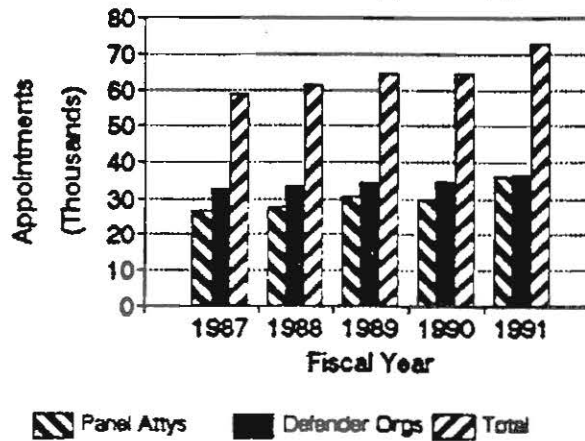
Charts A and B on the following page present the distribution between federal defenders and panel attorneys of appellate and district court CJA appointments, respectively.

Chart A - Criminal Justice Act  
U.S. Court of Appeals Appointments



	1987	1988	1989	1990	1991
Panel Attorneys	2,474	3,082	3,627	3,700	3,983
Defender Orgs	867	1,336	1,571	1,731	1,807
Total	3,341	4,418	5,198	5,431	5,790

Chart B - Criminal Justice Act  
U.S. District Court Appointments



	1987	1988	1989	1990	1991
Panel Attorneys	26,397	27,740	30,325	29,852	36,048
Defender Orgs	32,545	33,349	34,431	34,877	36,756
Total	58,942	61,089	64,756	64,729	72,804

The following table presents the judiciary's estimate of average costs per case for federal defender organizations and panel attorneys.

Table 3

Criminal Justice Act Cost by Activity  
Fiscal Years 1991-1993

	FY 1991 (ESTIMATED)		FY 1992 (ESTIMATED)		FY 1993 (ESTIMATED)	
	CASES	AVERAGE COST	CASES	AVERAGE COST	CASES	AVERAGE COST
<b>Federal Defenders (1)</b>						
Regular Representations*	37,893	1,851	43,151	2,065	45,595	2,401
Death Penalty Resource Centers	670 (2)	14,646	847 (2)	13,806	1,153 (2)	17,402
Subtotal	38,563	1,876	43,998	2,287	46,748	2,771
<b>Panel Attorneys (3)</b>						
Appeal Cases	3,701	3,148	4,348	3,445	4,206	4,602
District Cases	33,687	1,985	39,127	2,178	37,851	2,898
Subtotal	37,388	2,100	43,475	2,304	42,057	3,068
Related Investigative, Expert, and Other Services		150		164		185
Subtotal		2,250		2,468		3,253
<b>TOTAL</b>	<b>75,951</b>	<b>2,136</b>	<b>87,473</b>	<b>2,459</b>	<b>88,805</b>	<b>3,097</b>

(1) The term Federal Defenders includes both Federal Public and Community Defender Organizations.

(2) Death Penalty Resources Centers' caseload represents new and carryover cases, both direct representation and consulting in representation.

(3) The panel attorney caseload and expenditures for FY 1991 are artificially low due to the cessation of payments for September, 1991. Accordingly, panel attorney caseload and expenditures for FY 1992 include an estimated 2,643 cases and \$5.5 million from the previous year.

\* Regular Representations by Federal Defenders includes appeals.

Table 4 on the next page portrays an approximate distribution between federal defenders and panel attorneys of all non-appellate CJA representations in Fiscal Year 1991 on a district-by-district basis.



Table A

## FY1991 Federal Defender and Panel Attorney Non-appellate Representations by District

DISTRICT	FED DEF*	PAN ATT**	TOTAL	F.D. % TOT	P.A. % TOT	DISTRICT	FED DEF*	PAN ATT**	TOTAL	F.D. % TOT	P.A. % TOT
ALABAMA MIDDLE	0	179	179	0.00%	100.00%	MONTANA	0	294	294	0.00%	100.00%
ALABAMA NORTH	0	318	318	0.00%	100.00%	NEBRASKA	0	302	302	0.00%	100.00%
ALABAMA SOUTH	0	282	282	0.00%	100.00%	NEVADA	939	419	1,358	69.15%	30.85%
ALASKA	76	84	160	47.50%	52.50%	NEW HAMPSHIRE	0	126	126	0.00%	100.00%
ARIZONA	1,269	1,466	2,735	46.40%	53.60%	NEW JERSEY	1,234	502	1,736	71.06%	28.92%
ARKANSAS EAST	0	251	251	0.00%	100.00%	NEW MEXICO	381	735	1,116	34.14%	65.86%
ARKANSAS WEST	0	121	121	0.00%	100.00%	NEW YORK EAST	1,138	1,353	2,491	45.68%	54.32%
CALIFORNIA CENTRAL	1,646	2,019	3,665	44.91%	55.09%	NEW YORK NORTH	0	485	485	0.00%	100.00%
CALIFORNIA EAST	1,976	748	2,724	72.54%	27.46%	NEW YORK SOUTH	1,341	1,224	2,565	82.28%	17.72%
CALIFORNIA NORTH	962	776	1,738	55.85%	44.14%	NEW YORK WEST	0	331	331	0.00%	100.00%
CALIFORNIA SOUTH	5,882	2,284	8,166	72.03%	27.97%	NORTH CAROLINA EAST	509	260	769	68.19%	31.81%
COLORADO	442	299	741	59.65%	40.35%	NORTH CAROLINA MIDDLE	0	353	353	0.00%	100.00%
CONNECTICUT	232	221	453	51.21%	48.79%	NORTH CAROLINA WEST	0	456	456	0.00%	100.00%
DELAWARE	0	97	97	0.00%	100.00%	NORTH DAKOTA	0	220	220	0.00%	100.00%
DISTRICT OF COLUMBIA	474 (1)	1,518	1,990	23.82%	76.18%	OHIO NORTH	291	328	619	47.01%	52.99%
FLORIDA MIDDLE	1,075	691	1,766	60.87%	39.13%	OHIO SOUTH	0	483	483	0.00%	100.00%
FLORIDA NORTH	307	259	566	54.24%	45.76%	OKLAHOMA EAST	81	31	112	82.20%	17.80%
FLORIDA SOUTH	1,590	952	2,542	62.55%	37.45%	OKLAHOMA NORTH	116	88	204	56.86%	43.14%
GEORGIA MIDDLE	0	194	194	0.00%	100.00%	OKLAHOMA WEST	210	185	395	56.00%	44.00%
GEORGIA NORTH	907	301	1,208	75.08%	24.92%	OREGON	785	849	1,634	48.04%	51.96%
GEORGIA SOUTH	0	241	241	0.00%	100.00%	PENNSYLVANIA EAST	657	532	1,189	55.26%	44.74%
GUAM	0	5	5	0.00%	100.00%	PENNSYLVANIA MIDDLE	272	133	405	67.16%	32.84%
HAWAII	604	201	805	75.03%	24.97%	PENNSYLVANIA WEST	213	118	331	64.35%	35.65%
IDAHO	0	130	130	0.00%	100.00%	PUERTO RICO	436	222	658	66.26%	33.74%
ILLINOIS CENTRAL	4	230	234	1.71%	98.29%	RHODE ISLAND	0	133	133	0.00%	100.00%
ILLINOIS NORTH	787	785	1,572	50.06%	49.94%	SOUTH CAROLINA	491	179	670	73.28%	26.72%
ILLINOIS SOUTH	217	91	308	70.45%	29.55%	SOUTH DAKOTA	0	345	345	0.00%	100.00%
INDIANA NORTH	0	186	186	0.00%	100.00%	TENNESSEE EAST	0	321	321	0.00%	100.00%
INDIANA SOUTH	0	269	269	0.00%	100.00%	TENNESSEE MIDDLE	328	144	472	69.49%	30.51%
IOWA NORTH	0	154	154	0.00%	100.00%	TENNESSEE WEST	330	224	554	59.57%	40.43%
IOWA SOUTH	0	211	211	0.00%	100.00%	TEXAS EAST	0	285	285	0.00%	100.00%
KANSAS	433	110	543	79.74%	20.26%	TEXAS NORTH	331	433	764	43.32%	56.68%
KENTUCKY EAST	0	228	228	0.00%	100.00%	TEXAS SOUTH	1,652	1,009	2,661	62.08%	37.92%
KENTUCKY WEST	0	208	208	0.00%	100.00%	TEXAS WEST	1,144	943	2,087	57.00%	43.00%
LOUISIANA EAST	460	124	584	78.77%	21.23%	UTAH	0	307	307	0.00%	100.00%
LOUISIANA MIDDLE	0	33	33	0.00%	100.00%	VERMONT	0	151	151	0.00%	100.00%
LOUISIANA WEST	0	265	265	0.00%	100.00%	VIRGIN ISLANDS	238	87	325	73.23%	26.77%
MAINE	0	212	212	0.00%	100.00%	VIRGINIA EAST	0	1,501	1,501	0.00%	100.00%
MARYLAND	896	749	1,645	54.47%	45.53%	VIRGINIA WEST	0	288	288	0.00%	100.00%
MASSACHUSETTS	137	280	417	32.85%	67.15%	WASHINGTON EAST	0	610	610	0.00%	100.00%
MICHIGAN EAST	790	509	1,299	60.82%	39.18%	WASHINGTON WEST	521	704	1,225	42.53%	57.47%
MICHIGAN WEST	0	170	170	0.00%	100.00%	WEST VIRGINIA NORTH	0	215	215	0.00%	100.00%
MINNESOTA	326	256	582	56.01%	43.99%	WEST VIRGINIA SOUTH	178	261	439	40.55%	59.45%
MISSISSIPPI NORTH	0	138	138	0.00%	100.00%	WISCONSIN EAST	0	306	306	0.00%	100.00%
MISSISSIPPI SOUTH	0	181	181	0.00%	100.00%	WISCONSIN WEST	0	106	106	0.00%	100.00%
MISSOURI EAST	286	154	440	65.00%	35.00%	WYOMING	0	136	136	0.00%	100.00%
MISSOURI WEST	408 (2)	142	550	74.18%	25.82%	TOTAL	35,982	37,934	73,916	48.69%	51.31%

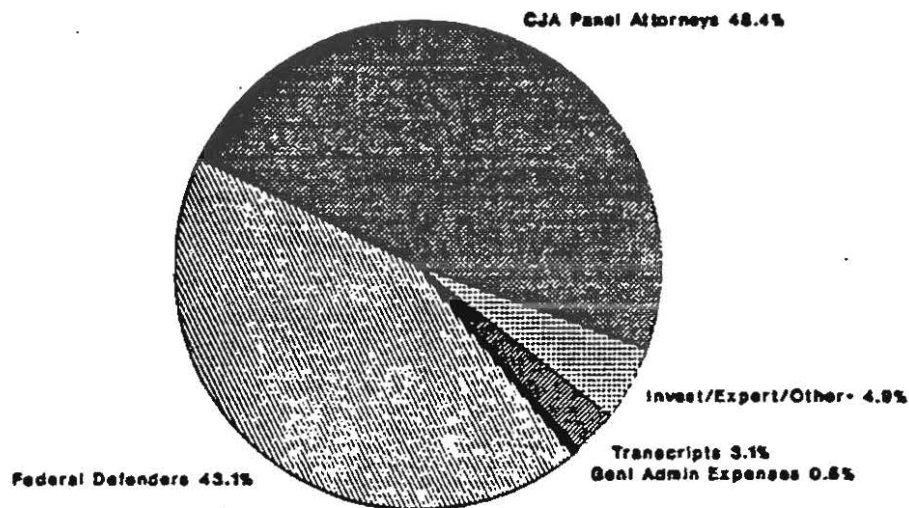
\* Number of cases opened, other than appeals.

\*\* Number of vouchers processed for payment in the district, other than appeals, as an approximation of number of CJA appointments.

(1) The Federal Defender for the District of Columbia began reporting representation in January 1991.

(2) Total excludes 920 court directed prisoner representations of inmates of the U.S. Medical Center for Federal Prisoners at Springfield, Missouri.

## THE CRIMINAL JUSTICE ACT DOLLAR FISCAL YEAR 1991



•The sector relating to Invest/Expert/  
Other Services includes Federal Defender  
Organization expenses in this category.

The proportion of CJA dollars spent on various functions in Fiscal Year 1991 is illustrated in the above pie chart.

## THE CREATION AND ACTIVITIES OF THE CJA REVIEW COMMITTEE

In 1988 Congress passed legislation to create the Federal Courts Study Committee. The 15-member Committee consisted of legislators, judges, law professors, and lawyers. Its mission was to review every element of the operation of the federal judiciary and make recommendations for its more effective operation.

The Committee examined, as part of its broad mandate, the operation of the Criminal Justice Act. It identified a considerable number of problem areas and concerns and ultimately made the following recommendations:

1. Congress should amend 18 U.S.C. § 3006A(g)(2)(A) to require that the selection of the federal defender in each jurisdiction be done by an independent board or commission formed within the district to be served.
2. The Judicial Conference should conduct a comprehensive review of the 1964 Criminal Justice Act, as amended, including its implementation and its administration.
3. Based on the study recommended above, Congress should enact a more comprehensive compensation system for CJA attorneys that will include an amount to cover reasonable overhead and a reasonable hourly wage.

With its passage of the Judicial Improvements Act of 1990, Congress implemented many of the recommendations of the Federal Courts Study Committee, including a provision that the Judicial Conference of the United States conduct a study of the Criminal Justice Act.<sup>19</sup> The Judicial Improvements Act directs that, in assessing the effectiveness of the program, the Judicial Conference consider a list of specified issues which had been identified by the Federal Courts Study Committee.<sup>20</sup> The Judicial Improvements Act further requires that the Judicial Conference transmit to the Committees on the Judiciary of the Senate and the House of Representatives a report on the results of the study and include:

1. Any recommendations for legislation that the Judicial Conference finds appropriate;
2. A proposed formula for the compensation of Federal defender program counsel that includes an amount to cover reasonable overhead and a reasonable hourly fee; and,

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<sup>19</sup> The relevant provision of the Judicial Improvements Act is included with this Report as Appendix II.

3. A discussion of any procedural or operational changes that the Judicial Conference finds appropriate for implementation by the courts of the United States.

Acting in his capacity as presiding officer of the Judicial Conference of the United States, Chief Justice William H. Rehnquist established the Committee to Review the Criminal Justice Act in August 1991.

Over the past 16 months, the CJA Review Committee has engaged in an extensive research process leading to the recommendations set forth in this report. The Committee has reviewed the *Allen* and *Oaks Reports*, exemplary state defender programs, and systems for the provision of appointed counsel in the armed services and in other countries. The Committee solicited and received extensive comments and information from federal circuit, district and magistrate judges; circuit and district court executives and clerks; Federal Public and Community Defenders and their staffs; private panel attorneys, investigators, and providers of expert and other services; law professors; state judges and public defenders; United States Attorneys and their staffs; and various organizations with criminal justice expertise and experience, such as the American Bar Association (ABA), the National Legal Aid and Defender Association (NLADA), the National Association of Criminal Defense Lawyers (NACDL), and state and local bar associations. Five public hearings were held throughout the country, at which the Committee heard statements from these various groups. Interviews or discussions were conducted with officials of the Administrative Office of the United States Courts, the Federal Judicial Center, the United States Sentencing Commission, the Court of Appeals for the Federal Circuit, and the House of Representatives subcommittee responsible for the appropriation for the judiciary. The Committee also met with a former official of the Legal Services Corporation (LSC) and a founding director of a local LSC grantee program.

On July 28, 1992, the Committee submitted an Interim Report to the Judicial Conference for information and possible discussion at the Conference's September 1992 session. At its September meeting, the Judicial Conference adopted a resolution requesting the Defender Services Committee to review and analyze the Interim Report of the CJA Review Committee and report back to the Conference on or before January 15, 1993, so that the Conference would have sufficient time to consider the matter fully and file a timely report with Congress.

At the CJA Review Committee's request, the Conference's Executive Committee authorized public release of the Interim Report on August 12, 1992, the same date it was distributed to all members of the Judicial Conference. A primary purpose in issuing the Interim Report was to stimulate constructive dialogue that would further inform the CJA Review Committee prior to release of its final Report. Accordingly, the Interim Report was made available to all circuit and district court judges; court executives and clerks; magistrate judges; Federal Public and Community Defenders; DPRC directors; members of the CJA Panel Attorney Advisory Committee; bar associations and other legal



organizations; all speakers at the Committee's public hearings; members of the Federal Courts Study Committee; the Attorney General and Assistant Attorneys General of the Department of Justice's Criminal Division and Office of Legislative Affairs; Executive and Senior Staff of the Administrative Office of the U.S. Courts; and the Director, Deputy Director and Division Directors of the Federal Judicial Center. Additionally, the Interim Report was published in its entirety in the Criminal Law Reporter and in the electronic media services of Westlaw and LEXIS.

The wide circulation of the Interim Report generated many additional comments and suggestions. As it began working on its final Report, the Committee concentrated its efforts on refining its recommendations, determining costs of the existing and proposed programs, drafting legislation, and gathering additional information related to various aspects of the study. The results of those activities are included in this Report. Committee members also received invitations to participate in the fall meetings of the ABA Criminal Justice Section Council and the ABA Standing Committee on Legal Aid and Indigent Defendants, the NACDL and the NLADA, at which the Interim Report was discussed and generally supported.

After receiving evaluations, additional data and comments generated by the Interim Report, the CJA Review Committee met and decisions were made to modify several of the recommendations in the Interim Report. This information was shared with the Defender Services Committee to assure that that Committee's report to the Judicial Conference would be based as closely as possible on the actual recommendations in the CJA Review Committee's final Report.

Throughout the course of its study, the Committee had considerable interaction with the Federal Public and Community Defenders and panel attorney representatives in meetings, public hearings, telephone conference calls, and correspondence. Additionally, an early draft of the Interim Report was shared with the Committee on Defender Services, and members of the two committees met to discuss it. These groups endorse most of the Committee's recommendations and have suggested alternatives in areas of disagreement. The Committee has carefully evaluated all suggestions received and believes that the system outlined in its final Report would provide high quality representation to financially eligible persons in the federal criminal justice system.



## COMMITTEE FINDINGS

The federal judiciary, charged with responsibility for the implementation and administration of the CJA, has guided the program's development since its origins. Much has been achieved. In lieu of the ad hoc procedures which prevailed before its enactment, the CJA provides a framework to ensure adequate representation of financially disadvantaged persons. Local CJA plans include certain uniform requirements but provide flexibility to allow for the unique characteristics of each district. Since the passage of the 1970 amendments providing for the federal defender organization option, these entities have become an integral part of the appointed counsel program. The information available to the Committee indicates that these organizations, staffed by trained, full-time federal criminal defense practitioners, provide quality representation in a relatively efficient manner. In recent years, federal defender organizations have been assigned about one half of the total CJA appointments, while using less than half of the funds. Moreover, in districts where federal defender organizations exist, they often enhance the level of representation provided by panel attorneys by acting as a resource for the panel. Private panel attorneys continue to shoulder a substantial proportion of CJA cases, as required by the Act. In sum, the CJA has moved the criminal justice system closer to the ideal of egalitarian treatment under the law regardless of one's station in life.

While the CJA Review Committee recognizes the strengths and successes of the CJA program, it has also found areas of concern. The observation that there is room for improvement does not detract from what has been accomplished. Rather, it is vital to the continued progress of the CJA toward fulfillment of its mission. The Committee echoes the sentiments of the Allen Committee:

Concern with the just administration of the criminal law need not be based on the conviction that egregious wrongs and shocking inequities are now being practiced. The work of the Committee proceeded on no such assumption. Indeed, we have been heartened by the numerous evidences of concern for the fairness and decency of the criminal process in the federal courts. The purpose of this Report is to contribute to a tradition of justice already strongly expressed in the courts of the United States. That the emphasis of this Report is on shortcomings of the present system reflects the fact that improvement must be preceded by an awareness of deficiencies."

In addition, the CJA program must now be examined with the realization that the nature of federal criminal practice has changed. The number and complexity of CJA cases have been greatly affected by the prosecutorial policies of the Department of Justice and statutory initiatives.\* For instance, the number of federal drug prosecutions has tripled from 3,732 in 1981 to 12,400 in 1991.\* Workload, and therefore the cost, for providing defense services has increased dramatically. The sentencing guidelines,

promulgated under the Sentencing Reform Act of 1984, have increased the time required to provide representation in most cases by an estimated 25-50%.<sup>4</sup> Additional factors include an increase in multi-defendant litigation, and an increase in complex cases brought under the Racketeer Influenced and Corrupt Organizations Act (RICO) and the Continuing Criminal Enterprise Act (CCE). Prosecutions under RICO and CCE often involve lengthy multiple-defendant trials and appeals in which an attorney representing one defendant may have to devote substantial time to reviewing evidence, attending proceedings and reviewing records that are related to another defendant's case and could impact on the case against the attorney's client. The Comprehensive Forfeiture Act has led to the need to represent more defendants who have become eligible for CJA representation due to asset forfeiture. These litigations generally are multi-defendant drug or bank fraud prosecutions which are typically complex and require significant additional preparation, trial time and resource commitments.

When analyzing how the CJA program functions, it is also important to note the limited empirical data and means for gathering it. This is illustrated by comments made by a statistician in the Research Division of the Federal Judicial Center when the Judicial Center was asked by the Committee to provide empirical data regarding delays in processing CJA vouchers. The Judicial Center statistician reported:

The Center conducted searches of both the Integrated Database (IDB) and the AO CJA voucher database. We found that, except for matters covered by specific statutory requirements, CJA programs, methods, voucher processing and data collection efforts differ substantially from district to district. Consequently, the information stored in the centralized computer database is completely inadequate for addressing questions of intra- and inter-district variation and quite limited for addressing most of the other questions posed by the Committee.<sup>5</sup>

In spite of this difficulty, the Committee has sought out and considered all known sources of empirical data, together with the wide range of testimony, correspondence, resource materials and other evidence received during the course of this study.

It is with this background that the Committee details various program concerns and structural deficiencies.

### **Program Concerns**

Bearing in mind that the goal of the CJA is effective assistance of counsel for those who cannot afford to pay for representation, the Committee's investigation has revealed problems in both the panel attorney and federal defender components of the CJA program, as well as a lack of effective program review.

## 1. Panel Attorneys

Panel attorneys are operating in the midst of many difficult circumstances. In a number of districts there is no design or system of appointments that matches the ability and experience of panel attorneys to the complexity of the cases assigned to them. There is a lack of support or training for panel attorneys, ranging from such mundane yet critical matters as the procedural steps to hire an investigator or expert, to more substantive assistance with such complex issues as RICO prosecutions or sentencing guidelines interpretation. In the absence of adequate support or training, providing effective representation in a CJA case is, for many attorneys, a difficult undertaking. In addition, the compensation is minimal and subject to delays in the voucher process. The cumulative effect of these conditions has led to dissatisfaction among panel attorneys. Indeed, the most consistently cited concern throughout the Committee's investigation has been the plight of panel attorneys under the CJA program and its threat to effective assistance of counsel. While the statute establishes panel attorneys as a cornerstone of the appointed counsel program, there has been an increasing erosion of the panels' ability to provide quality representation to the accused.

### Panel Attorney Administration

In some districts, every member of the federal bar, regardless of experience or specialty, is obligated to serve on the CJA panel and accept CJA appointments. Mere admission to practice is equated to competency, and lawyers who have no relevant experience, knowledge or ability in criminal law are conscripted and appointed to CJA cases.\* Under such a system, attorneys receive too few appointments to ensure proficiency in a highly specialized, complex and changing area of the law. The President of the National Association of Criminal Defense Lawyers, Nancy Hollander, was among those emphasizing this point to the Committee:

[W]here every lawyer [who] is admitted to federal court has to join the panel,...each lawyer gets too few appointments to remain current on the law, and the lawyers, unless they have a retained Federal criminal practice, simply are not effective. They have no training and they cannot lead their clients through the maze of criminal sentencing guidelines.'

Indeed, it is virtually impossible for an attorney who has had no exposure to the federal sentencing guidelines to be an effective advocate for his client. Defending a federal criminal case without knowledge of the sentencing guidelines is akin to practicing tax law without knowledge of the Internal Revenue Code.\*

Despite the *CJA Guidelines*, which call for matching the complexity of cases with the experience and qualifications of practitioners, the Committee was advised of the purely mechanical assignment of cases to panel attorneys by a secretary in the clerk's, the

magistrate's, or the federal defender's office.' Assignments are reportedly totally random in some districts, based merely on a rotation through the list of attorneys or picking a name at random from a file box of cards. Thus, an attorney who has little or no criminal experience may be appointed to a case involving the most complex issues or a serious potential term of incarceration."

This is a serious matter, especially since it was the subject of recommendations by Professor Oaks 25 years ago. When district-wide systems of appointment fail to attempt to match the skills of counsel with the seriousness of the case, remedial action which ensures minimum uniform requirements is needed. Defendants in all districts are entitled to counsel whose skills will approximate, as closely as possible, the rigors of the case and abilities of counsel whom they would choose to retain if financially able to do so. While deference to local preference is an important component of the CJA, it should not be permitted to undermine the basic objective of the CJA -- to provide effective representation to individuals with limited financial means.

The CJA has no explicit requirement that an attorney perform to a standard. Nor does the Act require monitoring of an attorney's ability or that any sort of evaluation of an attorney's ability periodically be performed to ensure that clients are receiving adequate representation. The model plan found in the *CJA Guidelines* does call for the same level of service which an attorney would provide to a private client and that attorneys conform their conduct to the codes of professional responsibility.<sup>11</sup> This requirement is not binding on the districts. The Committee found that, in general, districts do not monitor attorney performance or include any such requirement in their plans.

This lack of performance standards against which an attorney's representation can be measured creates a situation in which it is unknown what type of representation a client is being provided. The Committee is aware that occasionally an attorney's poor performance may be reported by a judge or a defendant and that in some cases an attorney may be removed from the panel informally through non-assignment to future cases, but such a haphazard situation is entirely inappropriate for a system where an individual's liberty is at stake.

Performance standards provide guidance to attorneys so that they know what is expected of them.<sup>12</sup> This guidance also serves to allow attorney performance to be monitored and, in appropriate circumstances, provides a basis for the suspension or removal of an attorney from the CJA panel.

Another issue which has had little attention is the composition of CJA panels with respect to women and minorities. A recent report of the Ninth Circuit found that in the

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<sup>11</sup> Both the ABA and NLADA have developed standards for performance, as have several state systems.



ten districts surveyed the percentage of women panel attorneys ranged from a low of zero percent in two districts to as high as 36 percent. The research group found, among other things, that: 1) The CJA plans developed in each district "uniformly fail to address equality of opportunity in recruitment or selection of members of the selection committees or panels;" 2) "There is no written circuit-wide policy, and hence, no mandate, committing each district to ensuring equal access of attorneys to panels, regardless of gender;" 3) There is a lack of affirmative or regular recruiting of applicants to panels; and 4) There is no circuit requirement to keep or report statistical data showing the gender of attorneys appointed to CJA panels.<sup>7</sup>

Once appointed to a case, panel attorneys, at least those in districts with no federal defender office, are provided little if any continuing support, orientation, advice or assistance with respect to the processing of claims; procedures for obtaining approval of investigative, expert and other services necessary to an adequate defense; or substantive guidance concerning even the most complex of cases. Likewise, particularly in districts in which there is no federal defender organization, panel attorneys have been without organized continuing legal education and training.<sup>12</sup> While federal defender organizations frequently act to address such needs for the panel in their own districts, panel attorneys have expressed frustration and a sense of isolation over the absence of focused resources and guidance.<sup>13</sup> Many attorneys doubt their ability to provide adequate representation under these circumstances.

Attempts to expand training for panel attorneys in response to the obvious need are limited by the lack of clear lines of authority and unavailability of funds and an administrative staff to support such needs. Training for several thousand panel attorneys throughout the country is currently supported by a single training coordinator employed by the Defender Services Division. In 1992 the training coordinator was able to organize 26 local training programs for panel attorneys in non-defender districts. In addition, the Division provided support for nine panel attorney training programs in districts which are served by federal defender organizations. The Committee on Defender Services has recently authorized the funding of CJA Resource Counsel<sup>14</sup> and a Sentencing Guidelines Training Group.

Given the limited resources and support the Division has been able to devote to training, the accomplishments have been impressive. Staffing for these efforts, however,

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<sup>12</sup> Training for federal defender staff is currently provided through a federal defender core training program, which consists of several separate seminars, operated cooperatively by the Federal Judicial Center, the Defender Services Division of the Administrative Office, and the Training Subcommittee of the Federal Defender Advisory Committee. Through an interagency agreement, the Federal Judicial Center plans, develops and produces this program. A limited amount of funding is available to provide for the cost of tuition and transportation associated with commercially offered training programs which are necessary to supplement the core program.



stands in stark contrast to the Advocacy Institute, the training component of the Department of Justice, which employs a full-time staff of approximately 25 to support the training of approximately 5,000 Assistant United States Attorneys.

Panel attorneys must be provided with the tools to make them as effective as their fully salaried and supported adversaries. There is a strong sentiment among panel attorneys that every district ought to have a resource presence for support of the panel.<sup>12</sup> Moreover, in view of the fact that the amendment to the Criminal Justice Act which authorized training for panel attorneys was enacted in 1986, adequate staffing for this activity is clearly overdue.

In spite of the criticisms of the panel attorney program, the Committee believes that the present "mixed" system of panel attorneys and federal defenders should be maintained for reasons of both practice and theory. Even in those districts that have a defender organization, panel attorneys play a prominent role. A defender organization cannot properly undertake the representation of more than one defendant in a multi-defendant prosecution because a conflict of interest almost invariably results. The participation of the private bar is essential to a strong, viable defender program.

#### **Panel Attorney Compensation**

A primary reason for the growing dissatisfaction with the functioning of the private bar component of the CJA program stems from the historically and increasingly inadequate compensation paid to panel attorneys. As the number and complexity of CJA cases proliferate, and the practice of federal criminal law becomes more specialized, a smaller segment of the bar remains qualified to render effective representation for defendants and the financial sacrifices imposed upon panel attorneys are becoming more than many are willing or able to bear.

The hourly rates and case maximums generally are insufficient payment for even average federal cases of today. Funding of the panel attorney component of the defense function has been inadequate, and dramatically so over the last three years. The rates of \$30 per hour for in-court time and \$20 per hour for out-of-court work, which were established in 1970, remained in effect until 1984, when Congress approved a doubling of the rates. Over the past six years, the Judicial Conference has authorized higher compensation for overhead-related costs in 88 of the 94 districts and cost-of-living adjustments to all maximum rates of compensation. However, frustrations are heightened by increases in the hourly rates to \$75<sup>13</sup> which, while authorized, remain unfunded."

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<sup>13</sup> Since 1970, the cost of living (using the Consumer Price Index) has risen more than 350% while the compensation rate in most districts is 100% higher (\$60/\$40), a net loss to inflation of over 250%. If rates had kept pace with the CPI since 1970, panel attorneys would be receiving approximately \$108 per in-court hour and \$72 per out-of-court hour.

Indeed, not only has there been no funding for the compensation increases in most districts, a shortfall of funds has led to the suspension of all payments to panel attorneys for portions of the past two years and is projected for the current year. Attorneys who have loyally remained on the panel have expressed fear of extreme financial hardship.

Correspondence and testimony provided to the Committee indicates that the quality of representation by CJA panel attorneys is, in fact, being compromised in some instances by the financial burden imposed upon them.<sup>14</sup> Since accepting a CJA case often means being paid at a rate less than the prevalent overhead expense in a district,<sup>15</sup> attorneys have withdrawn, or indicated that they would withdraw, from CJA panels.<sup>16</sup> As the Supreme Court of Kansas observed in *Stephan v. Smith*, 242 Kan. 336, 747 P.2d 816 (1987), because appointed counsel are generally compensated at rates well below the market rate for legal services, or even the overhead expense of the attorney, appointed counsel face an inherent conflict between remaining financially solvent and the defendant's need for vigorous advocacy.

The Committee on Defender Services examined the issue and adopted the following resolution in June 1990:

The Sixth Amendment to the Constitution places upon the government the obligation to provide, at its expense, effective assistance of counsel to persons financially unable to secure their own legal representation. *Pro bono* legal services have been an outstanding contribution of the legal profession to our society and have greatly assisted the government in providing these constitutionally mandated services. The complexities of modern criminal litigation and the economics of practice, however, make it fundamentally unfair to expect lawyers to perform increasingly burdensome work for which they are inadequately compensated. It is the sense of the Committee that equal access to justice is impaired when, for those with limited financial resources, that access depends upon mandatory *pro bono* legal services.

Despite the widespread promulgation of this resolution, many judges continue to require that attorneys accept appointments in CJA cases as a condition of practice before the federal courts. The *pro bono* contributions of the bar to the CJA program have been commendable but, as the Defender Services Committee has resolved, effective

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<sup>14</sup> According to expert testimony in a recent case, the average overhead rate for attorneys in the St. Louis metropolitan area is \$61.00 per hour. (See Letter to the Committee from Lawrence J. Fleming, St. Louis, Missouri, dated September 2, 1992, referring to *U.S. v. Lewis-Bey, et al.*, No. 91-00001CR(6) (E.D. Mo.), Transcript of Proceedings, July 10, 1992, pp. 95-110.) Even ignoring statutory maximums on compensation per case, current hourly compensation rates are a financial disincentive for panel attorneys to spend substantial time on a CJA case.

representation for those with limited financial resources is impaired when it is dependent upon mandatory *pro bono* legal services.

Many panel attorneys cite further financial strains imposed upon them when their fee claims are reduced by judges with neither explanation nor recourse,<sup>13</sup> and there are lengthy delays in approving claims for payment.<sup>14</sup> These concerns are widespread and well documented in the information supplied to the Committee by hundreds of individuals with experience in the criminal justice system. The Committee endeavored to collect specific statistics in an effort to pinpoint the prevalence of these problems, but, as noted in subsection 3, *infra*, there is generally a lack of reliable data available to make such assessments with a high degree of confidence.<sup>15</sup> The data limitations do not detract, however, from the views expressed over the course of the Committee's study which reflect the existence of voucher reduction and delay problems, and the necessity for corrective measures. Also, particularly in protracted cases, interim compensation procedures are neither encouraged nor fully utilized. These inefficiencies exacerbate financial hardships on panel attorneys, especially sole practitioners or members of small firms.

## 2. Federal Defender Organizations

The information presented to the Committee indicates that the overall level of representation provided by federal defender organizations is excellent. As the number and size of these organizations have increased, they have become a vital component of the CJA program. The services provided by federal defenders have had a salutary effect on the CJA program and should be expanded. Improvement is needed, however, in some key administrative areas. Equal employment opportunity is one area that should be strengthened. Also, Federal Public Defender offices lack explicit administrative policies on personnel matters such as promotions, grievances, and termination.

There are districts without federal defender organizations which would benefit from having one, both in terms of raising the quality and reducing the cost of CJA representation. In 1991, 27 of the 44 districts without federal defenders met the 200-case threshold for seeking a defender organization; 13 of these districts had more than 300 CJA appointments.<sup>16</sup> In a few of those districts, federal defender organizations have been, or are in the process of being, established. In other districts, the Defender Services Division has made contacts with the court to determine if there is sufficient interest for a feasibility study to be performed. Absent interest by the eligible court, such a study is not initiated and a federal defender organization cannot be established. The Committee finds this absolute veto power, regardless of the potential for improved representation or cost savings, to be contrary to the objectives of the CJA. Indeed, in September 1992, the

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<sup>13</sup> See Table 4, *supra*. These figures do not include situations in which the combined CJA caseload of adjacent districts exceeds 200.

Judicial Conference agreed with a Defender Services Committee recommendation to seek legislation to eliminate the 200-case minimum in order to encourage the establishment of federal defender organizations in more districts.<sup>14</sup> Accordingly, an existing federal defender organization should not be dismantled without a showing that its continued existence would be detrimental to the objectives of the CJA.<sup>15</sup>

Equal employment opportunity (EEO) is another area which needs attention. Employment practices for Federal Public Defender offices are governed by the provisions of the EEO plan of the organization's respective circuit. Community Defender Organizations, including Death Penalty Resource Centers, are not covered by the court EEO plans. However, the Grant and Conditions under which the CDOs and DPRCs operate require the organizations to establish EEO programs unless they are obligated to submit reports to the Equal Employment Opportunity Commission pursuant to Title VII of the Civil Rights Act of 1964.

A Defender Services Division report on the status of EEO programs in federal defender organizations showed that progress has been made in affording equal employment opportunity to women and minorities in the federal defender organizations.<sup>16</sup> The area which appears to require the greatest attention is the selection of federal defenders, particularly Federal Public Defenders. The rate at which women and minorities are gaining access to these positions is significantly slower than the progress made in the employment of attorneys generally. Of the 40 Federal Public Defenders currently in place, only five (12.5%) are women and there is only one Black (Virgin Islands) and one Hispanic (Puerto Rico). In other words, within the continental United States, there is not one minority Federal Public Defender.

Another deficiency in the administration of federal defender organizations is that there are few formal written policies with regard to management and personnel matters. For example, personnel performance evaluations and grievance procedures, common in the government as well as the private sector, are virtually non-existent in Federal Public Defender offices. A number of Federal Public Defenders clearly testified that their employees serve at will and no explicit procedure exists for employment disputes and grievances.<sup>17</sup> Court of appeals judges expressed dissatisfaction with involvement in such situations. For example, Chief Judge Monroe G. McKay of the Tenth Circuit stated:

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<sup>14</sup> In two districts the court decided to eliminate an existing Federal Public Defender office. The CJA does not expressly cover closing federal defender organizations; nor do the *CJA Guidelines*. A district court can amend its CJA plan, with the approval of the circuit's judicial council, to close a defender organization.



I have had a complaint filed, the run-of-the-mill office complaint against the Public Defender. I have been writing opinions on why I don't have jurisdiction to discipline her boss.

Now the court shouldn't be involved."

### **3. Effective Program Evaluation and Review**

The Committee found generally declining levels of effective evaluation and review of the CJA program. Although the AO is able to collect some data on the operation of the CJA program, there is no comprehensive system for identifying and obtaining pertinent, reliable data and evaluating the overall efficiency and effectiveness of the program. This includes a lack of any mechanism to detect or report inadequate or compromised representation by institutional defenders or panel attorneys, or instances of improper interference with the operation of the program on the local level or with individual attorneys.

When the Administrative Office established the Defender Services Division in 1975, it was envisioned that that organization would assume responsibility for reviewing, reporting on and making recommendations with respect to the operation of district and circuit CJA plans and the operation of panel attorney and federal defender programs nationwide. In the first several years of its operation, the Division did make an effort to visit each federal defender office (and concurrently review the panel attorney program in the district) once every three years. By the fifth year of its existence, staffing limitations caused the visitation practice to be limited to those districts in which Division personnel were present by virtue of other business. By the tenth year of its operation, all efforts and appearances of meaningful review had been abandoned altogether. Thus, as it currently stands, no federal defender organization is regularly subjected to a formal review by the AO of either policies or practices.

These difficulties are further compounded by limited empirical data gathering with respect to the operation of the CJA program. The effectiveness of the program as a whole, the individual operations on the district level, and the cost efficiency of the program cannot be adequately evaluated without an ongoing system of collecting and reporting the statistical underpinnings of the program on a local and national level.

Federal Public Defenders are appointed for four-year terms. During that term, there is no institutional mechanism for evaluating the operation of the Federal Public Defender's office, unless the court of appeals decides to remove the defender for



incompetency, misconduct in office or neglect of duty.<sup>17</sup> In practice, the only time that an evaluation will be conducted is when the Federal Public Defender seeks reappointment for another term. At that point, the circuit court of appeals determines what, if any, review of the defender's operations is needed in order to decide whether the incumbent or another individual will serve as Federal Public Defender.

Heads of CDOs serve at will, under the supervision of their organizations' boards of directors. It is the responsibility of each board to oversee its own organization, thus providing an important oversight entity, detached from the courts, which the Federal Public Defenders lack. Stephanie Kearns, Executive Director of the CDO in Atlanta, explained the benefits she found with a board:

My board meets quarterly with me. They do not get involved in the day to day operations. I very much feel like I have constant accountability to that board, not for nitpick things, but for the quality of the representation my office is providing, also fiscal accountability, since it's very different from a public defender office because I manage my funds and I think that's important, but I feel that I don't have four years that I can breathe easy. I feel like every quarter, I'm not on the carpet, but I'm there, potentially on the carpet for anything that happened during the preceding three months. I think the other advantage to that that I really appreciate is that it is not likely that I'm going to come in after four years, have a review and start hearing about something that happened two years ago that has gotten blown out of proportion, because I have the opportunity to get criticism as I go along and act on it."

The Committee on Defender Services has favored an evaluation process for federal defenders. Thus far, a number of voluntary peer reviews of and by the defenders have been conducted, but it has not become an established practice with refined standards, goals or objectives."

The situation with respect to panel attorneys is also of great concern. In 1975 it was agreed within the Administrative Office that, in those districts in which there was no federal defender organization, the Management Review Division (which, with the Defender Services Division, was created in that year) would, as part of its review of the comprehensive range of operations of the district and circuit courts which it visited, compare actual CJA panel attorney practices with those described in the particular CJA plan. Staffing limitations within the Defender Services Division precluded on-site participation in such reviews. And, as was the case with respect to the review of federal

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<sup>17</sup> The Ninth Circuit has developed formal procedures for the removal of Federal Public Defenders; the Committee is not aware of any other circuit that has done so.

defender organizations, by 1985 even the limited reviews of panel attorney operations were terminated.

The need for an evaluation process is especially great with respect to the circumstances of panel attorneys, who lack adequate orientation, information, training and general support and whose skill levels vary widely. Of concern also is the historic evidence (particularly noted in past management reviews) that local practices often differ substantially from those described in the CJA plan for the district and that most plans, once enacted, are infrequently reviewed or revised. Similarly, many panels were found to have operated for extended periods without a review of membership or effort to attract qualified practitioners or to remove those who lack interest or adequate skills.

The lack of a concentrated effort to collect pertinent, reliable empirical data hindered the Committee's evaluation of other panel attorney complaints concerning such areas as arbitrary voucher cuts and delays in voucher processing. Although these areas are of great concern to panel attorneys, and have the potential to undermine the vitality of the program, no system has been put into place to evaluate the extent of the problems or identify the districts in which the problems exist.<sup>18</sup>

The absence of any comprehensive management system, appropriate and comprehensive administrative oversight (including a safe mechanism for reporting improper interference with the delivery of legal services), or focused data collection and evaluation procedures represent serious deficiencies in a government program with a budget exceeding \$200 million.

In addressing the need for improved management and administration of the CJA program, the Committee does not mean to imply that soaring costs associated with the program are the result of the present administrative structure. It is clear that the growing fiscal needs of the program result from the growing number of federal prosecutions and the complexity and seriousness of many of those cases.

### Structural Concerns

In amending the Criminal Justice Act in 1970, Congress sought to strike a balance between independence and accountability. Conscious of the need for independence of the defense function, Congress determined that it was most important to insulate federal defenders from control by the judges before whom they principally practiced. Accordingly, the appointment and compensation of Federal Public Defenders was made a responsibility of the judges of the courts of appeals. In the community defender model, boards of

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<sup>18</sup> See also Endnote hh.

directors provided a buffer. The panel attorneys were thought to be sufficiently protected by virtue of their only occasional appointment in CJA cases. The district courts were directed to formulate plans for implementing the Act which were to be approved by the judicial councils of the circuits. The result was a dispersion of authority among a multitude of court authorities.

One of the benefits of this dispersion of authority has been substantial independence for the federal defenders, at least with respect to office management and client representation. However, the absence of clear authority for enforcement of policies or overall supervision, management and administration discourages coordination, review and support for the program in general and for panel attorneys in particular.

The independence of the federal defenders and panel counsel in providing representation to their clients and in responding to local needs must be preserved and protected. However, general administrative and fiscal direction of the program should rest in a central entity.

Both the *Allen Report* and the *Oaks Report* discuss the imperative of independence of counsel providing representation to financially eligible persons in criminal cases. This goal is reflected in standards for providing defense services adopted by the American Bar Association and the National Legal Aid and Defender Association. A recurrent theme throughout these standards is that the judiciary should exercise no significant control over the defense function." The judiciary exercises no similar control over either the prosecution or the activities of private, retained counsel."

The need for independence is consistently stressed by attorneys practicing in federal court and by many judges as well." Judge Stephanie K. Seymour, a former Chair of the Committee on Defender Services, stated:

I believe it is time to change the administrative structure of the Criminal Justice Act.

Although it may have been wise to place the defender services program under the guidance of the judiciary in the program's infancy, logically the defense component of our criminal justice system should be as independent of the decision maker as is the prosecution. It is uncomfortable and a bit unseemly for the very judges before whom the criminal defense lawyer must try his or her cases to participate in the selection of that lawyer or to decide his or her compensation.

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Moreover, the increased number and complexity of federal criminal cases, along with the burgeoning of civil litigation, has strained the ability of judges to handle the day-to-day operation of the defender services program."

Chief Judge Wallace of the Ninth Circuit expressed concerns about the authority to appoint Federal Public Defenders being vested in the courts of appeals:

The judges who must evaluate whether to appoint a defender seeking a subsequent term are the same judges who evaluate the defender and the defender's staff's appellate arguments and performances.

It is the strong consensus of those circuit judges who have been serving on the Ninth Circuit committee which administers these appointment procedures that it is inappropriate for a Court of Appeals to exercise this responsibility. These judges urge your Committee to propose an alternative institution to appoint and to remove federal public defenders. This sentiment coincides with the recommendation of the Federal Courts Study Committee which objected to the role of judges in the appointment and removal processes of federal public defenders."

One magistrate judge explained the day-to-day conflicts that can occur:

I mean you only have to be in the middle of a trial sometime and then have to take [off] your trial hat and go approve an interim ex parte order for the hiring of an expert, to wonder who you are. You can only be so schizophrenic."

The Committee finds that the goals of the CJA would be best served in the future if judicial involvement in aspects of the Act's administration were shifted to boards composed of persons not involved in the prosecutorial or adjudicatory process. It is not that judges do not appreciate the criminal defense function; rather, it is that judges and defense counsel have their own, unique roles to play in the criminal justice system. When judges bear the responsibility (and power) to assign particular lawyers in particular cases, to determine the lawyer's compensation, to select the Federal Public Defender and review the FPD's performance in that capacity, the judiciary has become entangled in a web of matters that are more properly the province of separate entities devoted to criminal defense.

This is not just a theoretical problem. While the present structure has the inherent potential for judicial interference or defender reluctance to incur the disapproval of their judicial "employers," there is no protected mechanism for reporting or detecting such occurrences and for immediate remedy. Nevertheless, the Committee heard sufficient examples of conflicts between the courts and appointed counsel to conclude that a

systemic transfer of CJA administration would be beneficial. Attorneys are still being conscripted in some districts to take CJA cases even though they have no federal criminal defense experience or training; CJA panel attorneys are concerned about the impact of their defense tactics on the presiding judge's review of their compensation and expense vouchers; and judges are selecting FPDs who appear before the court and are privy to such matters as employee grievances filed against FPDs."

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

The structural concerns regarding conflicts exist not only at the local level, but nationally as well. When the judiciary must make budgetary and other policy decisions affecting the appointed counsel program, the needs of the CJA program must continually be counterbalanced by other legitimate needs of the judiciary.

This is especially true in fiscal matters. It appears that few people fully understand the process of incorporating policies, setting priorities and obtaining an appropriation for the federal defender and appointed counsel program. The diffusion of authority with respect to the program tends to lead those with responsibility over just a portion of it to assume someone else is "minding the store." Thus, little is done collectively to encourage the AO, Judicial Conference and Congress to provide adequate appropriations for the CJA program and its administration.

The funding for the administration and oversight of the CJA by the Defender Services Division of the AO is part of the AO budget and, therefore, subject to priorities established for administration of the entire judiciary. At the present time the Defender Services Division does not have sufficient personnel and funding to oversee adequately the operations of the federal defender offices and panel attorney systems across the country.

The appropriations process for the CJA program itself is opaque. The Defender Services Committee and personnel from the Defender Services Division attempt to set priorities and funding requests for the various elements of the CJA, including the defender offices, panel attorney costs and Death Penalty Resource Centers. The Chair of the Defender Services Committee negotiates with the Budget Committee and chairs of the spending committees (whose jurisdictions encompass such interests as security, probation and pretrial services, and automation) of the Judicial Conference – perhaps holding the line, or perhaps having to give up some desired part of the funding request in the interest of holding down the overall appropriation request for the judiciary. This process is largely closed to the scrutiny of the public, bar associations, federal defenders, panel attorneys and others who are directly affected by the priorities set and the funding decisions made.



What emerges is a judiciary budget in which the CJA is one highly visible line item within the operation of the courts of appeals, district courts and other judicial services.<sup>19</sup> This budget is then presented to Congress by the Budget Committee of the Judicial Conference and supporting staff from the AO's Office for Finance, Budget & Program Analysis. Since neither the Defender Services Committee nor the Defender Services Division is generally directly involved in presenting the budget to Congress, the work, needs, and interests of the CJA program are presented as part of a complex and, in recent years, fairly competitive quest for funds."

While the efforts of the Chairs of the Executive and Budget Committees of the Judicial Conference and the Director of the AO have been highly commendable with respect to defender funding, this appropriations process does not adequately serve the needs of the CJA program. When the budget of the CJA program was relatively small and noncontroversial, the process produced adequate funding. However, with the extraordinary growth of the CJA program, a more dedicated, open and forceful appropriations process, in which priorities and funding levels can be properly debated and presented to Congress with the active support of bar associations, the public, the federal defenders, panel attorneys, the judiciary and others who support the program, is critically needed.

The Committee believes that these fiscal concerns as well as other concerns regarding independence, oversight and administration, can best be addressed through the establishment of an entity dedicated to federal defense services. The Committee has been impressed by the operation of CDOs which are actively supervised by boards rather than the courts. Such boards have the defense function, and only the defense function, as their mission. These boards provide an attractive model for administration of the CJA program both at the national and local level.

There has been a general trend among the states toward establishing independent boards, commissions or agencies, separate from the courts, to administer their appointed counsel programs.<sup>20</sup> A number of states have organized their systems through a statewide defender program. Under these systems, a separate statewide agency is created through the executive or judicial branch of government, or as an independent public or private agency. Some states organize their systems so that the state commission or board is established to provide overall direction, develop standards and guidelines for local program operation, develop comprehensive management information programs for the projection of costs and caseload throughout the state, etc. The principal feature of this system is the provision of a central, uniform policy across the state that assures accountability, often

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<sup>19</sup> Appendix III shows the prominence of the defender services appropriation request as the second largest line item in the judicial branch of government.

permitting local jurisdictions in the state to determine the type of program (public defender, assigned counsel, contract) that best suits their local needs.

In studying various models for rendering defense services, the Committee found in the military establishment an interesting evolutionary parallel. Toward the end of the 1940s, there was great concern about the adequacy of the Army's judicial system. At that time the judicial function, as well as those of the prosecution and the defense in criminal cases, were all supervised by field commanders and, thus, were susceptible to command influence. In response to criticism, in 1959 the Army separated the judicial function from such influence and then, by 1980, removed the defense function from the control of commanders or military judges. Significantly, in so doing the Army acted contrary to the strong views of many commanders in order to eliminate even the appearance of any conflict of interest.<sup>24</sup> A similar evolution occurred in the Air Force. Of particular interest is the fact that the Armed Forces were not motivated by evidence of actual abuse of authority but by high principle and by a concern for fostering confidence in the military justice system. The Army and Air Force completed their evolutionary processes in 1980, but in the federal courts there are still important steps to take.

## RECOMMENDATIONS

The recommendations which the Committee has developed for improvements in the CJA program are grouped in the following nine categories: A. Selection, Training, and Evaluation of Panel Attorneys; B. Compensation of Panel Attorneys; C. Defender Organizations and Personnel; D. Litigation; E. Funding; F. National Structure and Administration; G. Local Structure and Administration; H. Death Penalty Resource Centers; and I. Other Recommendations. There is a broad consensus of support for the vast majority of these recommendations, and their adoption would accomplish much to upgrade and improve our federal criminal justice system. Proposed legislation to implement the recommendations is included at page 101.

The recommendations are comprehensive and reflect commonality of concern. The existence today of concerns noted in both the *Oaks* and *Allen Reports* is of particular significance. This is the third report in the history of the Criminal Justice Act and it discusses some reforms which were seen as absolute necessities more than 20 years ago, but have not yet been achieved. It proposes these reforms at what the Committee believes is an acceptable cost to the system while offering substantial improvements to the quality of the administration of justice. The recommendations would benefit panel attorneys, the judiciary, federal defenders and, most importantly, those to whom the Sixth Amendment guarantees effective assistance of counsel.

The centerpiece of the Committee's recommendations is the call for the establishment of a free-standing Center for Federal Criminal Defense Services. The Center would be located within the judicial branch as an independent body, endowed with a broad mandate to lead, administer and speak for defender services in the federal criminal justice system. While it is possible for most other recommendations in this Report to be implemented without establishment of the Center, considerations of both principle and practicality dictate that any delivery system, current or reformed, will produce optimum results only if administered through an independent and vigorous structure.

The United States Judicial Conference has administered the CJA program since its inception, through the Administrative Office of the United States Courts and, for the last 17 years, through the Administrative Office's Defender Services Division. Broad policy is made by the Judicial Conference Committee on Defender Services, a group of 10 federal circuit, district and magistrate judges that normally meets twice a year. Daily operations and the implementation of most policy decisions are the responsibility of the Defender Services Division in consultation with others in the Administrative Office and with the Defender Services Committee chair.

This structure has generally served the cause of defender services well. Judges dedicated to the principles underlying the Sixth Amendment have teamed with strong

congressional supporters and effective and dedicated personnel within the Administrative Office to nurture a tiny, \$1 million program into a mature operation whose resource needs for Fiscal Year 1993 approximate \$300 million. But a large, complex and mature program has different needs than a developing one, and a straightforward look at federal defender services reveals weaknesses in the current structure that require substantial reform if the program will be vibrant and accountable in the coming years.

One manifestation of stress is very apparent -- the program has experienced an end-of-year funding crisis in each of the past two fiscal years and a shortfall is projected for the current year. While creation of a Center with authority and responsibility to present its appropriation requests directly to Congress and administer a coordinated, nationwide delivery system would not guarantee the elimination of such crises, it should substantially decrease their likelihood. Having in its midst a complex constitutionally-based program whose resource needs already exceed a quarter billion dollars puts an enormous strain on the Judicial Conference. Each year, both at budget time and at crisis time, it must try to balance the many and varied needs of the entire federal judiciary against the constitutionally-mandated Sixth Amendment rights of the federal defendants. The burden is increasingly complicated, onerous and frequent, and it begs for curative attention.

There are important reasons beyond administrative efficiency and budgetary accountability to create the proposed Center. One is simply separating the defense function from judicial oversight and control. No rational policy maker would suggest that the judicial branch supervise the activities of privately retained defense counsel, much less the Department of Justice or individual U.S. Attorney offices. The judiciary itself was granted autonomy in 1939 when its administration was transferred from the Department of Justice to the newly-created Administrative Office of the U.S. Courts." Yet because defender services came late to the system and was politically sheltered within the judiciary, it is regarded as normal for judges to do everything from making the most fundamental defense-related policy decisions to, in many instances, picking a particular defense attorney for a particular case. While the Committee has received several chilling examples of inappropriate involvement by the judiciary in the administration of the CJA program on the local level, it is not clear, due to the obvious reluctance of attorneys to report such instances and the lack of a confidential and effective mechanism for such reporting, whether such problems are rare, or more pervasive. The important point is that the current system creates a serious problem of perception and provides the opportunity for abuse, particularly in light of the fact that the current system of oversight has the inherent potential for conflict in the judiciary's management function at the national and local levels with no prophylactic measures to identify and remedy any actual conflicts which undermine CJA representation.

Curing the perception problem would not be the only benefit derived from removing the defense function from judicial oversight. It would also, for the first time,

grant defender services an unfiltered voice with which to address issues concerning the criminal justice system. The criminal justice system rests on a tripod -- the judiciary, the prosecution and the defense. That tripod is strongest and most stable when each leg is equally and independently represented. The Center would serve as a clear and unified voice for defense services, benefitting the entire criminal justice system by assuring that the defense viewpoint is heard by Congress, the Judicial Conference, other deliberative bodies, and the public itself without first having to gain the approval of another component of the system.

A final, important reason to create the Center is to provide a substantially greater capacity for centralized management of defender services. This point is made in part in the previous discussion of budgeting and spending policies. But far more is involved. The current administrative body meets but twice a year, with further involvement at the discretion of the chair. The permanent staff is stretched beyond its capacity with the basic chore of making the trains run on time in an ever-growing, ever-more-complex network of programs. Neither the judges nor the staff has either the time or, in some instances, the authority to develop the national guidelines, the program evaluation systems, the training publications and seminars, the specialty resource centers, the research and development experiments, the automation support advances, the statistical studies, or any other programmatic functions that convert a series of outpost offices to a true delivery system.

Central management does not mean central control of the practice of law -- local programs must have broad discretion to deliver the defender services they believe will be most effective in meeting local needs. But intelligent and realistic deference to professional judgment should not mean abdication of managerial responsibility. The administrative supervision mechanisms currently in place may have been acceptable before expansion of the federal criminal code, bail reform, national drug policies, sentencing guidelines and death penalty resource centers. They no longer are acceptable. A national center devoted to the purpose of creating a genuine, coordinated and well managed defender system is the fundamental reform most likely to assure maximum returns in effective legal services for the growing monetary investment in those services being made annually by Congress and by the American taxpayers.

Since dissemination of the Committee's Interim Report, the Committee has received numerous comments regarding its recommendations. The comments have supported most of the recommendations. The greatest reaction has been generated by the recommendations for creation of the Center for Federal Criminal Defense Services and creation of local boards.

The national bar organizations that have commented have been unanimous in their support for the Committee's recommendations other than the creation and nature of the Center for Federal Criminal Defense Services and local boards. The American Bar



Association, as conveyed in a letter from its president, found the Committee's Interim Report to be "a thorough and balanced analysis of the Criminal Justice Act program [that] accurately identifies the major issues and proposes significant improvements." In vowing to help support the implementation of many of the recommendations, especially those concerning the compensation and evaluation of panel attorneys, the ABA's stance with respect to the proposed Center and local boards was set forth as follows:

The ABA Standards also strongly support the recommendation to establish local boards to supervise the CJA program. Removal of the judiciary from the direction of the local CJA program will provide critical reassurance to indigent clients as well as the general public that CJA program lawyers can act zealously and independently in their provision of representation.

The ABA has not taken a position on the recommendation to establish the Center for Federal Criminal Defense Services. Our policy positions regarding judicial control and program independence have focused on program operation in each jurisdiction. We have not fully considered and adopted policy on the appropriate governance of the entire CJA program."

The president of the National Legal Aid and Defender Association has written to indicate NLADA's support for the Committee's recommendations, including the concept of the proposed Center, but expressed NLADA's view that leaving the Center in the federal judiciary would not go far enough to ensure independence. NLADA recommends a wholly independent corporation outside the government to administer the CJA program, with no federal judges serving on its board of directors even during a transitional period."<sup>29</sup> The National Association of Criminal Defense Lawyers approved of all of the Committee's recommendations, including the creation of the Center for Federal Criminal Defense Services and local boards, but with the caveat that the Center's board be selected from a list of citizens nominated by NACDL, the Criminal Justice Section of the ABA, the National Bar Association, the NLADA, the NAACP, and the Federal Public and Community Defender Organizations."<sup>30</sup>

The strongest opposition to the recommendations for creation of a Center for Federal Criminal Defense Services and local boards has come from a majority of the federal defenders and members of the Defender Services Committee,"<sup>31</sup> although these groups support most of the CJA Review Committee's other recommendations."<sup>32</sup> Their opposition to the proposed administrative structure cites lack of empirical support, cost, and fear of added bureaucracy and loss of political and funding support for the CJA program as the basis for their positions.

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<sup>29</sup> The Defender Services Committee met on November 20, 1992 to consider the recommendations in the Interim Report, as modified by the CJA Review Committee, and voted 7 to 3 against the recommendations for a Center and local boards.

The CJA Review Committee believes that each of these concerns is fully addressed herein. Although creation of the Center for Federal Criminal Defense Services would represent a change which would bring about a higher level of oversight of the federal defenders, and some loss of control over the defense function for the judiciary, these changes are necessary and appropriate to fulfill the mandate of the Sixth Amendment, as well as the legislative history of the Criminal Justice Act.

#### **A. Selection, Training and Evaluation of Panel Attorneys**

**Recommendation A-1. Qualification standards should be developed for appointment to the CJA panel,**

1. The Criminal Justice Act should be amended to specifically require that attorneys appointed to handle cases under the CJA meet minimum qualifications with regard to knowledge and experience. Every attorney appointed under the CJA must have experience in handling federal criminal cases and must have knowledge of federal criminal law and procedure, including the Bail Reform Act and sentencing guidelines.

2. The Criminal Justice Act should be amended to require, in each district plan, administration of CJA panels in such a way as to ensure that:

a. Panels are sufficiently limited in size to allow each attorney sufficient appointments annually to ensure ongoing familiarity with federal criminal law and procedure; and

b. Attorney qualifications are matched with the difficulty of each case.

The Committee further suggests that the following procedures be required on an administrative level to further the goals of these recommendations:

1. An explicit application procedure be required in which each applicant to become a panel attorney must state and verify the applicant's education, experience and other qualifications;

2. Conscription of all attorneys admitted to the federal bar for panel service should be forbidden;

3. Panel lists should be "tiered" to qualify attorneys for appointment for different levels or types of cases, depending upon their experience and training;

4. Writing and appellate experience should be one measure of qualification, and where appropriate, separate tiers or panels should be established for appellate representation;<sup>21</sup>

5. A "second chair" program should be encouraged in which inexperienced attorneys could assist panel attorneys in order to gain the qualifications necessary to admission to the panel or to a higher tier of the panel; and

6. The appointing authority should be allowed to appoint attorneys who are not on the official CJA panel, but only in special circumstances, such as death penalty cases, where special qualifications are required.<sup>22</sup>

### Discussion

Under the current CJA there is no requirement that an attorney who is a member of the CJA panel or who is appointed to a case be found qualified to provide representation in a criminal proceeding. The Model Criminal Justice Act Plan in the *CJA Guidelines* provides in relevant part that:

1. The Court shall establish a panel of private attorneys (hereinafter referred to as the "CJA Panel") who are eligible and willing to be appointed to provide representation under the Criminal Justice Act.

2. The panel shall be large enough to provide a sufficient number of experienced attorneys to handle the CJA caseload, yet small enough so that panel members will receive an adequate number of appointments to maintain their proficiency in federal criminal defense work, and thereby provide a high quality of representation.

3. Attorneys who serve on the CJA Panel must be members in good standing of the federal bar of this district, and have demonstrated experience in, and knowledge of, the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, and the Sentencing Guidelines.<sup>23</sup>

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<sup>21</sup> The Committee believes in maintaining the continuity of counsel between the trial and appellate levels but recognizes that situations frequently arise in which new or appointed counsel becomes necessary or desirable after trial.

<sup>22</sup> Although the Committee believes that these provisions can best be implemented under the guidance of the proposed Center for Federal Criminal Defense Services (see Recommendation F-1), the CJA could be amended to require these provisions within each district and circuit CJA plan.

The comment of the Defender Services Committee to the Model CJA Plan states: "More detailed and specific qualification standards can, if desired, be developed and substituted locally by each district."

Despite these suggestions, in some districts every member of the federal bar is required to take CJA appointments regardless of whether the lawyer has experience in criminal cases. In other districts, if an attorney volunteers to serve on the CJA panel, the attorney is deemed eligible for CJA cases without additional scrutiny. Consequently, the quality of representation by CJA panel attorneys varies considerably across the country and within individual districts.

Attorneys from districts which have no qualification standards testified repeatedly at the Committee's hearings about their concern over the ramifications of such systems. One comment received by the Committee pointed out the high stakes involved:

People who have never been in a courtroom before are asked to defend people who are going to be looking at sentences of 10 years and up, with no parole and having absolutely no idea of what they are doing. While other attorneys informally assist them, that is no help in the courtroom. This leads to a number of guilty pleas when there should not be guilty pleas, and a number of search and seizure, confession and other clear constitutional and statutory issues that should be litigated, but are not."

Particularly as the practice of federal criminal law has become highly specialized, there is a need to ensure that counsel appointed to CJA cases possess appropriate qualifications.<sup>10</sup> While it may be appropriate to tailor the qualification requirements in some districts to deal with problems of availability of experienced counsel and recruiting, the standards should require minimum levels of experience in criminal defense, as well as specific experience or training in criminal practice in federal court. In order to ensure that only qualified counsel are appointed to CJA cases, no member of the bar should be selected for inclusion on the CJA panel until it has been determined that the lawyer meets the requisite qualifications.

The Committee is convinced that the establishment of qualification standards, along with the training and increased compensation recommendations discussed elsewhere in this Report, would result in a more competent panel of attorneys who would provide quality representation.

**Recommendation A-2. Training in federal criminal law and practice with regard to court and Criminal Justice Act procedures should be provided.**

The Criminal Justice Act should be amended to require the CJA's national administrative entity to provide ongoing training in federal law and practice, on a par with that provided to the prosecutors, to attorneys supplying service pursuant to the CJA. The amendment should include clear statutory authority to contract with the Federal Judicial Center or other public or private entities to assist in the provision of such training to the extent they are called upon to do so. The CJA should require that each local plan include provisions for training.

### Discussion

The practice of federal criminal law has become highly complex. It is no longer feasible for even an experienced state court criminal defense practitioner to simply appear occasionally in a federal court and be expected to perform competently.<sup>23</sup> The passage of the Bail Reform Act and sentencing guidelines, for example, make it absolutely imperative that the CJA appointed attorney be knowledgeable in these areas at the earliest moment of appointment. Lack of knowledge may lead to mistakes that will have a significant impact on the outcome of the case.

Deficiencies in training for panel attorneys were a primary topic of attorneys, court personnel and prosecutors at the Committee's public hearings and in correspondence received by the Committee. Substantial ongoing training, on a par with that provided to the prosecutors, is absolutely essential in order for federal defenders and panel attorneys to provide adequate representation under the CJA.

The Committee believes that better training would lead to cost savings in billable hours as well as better representation. Further, training should be coordinated and centralized in the entity responsible for national administration of the CJA. Such entity should be funded to begin immediate development of central resources, such as video tapes, for training and should develop a national outreach program, utilizing resources such as law schools, to ensure that the training program reaches every district.

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<sup>23</sup> Emphasizing the complexity of federal criminal law, Chief Judge Judith N. Keep, a member of the Federal Courts Study Committee, noted in a recent letter to a United States Senator:

...you have created a body of criminal law which requires expertise. When I first started practicing law, it was common for attorneys to handle some criminal cases and domestic relations cases to assure income to pay the overhead. Those days are gone, at least insofar as the federal criminal law is concerned. (Letter from Chief Judge Judith N. Keep, United States District Court for Southern California, to United States Senator Alan Cranston, dated June 26, 1992.)



Since current law does not specifically authorize assistance in training panel attorneys from entities such as the Federal Judicial Center, the proposed amendment should provide the authority for governmental or private bodies with relevant expertise to assist in training all CJA counsel to the extent they are called upon to do so. Necessary funding for this purpose should be provided.

**Recommendation A-3. Performance standards and reviews should be established for all representation by appointed counsel.**

The entity charged with national administration of the CJA should develop and monitor clear performance standards for attorneys appointed to handle CJA cases.

#### Discussion

Consistent with Recommendation A-1 that qualification standards should exist for appointment to CJA panels, it is equally important that there be a clearly delineated means of evaluating the performance of all appointed counsel in order to help ensure that quality representation is rendered to individuals whose life or liberty is at stake.

Quality defense representation in criminal cases involves a higher performance level than the federal constitutional minimum standard employed in *Strickland v. Washington*, 466 U.S. 668 (1984), to determine when a defense lawyer's representation was so deficient that the client's conviction must be reversed due to a violation of the Sixth Amendment right to effective assistance of counsel. The *Strickland* standard is an abstract, after the fact, reviewing standard which provides little or no guidance to criminal defense lawyers in the investigation, preparation, and trial of their cases. Conversely, performance standards are designed to provide defense counsel with specific information regarding the duties and obligations of a competent and vigorous criminal defense lawyer.

The American Bar Association, the National Legal Aid and Defender Association, and a number of states have developed specific performance standards.<sup>200</sup> Similar standards should be adopted as a means of assessing the work of attorneys appointed under the CJA.

Attorneys who meet the standards of performance should be protected from arbitrary disqualification from CJA appointments. Attorneys who fail to fulfill the basic performance standards should be disqualified from handling additional CJA cases at least until the adequacy of their services can be assured.

## **B. Compensation of Panel Attorneys**

**Recommendation B-1.** Fair compensation should be paid to all panel attorneys providing representation under the Criminal Justice Act. The compensation should cover reasonable overhead and a fair hourly fee.

The Criminal Justice Act should be amended to provide a level of compensation to attorneys based upon reasonable overhead and a fair hourly fee. Case maximums and the exact formulation of hourly rates should be determined by the entity administering the CJA on the national level,<sup>24</sup> and should be broad enough to allow for local differences.<sup>25</sup>

### **Discussion**

The United States has an unequivocal obligation to provide effective assistance of counsel to persons who are facing loss of life or liberty and lack the financial ability to retain counsel. The inclination of the government to pressure the private bar into subsidizing this responsibility produces an unacceptable risk that the quality of representation will be compromised. The inquiry inevitably shifts from whether services are adequate to whether attorneys deserve the compensation levels that they seek from the government. Lawyers have an outstanding record for providing *pro bono* services. It is inappropriate for the government to dictate how, when, by whom, and in what amounts such services will be rendered. If *pro bono* services are to be required, that decision should be made by bar associations rather than the government, which has a financial interest in the level of support to be provided. Lawyers should be given a choice as to how they may most effectively foster ideals or satisfy obligations regarding equal access to justice.

As the Federal Courts Study Committee recommended, what is needed is the establishment of a compensation system which ensures that panel attorneys are paid an amount that covers reasonable overhead expenses and a reasonable hourly fee,<sup>26</sup> with

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<sup>24</sup> At present the Judicial Conference is the entity that would set rates under this proposal. The Committee envisions this function as one within the purview of the Center for Federal Criminal Defense Services proposed in Recommendation F-1.

<sup>25</sup> The Committee also suggests, in Recommendation B-3, that attorneys be allowed to employ paralegals and law students, at a reduced hourly rate, as a financially efficient measure.

<sup>26</sup> The Judicial Conference and its Committee on Defender Services have taken a series of actions in an effort to address the inadequate compensation of panel attorneys. These actions include establishment of panel attorney pay cost adjustments and approval of federal pay comparability adjustments. Unfortunately, these adjustments in panel attorney compensation have not been implemented due to the depletion of funds in the CJA appropriation. The result is inadequate resources for some panel attorneys to provide quality representation to their clients.

case maximums being adjusted accordingly." The compensation rate should be the same for in-court and out-of-court time in recognition that, as pointed out by many criminal defense practitioners, time spent preparing a case for trial is no less important than, and has a significant impact upon, the trial itself. Case maximums are artificially low, having remained unchanged since 1984, and the override mechanism for exceeding the maximums is heavily utilized (over 9,000 approved "excess" payments in Fiscal Year 1991) though burdensome administratively. On the subject of the statutory case maximums, the Committee notes the ambiguity currently surrounding the appropriate ceiling to be applied with regard to appeals from federal district court *habeas corpus* proceedings. Paragraph 2.22 B(2)(vi)(e) of the *CJA Guidelines* provides that such an appeal should be treated as an "other matter" involving a limitation of \$750. The CJA Review Committee finds that such an appeal typically involves, at the least, the complexities of an appeal of a felony matter and, thus, the maximum for direct appeals should apply to *habeas corpus* appeals as well.

#### Potential Formula for Compensation of CJA Panel Attorneys

The development of a formula which will ensure that panel attorneys are reasonably compensated for their services, including reasonable overhead, was a primary recommendation of the Federal Courts Study Committee and was mandated by Congress when it directed the Judicial Conference to study the CJA program.

Various statutory methods could be employed to ensure that CJA compensation would consist of a fair hourly fee over and above a CJA panel attorney's reasonable overhead. For example, the pertinent statute could create a national presumptive overhead figure, such as \$25 per hour. Any CJA fee for compensation, such as \$50 per hour, would be in addition to the \$25 hourly reimbursement for overhead. Under this formula, every CJA panel attorney would receive no less than \$75 per hour for both in-court and out-of-court work.

One permutation of this statutory formula would allow CJA panel attorneys to rebut, on a district-wide basis, the presumptive hourly overhead rate and to have the rate adjusted upward within an authorized range. Based on probative evidence of the actual cost of doing business throughout a particular federal district, the presumptive overhead rate could be raised within the district from \$25 to as much as \$40 per hour. In a federal district employing the maximum hourly overhead rate, CJA panel attorneys would receive a reasonable hourly overhead fee of \$40 coupled with a fair hourly fee of \$50 for a total hourly rate of \$90 in court and out.

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<sup>27</sup> The current statutory limits on case compensation are: appeals (\$2,500), felonies (\$3,500), misdemeanors (\$1,000), and other matters (\$750). 18 U.S.C. § 3006A(d)(2).

Local bar associations, chambers of commerce and even the CJA panel entity in a federal district could contribute empirical data concerning the actual regional costs incurred by lawyers. Hourly overhead rates would not be based on the individual lawyer's actual overhead costs, but instead on a district average which would combine the overhead costs of large cities with those of rural communities within the same district.

The rebuttable nature of the presumptive minimum national hourly overhead rate would constitute an incentive to the CJA panel attorneys in a district to collect proof that the average hourly district overhead rate exceeds the national minimum rate. Challenges to the applicability of the national presumptive hourly overhead rate or to the district's higher hourly overhead rate could be restricted by law to once a year or once every two years to preclude repetitive and time-consuming efforts to reconsider the approved overhead rate.

The use of a reasonable hourly overhead rate in conjunction with a fair hourly fee to compensate CJA attorneys may reduce the fee portion, but the actual total hourly compensation for CJA panel attorneys would be dramatically increased.

Another version of the overhead/fee formula would involve a national hourly rate of compensation, such as \$75 per hour, which would contain an unspecified average national hourly overhead fee. Certain areas of the nation could be designated as high-cost locations in which to practice law. CJA panel attorneys residing in or practicing in a designated high-cost area would receive a statutorily prescribed hourly overhead supplement such as \$25 per hour for every hour of compensation approved. This procedure would place the onus on a federal district where overhead costs are high to appeal for designations of locations within the district for eligibility to receive the hourly overhead supplement.

Any attempt to calculate a presumptive or average national, district or area overhead rate must omit those costs of doing business which are reimbursable expenses under the CJA, such as postage, photocopying, and long distance phone calls.

As the CJA now provides, all hourly rates should be adjusted periodically at least to the extent of cost of living increases granted to federal employees.

**Recommendation B-2. Special attention should be given to compensation for extended travel demands placed upon panel attorneys.**

The Criminal Justice Act should be amended to require payment for all necessary and reasonable travel associated with CJA representation.

#### Discussion

At present, the *CJA Guidelines* allow, but do not require, compensation for an attorney's travel time, even when it is necessary and reasonable. Paragraph 2.26 of the *CJA Guidelines* provides that "[c]ompensation may be approved for time spent in necessary and reasonable travel." In addition, the provisions of Paragraph 2.27 relate to reimbursement of out-of-pocket expenses reasonably incurred in travel. Despite this guidance, testimony at the Committee's public hearings indicated that in some cases attorneys are not being compensated for their time spent in traveling to meet with clients or for court appearances.

In large geographical districts, where travel to a detention center or courthouse may require hundreds of miles of travel over several hours or an entire day, such disallowances can result in a major loss of revenue to attorneys. Time spent in travel on behalf of private clients normally results in a charge to the client and, accordingly, the reasoning behind denying this compensation to CJA panel attorneys is unclear.

**Recommendation B-3. Counsel appointed under the CJA should be allowed to charge for the time of paralegals and law students at a reduced hourly rate.**

The Criminal Justice Act should be amended to allow appointed counsel to employ paralegals and law students at a reduced hourly rate.

#### Discussion

In 1967 the *Oaks Report* noted that guidelines should be issued clarifying the propriety of using subsection (e) of the CJA to compensate, at specified rates, law students for expert services in the form of legal research. In addition, law student involvement was seen as being valuable to the students and useful, perhaps even essential, to CJA counsel. Professor Oaks stated that these programs, then in their infancy, held the promise of increasing the number of young lawyers interested and qualified for federal criminal defense and also increasing the quality of service under the Act. The *Oaks Report* recommended that subsection (e) of the Act be interpreted to permit law students to be paid small hourly amounts for expert services in investigative work and legal research."



Although CJA attorneys are now allowed to charge, as an expense, the cost of having law students do legal research,<sup>28</sup> this concept should be expanded to allow counsel to employ law students and paralegals to conduct the full panoply of duties expected of such support personnel, including such matters as document and tape review, investigation, interviews, and trial preparation.

At the present time counsel must handle all routine matters themselves (charging attorney rates) or forego compensation for support staff who assist. This situation is significantly out of step with modern law office practices and results in serious inefficiencies and increased costs to the CJA program. The Committee has not found widespread use of what it believes could be a valuable and highly cost-effective resource.

Counsel should be allowed to employ paralegals and law students to assist with all appropriate matters, at a reduced hourly rate (which could be calculated as a percentage of the then-authorized attorney rate) or through law school credit.

Reimbursement should be based upon a prevailing hourly rate, rather than expensed at the actual cost of the assistant's salary, since, where the support staff is regularly employed by the attorney, the actual cost of retaining the employee includes necessary overhead. In those circumstances where law students or paralegals are specially employed for work on a particular case, the actual cost should be charged as an expense.

The proposal would result in significant efficiencies in the CJA program.

**Recommendation B-4. Vouchers for fees and expenses of panel attorneys, experts and other providers of services should be processed and paid in an expeditious manner.**

The Criminal Justice Act should be amended to require prompt processing and payment of CJA vouchers. The amendment should provide for presumptive approval of claims unless acted upon within 30 days of submission of the claim; if a voucher is reduced, the claimant should be notified and provided with an opportunity to respond; and, if the decision is adverse, an appeal authorized.<sup>29</sup>

### Discussion

When an attorney agrees to provide representation in a non-CJA criminal matter, the general procedure is to receive a retainer. The attorney then draws against this amount as expenses and billable hours are incurred. The CJA program differs in that the

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<sup>28</sup> If voucher approval is vested in an administrator, as suggested in Recommendation G-2, the appeal could be to the CJA's local administrative body. If voucher approval remains vested in the district court, appeal would be made to the circuit court.

attorney generally presents his or her bill only after the services are completed and the bill is presented to a non-party. In the meantime the attorney has gone without compensation or reimbursement, sometimes for a considerable length of time. It is essential that an attorney receive prompt payment of the amounts owed in a matter in which he or she assisted the federal government in fulfilling its constitutional obligation.<sup>29</sup> Much has been done by the AO and the courts to ensure expeditious payment of vouchers. As discussed previously, however, the time spent in the review and approval of vouchers still leads to serious delay.

Review of vouchers is essential to ensure fair and accurate compensation for attorneys and to prevent errors or possible abuses. While the Committee prefers that review and approval of vouchers be vested in a local administrator, reforms are necessary to ensure prompt payment of vouchers under the current system in the event the local administrator recommendation is not adopted.

The courts' activities with regard to vouchers have consistently been interpreted to be an administrative function for which an attorney has no judicial remedy. Legislation should be enacted which ensures prompt action on vouchers and provides some form of meaningful review.

Vouchers which have not been acted upon within 30 days of submission to the presiding judicial officer should be deemed approved. The attorney, as an officer of the court, should be presumed to be providing an accurate and truthful statement. Before a decision to reduce a voucher is made, the judicial officer should be required to notify the attorney of both the reduction and the reason for the reduction. The attorney should then be allowed a limited amount of time in which to respond. A voucher which is reduced should be accompanied by a statement of reasons for that decision. An attorney should then be afforded an opportunity to appeal for a review of that decision by the court of appeals. While it is important that this be a meaningful review, it should be performed within a short period of time, be limited in scope and be judged on a standard deferential to the original presiding judicial officer. In the case of claims which must be forwarded to the circuit because they exceed the case compensation maximum, the same 30-day time limit would apply, as would the requirements that there be a statement of reasons provided for a reduction and an opportunity to respond.

The requirement that panel attorneys obtain prior judicial approval before submitting interim vouchers should be eliminated. Instead, after an attorney has reached a designated number of hours on a case, submission of an interim voucher should be automatically authorized. This would encourage attorneys who refrain from submitting

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<sup>29</sup> This discussion refers only to attorneys, but the same is true for experts, investigators, and other providers of defense services.

interim vouchers because of the procedural obstacles to do so, thereby lessening the financial burden of waiting until completion of the case to apply for compensation.

### **C. Defender Organizations and Personnel**

**Recommendation C-1.** Federal defender organizations should be established in all districts, or combinations of districts, where such an organization would be cost effective, where more than a specified minimum number of appointments is made each year, or where the interests of effective representation otherwise require establishment of such an office.

The Criminal Justice Act should be amended to require establishment of a federal defender organization in all districts, or combinations of districts, where such an organization would be cost effective, where more than a specified minimum number of appointments is made each year, or where the interests of effective representation otherwise require establishment of such an office. The determination of the need for a federal defender organization and the geographic boundaries of the organization should be left to the entity charged with national administration of the CJA.

### **Discussion**

The CJA presently allows for creation of a federal defender organization if a district has over 200 appointments per year, but the Act does not require it. Thus, there are several districts with more than 300 appointments per year, including one with about 1,500 appointments, where no federal defender exists.

The undisputed testimony received by the Committee indicates that the federal defenders render cost-efficient defender services at the highest level of competence. Their presence provides a valuable resource for all CJA programs and raises the level of CJA panel representation by assisting with information, resources and training.

The Committee recommends, therefore, that the Criminal Justice Act should require creation of a federal defender organization where more than a set number<sup>28</sup> of appointments is made each year in a given district.

Moreover, if it will permit or facilitate cost savings, some innovativeness should be exhibited in seeking to establish federal defender organizations which go beyond the boundary lines of judicial districts or divisions. Such a policy would enhance the quality

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<sup>28</sup> The Committee believes that this number should be left to the determination of the national entity administering the CJA.

of representation provided under the CJA and provide for the greatest possible cost savings and efficiency.<sup>21</sup>

Legislation appears necessary to implement this recommendation, due to resistance by some judges or others to the formation of federal defender offices in some districts where such offices would clearly provide cost savings. The Judicial Conference recently agreed with the Defender Services Committee that the 200-case eligibility requirement should be eliminated in order to encourage creation of more federal defender offices.

High costs associated with panel attorney appointments in complex, multi-defendant cases have led to periodic consideration of the feasibility of establishing a second defender organization in some districts to handle conflict cases. The CJA Review Committee believes that creating conflict defender organizations would save little if any money. Many multi-defendant cases involve more than two defendants. In such prosecutions, the "conflict office" could accept only one defendant, necessitating the appointment of panel lawyers for the remaining defendants. It is uncertain that money would be saved in such cases. Moreover, there is no way to predict the number of multi-defendant prosecutions that will be brought in any given year. During slow periods, the "conflict office" would be cost ineffective, leading to the temptation to compete with the primary defender organization for appointments. This could lead to a "bidding war" between two organizations to reduce costs with the potential for a diminution in the quality of representation provided. The present "mixed" system best addresses the demands of multi-defendant cases.

**Recommendation C-2. EEO and Affirmative Action policies should be developed and closely monitored for compliance in the federal defender and appointed counsel programs.**

The Criminal Justice Act should be amended to require the entity charged with administration of the CJA on the national level to take affirmative steps to ensure that EEO and Affirmative Action policies are developed, implemented and monitored, and to ensure that the federal defenders, their staffs and the panel attorney lists reflect racial, ethnic, and gender diversity.

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<sup>21</sup> The Committee favors requiring some form of support services for those districts without a federal defender organization, including the option of some affiliation with a federal defender organization in an adjoining district (see Recommendation G-3).

## Discussion

### **Federal Defender Organizations**

The 1992 status report on EEO compliance by federal defender organizations showed progress in diversity of attorneys and overall staff. Further efforts are needed to maintain the levels of opportunity which have already been achieved and to assist defender organizations in achieving more representative staffing. The absence of minority FPDs in the continental United States needs to be remedied.

The Committee on Defender Services has taken certain initiatives in an effort to address the EEO deficiencies in the program. Upon receiving the report produced by the Defender Services Division, the Committee on Defender Services at its June 1992 meeting voted to have the Chair of the Committee communicate to the courts of appeals the information contained in the report with a reminder to the courts of their responsibility for appointment of Federal Public Defenders. Previously, at the request of the Committee, the Director of the Administrative Office established a policy under which reimbursement of travel costs may be approved by the Defender Services Division for up to two qualified candidates for certain positions to facilitate recruitment of women and minorities. In 1990, the Committee determined that the absence of substantial minority representation might be attributable to the fact that in many districts local rules require that attorneys who regularly practice before the federal court be admitted to the bar of the state in which the district is situated. In some districts this requirement exists with respect to defense counsel but not the prosecution. The Committee on Defender Services urged reconsideration of this policy in those districts which provided an exemption for United States Attorneys and their assistants. The CJA Review Committee believes that the practice in many circuits of nationally advertising vacant Federal Public Defender positions should be the standard and that appropriate accommodation should be made to ensure that individuals not admitted to practice in the state in which vacancies occur should, at the least, be granted admission *pro hac vice* and given a reasonable period of time in which to become admitted to the state bar.

### **Appointed Counsel Program**

With regard to panel attorneys, no uniform system exists to ensure diversity. In fact, nationally, no system is in place to monitor the panel system.

The results of the Gender Bias Task Force study in the Ninth Circuit confirm the need for attention to EEO matters regarding CJA panels in district and circuit CJA plans. Data regarding the composition of the panels should be maintained and reported to the entity charged with national administration of the CJA.



A strong and vigorous EEO and recruitment program should be initiated both in the federal defender and panel attorney programs which ensures ethnic, racial and gender diversity and which provides opportunities for the disabled.

**Recommendation C-3. Federal defender organizations should have evaluation procedures to monitor attorney and staff performance.**

The entity charged with national administration of the CJA should ensure that federal defender organizations and/or local boards (see Recommendation G-1) develop and monitor effective performance standards for federal defender attorney and staff performance.

#### Discussion

Modern management practice assumes some method for evaluating attorney and staff performance in the federal defender organizations. However, there appears to be no requirement that any evaluation system be employed and there is no record that any significant number of federal defender organizations employ such a system.

Consistent with Recommendation A-3, federal defender organizations should be required to have evaluation procedures to monitor both attorney and staff performance to ensure not only effective representation, but the best possible representation within a productive and efficient defender office.

The entity responsible for national management of the CJA program would be best situated to ensure the development and provision of procedures for evaluations.

**Recommendation C-4. There should be standards for managing federal defender offices, including clearly written employment policies and grievance procedures.**

The entity charged with national administration of the CJA should ensure that federal defender organizations and/or local boards (see Recommendation G-1) develop and monitor clearly written management, employment and grievance policies and procedures for the federal defender organizations.

#### Discussion

Up to the present time, there have been minimal steps taken to ensure effective, efficient management of federal defender offices. This fact was evidenced by testimony from defenders at the Committee's public hearings and comments from officials in the

AO, and is most evident in the lack of grievance procedures available to employees of the federal defender offices.

All federal defender offices should be required to implement written employment policies, including grievance procedures. The entity responsible for national oversight of the CJA program should ensure the development of management standards for federal defender offices and should provide appropriate oversight to ensure implementation of such employment policies and standards.

**Recommendation C-5.      Clearly defined procedures should exist for removal of federal defenders.**

The Criminal Justice Act should be amended to implement clearly defined procedures for removal of a federal defender. Such procedure should be administered by the entity charged with the national administration of the CJA.

#### Discussion

The Committee has learned of instances in which public defenders were removed from office, or federal defender offices closed, under circumstances that raise questions about the role of the courts in supervising or influencing federal defender offices. Insufficient formal procedures currently exist to ensure that the removal process is attended with appropriate safeguards to protect the defender and to ensure fairness and the appearance of fairness.

To the extent that the federal courts have any role in the appointment, reappointment, or removal of federal defenders, those functions should be controlled by clearly defined standards which not only provide for fairness, but which are free of any appearance of impropriety.<sup>2</sup>

**Recommendation C-6.      Federal defender and support staff salaries should be equal to those of personnel with similar responsibilities in the United States Attorney's Office.**

The Criminal Justice Act should be amended to ensure that the salary structure for the federal defenders and their staffs is equal to that of the United States Attorney and his or her staff.

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<sup>2</sup> The *CJA Guidelines* offer several factors to consider for the appointment and reappointment process which could serve as standards. (*CJA Guidelines* 4.02A(5) and (6).)

## Discussion

Salary parity between the federal defender and the United States Attorney is very important to acknowledge their equivalent roles as adversarial counterparts in the criminal justice system. Moreover, salary parity would eliminate any appearance that the defense function is to be valued less than the prosecution function.

Under the CJA, the compensation of the Federal Public Defender is set by the court of appeals of the circuit at a rate "not to exceed" the salary of the United States Attorney for the district where representation is furnished. The Federal Public Defender sets the compensation for attorneys and other personnel hired for the defender's office at a rate "not to exceed" that paid to attorneys and other personnel of similar qualifications and experience in the United States Attorney's office in the same district.

The salary structure should be revised to equalize the compensation between the Federal Public Defender and the United States Attorney, as well as between the support staffs in the two offices. The primary responsibilities of the positions involved are of equal importance.

## D. Litigation

**Recommendation D-1.** Counsel should be made available to financially eligible defendants as early in the initiation of proceedings as feasible.

The Criminal Justice Act should be amended to require a determination of the need for appointed counsel and appointment of counsel as early in the proceeding as possible and no later than at the time of the pretrial services interview.

## Discussion

The role an attorney may play in the protection of a defendant's constitutional rights often turns on how early in the proceedings the attorney is able to provide advice to the client. Presently, the CJA authorizes representation for eligible persons at "every stage of the proceedings from his initial appearance before the United States magistrate or the court ...." The advent of the sentencing guidelines has caused the federal judiciary to focus on the potential adverse impact that information provided by a defendant at a pretrial services interview could have on the defendant at sentencing. At its March 1988 proceedings, the Judicial Conference, upon the recommendation of the Committee on Defender Services, adopted the following statement:

The Judicial Conference recognizes the importance of the advice of counsel for persons subject to proceedings under 18 U.S.C. § 3142 *et seq.*, prior to

their being interviewed by a pretrial services or probation officer. Accordingly, the Conference encourages districts to take the steps necessary to permit the furnishing of appointed counsel at this stage of the proceedings to financially eligible defendants, having due regard for the importance of affording the pretrial services officer adequate time to interview the defendant and verify information prior to the bail hearing.

The Act should provide for early appointment of counsel to cover, at a minimum, representation at the pretrial services interview. In addition, counsel should be provided to qualifying grand jury witnesses and to those who believe that they are targets of investigation. Assessment of the right to counsel for individuals threatened with a prosecution or subpoenaed before a grand jury should be construed liberally.<sup>20</sup> At no time should government counsel be involved in the decision making.

**Recommendation D-2.** In appropriate circumstances, transportation and maintenance expenses should be provided under the Criminal Justice Act for defendants eligible for CJA services who lack sufficient funds to permit them to travel to and from court for purposes related to litigation and for their subsistence during court proceedings.

The Criminal Justice Act should be amended to allow, in appropriate circumstances, transportation and maintenance expenses for defendants who lack sufficient funds to permit them to travel to and from court for purposes related to litigation and for their subsistence during court proceedings.

### Discussion

Under the current statutory scheme the United States Marshal is required to furnish subsistence and transportation to an arrested but unconvicted person released from custody to the place of arrest or the person's residence. The court may direct the United States Marshal to provide a financially eligible defendant released pending further judicial proceedings with funds, including subsistence expenses and the cost of non-custodial transportation, to the court where his or her appearance is required. There is no provision for subsistence during the judicial proceedings, for the return trip to the defendant's residence or for successive trips by the defendant to appear at subsequent judicial proceedings or to consult with attorneys. When a defendant is unable to afford the cost of temporary quarters, pretrial services offices may provide for shelter, but no other expenses, in halfway houses or YMCAs or similar subsidized facilities.

One attorney in Connecticut expressed her concerns over a case she had been involved in since 1985, and that was still awaiting trial in December 1991, in which her client was from Puerto Rico and the case was being litigated in Hartford:

Indigent defendants arrested, transported thousands of miles from their home, and required to remain at the site of court at their own expense for months or years must necessarily be under extreme pressure to give up their legal right to fully contest the case and instead plead "guilty" out of hopelessness and frustration....Food, lodging, and transportation are basic expenses which should be provided. In cases such as [my client's] where defendants are brought to Connecticut from the tropical climate of Puerto Rico, clothing allowances should be provided for coats and similar items which are required only because of the venue selected by the prosecution.<sup>11</sup>

The growing number of complex and extended cases, sometimes lasting several months or longer, makes the need to provide some assistance with transportation, housing and subsistence for financially eligible clients even greater. Some courts have ordered such assistance, but, in the interest of clarity, there should be explicit statutory authority for the courts to do so in appropriate circumstances.

**Recommendation D-3.** The prosecution should be required to provide copies of relevant discovery material to a defendant represented by appointed counsel, and the expenses of duplication should be reimbursed from CJA funding.

The Criminal Justice Act and/or the Federal Rules of Criminal Procedure should be amended to require the prosecution to provide copies of relevant discovery material to a defendant represented by appointed counsel, and the expenses associated with duplication of the discovery material should be reimbursed from the defender services appropriation. This process, and the resolution of disputes and conflicts, should be under the supervision of the judicial officer controlling discovery.

### Discussion

Rule 16(a) of the Federal Rules of Criminal Procedure regulates discovery by the defendant of evidence in possession of the prosecution. In general, the government is only obligated to make material subject to discovery available for inspection, copying or photographing by the defense. The prosecution is not obligated to supply copies to the defense.

The present arrangement results in economic inefficiency and potential lapses in representation. Appointed counsel must advance the cost of copying discoverable material or forego copying and rely, at best, upon personal review at the prosecutor's office.

In multi-defendant, multi-count "megatrials," there may be thousands of pages of discoverable material and hundreds of tape recordings. Since appointed counsel is entitled under the CJA to reimbursement only for expenses the court later determines to have



been "reasonably incurred," counsel must first guess what the court will think is reasonable and advance what might amount to thousands of dollars in copying costs. Then counsel must submit the expense to the court for approval.<sup>23</sup> Neither retained defense attorneys nor the prosecution must face such a dilemma.

Under such an economic pressure appointed counsel may forego copying and deprive the client of essential discovery. On the other hand, appointed counsel may choose to rely upon multiple reviews of the prosecution's copy. The time and expense of such reviews is then billed under the CJA at attorney rates.

Effective representation and cost savings are likely to be achieved if Rule 16 is amended to require the prosecution to supply copies of all discoverable material relevant to a defendant to the defendant's appointed attorney, with the duplication costs charged to the defender services appropriation. Economies could be achieved in some multi-defendant cases by urging that defense counsel make such joint or sequential use of the copied material as may be consistent with effective representation of the defendants.

Alternatively, the court could be given discretion to require this procedure on a case-by-case basis. Such a procedure would achieve greater financial efficiency and ensure that appointed counsel is not forced to choose between personal financial sacrifice and the best interests of the client.

**Recommendation D-4.** There should be a safeguard, such as a protective order, to prevent inappropriate discovery by the prosecution of defense strategies through the procedure for paying the expenses of fact witnesses.

The Criminal Justice Act should be amended, or standing orders should be entered in every district, protecting information about defense witnesses contained in expense reimbursement documents from discovery by the prosecution.

### Discussion

Historically, the Department of Justice, through the United States Marshal Service, has paid the fees and expenses of fact witnesses for defendants whose funds were limited. Certification by the United States Attorney or an Assistant United States Attorney was required. This procedure continued even after enactment of the CJA. In 1986 the provision for payment of witness fees was amended so that certification by a federal defender or clerk of court upon affidavit of appointed CJA counsel could be substituted

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<sup>23</sup> Testimony at the public hearings indicated that counsel might have to wait months for reimbursement when the case is lengthy and no interim payments are approved, or there is a delay in voucher approval or payment. (See, e.g., Chicago Hearing Tr. 337-42; see also Boston Hearing Tr. 353-55.)

for certification by the United States Attorney's office. This arrangement, while an improvement over the prior procedure, perpetuates, at the least, the appearance of a conflict of interest and, at worst, the potential for inappropriate discovery of defense strategies by the prosecution.<sup>24</sup> In order to prevent such occurrences, protective orders or other safeguards should be provided to prohibit the use of the current procedure for payment of defense fact witnesses as a means for the prosecution to obtain discovery. Eventually the authority for reimbursing defense fact witnesses should be transferred from the Department of Justice to federal defenders and local administrators.

### **E. Funding**

**Recommendation E-1.** Congress should provide appropriate resources for the support of the CJA program. Congress should require that it be provided with judicial impact statements, including the costs for appropriate defense services, in connection with new legislation or new executive policies affecting prosecutions.

Federal legislation should be enacted to require submission of judicial impact statements to Congress, including the costs associated with the CJA program, with respect to new legislation or new executive policies affecting prosecutions.

### **Discussion**

One of the problems in administering the CJA program is that its funding needs are largely determined by external factors. The prosecutorial policies and activities of the Department of Justice substantially affect the resources required by the appointed counsel defense function. When there is a significant increase in the number of Assistant United States Attorneys, as there has been in recent years, or new prosecutorial initiatives are introduced, prosecutions rise and the demand for CJA counsel grows correspondingly. Similarly, such initiatives as the federal sentencing guidelines, mandatory minimum terms of incarceration and the death penalty have made federal criminal defense work more complicated and time consuming, and therefore more costly.

Elementary principles of justice demand that there be a level playing field for the prosecution and the defense. In order to ensure the fairness of the criminal justice process, the resources available to the defense function for CJA cases should be no less than the resources provided to the prosecution in such cases. Unfortunately, there have been difficulties in obtaining adequate funding for the entire CJA program.

In Fiscal Year 1991 a shortfall of funds required the suspension of all payments to panel attorneys for the final three weeks of the year. In Fiscal Year 1992 the situation was even worse, with a suspension of all payments to panel attorneys as of June 17th and resumption after a temporary transfer of funds from within the judiciary. In Fiscal Year

1993 funding for the CJA program has not been increased, and it is anticipated that panel attorney payments could be suspended as early as April 1993.

Such difficulties reflect the added costs to the defense of more numerous and more complex federal prosecutions. There needs to be a systematic way in which to identify the strain placed on the CJA by new crime legislation and prosecutorial initiatives. Equipped with advance notice of their fiscal impact on defense costs, Congress could adjust CJA appropriation levels accordingly. Thus, the Committee believes that Congress should be provided with impact statements describing the anticipated costs to the CJA program of new legislation or new executive policies affecting prosecutions. In this regard, the Attorney General should be required to report to the courts annually on law enforcement policies affecting the judicial work load, including new initiatives and directives likely to have an impact on the CJA program.

**Recommendation E-2.** Funds appropriated to provide for services under the CJA should not be available to support other activities within the judicial branch. Appropriation requests to support the Criminal Justice Act should be presented directly to Congress.

The Criminal Justice Act should be amended to provide that appropriations under the Act shall not be used for non-CJA activities of the judiciary and to allow for appropriation requests to be presented directly to Congress.

### Discussion

Because of the difficulty in estimating the amounts needed to support the CJA each year, Congress provided that the funding for the CJA program would be accomplished by the establishment of a separate, "no-year" account within the appropriation for the federal judiciary. This allows any funds not expended in a particular year to be carried over and used in successive years. The budgetary strains associated with the funding of government operations in a deficit environment and the increased activity levels and demands placed on every component of the judiciary have altered the way in which appropriations requests are formulated. As one of many activities within the federal judiciary, the appointed counsel program must compete in this harsh environment for limited resources. Funding priorities must be established for each component and for every proposed activity. The responsibilities of the judiciary extend beyond the obvious needs for the maintenance of court facilities and the payment of salaries and expenses of judges and their staffs. The salaries and expenses of probation and pretrial services offices and the involvement in such tangential matters as drug testing, therapy and even home confinement have also been visited upon the judiciary. This has resulted in both decisions to limit the budget request for the CJA program and, previously when there has been a surplus in the CJA appropriation, requesting the reprogramming of portions

to other parts of the judiciary budget and thereby not having those funds available in later years to cover shortages. Amending the CJA to make the amounts appropriated for that program unavailable for other judicial budget needs would ensure that funds appropriated for the CJA program would be independent from other judiciary appropriations and would result in separating those amounts from the rest of the judiciary's budget activities.

The defense function is, by its nature, adversarial. The representation of impecunious accused is not a popularly supported function. The judiciary has handled this fiduciary responsibility with great care and commitment. It has been both creative and highly effective in advocating for the funding of federal defender offices. Despite its concerns and best efforts, the funding of panel attorneys has not been nearly as successful. The importance of the defense function in our criminal justice system warrants active and consistent representation before funding authorities. Independent access to the appropriations authorities would best ensure the viability and public confidence in the program. In addition, it would provide Congress with the benefit of input on the effect of other legislation which would have consequences on the budgetary needs of the appointed counsel program. The Committee believes that the best framework to provide such access is the Center discussed in the next recommendation.

#### **F. National Structure and Administration**

**Recommendation F-1.** There should be established within the judicial branch a Center for Federal Criminal Defense Services.

The Criminal Justice Act should be amended to create the Center for Federal Criminal Defense Services, which would be the entity responsible for national administration of the CJA.

#### **Discussion**

The CJA program has become so large and complex that full-time management is needed to run it. In order to provide modern, efficient management for this multifaceted, nationwide program, there should be created within the judicial branch of government a Center for Federal Criminal Defense Services.<sup>34</sup>

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<sup>34</sup> While some judges and federal defenders oppose creation of the Center for Federal Criminal Defense Services as unnecessarily independent of the judiciary, some bar associations have asserted that this recommendation would not create a sufficiently independent entity. (See discussion *supra* at pp. 51-52.) The Committee believes that this structure, within the judicial branch of government, is the logical next step in the legislative evolution of the CJA program, providing administrative and program independence from the judiciary, while maintaining historical closeness to the judicial branch of government as a means of maintaining the support for the CJA program by the judiciary.

The Center, governed by a board of directors, would establish policy and provide direction with respect to the appointment of counsel and the provision of legal services for financially eligible individuals in federal criminal proceedings. It would ensure the independence of counsel, provide essential management and administrative support, direction, economies and efficiencies, and would be responsible for developing and presenting the CJA budget.

The proposed Center, which was prophesied by the Senate Judiciary Committee in 1970, is a necessary step in the evolution of the CJA program and should prove to be more effective than mere remedial, situational legislation. The recommended restructuring would be consistent with the trend in half the states and follows the path adopted by both the Army and Air Force. Moreover, the CJA Review Committee believes that the proposed system would, in fact, be cost effective.

### Structure of the Center

The Center would be situated within the judicial branch<sup>\*</sup> and would be supervised by a Board of seven directors. The directors would be appointed by the Chief Justice of the United States in close consultation with legal organizations interested in the CJA program.<sup>\*</sup> All Board members would be persons committed to the principle of providing quality defense services free from judicial or political influence. Their appointment should reflect geographic and racial diversity and gender balance.

Initially, not more than two of the members of the Board of the Center would be active or senior federal judges, but ultimately there would be no judicial membership on the Board of the Center. Non-judicial members of the Board would be persons experienced in the defense of federal criminal cases, but they would not be currently employed by or as prosecutors or law enforcement officials. No more than one member of the Board would be a current Federal Public Defender or employed by a Federal Public or Community Defender Organization.

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<sup>\*</sup> Two independent entities currently in the judicial branch are the United States Sentencing Commission and the Federal Judicial Center.

<sup>\*</sup> This would include organizations such as the American Bar Association, the National Legal Aid and Defender Association, the National Association of Criminal Defense Lawyers, the Federal Bar Association, and the NAACP-Legal Defense Fund.

A minority of CJA Review Committee members favors a requirement that the directors be selected from a list of candidates submitted to the Chief Justice by national legal organizations specializing in criminal defense issues. (See Separate Statement of Judy Clarke, Thomas W. Hillier, II, Robert Altman and J. Vincent Aprile, II, at page 99 *infra*.)



Members would serve staggered, three-year terms with a maximum of two terms for each Board member. The initial Board would have two members serving a one-year term, two members serving a two-year term, and three members serving a three-year term. The exception to the two-term maximum would be for the two members of the initial Board with a one-year term; they would be eligible for reappointment to a third term. Accordingly, active or senior judges would be eligible for appointment only during the first seven years of the Board's existence. Members of the Board of the Center would be reimbursed for their expenses but otherwise would serve without compensation.

The Board would be authorized to employ such staff as it deems necessary, including the Center's administrator. The Administrative Office of the United States Courts would be authorized and directed to provide, on a cost reimbursable basis, such administrative services as might be needed and requested by the Board or the Center. Thus, the Center would still receive the benefit of the expertise of the resources of the Administrative Office which has been very important in the evolution of the existing program.

### **Responsibilities of the Center**

The Center would assume the authority and responsibility for criminal defense functions currently vested in the United States Judicial Conference, the judicial councils of the circuits, the federal circuit and district courts and the Administrative Office of the U.S. Courts. The responsibilities of the federal judiciary would change substantially and federal judges would no longer be responsible for appointment of Federal Public Defenders or selection of panel attorneys. Their role with respect to the provision of defense services would change from controller to the more appropriate role of consultant and impartial evaluator under the adversarial system.

The Center would be charged with ensuring that minimum standards in certain critical areas are met nationwide with respect to the CJA program. This would include responsibility for many of the areas which are the subject of other recommendations in this Report such as qualification standards, training and performance standards. District plans, whether formulated by the district courts or the local boards discussed in Recommendation G-1, would be approved by the Center. The Center would approve grants and contracts with the local boards or with the Community Defender Organizations, and would be responsible for establishing and supporting the resource support program discussed in Recommendation G-3. For Federal Public Defenders, the Center would be the appointing authority and would have to be consulted with regard to appointment, reappointment and removal activities. The Center would have oversight responsibility for efficient processing of vouchers, for EEO programs and other employment procedures, for the administrative operation of defender offices and for obtaining statistical information. The Center should also include a human resources development component to provide

training for appointed counsel.<sup>27</sup> The Center would be authorized to enter into contracts, to establish a data processing center, to provide technological support to local organizations and to promulgate regulations which would be enforceable.<sup>28</sup> The Center would perform, or arrange for the performance of, functions such as payroll, space acquisition, personnel, and accounting. The Center would also be able to initiate certain pilot programs, such as early representation of counsel and client choice of counsel. Compensation rates for panel attorneys would be established by the Center. Vouchers which are in excess of amounts which can be approved at the local level would be reviewed by the Center.

The objective would not be to enforce uniformity on every district's CJA plan because to do so would stifle local creativity as well as ignore differences between districts. Nor would the Center be authorized to interfere in actual cases.<sup>29</sup> Rather, the goal would be to guarantee that each person who is assigned appointed counsel pursuant to the Criminal Justice Act receives quality representation which is at least commensurate with the Sixth Amendment's mandate.

A special emphasis would be placed on securing adequate funds for defense services through the appropriations process. In order to maintain the required independence for the defense function, the Center would submit its annual appropriation request directly to Congress. The request would not be amended or modified by the judicial branch; but to the extent requested by the Board, the Administrative Office would assist in the preparation of the budget. The Center's Board would provide an annual report to the Judicial Conference and would have direct access to Congress to seek support for its appropriations. Through the Center the legislative branch would receive directly -- not indirectly -- the views of those responsible for providing defense services.

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<sup>27</sup> Enforceable regulations are critical, as illustrated by the statement of the immediate past Chair of the Defender Services Committee:

One of the significant deficiencies I see in the current system is that the guidelines promulgated by the Conference are merely recommendations. No district judge has been, or will ever be, impeached for refusing to follow those guidelines, and there are no remedies short of impeachment. As a result, there is no effective way in the present system to enforce much needed changes. (Statement to the CJA Review Committee of Judge Stephanie K. Seymour, United States Court of Appeals for the Tenth Circuit, April 10, 1992.)

<sup>28</sup> A number of the federal defenders have expressed a fear that the Center would attempt to interfere with the representation provided by their offices. The Committee states unequivocally that the national administrative entity should never interfere in such a manner. The Committee sees no reason that the Center should do so and the proposed legislation explicitly states this principle.

The insight rendered thereby would be of considerable assistance to Congress in its consideration of problems relating to the criminal justice system and its resource needs."

Representatives of the federal defenders have expressed concern about the Committee's recommendation to transfer the national administration of the CJA program from the Judicial Conference and place it in an independent agency. The chief reservation of the federal defenders is that sufficient funding for the CJA may not be realized under the proposal because they feel the Center might be less effective than the judiciary in dealing with the appropriations committees and their staffs in Congress. In addition, since CJA funds are expended to represent persons accused of committing crimes, a generally unpopular political cause, there is concern that a separate appropriation for the Center would be more "visible" and vulnerable to attack than is the present CJA appropriation. The Committee has considered these concerns and has concluded that the benefits flowing from creation of the Center would outweigh the risks.

The CJA budget is already quite visible as the second largest item in the judiciary budget. This recommendation would actually give greater strength to the CJA budget presentation since it would eliminate the "horse-trading" that the CJA budget currently endures within the AO and would allow the directors of the Center, and others in support of the appropriation, to work directly with Congress to ensure proper funding. Although risk always comes with change, the Committee concludes that the risks are far outweighed by the benefits which would flow from the adoption of this recommendation.

The Committee is unanimous in its objective to secure the necessary funds for the CJA program. The Committee rejects the suggestion that the judiciary would give less support to defense services funding because Congress concludes there are gains in independence and efficiency to be achieved by removing the CJA program from supervision by the Judicial Conference and transferring it to a Board appointed by the Chief Justice of the United States. It is noteworthy that historically the Community Defender model, which enjoys significantly greater autonomy, has suffered no perceptible lack of support from the judiciary in relation to Federal Public Defender organizations. Whatever minor disadvantage may occur would be more than offset by the benefits flowing from the grant of authority to manage the program and make it more accountable but no less independent, and from the proposed direct access of the Center to Congress. Since federal criminal trials cannot proceed constitutionally without providing counsel for defendants with limited financial means, federal judges will always have an abiding interest in ensuring that defense services are adequately funded. Given the judiciary's recognition

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\* For example, the Center might assist in providing Congress a balanced view of the impact on the criminal justice system of proposals for the creation of new federal crimes and the expansion of federal criminal jurisdiction.

and historic support\* of the need for the effective assistance of counsel in federal criminal proceedings, the Committee does not believe that the judges would fail to support the Center's appropriation requests. Nor does the Committee feel that the creation of the Center, which would foster accountability in managing a program currently expending hundreds of millions of dollars, would set up a "target" that would make Congress more inclined to limit funds for constitutionally required services.

In sum, the Center would be responsible for formulating national policy, funding requests, and for ensuring appropriate management controls and administrative support for the CJA program. The Center would oversee local boards which would have direct responsibility for the formulation, administration and operation of the CJA plans in their respective districts.

#### G. Local Structure and Administration

**Recommendation G-1.** There should be established within each circuit one or more boards whose responsibility would be to supervise the CJA program and appointment and compensation of Federal Public and Community Defenders and panel attorneys within each district in the circuit.

The Criminal Justice Act should be amended to require creation of local boards, on a district or regional basis, to oversee local administration of the CJA. Like the boards that presently oversee the community defender offices, such local boards would be composed of local individuals on a non-compensated basis. The local board, which would be responsible for employment of a local administrator, would devise and implement a local plan for CJA representation and would oversee the operations of the local panel.

#### Discussion

This recommendation could be implemented independent of the creation of a Center for Federal Criminal Defense Services. Whether the most effective structure to implement the Criminal Justice Act (and the policies of the Center, if applicable) is a series of regional boards, at the circuit court level for example, or local boards in all 94 districts, is a matter that would be determined based upon several factors, such as costs, administrative feasibility, and efficient administration of the criminal justice system. The nearly 30 existing Community Defender Organizations (including Death Penalty Resource Centers) now receiving funding under the Criminal Justice Act are supervised by

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\* As an example of this commitment, the judiciary in recent years has led the efforts to create death penalty resource centers. The concept was unique and its acceptance resulted from the interest and support of federal and state judges, prosecutors and defense attorneys and, in significant part, from the resourcefulness of the federal judiciary.



uncompensated boards of directors. A minuscule proportion of the funds provided to Community Defender Organizations are used to support the activities of these governing bodies. The Committee is convinced, however, that whatever minimal costs might be generated would be more than justified by the profound and positive benefits of ongoing supervision; the elimination of current, uncoordinated and undirected administrative activities; and an enhancement of public confidence in the defender program and, in consequence, our judicial system.

In order to maximize local autonomy and innovation, the Committee's preferred approach is to establish a local board for each district, although one board could cover two or more adjoining districts.

### **Structure of the Local Board**

The local board would also be non-salaried and would consist of a minimum of three and a maximum of 11 members, none of whom would be judges, prosecutors or law enforcement personnel or their employees. The local board would be composed of persons who have demonstrated an interest in and dedication to criminal justice issues, such as federal criminal defense attorneys, past federal defenders, state public defenders and law professors. Members would serve three-year, staggered terms. The initial board for each district would be appointed by the chief judge of the court of appeals for the circuit in which the district is located, after consultation with such organizations as state and local bar associations; the other judges of the circuit and the district, including magistrate judges; and attorneys, including federal defenders, in practice in the district. The local board, once constituted, would be self-perpetuating, selecting individuals to fill vacancies after following the consultation process used in connection with the creation of the initial board.

In districts in which a CDO currently provides representation the board of directors of that organization may be authorized to function as the district board. In this way continuity can be assured and the operation of the existing CDOs will not be disturbed.<sup>41</sup>

### **Responsibilities of the Local Board**

Each local board, in consultation with state and local bar associations, district and magistrate judges, and federal criminal defense attorneys, would be required to devise a plan for the appointment of counsel and the provision of other services necessary for the defense of individuals who are involved in the federal criminal justice system and who lack

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<sup>41</sup> For example, for decades New York City has been served by a legal aid program, the Legal Aid Society of New York, and the federal defender program has functioned as a component of that organization under the supervision of the Society's board of directors. Under the Committee's proposal, this program would remain intact.



the financial ability to retain private counsel. The CJA plan would be submitted to the national administrative body<sup>4</sup> for approval.

In view of the outstanding record of existing federal defender organizations in providing defense services, the Committee emphatically supports the continuation of those organizations already in place. It is anticipated that those organizations would continue to exist, with the modification that future appointments and reappointments of Federal Public Defenders would be made by the national administrative body, based on nominations by the respective local board, instead of by the court of appeals of the respective circuit.<sup>4</sup>

The incumbent Federal Public Defender would be eligible for reappointment for additional four-year terms. The national administrative body would be responsible for promulgating standards and criteria to guide the appointment and reappointment process. Such standards and criteria would reflect concern for gender and racial diversity. Before reappointment of an incumbent, the local board would be required to assess the quality of representation and level of commitment and service to clients provided by the Federal Public Defender's Office, and the administrative efficiency of the Federal Public Defender. Should the local board receive adverse information concerning the performance of the incumbent, the defender would be provided meaningful opportunity to respond. If the local board determines that an incumbent is performing at or above standards and criteria established by the national administrative body, it could nominate the Federal Public Defender for reappointment. Regardless of the results of the assessment of an incumbent's performance, the local board could, in its discretion, declare the position vacant and solicit applications for the position. An incumbent seeking reappointment under such circumstances would be required to apply and would be judged under the same standards and criteria as all other applicants.

If the local board's CJA plan calls for the creation of a federal defender organization in a district which currently does not have one, a Community Defender Organization would be created. The local board could serve as the board of directors for the CDO. In that event, the local board would set the term of the director, if any; establish appointment, reappointment and removal criteria consistent with the standards

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<sup>4</sup> Under the Committee's Recommendation F-1, this would be the Center; under the current system this would probably be the Judicial Conference (or the Conference's delegate). The Committee feels that the circuit judicial councils should not be the approving authority. Further references to the "national administrative body" under the current system refer to the Judicial Conference (or the Conference's delegate) unless otherwise indicated.

<sup>4</sup> The intent of this provision is to ensure the continuation of federal employee status for Federal Public Defenders and their staffs.

and procedures promulgated by the national administrative body; appoint the federal defender; and oversee the activities of the defender's office.

The national administrative body would provide criteria and procedures for abolition of an office or change in its form. No office could be abolished without the recommendation of the local board and the approval of the national administrative body.

The local board also would select an individual to serve as the local administrator of the CJA panel program.<sup>44</sup> As described in Recommendation G-2, the local administrator would assume all day-to-day activities of the local panel program.

Each local board would be responsible for implementing in its district the policies promulgated by the national administrative body. For instance, the local administrator would, with the assistance of the local board and the national administrative body, ensure that all panel attorneys participate in necessary training programs. Similarly, in compliance with standards set by the national administrative body, the local administrator would also implement a system of rotation that would ensure that attorney members of the panel receive appointments in an equitable manner and that specialized appointments in particularly serious or complex cases be assigned only to attorneys with the necessary experience and training.

In essence, the proposed system would reduce the number of decision makers by more than 90 percent, from almost 1,200 federal circuit, district and magistrate judges to fewer than 100 local administrators. In so doing, the program would be more manageable, efficient and effective.<sup>45</sup>

**Recommendation G-2. Voucher approval authority and other panel attorney responsibilities should be vested in a local administrator.**

The Criminal Justice Act should be amended to vest local panel attorney administration and voucher review in a local administrator under the supervision of the entity responsible for national administration of the CJA. Decisions of the local administrator should be subject to appeal.

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<sup>44</sup> To provide local administrators with federal employment status, the local board may select the local administrator to be appointed by, and with the approval of, the national administrative body. Procedures to remove a local administrator would also be developed.

<sup>45</sup> It is noteworthy that several states have established commissions which operate extensive and efficient defender systems without direct judicial control; and this is equally true of the Army and Air Force. In the federal system, districts with Community Defender Organizations (such as those located in Chicago, New York, and San Diego) have systems for CJA defense services which function effectively with non-judicial supervision.

## Discussion

The Committee has concluded that voucher administration and approval should be handled by a local administrator. This local administrator may be a part of a federal defender organization, local resource counsel (see Recommendation G-3) or an independent administrator in those districts where such an administrator would be cost efficient.

In addition to the concerns raised previously in this Report about the delays in voucher processing, judges and attorneys have expressed concern that there may be a conflict of interest or the appearance of a conflict of interest created when judges approve the compensation and reimbursement claims of CJA panel attorneys appearing before them. When a judge approves a fee of less than the amount sought, or denies reimbursement for services or experts, or delays the approval of the voucher, counsel may -- rightly or wrongly -- perceive this action as an admonition, rebuke or retaliation for defense tactics. The present system of non-reviewability of a judge's action regarding compensation and reimbursement claims contributes to the problem.\*

A local administrator with voucher approval authority should be authorized for each district.<sup>¶</sup> In some districts, a part-time position may be adequate. This individual would be responsible for all aspects of the CJA panel attorney program. These responsibilities would include recruiting panel members (with the assistance of a local panel selection committee), screening and assigning CJA panel attorneys to cases upon notification by the appropriate federal judicial officer of the need for appointed counsel,

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\* At its March 1990 proceedings, the Judicial Conference rejected recommendations of the Committee on Defender Services which would have (1) amended paragraph 2.22(D) of the *CJA Guidelines* to advise judicial officers to provide appointed counsel with the opportunity to respond to proposed voucher reductions and (2) transmitted a recommendation to the circuit councils that they adopt local procedures providing that presiding judicial officers shall afford counsel an opportunity to respond to a proposed fee reduction.

<sup>¶</sup> This recommendation should be adopted even if neither the local board nor the Center recommendations (G-1 and F-1) are adopted. The local administrator would still have the same responsibilities but would be hired either by the circuit court or the national administrative body. Alternatively, in districts with a defender organization, the local administrator could operate out of the defender office either as a federal employee in an FPD office or an employee of the CDO. If there are local boards in the district (see, e.g., Recommendation G-1), the district plan should adopt procedures to remove potential conflicts arising from the defender organization's review of vouchers of panel attorneys who are local board members and responsible for the appointment, reappointment or removal of the federal defender. The district plan should also ensure that there are procedures for eliminating other potential conflicts of interest, such as a federal defender organization's review of panel attorney vouchers in a multi-defendant case in which the federal defender organization represents one of the defendants. Also, the functions of the local administrator could be combined with those of a resource counsel in districts with no federal defender (see Recommendation G-3).

and making voucher determinations regarding compensation and expense reimbursement. The local administrator would recruit, maintain and manage any local appellate panel, which would be composed of qualified attorneys as described in Recommendation A-1. The local administrator would also review and approve vouchers for experts, investigators and all other non-lawyer fee services."

In regard to vouchers, a procedure similar to the one described in Recommendation B-4 should be implemented. Panel attorneys should be able, without prior approval, to submit interim vouchers at reasonable intervals. Interim and final vouchers should be reviewed by a local administrator and a decision on the voucher should be reached within 30 days. The presiding judicial officer in the case should be given the opportunity, during a reasonable time period, to comment upon the administrator's initial determination before a voucher is certified by the administrator for payment. While the judiciary is certainly experienced in approving attorney fees, judges may be at a disadvantage in some respects in this regard. For example, judges usually are not in a position to discuss with the client his or her feelings about the quality of the representation provided, nor do they usually have an opportunity to review a defense attorney's case file with the attorney. Moreover, the experience of special masters and federal defenders with respect to attorney fee determinations illustrates that non-judges are quite capable of making such assessments. A local administrator charged with establishing panels, ensuring minimum qualifications and providing training of its members can be expected to be at least as familiar with their abilities and the reasonableness of claims relating to particular activities. Questions or concerns relating to a claim could be discussed with the presiding judicial officer.

Before a decision to reduce a voucher is made, the local administrator must notify the attorney, inform the attorney of the intent to reduce and why, and provide the attorney the opportunity to respond. If, after the attorney has been provided the opportunity to respond, the local administrator determines that the voucher should be reduced, the administrator would be required to provide a statement of reasons for that decision. The Committee favors creation of legislation that enables attorneys to appeal a decision to reduce a voucher.\* The Committee believes such appeals should be expedited, limited in scope, and judged on a deferential standard to the local administrator's discretion.

**Recommendation G-3.** There should be some form of support services for Criminal Justice Act programs for every division of each federal judicial district in the country.

The Criminal Justice Act should be amended to require that support services be available for every division of each district to support panel attorneys. The entity

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\* If the local board recommendation (G-1) is adopted, then appeals should be to the local board. Absent local boards, appeals should go to the circuit court of appeals.

administering the CJA on the national level should ensure that support is available to all panel attorneys for all divisions. In those districts where no federal defender exists, such support should be provided by a full or part-time resource counsel.

### Discussion

A resource and support presence for panel attorneys should exist for every division of each federal judicial district. Such a resource presence would be a cost effective way for panel attorneys to gain assistance with procedural and legal questions, and to have support with administrative problems such as seeing a court officer hundreds of miles away and locating expert and investigative services.

This recommendation is designed to offer enough flexibility to allow each district to tailor a program to its own needs. The proposed Center (Recommendation F-1) would offer guidance to local districts in implementing this recommendation. The local boards (Recommendation G-1) would be responsible for creating and maintaining the resource presence with the assistance of the national administrative body. In districts with a federal defender organization, that office should be given sufficient staff to help undertake this function. For those districts or divisions where no federal defender exists, the district plan should require that one of the following two options be adopted to provide necessary support functions for the CJA panel and CJA program:

1. Affiliation with a federal defender organization in an adjoining district or division; or
2. Establishment of a "resource counsel" on a full or part-time basis.

A single attorney could provide all of the services of the panel administrator and resource counsel, or these functions could be divided, as best suits the particular district.

Whichever option (or combination) is adopted, this recommendation would help to ensure that every panel attorney, in every division of each district, would have access to support services. Every district should have an attorney available for consultation who is experienced in federal criminal defense in general and in practice before the local federal courts in particular.

Although the Committee sees numerous ways in which the obligations of panel administrator and resource counsel could be established, the Committee's strong recommendation is that there be a federal defender or resource counsel presence for every district and division.



## H. Death Penalty Resource Centers

**Recommendation H-1.** The Criminal Justice Act program should continue to provide funding and support of Death Penalty Resource Centers.

The provision of competent counsel at the trial level is critical to the full, fair and efficient litigation of death penalty cases. Errors cited in federal *habeas corpus* death penalty cases often are attributable to the failure of states to provide adequate counsel at the trial level. The Committee on Defender Services recognized that higher fees alone are not sufficient to ensure the availability of counsel who have the expertise necessary to furnish adequate representation in capital cases. Death penalty litigation requires specialized expertise possessed by few lawyers and an emotional, time and financial commitment which most lawyers are exceedingly reluctant to accept. Noting the growing difficulty in finding volunteer attorneys, due in part to the expertise required in connection with federal *habeas corpus* death penalty representation, Congress, at the request of the Judicial Conference and its Committee on Defender Services, authorized establishment of Death Penalty Resource Centers (DPRCs). By recruiting, training and providing expert assistance to private attorneys, DPRCs are able to assist courts in ensuring that competent attorneys are available in capital post-conviction cases. The Committee on Defender Services determined that DPRCs should be structured as Community Defender Organizations and receive grants under the CJA.

To date, approximately 20 persons have been charged with federal capital offenses under 21 U.S.C. Section 848(e) and approximately nine persons under pre-1972 statutes. This does not include prosecutions in the military. These cases have demonstrated that the type of expert assistance that DPRCs devote to capital *habeas corpus* proceedings is also critical to ensuring competent representation of persons charged with federal capital offenses. At its January 1992 meeting, the Committee on Defender Services approved funding for the services of "expert resource counsel" in federal capital prosecutions. Two experienced capital litigators provide, on a contract basis, expert assistance in individual federal capital cases and to federal courts in recruiting counsel. These resource counsel will also develop brief and motion banks, prepare a capital litigation manual and provide training on federal capital litigation matters. The resource counsel are supervised by Federal Defender Program, Inc., the Community Defender Organization for the Northern District of Georgia.

While provision of these services is an expensive and oftentimes unpopular endeavor, it is essential that the Death Penalty Resource Centers continue to be given strong and vigorous support. This Committee highly commends the initiatives and support of the many state and federal district and circuit court judges; the Administrative Office; the circuit councils; the Committee on Defender Services; the Judicial Conference; state, local and national bar associations (particularly the American Bar Association); and Congress in bringing these centers into existence and working to ensure their continued

existence and adequate funding. This Committee also recognizes the substantial contribution that the Death Penalty Resource Centers have already made to the improvement of the administration of justice in these difficult cases.

The following recommendations will further enhance and strengthen the DPRC program:

1. Federal, together with state, resources of the DPRCs should be made available to all defense attorneys handling death penalty cases. The resources of the present DPRCs should be made available in states and districts where no DPRC exists through appropriate coordination on the national, circuit, district, and state level. New DPRCs should be established in states in which the death penalty is authorized and where sufficient numbers of postconviction death penalty cases exist to make a resource center cost-effective.

2. Funding for the DPRCs should be given equal priority with the funding for the federal defender offices and the panel attorney program.

3. Minimum qualifications should be established for counsel appointed in death penalty cases in view of the specialized nature of capital litigation.

4. The entity managing the CJA program should ensure that specialized training is made available to defense attorneys appointed to handle death penalty cases.

5. Resource counsel assistance, in a form appropriate to meet the demands of increased federal death penalty prosecutions, should be made available to appointed counsel in federal capital cases at the trial, appeal and post-conviction stages. The present mechanism of contracting with experienced death penalty litigators to provide "expert resource counsel" assistance in federal capital cases across the country may not be sufficient should the federal death penalty prosecutions increase dramatically. Increased need for this type of specialized assistance may require this program to create either a centrally located federal death penalty resource center or several regional federal death penalty resource centers. A center mechanism may be necessary in the future to ensure that appointed counsel in federal death penalty cases has adequate access to experienced death penalty litigators for advice, assistance and consultation, particularly in federal districts where there is either no state death penalty or state death penalty prosecutions are extremely rare.

These recommendations, and particularly the goals of broad distribution of the resources available through the DPRCs with equal priority of DPRC funding, can best be achieved through the management which would be provided by the Center for Federal Criminal Defense Services.

## I. Other Recommendations

**Recommendation I-1.** An experimental program should be developed in which certain defendants would be offered a limited choice in the selection of counsel to be appointed to represent them.

The entity charged with administration of the CJA on a national level should implement a limited experimental program in which certain defendants in a few districts would be offered a limited choice in the selection of counsel to be appointed to represent them.

### Discussion

An individual who is accused of a federal crime and who possesses sufficient financial resources to pay for an attorney may seek to hire the lawyer of his or her choice. It is an important decision because defense counsel is the person who will represent the defendant in challenging the government's attempt to establish guilt and to subject the defendant to loss of property, liberty or even life.

Individuals who lack the funds to compensate an attorney are eligible to have counsel appointed under the CJA program. However, as opposed to those with monetary means, the defendant has no voice in the selection of his or her attorney. Counsel is appointed administratively, typically before the defendant has met with the attorney.

By contrast, in England and Wales, the legally assisted person is granted a complete freedom of choice of counsel and government funds are provided to the chosen Solicitor. The system is viewed as particularly significant in the criminal context because it guarantees independence from state control."

Given the critical nature of the attorney/client trust relationship, especially in the criminal setting, there should be experimentation in some districts with providing at least a limited choice of counsel to certain defendants who are eligible for appointed counsel. For example, each defendant could be given a pre-approved list of three CJA panel attorneys from which to select counsel. In the event that a defendant desires the appointment of a particular attorney who is not on the list, the requested attorney could be appointed, provided that the attorney is already a member of the CJA panel for the jurisdiction or found eligible for admission to the CJA panel *pro hac vice*."

The Committee agrees with the opinion expressed in a comment received by the Committee in response to this recommendation in its Interim Report:

[The importance of the choice-of-counsel experiment derives] from the fact that the defendant is treated as responsible for his or her own fate. If that

is one goal of the penal end of the criminal justice system, it seems quite appropriate that the system which demands that people accept responsibility allow them to exercise it as well."

One of the great strengths of the CJA program is the variety of approaches taken to provide quality representation throughout the country. In a sense, each district functions as a separate laboratory with its own CJA plan. While certain components of a CJA plan may relate specifically to the characteristics of the particular district, there are other elements that may be of value to other districts. By means of local innovation and experimentation, initiatives may be developed which are found to have general application.

While this proposed attorney selection process may create some problems in facilitating access to counsel at an early stage of the proceedings,\* the Committee believes the potential benefits to be gained in client confidence in counsel and public perception of fairness make an experimental program desirable.

**Recommendation I-2.** A study should be conducted to determine whether sufficient attention is being given to seeking reimbursement to the CJA appropriation from those receiving services.

The national administrative entity should initiate an in-depth statistically-based study to determine whether reimbursement to the CJA appropriation is being pursued.

### Discussion

In defining eligibility for CJA representation, Congress adopted the recommendation of the *Allen Report* that the terms "indigent" or "indigency" should be avoided and that representation should be furnished "for any person financially unable to obtain adequate representation." The Committee unequivocally endorses continuation of this principle. The CJA provides that eligibility determinations shall be made by the United States magistrate judge or the court. The Act also allows for a finding of partial eligibility. The Judicial Conference has adopted guidelines and forms to assist judicial officers in making the eligibility determination.

The Committee received little information to suggest that there are other than a few instances in which financially ineligible defendants may have received CJA representation. Although experience and the weight of authority suggests that the prospects of obtaining substantial reimbursement may not be great, the Committee,

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\* One possibility might be to limit the experiment to individuals who are expected to be free on recognizance or on bond pending trial.

nonetheless, feels that the matter is worth exploring. A member of the Committee on Defender Services related his practice of ordering a percentage of the defendant's wages to be deposited in a special bank account pending trial to be applied against attorney fees. A more in-depth, statistically-based study should be conducted to determine whether measures for reimbursement are being pursued and, if so, whether the benefits of such measures would outweigh the costs.

**Recommendation I-3. Indemnification should be provided to panel attorneys for malpractice and related actions arising from their CJA representation.**

The Criminal Justice Act should be amended to allow the entity charged with administration of the CJA on a national level to indemnify panel attorneys for civil malpractice and related actions arising from their CJA services.

#### Discussion

Every criminal defense lawyer, whether retained or appointed, realizes that the representation of any criminal defendant may generate personal exposure to civil malpractice and related actions. These challenges to counsel's competence and integrity apply with equal impact to CJA panel attorneys.

CJA panel attorneys, who are frequently under-compensated, are neither reimbursed nor indemnified under the CJA to cover the expenses of defense representation for such proceedings and any compensatory or punitive malpractice damages arising from their CJA work. Without this type of coverage for CJA cases, panel attorneys are required to subsidize their own defense in these various proceedings, even when innocent of any professional misconduct."

The Committee suggests that if compensation under the CJA was fairly based upon average overhead costs and a reasonable profit, the cost of malpractice coverage could properly be considered an element of overhead. However, until attorney compensation rises to such a level, CJA panel attorneys throughout the country should be indemnified to the same extent as liability insurance indemnifies criminal defense attorneys.

**Recommendation I-4. A comprehensive review and evaluation of the Criminal Justice Act should be undertaken every seven years.**

Legislation should be enacted to provide for a comprehensive study and analysis of the CJA program by an impartial entity every seven years which would include an evaluation of the current system and an assessment of long range needs.



## Discussion

Twenty-five years passed between Professor Oaks' study of the CJA program and the initiation of this study. During that time profound changes occurred in the nature of federal criminal practice. While, as a whole, the system for the provision of defense services has proven relatively adaptive to changes in national law enforcement policies and practice, certain aspects of the program have suffered substantially because of the lack of periodic comprehensive reviews. It can be expected that current prosecutorial efforts will not remain static and that the defender services program will continue its need to adapt. While it is contemplated that oversight, review and evaluation of the program should be conducted on an ongoing basis,<sup>30</sup> a comprehensive global examination of the CJA program should be undertaken every seven years to ensure continued viability and cost effectiveness.

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<sup>30</sup> The Committee recommends that the CJA's national administrative entity require that there be a review of each district's CJA plan, panel attorney program and, if applicable, federal defender organization at least every four years.

## COST ANALYSIS

Throughout its deliberations, the Committee has considered the costs associated with its recommendations. While recognizing that raising the compensation of panel attorneys would increase the cost of the CJA program, the Committee also suggests that most of the administrative activities referred to in this Report are being performed, at this time, by a wide variety of people within the judicial branch of government and that consolidation of these functions would result in significant efficiencies and only a slight increase, if any, in cost.

Estimating the actual fiscal impact of the Committee's recommendations is difficult. The AO's Judicial Impact Office (JIO) has prepared a Judicial Impact Statement with respect to the Committee's recommendations.<sup>91</sup>

With regard to the cost of the Center for Federal Criminal Defense Services, including its administrative, policy, program and training functions, the JIO estimated that the cost would be \$4.6 million higher than the present headquarters activities and administrative support related to those functions. However, the JIO notes that the Defender Services Division has requested 24 additional staff positions because of its present inability to administer the CJA program adequately. Factoring in the Division's present need for additional personnel (compared to the JIO's projection of 32 additional personnel for the proposed Center to perform similar headquarters activities) significantly reduces the new costs attributable to the Center. Also, the JIO estimates that 22 positions, projected to cost \$1.43 million, would be dedicated to training, one area of the CJA program in which there is unanimous support for improvement regardless of national administrative structure. Presently, there is only one training coordinator employed by the Defender Services Division. In addition, the JIO has assumed additional staffing at the Center for certain administrative support functions currently carried out by the AO (e.g., personnel and payroll, space and facilities, and other administrative activities) even though the Committee recommends that the Center contract with the AO for the performance of such services, thereby negating the need for such personnel at the Center. Given these considerations, plus efficiencies the Committee expects to flow from its recommendations, the Committee suggests that the cost of the Center for Federal Criminal Defense Services may be significantly lower. Even at the \$4.6 million figure, the Center would increase the cost of the CJA program by less than 2%.

The Committee's proposed changes in regional administration, including local boards and administrators, were projected to account for \$10.8 million in additional annual resource costs. The JIO made this projection assuming an average of three staff persons (an experienced attorney, supported by a mid-level assistant who could review vouchers

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<sup>91</sup> The Judicial Impact Statement is included with this Report as Appendix IV.

and a secretary) per district in place of the value of Article III and magistrate judges and clerks' office support (including 19 work years for the judges and 10 work years for their staffs, two work years for circuit executive offices and 41 work years for clerks' offices, totalling \$7.81 million) under the current system.

The JIO's assessment of the cost of the current system is understated because, as the JIO points out, it does not include the contribution of federal defender organizations in many districts to such panel administration matters as recruitment of CJA panel attorneys, assignment of cases, voucher review and training.<sup>32</sup> At the same time, the Committee believes that the JIO's projection of additional cost for the Committee's proposed regional administration is overstated because the cost of administration of these activities by federal defender organizations is subsumed in the JIO's evaluation of the overall regional administrative costs of the Committee's proposal.<sup>33</sup> Moreover, the JIO could not quantify the many options available to the districts. For example, the Committee has suggested that the functions of local administrator and resource counsel may be combined, or may be performed on a part-time basis. Even so, the Committee believes that the maximum increase of 5% of current CJA funding to ensure proper training, performance and administration on the local level is within acceptable bounds.<sup>34</sup> Furthermore, while not quantifiable by the JIO, the impact statement indicates that there may be savings in future judgeship costs by freeing judges from the time committed to CJA administration.

The JIO has also estimated a \$31.8 million increase attributable to higher panel attorney compensation. This is based upon an increase of \$25.00 per hour in the 78 judicial districts in which pay cost adjustments above the \$60/\$40 hourly rates have not been funded.

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<sup>32</sup> The Defender Services Division circulated a questionnaire to federal defender organizations in May 1992 regarding their panel administration activities. Of the 29 respondents, 16 indicated that they are involved in managing the panel in their respective district, 18 participate in selecting attorneys for the panel, nine select attorneys for each case, seven are involved in reviewing attorney vouchers, and 21 are involved in panel training. The more involved end of the continuum is illustrated by the FPD in the Eastern District of California (where there were more than 700 panel attorney appointments in Fiscal Year 1991), which employs an estimated 2.5 full-time clerical positions plus 10% of the FPD's time in panel management, including voucher reviews.

<sup>33</sup> In the JIO's earlier version of its impact statement, based upon the Committee's Interim Report, the same estimate of regional administration costs for the Committee's proposal was made even though the impact statement had not then accounted for the potential role of federal defender organizations in panel administration matters.

<sup>34</sup> With respect to the Committee's proposed administrative structure locally and nationally, the JIO forecasts a one-time start-up cost of \$4.72 million for furniture and ADP purchases, space (new and alterations), etc. Again, this estimate may be high due to the existing infrastructure provided locally by some federal defender organizations and nationally by the AO.

The Committee recognizes that this is a significant increase of 14% over the estimated \$233.9 million cost of the CJA program in 1992. The Committee notes, however, that there has been no hourly rate increase in those judicial districts since 1984. It is unfortunate that the Judicial Conference has not implemented cost-of-living increases to the panel rates, as presently authorized by Congress, since small increases over the years would have relieved pressure for a greater increase at this time. The Committee believes that increased panel compensation is justified and required to provide effective representation within the historical framework of the Criminal Justice Act.

In addition, adoption of the Committee's recommendation to require establishment of federal defender organizations in districts where it would be cost effective or where there are a sizeable number of CJA appointments should lessen the impact of increased panel rates. To the extent that new federal defender organizations are created because they are cost effective, there should be long-term cost savings. Likewise, as the JIO points out, the Committee's recommendation to authorize appointed counsel to use paralegals and law students at reduced rates would produce potentially significant cost savings (over \$11 million annually according to one JIO estimate).

The cost of implementing the Committee's further recommendations with regard to training and administration of the panel attorney program and oversight of the CJA program as a whole is, for the most part, a matter of administrative effort rather than cost. Overall, the cost of the Committee's major administrative recommendations for creation of an independent Center for Federal Criminal Defense Services and for more focused administration on the local level is reasonable in view of the program and administrative benefits and efficiencies that would be derived.

## CONCLUSION

The Committee to Review the Criminal Justice Act has undertaken its charge to conduct a comprehensive examination of the Criminal Justice Act with an open mind and a determination to gather all relevant facts and hear all opinions. The Committee has been aided by the visionary work of the Allen and Oaks studies and has received a wide range of constructive and thoughtful recommendations from judges, lawyers and others with expertise concerning the CJA. The Committee views its recommendations as historically and practically necessary to address those problems which prevent the CJA program from achieving the constitutional mandate of effective assistance of counsel within an administrative system premised upon the goals of independence, effectiveness and efficiency. In addition, the structure, as modified, must provide sufficient flexibility to permit administrative responses (rather than requiring legislative repairs) to challenges which will emerge well into the future.

On the basis of five public hearings, hundreds of letters and dozens of meetings with judges, lawyers and others, the Committee proposes the preceding recommendations to improve and reform the Criminal Justice Act. Viewed in a historical context, the Committee's recommendations will provide for an improved CJA program more nearly reflecting the principle of independence expressed by legal organizations and in the legislative evolution of the Criminal Justice Act.

The Committee's recommendations are not self-effectuating. Therefore, the Committee's report is only the first step in moving ahead to achieve an improved, more efficient CJA program. The Committee encourages the Judicial Conference to act swiftly to address the weaknesses that are within its present purview. The Committee also urges all judges, lawyers and other interested persons to join with it in a constructive, objective effort to achieve appropriate structural and legislative modifications which will more nearly ensure the accomplishment of the goals which are the foundation of the CJA.



## SEPARATE STATEMENT OF GEORGE H. REVERCOMB

My principal disagreements with the recommendations of the Committee relate to the removal of the federal criminal defense services from the supervision and authority of the Judicial Conference, and the requirement that a local board in each circuit supervise the Criminal Justice Act program and appoint the Federal Public Defender within each district in the circuit.

The creation of an independent Center would in my view create a national focal point and target for political influence and interference with federal public defender functions. Such interference, I believe, would be harmful and unprecedented. The CJA program from its inception has been free from political influence. The Administrative Office and the entire Judicial Conference, in my opinion, are primarily responsible for the ability of the CJA program to flourish, protected from outside influences.

Far from being a liability, the supervision and support of the Judicial Conference of the United States and the Administrative Office of the United States Courts have been decisive in the substantial progress of the CJA program over the last 25 years. I do agree with the Committee report that a weakness in the present system is the lack of support of the panel attorneys in several of the judicial districts. But this weakness should not overshadow the fact that notable advances in the program continue to be made, including the expansion of federal defender offices and the increasing emphasis upon training of panel attorneys. Thus, in my opinion, the key problems are ones of adequate funding and lawyer personnel difficulties, and not the presence or role of the Courts or the Administrative Office.

With regard to individual federal public defender offices and CJA panel attorney programs, I believe that complaints of interference from the Courts greatly exaggerate the problem. The fact of the matter is that the vast majority of federal defender offices work efficiently and harmoniously without judicial interference. There is no reason these results cannot be achieved in all judicial districts and within the present framework. It would indeed be unfortunate if the inability of individuals in a few districts to cooperate in a professional manner resulted in the destruction of the existing arrangement of local autonomy within the federal defender offices as a whole. Such local autonomy, in my opinion, has been and continues to be essential to the successful expansion of federal defender services; the simplicity and flexibility of the present system is a strength, not a weakness. And where federal defender services have functioned well without a local board, it would be most unfortunate to impose this sort of supervision or control. Whether there should be a local board or not is a matter that should be strictly determined by each judicial district under its CJA plan. In providing for the criminal defense function, the nation is too large and diverse to have uniformity, or even direction, imposed from a national Center.

It is clear that the funding of the Criminal Justice Act program will remain the critical problem. Yet there is no reason to believe that the creation of an independent Center will solve this problem; it could well make it worse. I believe that the active support of the Administrative Office and Judicial Conference will be the most significant factor in meeting the funding problem, as well as in continuing the real progress that has been achieved in enhancing the representation of indigent defendants. A national commission with local governing boards in every judicial district, in my opinion, would unfortunately -- and inevitably -- result in more bureaucracy, greater expense, and less efficiency.

**SEPARATE STATEMENT OF JUDY CLARKE, THOMAS W. HILLIER, II,  
ROBERT ALTMAN AND J. VINCENT APRILE, II**

We write separately to express disagreement with one aspect of the Committee's report. A strong, independent system of delivering defense services cannot be developed by vesting unrestricted power in the judiciary and judges to appoint the administrators of the program.

The report recommends the creation of an independent defense delivery system and recognizes the compelling need for independence from the judiciary in order to meet the increasingly difficult demands of providing effective assistance of counsel to the indigent accused. However, the report fails in its goal. If independence of the CJA program is the goal, and we agree that it must be, control over the appointment of the administrators of the defense delivery system cannot remain in the hands of the judiciary and judges.

The federal criminal justice system has endured tremendous pressures for the last several years. Congress has enacted multiple "reform" bills and expanded the federal criminal code on a regular basis -- the Victim Witness Protection Act of 1982, the Comprehensive Crime Control Act of 1984, the Anti-Drug Abuse Acts of 1986 and 1988 and additional crime legislation in 1990 and 1992. Stalled only by budgetary and other political problems in 1992, the Congress seriously considered enacting multiple federal death penalties, dramatic restrictions on the Great Writ and further expansion of federal court authority over traditionally state criminal conduct. Rigid policies of the Department of Justice such as Operation Triggerlock have resulted in an overwhelming number of "street crime" prosecutions in the federal court. Many of the Triggerlock defendants have been prosecuted in state court and are already subject to lengthy prison terms. Others have been acquitted of the underlying more serious conduct, but find themselves prosecuted by the federal government for possession of a firearm. Mandatory minimum penalties and unduly harsh and complicated sentencing guidelines have changed the practice of law in federal court. Federal judges are under stressful time and resource pressures. Federal criminal defense lawyers face the cold reality of advising clients on the meaning of sentencing guidelines that have been amended 473 times in five years and have been interpreted by some 3,000 or more published opinions. Just advising a client of the potential penalties of his or her case is a complicated task. Prosecutions under the racketeering, continuing criminal enterprise and money laundering statutes result in complicated legal and factual proceedings. No longer can a lawyer "get trial experience" by volunteering to serve on an appointed panel of lawyers. The field is too complex and the consequences far too serious.

It is against the kind of backdrop set forth above that the future of the Criminal Justice Act must be considered. Indeed, the Committee recognized the changing world of federal criminal law, the changing balance of power to the prosecution and the

increased resources demanded by these changes. The Committee has made far reaching recommendations, looking to the future of the Criminal Justice Act and the importance of the independence of the defense function to a free society. But the recommendations fall short of the necessary step – independence for the defense function.

We concur with the Committee's finding that the goals of the CJA would best be served if judicial involvement were shifted to both local and national boards of directors, composed of persons not involved in the prosecutorial or adjudicatory function. The report makes this recommendation based on a well founded view of the need for an independent defense lawyer and problems in the present system. However, the report fails to achieve an independent defense delivery system by retaining in the judiciary the sole power to appoint the members of both the national and local boards.

Given the historic role of the courts in the development of defender services, it seems logical to have the program placed as an independent body in the judicial branch. To ensure actual independence as well as the appearance of independence, the judiciary's power to appoint must be restricted. The power of the Chief Justice of the United States and the chief judges of the courts of appeal to appoint both the members of the Center for Federal Criminal Defense Services and the Local Boards which would be statutorily created, should be restricted to selection from a list of nominations recommended by bar groups with a demonstrated interest in and dedication to defense of the indigent.

In selecting the members of the Center for Federal Criminal Defense Services, the Chief Justice of the United States should make appointments from a list of names submitted by the National Association of Criminal Defense Lawyers, the National Legal Aid and Defender Association, the Criminal Justice Section and the Standing Committee on Legal Aid and Indigent Defense of the American Bar Association, the NAACP Legal Defense Fund, the National Bar Association, and the Federal Public and Community Defender Organizations. These national organizations have a demonstrated commitment to and knowledge of the issues involved in indigent defense and the Sixth Amendment right to counsel. The chief judges of the circuit courts of appeal should be similarly restricted in making appointments to the Local Boards, with the exception that local and statewide criminal defense bar groups should submit the restricted list of names.

Many of our colleagues in the federal defender organizations oppose the creation of the independent national center and the local boards to administer the CJA and we respectfully disagree. We are firmly committed to an independent defense delivery system and make this choice over the apparent security the judiciary's controlling involvement has offered some institutional defenders. We urge a strong step toward independence of the defense function. This report does not go far enough to ensure and preserve that independence.

## **PROPOSED LEGISLATION**

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, that this Act may be cited as the "Center for Federal Criminal Defense Services Act."

**Sec. 101. Redesignation of Section 3006A.** Section 3006A of title 18, United States Code, is redesignated as section 3006D of title 18, United States Code.

**Sec. 102. Establishment of the Center for Federal Criminal Defense Services.** Chapter 201 of title 18, United States Code, is amended by adding the following new sections:

**"Section 3006A. Center for Federal Criminal Defense Services. (a) Establishment.** There is established as an independent agency within the judicial branch the Center for Federal Criminal Defense Services, which shall coordinate the provision of defense services under sections 3006A through 3006F to all financially eligible persons to assure quality representation under the Sixth Amendment.

**"(b) Board of Directors.** The Center shall be governed by a Board of Directors, which shall consist of 7 members. The Chief Justice of the United States shall appoint to the Center's Board persons who have demonstrated a commitment to the principle of providing independent and effective defense services. The appointments shall be made after the Chief Justice consults with legal organizations dedicated to the criminal defense function, and shall reflect the diversity of the national population. A majority of the Center's Board shall be attorneys experienced in the defense of criminal cases. No more than one member of the Center's Board shall be a Federal Public Defender or employed by a Federal Public Defender Organization or Community Defender Organization. No more than two members of the Center's Board shall be serving as, or have served as, a judicial officer of the United States or a State, territory, district, possession, or commonwealth, and no person serving as, or who has served as, a judicial officer of the United States or a State, territory, district, possession, or commonwealth shall be appointed to the Center's Board after the Center has been in existence five years. No person shall be appointed who is employed as a prosecutor or law enforcement official, or by a prosecutorial or law enforcement agency. No member of the Center's Board shall concurrently serve as a member of a Local Board.

**"(c) Term of Member of Center's Board.** Members of the Center's Board shall serve three-year terms, except that the terms of the initial members of the Center's Board shall be staggered so that two members serve a one-year term, two members serve a two-year term, and three members serve a three-year term.



No member of the Center's Board shall serve more than two terms, except that a person appointed to serve a one-year term may be appointed to two additional three-year terms. A person appointed to replace a member who has resigned or is removed shall serve the remainder of the term of the person who has resigned or been removed.

**"(d) Compensation of Member of Center's Board.** Members of the Center's Board shall serve without salary, but shall be reimbursed for all actual and necessary expenses reasonably incurred in the performance of their duties as members of the Center's Board.

**"(e) Chair of Center's Board.** The Center's Board shall elect a member of the Center's Board to serve as chair for two years from the date of election. A member so elected may be reelected to serve as chair for an additional two years. If a member serving as chair is removed as a member of the Center's Board or is not reappointed to the Center's Board, the Center's Board shall elect another member to replace the member removed or not reappointed. The member elected as chair to replace the member removed or not reappointed shall serve as chair for two years from the date of election.

**"(f) Removal of Member of Center's Board.** The Center's Board, by a vote of five members, may remove a member of the Center's Board but only for malfeasance in office, persistent neglect of or inability to discharge duties, or an offense involving moral turpitude.

**"(g) Quorum of Center's Board.** Four members of the Center's Board shall constitute a quorum for the purpose of conducting business.

**"(h) Center's Board Governance.** The Center's Board shall adopt bylaws governing the operation of the Center's Board, which may include provisions authorizing other officers of the Center's Board and governing proxy voting, telephonic meetings, and the appointment of committees.

**"(i) Duties of Center's Board.** The Center's Board shall --

(1) employ an Administrator of the Center, who shall serve at the pleasure of the Center's Board and who, notwithstanding any other provision of law, shall be deemed an officer of the United States within the meaning of section 2105 of title 5, United States Code;

(2) submit to Congress requests for appropriations for the provision of defender services in the federal criminal justice system;

(3) submit to Congress, the President, and the Judicial Conference of the United States an annual report regarding the operation of the Center and the delivery of Federal criminal defense services pursuant to this chapter, and every seven years a comprehensive review and evaluation of the implementation of this chapter, including the identification of long range needs;

(4) establish standards for the provision of defense services under sections 3006A through 3006F;

(5) evaluate plans for the provision of defense services submitted by Local Boards, and approve those plans that meet the requirements of law;

(6) review the implementation of plans approved by the Center's Board at least every four years to ensure that each Local Board complies with the plan approved by the Center's Board;

(7) establish for private attorneys providing representation under sections 3006A through 3006F minimum and maximum compensation rates to cover reasonable overhead expenses and a fair hourly wage;

(8) establish procedures to obtain investigators, experts, and other providers of defense services necessary for adequate representation of financially eligible persons under sections 3006A through 3006F;

(9) establish case maximums for compensation of private attorneys providing representation under sections 3006A through 3006F, and for investigators, experts and other providers of defense services necessary for adequate representation under sections 3006A through 3006F, and establish procedures for awarding compensation in excess of those maximums;

(10) establish procedures for the reimbursement of reasonable expenses of attorneys, investigators, experts, and other persons providing defense services under sections 3006A through 3006F; and

(11) upon the request of the Chair or ranking minority member of a committee of the Senate or House of Representatives, submit an estimate of the impact of legislation being considered by that committee, including the costs of providing defense services under sections 3006A through 3006F.

**"(j) Powers of Center's Board.** The Center's Board may --

(1) request from a Federal agency, and such agency shall provide, to the extent permitted by law and with such reimbursement as appropriate, such agency's services, equipment, personnel, facilities, and information;

(2) authorize the development and implementation of experimental projects for the delivery of services authorized under sections 3006A through 3006F;

(3) submit to a committee of the Senate or House of Representatives an estimate of the impact of legislation being considered by that committee, including the costs of providing defense services under sections 3006A through 3006F;

(4) combine Local Boards or divide the area served by a Local Board, if the Center's Board determines that such action is necessary better to effectuate the purposes of sections 3006A through 3006F; and

(5) take any other action reasonably necessary to carry out the purposes of sections 3006A through 3006F.

**"(k) Duties of Administrator.** The Administrator, subject to the direction of the Center's Board, shall --

(1) appoint and fix the compensation of necessary employees;

(2) establish a personnel management system for the Center which provides for the appointment, pay, promotion, and assignment of all employees on the basis of merit, but without regard to the provisions of title 5, United States Code, governing appointments and other personnel actions in the competitive service, or the provisions of chapter 51 and subchapter III of chapter 53 of such title, relating to classification and General Schedule pay rates;

(3) make an annual report to the Center's Board on the activities of the Center;

(4) enter into contracts to provide or receive services with any public or private agency, group, or individual; and

(5) perform such other duties assigned by the Center's Board.

**"Section 3006B. Local Defense Services Boards. (a) Establishment.** Except as provided in subsection (b), the Chief Judge of the United States Court of Appeals shall, within 90 days of the date of enactment of the Center for Federal Criminal Defense Services Act, establish a Local Defense Services Board for each judicial district within the circuit unless the Chief Judge finds that the purposes of sections 3006A through 3006F would be better served by having a Local Board serve more than one judicial district. The Local Board shall coordinate the provision of defense services to all financially eligible persons in the area served by such Local Board to assure all financially eligible persons in that area of quality representation under the Sixth Amendment.

**"(b) Designation of Community Defender Organization's Governing Body as Local Board; Local Board for Districts Combined Before Enactment of Center for Federal Criminal Defense Services Act.**

**(1) Designation of Community Defender Organization's Governing Body as Local Board.**

(A) Within 90 days of the enactment of the Center for Federal Criminal Defense Services Act, the governing body of a Community Defender Organization in existence on the date of such enactment may apply to the Chief Judge of the Court of Appeals for the circuit in which the area served by the Community Defender Organization is located to function as the Local Board for the area served on the date of such enactment. Upon such application, such Chief Judge shall appoint the governing body of such Community Defender Organization as the Local Board for the area such Community Defender Organization serves. For purposes of this subsection, the term "Community Defender Organization" does not include a death penalty resource center.

(B) If the governing body of a Community Defender Organization does not apply within the time period set forth in subparagraph (A) of this paragraph to function as the Local Board, the Chief Judge of the United States Court of Appeals for the circuit in which the area served by the Community Defender Organization is located may request that the governing body of such Community Defender Organization serve as the Local Board. If such governing body declines the request, the Chief Judge shall follow the provisions for the establishment and appointment of Local Boards under subsections (a) and (c).

**(2) Local Board for Districts Combined Before Enactment of Center for Federal Criminal Defense Services Act.** A single Local Board shall be established for any districts which were combined prior to the enactment of the Center for Federal Criminal Defense Services Act for the purpose of establishing a federal defender organization. Where districts in more than one circuit were combined to establish a federal defender organization, the Chief Judge of each United States Court of Appeals for the circuits involved shall appoint an equal number of members of the Local Board and the members so appointed shall appoint an additional member of the Local Board.

**"(c) Composition of Local Board.** Except as provided in subsection (b), a Local Board shall consist of not less than three nor more than eleven persons. A majority of the Local Board shall be attorneys experienced in the defense of criminal cases.

**(1) Qualifications to Serve on Local Board.** The members of a Local Board shall consist of persons who have demonstrated a commitment to the principle of providing independent and effective defense services. The following persons shall not serve on a Local Board –

(A) a Federal Public Defender or an employee of a Federal Public Defender or a Community Defender Organization;

(B) a judicial officer of the United States or a State, territory, district, possession, or commonwealth, or a person who has served as such a judicial officer; or

(C) a person employed as a prosecutor or law enforcement official or by a prosecutorial or law enforcement agency.

**(2) Appointment of Members of Local Board.** The Chief Judge of the United States Court of Appeals shall, within 180 days of the date of enactment of the Center for Federal Criminal Defense Services Act, appoint the initial members of a Local Board established by such Chief Judge under subsection (a). Subsequent appointments to the Local Board shall be made by the Local Board. All appointments to the Local Board shall be made after consultation with members of the federal judiciary and state and local bar associations in the area served by the Local Board, and shall reflect the diversity of the population of the area served by the Local Board.



**(3) Term of Member of Local Board.** Members of the Local Board shall serve three-year terms, except that the terms of the initial members of the Local Board shall be staggered so that the term of no more than one-half of the members expire in any year. No member of a Local Board shall serve more than seven years on the Local Board. A person appointed to replace a member who has resigned or is removed shall serve the remainder of the term of the person who has resigned or been removed.

**(4) Compensation of Member of Local Board.** Members of the Local Board shall serve without salary, but shall be reimbursed for all actual and necessary expenses reasonably incurred in the performance of their duties as members of the Local Board.

**(5) Chair of Local Board.** The Local Board shall elect a member to serve as chair for two years from the date of election. A member so elected may be reelected to serve as chair for an additional two years. If a member serving as chair is removed as a member of the Local Board or is not reappointed to the Local Board, the Local Board shall elect another member to replace the member removed or not reappointed. The member elected to replace the member removed or not reappointed shall serve as chair for two years from the date of election.

**(6) Removal of Member of Local Board.** The Local Board, by a majority vote of the full membership, may remove a member of the Local Board but only for malfeasance in office, persistent neglect of or inability to discharge duties, or an offense involving moral turpitude.

**(7) Quorum of Local Board.** A majority of the full membership of the Local Board shall constitute a quorum for the purpose of conducting business.

**(8) Local Board Governance.** The Local Board shall adopt bylaws governing the operation of the Local Board, which may include provisions authorizing other officers of the Local Board and governing proxy voting, telephonic meetings, and the appointment of committees.

**"(d) Reorganization of Local Boards.** A Local Board may propose to the Center that Local Boards be combined or, in the case of a Local Board serving more than one district, that the area served by such Local Board be divided and that existing boards be combined or new boards be established, as may be required. The Center may approve a reorganization plan proposed under this subsection by a Local Board if the ends of justice would be served thereby, and --

(1) if a reorganization plan provides for combining Local Boards, all of the members of the existing Local Boards shall become members of the Local Board for the combined districts. No new members of the Local Board of the combined districts shall be appointed until the number of members of such Local Board has been reduced through attrition to fewer than eleven; and

(2) if a reorganization plan provides for dividing an area, the existing Local Board shall nominate persons to serve as members of the Local Boards created under the reorganization plan, and the Center shall appoint the persons so nominated.

"(e) **Duties of Local Board.** The Local Board shall --

(1) develop and submit to the Center a local plan for the provision of defense services under sections 3006A through 3006F for the area served by the Local Board, and implement the local plan approved by the Center's Board. Representation under each plan shall include counsel and investigative, expert, and other services necessary for adequate representation. The Local Board may modify the plan at any time with the approval of the Center's Board and shall modify the plan when so directed by the Center's Board. Each plan shall provide for --

(A) a Local Administrator to perform the duties set forth in subsection (g);

(B) appointment of qualified private attorneys from a defense services panel in a substantial proportion of the cases, including whether they will be used exclusively to provide representation under sections 3006A through 3006F;

(C) if qualified private attorneys are not being used exclusively to provide representation under sections 3006A through 3006F --

(i) attorneys furnished by a defender organization established in accordance with the provisions of section 3006E, if the Local Board determines that establishment of a federal defender organization would be cost effective, or that annual appointments exceed a minimum number determined by the Center's Board, or that the interests of effective representation otherwise require;

(ii) attorneys furnished by a bar association or a legal aid agency, if the Local Board determines that the interests of effective representation so require; or

(iii) attorneys furnished under both subsections (i) and (ii) of this section;

(2) include in the local plan, and comply with, standards established by the Center's Board for --

(A) the minimum qualifications for attorneys, with respect to knowledge of federal criminal law and procedure and experience in federal criminal cases, to serve on a defense services panel;

(B) the establishment of a system to ensure that defense services panels are administered so that --

(i) panels are limited in size to allow each attorney sufficient appointments annually to maintain continuing familiarity with federal criminal law and procedure;

(ii) attorney qualifications are matched with the complexity of each case so that appropriately qualified attorneys are appointed;

(iii) there is early entry of counsel, including representation no later than the pre-trial services interview; and

(iv) there are adequate support services, including training, for members of the panel for every division of each judicial district;

(C) the continuity of counsel between pre-trial, trial and appellate levels;

(D) the performance of attorneys furnishing representation under sections 3006A through 3006F;

(E) the appointment, reappointment and removal of Federal Public Defenders;

(F) the abolition or change in form of a federal defender organization;

(G) management of federal defender organizations;

(H) the avoidance of conflicts of interest; and

(I) equal employment opportunity for both the employees of federal defender organizations and panel attorneys;

(3) establish and maintain a panel of attorneys qualified for appointment to defend persons in federal criminal proceedings in the area served by the Local Board;

(4) in districts for which there is a Federal Public Defender organization, transmit to the Center the Local Board's nomination of a person to serve as Federal Public Defender;

(5) in districts for which there is a Federal Public Defender organization, evaluate the performance of the Federal Public Defender, and transmit to the Center the Local Board's recommendation about the reappointment of an incumbent Federal Public Defender;

(6) submit to the Center a proposed annual budget for the provision of defense services in the area served by the Local Board;

(7) submit to the Center, in such form and at such times as the Center may specify, a report on the appointment of counsel within the area served by the Local Board; and

(8) establish a procedure permitting a panel attorney or other defense service provider under sections 3006A through 3006F in the area served by the Local Board to appeal a decision of the Local Administrator concerning compensation or reimbursement.

**"(f) Selection of Local Administrator.** The Local Board shall set forth in the local plan whether the Local Administrator shall be a federal employee, and --

(1) if the local plan provides that the Local Administrator be a federal employee, the Local Board shall nominate an attorney for appointment by the Administrator of the Center as Local Administrator; or

(2) if the local plan does not so provide, the Administrator of the Center shall contract with the attorney selected by the Local Board as Local Administrator.

No federal judicial officer, judicial officer of a State, territory, district, possession or commonwealth, or person employed as a prosecutor or law enforcement official or by a prosecutorial or law enforcement agency shall be a Local Administrator.

**"(g) Duties of Local Administrator.** The Local Administrator shall --

(1) recruit attorneys for the defense services panel and place on the panel those attorneys who qualify to represent financially eligible persons;

(2) when notified by a United States magistrate judge or court of the need for counsel, refer for appointment by the United States magistrate judge or the court counsel qualified pursuant to the local plan, provided that members of the defense services panel receive appointments in an equitable manner and that only appropriately qualified attorneys are appointed in specialized or complex cases, including appellate and capital cases;

(3) authorize reasonable expenditures for transcripts and the services of paralegals and law students;

(4) review, and certify for payment, vouchers received from panel attorneys, investigators, experts, and other providers of defense services under sections 3006A through 3006F, as provided in subsections (b) and (c) of section 3006D;

(5) coordinate and administer appropriate training opportunities for panel attorneys in the area served by the Local Board;

(6) prepare, at the direction of the Local Board, an annual budget for the provision of defense services under sections 3006A through 3006F in the area served by the Local Board, except for defense services provided by any defender organization under section 3006E in the area served by the Local Board; and

(7) perform other duties as assigned by the Administrator of the Center or the Local Board.



**"Section 3006C. Protection of Attorney-Client Relationship.** No member of the Center's Board or the Board itself, employee of the Center, member of a Local Board or the Local Board itself, or Local Administrator shall interfere with the professional judgment of an attorney appointed under sections 3006A through 3006F."

**Sec. 103. Representation of Financially Eligible Persons.** Section 3006D of title 18, United States Code, as redesignated by section 101 of this Act, is amended to read as follows:

**"Section 3006D. Representation of Financially Eligible Persons. (a) Representation.** A United States magistrate judge or court shall appoint counsel for a person who is financially unable to obtain adequate representation and --

(1) who --

(A) is charged with a felony or with a Class A misdemeanor;

(B) is a juvenile alleged to have committed an act of juvenile delinquency as defined in section 5031 of this title;

(C) is charged with a violation of probation;

(D) is under arrest, when such representation is required by law;

(E) is charged with a violation of supervised release or faces modification, reduction, or enlargement of a condition, or extension or revocation of a term of supervised release;

(F) is subject to a mental condition hearing under chapter 313 of this title;

(G) is in custody as a material witness;

(H) is entitled to appointment of counsel under the sixth amendment to the Constitution;

(I) faces loss of liberty in a case, and Federal law requires the appointment of counsel; or

(J) is entitled to the appointment of counsel under Section 4109 of this title;

(2) who --

(A) is charged with a Class B or C misdemeanor, or an infraction for which a sentence to confinement is authorized; or

(B) is seeking relief under section 2241, 2254, or 2255 of title 28, United States Code;

whenever the United States magistrate judge or the court determines that the interests of justice so require; or

(3) who --

(A) is a witness before a federal grand jury; or

(B) is notified by a United States Attorney's office requesting a meeting to discuss a matter which may lead to the filing of criminal charges against that person;

whenever the United States magistrate judge, the court, or the Local Administrator determines that the interests of justice so require.

**"(b) Appointment of Counsel.**

(1) In every case in which a person entitled to representation under sections 3006A through 3006F appears without counsel, the United States magistrate judge or the court shall advise the person of the right to be represented by counsel and that counsel will be appointed if such person is financially unable to obtain counsel. Unless the person waives representation by counsel, the United States magistrate judge or the court, if satisfied after appropriate inquiry that the person is financially unable to obtain counsel, shall notify the Local Administrator. The United States magistrate judge or the court shall appoint counsel selected by the Local Administrator. Such appointment may be made retroactive to include any representation furnished prior to appointment. The United States magistrate judge or the court shall appoint separate counsel for persons having interests that cannot properly be represented by the same counsel, or when other good cause is shown.

(2) If at any time after the appointment of counsel the United States magistrate judge or the court finds that the person represented is financially able to obtain counsel or to make partial payment for the representation,

the United States magistrate judge or the court may terminate the appointment of counsel or authorize payment as provided in paragraph (3), as the interests of justice may dictate. If at any stage of the proceedings, including an appeal, the United States magistrate judge or the court finds that the person is financially unable to pay counsel whom he had retained, the United States magistrate judge or the court may appoint counsel as provided in paragraph (1) if the interests of justice so require.

(3) Whenever the United States magistrate judge or the court finds that funds are available for payment from or on behalf of a person furnished representation, it may authorize or direct that such funds be paid to the appointed attorney, to the bar association or legal aid agency or community defender organization which provided the appointed attorney, to any person or organization authorized pursuant to subsection (d) to render investigative, expert, or other services, or to the court for deposit in the Treasury as a reimbursement to the appropriation, current at the time of payment, to carry out the provisions of sections 3006A through 3006F. Except as so authorized or directed, no such person or organization may request or accept any payment or promise of payment for representing a person under sections 3006A through 3006F.

(4) In the interests of justice, the Local Administrator may refer for appointment by the United States magistrate judge or the court substitute counsel at any stage of the proceedings.

**"(c) Compensation and Reimbursement of Expenses of Counsel.**

(1) At the conclusion of the representation or any segment thereof, an attorney appointed under subsection (b) or a bar association, legal aid agency, or Community Defender Organization which has provided the appointed counsel shall be compensated at a rate established by the Center's Board for time expended, including time spent in travel, reasonably necessary for representation, and shall be reimbursed for expenses reasonably incurred, including the cost of transcripts and services of paralegals and law students authorized by the Local Administrator.

(2) A separate claim for compensation and reimbursement shall be submitted to the Local Administrator for each court or other authority before which the attorney provided representation to the person involved. Each claim shall be supported by a sworn written statement specifying the time expended, services rendered, and expenses incurred while the case was pending, and the compensation and reimbursement applied for or received in the same case from any other source.

(3) Except as provided in this paragraph, a claim for compensation and reimbursement shall be deemed approved and certified for payment unless the Local Administrator makes a final decision regarding the claim within 30 days from submission. Upon receipt of a claim, the Local Administrator shall transmit a copy of the claim to the presiding United States magistrate judge or court who may advise the Local Administrator of any comments regarding the claim within 10 days of such transmittal. The Local Administrator shall review the claim and determine the compensation and reimbursement to be paid. Before a decision to approve less than the amount claimed, the Local Administrator shall notify the claimant in writing of the intent to approve less than the amount claimed and the reasons therefor, and provide the claimant an opportunity to respond within a reasonable time in writing. Such notification shall toll the 30-day time limit in this paragraph until the claimant responds. If the Local Administrator approves less than the amount claimed, the Local Administrator shall provide the claimant a written statement of reasons for the reduction. In the event of such reduction, the claimant may appeal the decision of the Local Administrator to the Local Board in accordance with the procedures established for such appeals by such Local Board.

(4) For purposes of compensation and other payments authorized by sections 3006A through 3006F, an order by a court granting a new trial shall be deemed to initiate a new case.

(5) A person for whom counsel is appointed under sections 3006A through 3006F may appeal to an appellate court or petition for a writ of certiorari without prepayment of fees and costs or security therefore and without filing the affidavit required by section 1915(a) of title 28, United States Code.

**"(d) Services Other Than Counsel.**

(1) **Appointed Counsel.** Counsel appointed under sections 3006A through 3006F may obtain investigative, expert, or other services necessary for adequate representation pursuant to procedures established by the Center's Board. Such services may include travel, lodging and subsistence expenses of the person represented, where necessary for attendance at or preparation for any proceeding. Upon the order of the United States magistrate judge or the court, such services shall include the costs of copying or transcribing discovery materials in the possession, custody, or control of the government.

**(2) Other Counsel.** Counsel for any person who is financially unable to obtain services other than counsel necessary for adequate representation, including those services set forth in paragraph (1), may request from the United States magistrate judge or the court a determination of financial eligibility in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the person is financially unable to obtain such services, the United States magistrate judge or the court shall authorize counsel to obtain such services pursuant to procedures established by the Center's Board.

**(3) Compensation and Reimbursement.** A provider of services other than counsel necessary for adequate representation, whose services were obtained under procedures established by the Center's Board, shall submit, in compliance with subsection (c)(2), a claim for compensation and reimbursement. Such claim shall be submitted to the attorney who obtained the services covered in the claim, and that attorney shall forward such claim to the Local Administrator along with that attorney's claim for compensation and reimbursement. A claim submitted by a provider of services other than counsel necessary for adequate representation shall be subject to the provisions of subsection (c)(3)."

**Sec. 104. Defender Organizations.** Chapter 201 of title 18, United States Code, is amended by adding after section 3006D, as redesignated by section 101 of this Act, the following new sections:

**"Section 3006E. Defender Organizations. (a) Types of Defender Organizations.** There shall be two types of defender organizations --

**(1) Community Defender Organization.** A Community Defender Organization shall be a nonprofit defense counsel service established and administered by any group authorized by the local plan to provide defense services. The organization shall be eligible to furnish attorneys and receive payments under sections 3006A through 3006F if such organization's bylaws are set forth in the local plan. Each organization shall submit to the Center, in such form and at such times as the Center may specify, reports of that organization's activities and financial position and, with the approval of the Local Board, that organization's proposed budget. Upon application an organization may, to the extent approved by the Center --

**(A) receive an initial grant for expenses necessary to establish the organization; and**



(B) in lieu of payments under subsections (c) or (d) of section 3006D, receive periodic sustaining grants to provide defense services and other expenses pursuant to sections 3006A through 3006F.

A Community Defender Organization established prior to the enactment of the Center for Federal Criminal Defense Services Act cannot be abolished by a Local Board without the approval of the Center's Board and in no event shall a Community Defender Organization be abolished, unless by act of a Community Defender Organizations itself, within 5 years of the enactment of the Center for Federal Criminal Defense Services Act.

**(2) Federal Public Defender Organization.** A Federal Public Defender Organization established prior to the enactment of the Center for Federal Criminal Defense Services Act shall continue in operation, and the Federal Public Defender then in office shall continue to serve the Defender's term in that capacity. Upon the establishment and appointment of a Local Board for the district or districts served by a Federal Public Defender Organization, the Local Board shall oversee the operation of the Federal Public Defender Organization. An organization for a district or part of a district or two adjacent districts or parts of districts shall be supervised by a Federal Public Defender. The Federal Public Defender shall be appointed for a term of four years, unless sooner removed for incompetency, misconduct in office, or neglect of duty. Upon the expiration of the four-year term, a person serving as Federal Public Defender may continue to perform the duties of Federal Public Defender until a successor is appointed, or until one year after the expiration of the four-year term, whichever is earlier. The appointment or reappointment of a Federal Public Defender shall be made, upon nomination of the Local Board, by the Center without regard to the provisions of title 5, United States Code, governing appointments in the competitive service. The compensation of the Federal Public Defender shall be fixed at a rate equivalent to the compensation received by the United States attorney for the district where representation is furnished or, if more than one district is involved, the compensation of the highest paid United States attorney of the districts involved. The Federal Public Defender may appoint, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, full-time attorneys in such number as may be approved by the Local Board and other personnel in such number as may be approved by the Center. Compensation paid to such attorneys and other personnel of the organization shall be fixed by the Federal Public Defender at a rate equivalent to that paid to attorneys and other personnel of similar qualifications and experience of the Office of the United States Attorney in the district where representation is furnished or, if more than one district is involved, the highest compensation paid to persons of similar qualifications and experience in the districts involved. Neither the Federal Public Defender nor any attorney so appointed by the Federal Public Defender may

engage in the private practice of law. Each organization shall submit to the Center at the time and in the form prescribed by the Center, reports of the organization's activities and financial position and, with the approval of the Local Board, such organization's proposed budget. Payments under this paragraph to an organization shall be in lieu of payments under subsections (c) or (d) of section 3006D.

**"(b) New Defender Organizations.** After the enactment of the Center for Federal Criminal Defense Services Act, all new defender organizations shall be Community Defender Organizations.

**"(c) Malpractice and Negligence Suits.** The Administrator of the Center shall, to the extent the Administrator considers appropriate, provide representation for and hold harmless, or provide liability insurance for, any person who is an officer or employee of a Federal Public Defender Organization established under this section, or a Community Defender Organization established under this section which is receiving periodic sustaining grants, for money damages for injury, loss of liberty, loss of property, or personal injury or death arising from malpractice or negligence of any such officer or employee in furnishing defense services under this section while acting within the scope of that person's office or employment.

**"3006F. General Provisions. (a) Applicability in the District of Columbia.** The provisions of sections 3006A through 3006F shall apply in the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit. The provisions of sections 3006A through 3006F shall not apply to the Superior Court of the District of Columbia and the District of Columbia Court of Appeals.

**"(b) Definitions for Sections 3006A through 3006F.** As used in sections 3006A through 3006F --

(1) the term "Center" means Center for Federal Criminal Defense Services established by section 3006A;

(2) the term "Center's Board" means the Board of Directors of the Center for Federal Criminal Defense Services established by section 3006B;

(3) the term "Local Board" means a Local Defense Services Board established by section 3006B(a);

(4) the term "local plan" means a local plan for the provision of defense services developed and submitted to the Center for Federal Criminal Defense Services under section 3006B(e); and

(5) the term "district" means each federal judicial district in which there is a district court of the United States created by chapter 5 of title 28, the Virgin Islands, the Northern Mariana Islands, and Guam."

**Sec. 105. Technical and Conforming Amendments to Title 28, United States Code.**

**(a) Budget Authority.** The second paragraph of section 605 of title 28, United States Code, is amended by inserting the following after "such court" the second time such phrase appears, "and the estimate with respect to the provision of defender services in the federal criminal justice system prepared by the Center for Federal Criminal Defense Services shall be approved by the Board of Directors of the Center for Federal Criminal Defense Services".

**(b) Witness Fees.** Section 1825 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(d) In all service of process and payment of witness fees on behalf of witnesses summoned for the defense pursuant to this section, the United States Marshal shall be deemed to be acting as the agent of the defendant or his or her attorney, and shall be held to the same requirements of attorney client privilege as any other agent of the attorney for the defendant."

**Sec. 106. Authorization of Appropriations.** There are authorized to be appropriated to the Center, out of any money in the Treasury not otherwise appropriated, sums necessary to carry out the provisions of sections 3006A through 3006F, including funds for the continuing education and training of persons providing defense services under sections 3006A through 3006F. When so specified in appropriation acts, such appropriations shall remain available until expended. Payments from such appropriations shall be made under the supervision of the Administrator of the Center.

## ENDNOTES

a. *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938).

b. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

c. "[The] right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him." *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

"[L]awyers in criminal cases are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trial in some countries, but it is in ours." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

"In our adversary system of criminal justice, there is no right more essential than the right to the assistance of counsel." *Lakeside v. Oregon*, 435 U.S. 333, 341 (1978).

The "guiding hand of counsel"...is essential for the evaluation of the prosecution's case, the determination of trial strategy, the possible negotiation of a plea bargain and, if the case goes to trial, making sure that the prosecution can prove the State's case with evidence that was lawfully obtained and may be considered by the trier of fact. *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 435 (1988) (citation omitted).

d. *Hearings on H.R. 4185 before the House Committee on the Judiciary*, 86th Cong., 1st Sess. 27-28 (May 6, 1959).

e. *Allen Report* at 9.

i. *Allen Report* at 7.

g. *The Criminal Justice Act in the Federal District Courts*, by Dallin H. Oaks, Professor of Law, University of Chicago, December 31, 1967, *reprinted* by the Senate Committee on the Judiciary, 90th Cong., 2nd Sess. (U.S. Government Printing Office, Washington, D.C. 1969).

h. Senate Report No. 91-790, 91st Cong., 2nd Sess., April 23, 1970, at 18.

i. *Id.*

j. Senate Report No. 102-331, 102nd Cong., 2d Sess., July 23, 1992.

k. *See, e.g., The Champion*, Vol. XVII, No. 1, Jan./Feb. 1993, "Federalization of State Street Crimes," p. 3; Boston Hearing Tr. 341.

l. The source for the information in Tables 1 and 2, Charts A and B, the "federal defender" column of Table 4, and the pie graph is the "Summary Report on Appointments and Payments Under the Criminal Justice Act for Fiscal Year 1991," dated December 19, 1991 (1991 Annual Report), prepared by the AO's Defender Services Division for the Chair and Members of the Committee on Defender Services. The Defender Services Division provided the CJA Review Committee with updated information relating to the FPD expenditures in Fiscal Year 1991. The source for Table 3 is the Judiciary's "Budget Estimates for Fiscal Year 1993, Congressional Submission," page 6.9. The source for the "panel attorney" column of Table 4 is a computer-generated report on "CJA Vouchers Processed for Payment by District Clerk Office, Fiscal Year 1991," dated April 10, 1992 (1991 Voucher Report), prepared by the AO's Financial Applications and Analysis Division.

As this Report is being published, the Committee has learned that the database from which the number of panel attorney representations is drawn has been subject to recent review and perhaps significant revision. Such revision would alter the source data in the 1991 Annual Report and the 1991 Voucher Report. Enhancing the accuracy of the database is essential; such imprecision, however, is symptomatic of the data reliability problems plaguing the CJA program. (*See, e.g., Endnote hh.*)



**m.** In 1988 the Committee on Defender Services similarly supported a review of the CJA program. In response to recommendations of the Federal Public and Community Defenders, that Committee proposed in June 1990 a list of additional issues which supplemented those of the Federal Courts Study Committee. The additional issues are:

- 1) Adequacy of representation furnished by CJA panel attorneys, including a comparison of those in districts with a defender organization and those in districts without such an organization;
- 2) Training of CJA panel attorneys;
- 3) Determination of the most appropriate assignment of responsibility for the administration of the CJA panel (the court, the federal defender, or another organization);
- 4) Procedure for maintaining the independence of CJA panel attorneys in districts without a defender organization;
- 5) Selection, term and compensation of federal public defenders, and criteria for reappointment;
- 6) Relationship of federal defenders to the Administrative Office of the United States Courts and the judiciary;
- 7) Early appointment of counsel - both prior to the pretrial services interview and during questioning by federal law enforcement officers;
- 8) Procedures to assure the prompt payment of CJA attorney compensation vouchers; and
- 9) Review or appeal of the determination of compensation for attorneys furnishing representation pursuant to the Act.

**n.** *Allen Report* at 6.

**o.** The judiciary has cited several initiatives contributing to the increase in the number and complexity of criminal filings and the resulting rise in the number and cost of CJA appointments. Among them is Project Triggerlock, a major federal program initiated in March 1991, targeting dangerous criminals in each community to be prosecuted, convicted and sentenced to substantial terms in federal prisons. Violent Crime Task Forces, also initiated in March 1991, are pilot projects involving a massive effort by federal, state, and

local law enforcement agencies to remove violent individuals and drug dealers from a target area. (See the Judiciary's "Budget Estimates for Fiscal Year 1993, Congressional Submission," p. 6.7.)

p. *The Third Branch*, Vol. 24, No. 2, Feb. 1992, "Chief Justice Addresses ABA Midyear Meeting," p. 2, col. 2.

The Organized Crime Drug Enforcement Task Force Program is a multi-agency drug investigation and prosecution program aimed at the identification and prosecution of members of high-level drug trafficking organizations, many of which are international in scope. During the first nine months of Fiscal Year 1991, 501 Task Forces were initiated throughout the country, resulting in 1,262 indictments against a total of 3,630 defendants. Of these defendants, 79 were charged under the Racketeer Influenced and Corrupt Organizations Act, while 116 defendants were charged under the Continuing Criminal Enterprise Act.

Operation Alliance is a special drug seizure program which coordinates the operations, resources and technology of federal, state and local law enforcement agencies in the four southwest border states of California, Arizona, New Mexico and Texas. From Fiscal Year 1986 to Fiscal Year 1991, the federal defender organizations in the southwest border areas experienced a 244.8% increase in the number of drug-related appointments, from 591 to 2,038. A substantial proportion of this increase is believed to be attributable to Operation Alliance activities, which began in Fiscal Year 1986. (See "Summary Report on Appointments and Payments Under the Criminal Justice Act for Fiscal Year 1991," dated December 19, 1991, prepared by the AO's Defender Services Division for the Chair and Members of the Committee on Defender Services.)

q. See the Judiciary's "Budget Estimates for Fiscal Year 1993, Congressional Submission," p. 6.7. As pointed out in the budget estimate:

The effect of the sentencing guidelines must be considered at each stage of proceedings, beginning with the initial review of the indictment and continuing through pretrial services interviews, investigations, plea negotiations, and the filing of the sentencing report. The calculation of sentences is much more time consuming than was formerly the case. Attorneys must ensure the accuracy of every fact relevant under the guideline scheme, investigate defendants' relevant unadjudicated conduct, make complicated assessments of defendants' criminal histories, draft written memoranda and prepare for evidentiary hearings which address sentencing disputes.

r. Memorandum from Scott A. Gilbert, Statistician, to William B. Eldridge, Director of Research, Federal Judicial Center, January 4, 199[3].

s. Magistrate Judge John Carroll, of the Middle District of Alabama, stated:

We have a mandatory CJA panel, which I guess began with [a previous judge], who said if you practice in federal court you're going to take criminal appointments and that trend continues. (Atlanta Hearing Tr. 73.)

Jerry Zirkin, an attorney from Richmond, Virginia, testified:

New lawyers are essentially conscripted when they are sworn into the bar of the Eastern District to serve on the panel. No training is provided for panel attorneys in the Eastern District that I'm aware of. (Atlanta Hearing Tr. 180.)

Later in his testimony, he added:

I think the days of panels where every member of the bar is a member of the panel, or thousand member panels, I think those days should be behind us. This work is too complicated.... (Atlanta Hearing Tr. 205.)

A panel attorney in Savannah, Georgia, submitted:

The criminal defense lawyers in Savannah, Georgia would love to be appointed to the cases which require indigent representation in the Federal Court. However, the judiciary has decided that anyone who practices on the civil side of the docket must also take criminal appointments and I and others in this firm have been required to accept such appointments although we have no true expertise in that area. It seems most reasonable that if you have very competent criminal defense lawyers who are capable of handling these cases...the best resources of the bar are not being utilized to anyone's advantage. (Letter to the CJA Review Committee dated November 18, 1991.)

Vern Woodward, an attorney in the District of Montana, testified:

In Montana we have three district judges. Each one administers the panel, and each does it pretty much as he sees fit. One of our judges...conscripts

every new lawyer that comes to town for a period of two years to serve on the panel. I have talked to his law clerk, and I am told that those who rebel are called into the judge's office and persuaded that this is a noble thing to do. And the judge is very persuasive. (Denver Hearing Tr. 145.)

Lynn Williams, a panel attorney in Hot Springs, Arkansas, wrote:

In regard to your committee's study topics, the greatest concern I have is the appointment of competent CJA panel attorneys in the Western District of Arkansas. It is true that there are plenty of possible attorneys to appoint; however, many of those attorneys are skilled in the state criminal system, but are not skilled in the Federal Rules of Criminal Procedure and Evidence. Additionally, they have almost no knowledge of the federal guidelines.

I would like to see some type of qualification procedure done before an attorney is appointed as a CJA attorney. (Letter to the Committee dated January 7, 1992.)

t. Denver Hearing Tr. 112.

A sample of other comments includes:

Terence F. MacCarthy, the federal defender in the Northern District of Illinois, stated:

[T]here are a very limited number of lawyers in the United States who have the ability to be federal criminal lawyers, and the federal sentencing guidelines exacerbates this tremendously. I would guess that it's far less than one percent of the lawyers in the United States who have the capability to walk into a federal court and represent somebody in a federal criminal case, and I think that's something that has to be told and made known. (Indianapolis Hearing Tr. 204.)

Stephanie Kearns, the Executive Director of the CDO for the Northern District of Georgia, observed:

The Department of Justice [prosecutors] are not generalists. To think that we could send in panel lawyers like they do in the southern district and to some extent in the middle district, lawyers who handle a criminal case once every other year in federal court or never handle a criminal case to go up against somebody whose entire experience...for ten years or more has been

nothing but prosecuting federal criminal cases is absurd. (Atlanta Hearing Tr. 90.)

Gerald F. Uelman, Chair of the Criminal Law Section of the State Bar of California, submitted a statement on behalf of the Criminal Law Section, including:

Because of the complexity of federal practice, there is a need to recognize the importance of establishing small panels of lawyers with expertise in federal criminal law and procedure. Currently, many panel lawyers primarily are state court practitioners who venture over to federal court two or three times a year, at the most, to represent a client....The creation of small panels will enable panel lawyers to obtain a sufficient volume of federal cases to develop needed federal expertise. (Statement, dated May 16, 1992, at 5.)

u. As explained by a group of law professors who provide post-conviction representation:

Beyond dispute, the guidelines have so complicated federal criminal law that it is no longer possible for federal civil litigators or state criminal defense experts to "dabble" in federal criminal practice. As this Committee is aware, the guidelines themselves are enormously complex. The original version of the Sentencing Commission's Manual contained some 261 pages of guidelines and commentary. In addition to mastering the original set of guidelines, however, defense lawyers must also keep current on guidelines amendments and appellate decisions interpreting the guidelines. From 1988 to date, the Commission promulgated some 465 amendments to the guidelines and commentary. Some amendments are retroactive; others are not. In every case, defense lawyers must determine which version of the guidelines applies to the case. Moreover, the federal appellate courts have issued thousands of sentencing guidelines opinions, and federal defense practitioners must keep abreast of these decisions in order to negotiate meaningful plea agreements and to make effective arguments at sentencing.

An example of the lack of adequate representation that can result from unfamiliarity with the sentencing guidelines, cited by the law professors, follows:

A defendant was convicted after a jury trial of distributing heroin in the Western District of Oklahoma. The evidence at trial established that the defendant delivered 5 ounces of heroin to a co-defendant. The defense attorney did not accompany the defendant to his pre-sentence interview with the probation officer and, at the interview, the defendant admitted delivering an additional 19 ounces of heroin. The defendant thus admitted



delivering a total of 24 ounces of heroin. At sentencing, the trial judge estimated that the heroin would be "cut" 7 times before it reached "street quantities." The judge multiplied the 24 ounces by 7, and sentenced the defendant on the basis of an offense involving 168 ounces. The defense attorney appealed the sentence, arguing that the probation officer should have warned the defendant that anything he said during the interview could be used against him. The attorney did not understand the more fundamental point, namely that guidelines sentences are based upon seized quantities, not street quantities. The attorney failed to challenge the use of the multiplier, and the sentence was affirmed.

(Comments on the Interim Report of the Committee to Review the Criminal Justice Act, submitted by Charles D. Weisselberg, Post-Conviction Justice Project, University of Southern California Law Center; David J. Gottlieb, The Kansas Defender Project, The University of Kansas School of Law; J. L. Pottinger, Jr., Jerome N. Frank Legal Services Organization, Yale Law School, November 17, 1992, pp. 5-6 (footnotes omitted).)

v. Chief Judge Barbara Crabb of the Western District of Wisconsin, a former member of the Defender Services Committee, stated:

In our District, where there are just two Judges and one Magistrate and no Defender, we have just appointed a new magistrate who took office in January....The first thing the magistrate is doing is starting to worry about appointing counsel. And the way it works in our Court, and I don't think this is necessarily the best way, but his secretary is the person that gets out the list and starts dialing for lawyers....Here is a brand new Magistrate with a brand new secretary, a ton of indictments and arrests on complaints, which we hardly ever get -- a lot of crack conspiracy cases -- and he and his secretary are calling everybody that they can find in the area to try to take cases. He is realizing that the panel is very small, the number of people willing to take cases is very limited, and their ability to respond, to turn around on a dime, is almost nonexistent.

...

[I]t gets to the point where sometimes you are just thinking, if I can find a warm body that will answer a telephone, this person is going to be appointed to the case. And that's not, that is not how we want to run the system. (Chicago Hearing Tr. 31-32, 37.)

The Committee also heard testimony on this subject from panel attorneys throughout the country:

Manny Garcia, who practices in the Northern District of Florida, reported:

Our CJA panel is a panel that's not organized. You become a member of the bar of the Northern District of Florida, your name becomes available as a panel attorney. The method of selection of an attorney for a particular case is a secretary in the office of the Federal Public Defender goes into her little index box of 3 by 5 cards and will flip through and just pull a name out, and whoever she happens to pull that day, she'll make a phone call to them, if they're willing to accept the case, they get the appointment and that's the appointment system. (Atlanta Hearing Tr. 234.)

James Craven of the Middle District of North Carolina stated:

I don't know how you get on the panel....I got on it in 1969. I don't remember how....But I do happen to know how the lawyers are chosen now for a particular case, and they aren't chosen by judges, they aren't chosen by the magistrates. They're chosen by the magistrates' secretaries and there are two of them...they're the ones that make the choices....They always call you and say would you be willing to take this particular case. They tell you a little something about it. Sometimes I'm told the judge would really like for you to do this because it's going to be a mess and a half and we don't want to give it to somebody without much experience. (Atlanta Hearing Tr. 260.)

Fred Palmer of the District of Idaho indicated that Idaho is divided into three divisions for purposes of administering the panel:

I talked to clerks around the three different divisions who do the actual appointing and they indicated that although we have the CJA plan adopted in Idaho, that I think makes [a] recommendation as to matching a particular case, the complexity of the case, to the attorney's experience and so on, that doesn't happen at all. It's they, the clerks, just select the next attorney on the list. (Denver Hearing Tr. 154.)

Martin Pinales, an attorney in the Southern District of Ohio, noted:

In Cincinnati the magistrates make appointments. The way things have happened in recent years is that a person is arrested, the magistrate's clerk gets on the phone and dials the next person on the list: "There is an

appearance in an hour, can you make it?" If you can make it, that's your case. If you can't make it, they go down to the next person on the list. (Chicago Hearing Tr. 218.)

w. Kim Taylor, Associate Professor of Law, Stanford University, testified on behalf of the American Bar Association:

Assignments should be distributed as widely as possible among those members of the bar who are qualified to accept appointments. However, the right to counsel is more than a right to have a warm body by one's side....The notion that a lawyer fresh out of law school would be assigned to represent a client charged with conspiracy under the continuing criminal enterprise [statute] is so sobering for this particular law professor and should worry anyone concerned about providing quality legal services to the indigent, yet this can happen and has happened. (Denver Hearing Tr. 204.)

Bruce Ellison, a criminal defense attorney in Rapid City, South Dakota, appeared before the Committee in Chicago. In his statement, he noted:

With all due respect to my fellow attorneys, a person charged with murder or other serious offense who has an experienced tax or real estate lawyer as his or her defense attorney, will not likely receive the same quality of representation the defendant would receive from one skilled and experienced in criminal defense trial work. If a person comes to me with a serious tax problem, I have to refer them elsewhere since I have a hard enough time trying to understand the Tax Code to do my own taxes. (Statement of Bruce Ellison, March 13, 1992, p. 4.)

Harold J. Bender, an attorney in Charlotte, North Carolina, expressed the following concerns:

The most pressing problem in the Western District of North Carolina is the quality of CJA representation. The North Carolina State Bar has implemented minimum standards for representation of indigent defendants in State Court cases. An attorney must have minimum number of years in practice as well as minimum hours court experience before they are qualified to represent indigent defendants in felony case.

However, no such minimum standard is required for Federal Court. I have personally witnessed an attorney, licensed less than three (3) months,

represent (or misrepresent) a major drug defendant in a jury trial in Federal Court. The Defendant suffered greatly at the hands of this young, inexperienced attorney. (Letter to the CJA Review Committee dated January 3, 1992.)

Loren E. Weiss, writing on behalf of the Utah Association of Criminal Defense Lawyers' CJA Evaluation and Recommendation Committee, discussed the panel in the District of Utah:

The composition of the Panel (member-lawyers) is capricious. There is no screening process. Nor has there been any requirements for inclusion on the Panel. Therefore, the membership includes persons who have never tried any federal criminal cases. Some Panel members have little or no experience, and provide representation without supervision or review. (Letter to Theodore J. Lidz, Defender Services Division, Administrative Office of the U.S. Courts, November 4, 1991.)

x. The model plan in the *CJA Guidelines* provides:

A. Standards. The services to be rendered a person represented by appointed counsel shall be commensurate with those rendered if counsel were privately employed by the person.

B. Professional Conduct. Attorneys appointed pursuant to the CJA shall conform to the highest standards of professional conduct, including but not limited to the provisions of [the American Bar Association's Model Rules of Professional Conduct] or [the American Bar Association's Model Code of Professional Conduct] or [other standards for professional conduct adopted by the Court]. (*CJA Guidelines*, Appendix G at G-9 and G-10.)

y. "Advisory Research Group of the Gender Bias Task Force of the Ninth Circuit on Appointment of Private Counsel under the Criminal Justice Act: Working Papers," Maria E. Stratton (Los Angeles, California) and Sheryl Gordon McCloud (Seattle, Washington), pp. 2-3. See also Denver Hearing Tr. 135-47, 194; Letter to the Committee from Virginia Lee dated January 13, 1992.

At the Boston hearing, panel attorney James Krasnoo discussed problems that have resulted from the lack of qualified minority attorneys participating in panels, and suggested that law schools could get involved in solving these problems:

I think that if law schools were contacted by whoever does the appointing of people to the panels, they can be on the lookout for young people who have an interest in coming onto the panel – especially minorities that are so sorely needed, at least in the panel in Boston.

And they can arrange and have an ongoing program whereby those young people with that interest can have a mentor on the panel appointed to them, where they can work on those cases and as a result have a leg up when they come out of law school, or one or two years out, of having some know how in the Federal Court to get those minorities on that list more quickly, so that the minorities that are coming before this Court can be served and comforted that there are people out there like them who are on the team.

Which means that if I happen to be white and appointed for a black or hispanic or oriental, at least by knowing that there are others on that team, he doesn't think so much that I am automatically built into the system that is dead set against him. (Boston Hearing Tr. 367-68; punctuation modified for clarity.)

z. Michael Abbott, a sole practitioner in Atlanta, Georgia, stated:

[T]he problem is not merely paying adequate compensation to appointed attorneys. I think the larger problem is one of providing central resources.

Investigative help, expert witnesses, technology such as LEXIS and Westlaw, people who are experts in the field, people who are what I call scholar banks of people, people who know something about federal law; these are all things the Department of Justice takes for granted. The gap between the resources available to the prosecution and the defense becomes even larger. (Atlanta Hearing Tr. 43.)

Michael J. Trost, an attorney in Atlanta, Georgia, wrote:

There is often a critical need for access to independent investigators to assist appointed attorneys in locating and interviewing witnesses, chasing down documents and other evidence, and assisting in the preparation for trial. The investigators assigned to the Federal Defender's Office are not available for our use, and the courts are not usually receptive to authorizing the employment of an investigator in anything but the exceptional case. Access to investigators would be cost effective, as investigators could undertake tasks presently done by attorneys, at a greatly reduced cost. The denial of



adequate access to investigative resources significantly impinges upon a defendant's rights to adequate legal representation and due process. (Letter to Committee dated January 22, 1992.)

Sam Manly, a panel attorney from Louisville, Kentucky, offered:

One would not want to eliminate young lawyers from practicing in federal court. One would want to encourage them, but it seems to me just as in law firms young lawyers aren't turned loose to handle major civil trials or major mergers or acquisitions without the guidance and direction of senior partners, neither should they be turned loose in federal courts to handle major felony cases, death penalty cases, or even serious misdemeanors their first day out.

How that guidance and direction can best come about depends on what system is in place today in the district. In our district there is no guidance or direction because no one's there to provide it. (Indianapolis Hearing Tr. 355-56.)

Tova M. Indritz, Federal Public Defender for the District of New Mexico, testified:

[T]here has to be some mechanism to provide a way for panel lawyers to communicate with each other and get information, and I think that that kind of requirement of a defender presence or a resource center presence in every district has to come from a change in legislation. (Indianapolis Hearing Tr. 288.)

aa. Based upon the support and directive of the Committee on Defender Services and with the approval of the districts to be involved, the Defender Services Division is in the process of initiating a program in two districts (Western District of Wisconsin and Middle District of Georgia) not served by a defender organization whereby a local experienced panel attorney will furnish advice to other panel attorneys on case-related matters, will produce and distribute written resource materials, and will conduct training seminars. If the program is successful, efforts are expected to be made to expand the resource counsel program to other non-defender districts.

bb. Support for a resource presence for all districts was received from judges as well as panel attorneys and others concerned with effective representation.

Magistrate Judge John Carroll from the Middle District of Alabama observed:

I think one of the most important things would be some sort of a resource center in the district, itself, where panel attorneys could contact someone with expertise that they could discuss federal criminal defense problems, guideline problems, Bail Reform Act problems. That resource would, I assume, be responsible for training and providing written materials and providing updates, for example, in Eleventh Circuit law. At present there is no resource like that that these lawyers can go to. There is no resource for panel attorneys in our district. (Atlanta Hearing Tr. 80-81.)

While the judges of the Third Circuit believe that there should be a defender organization in every district, they favor making resources and support available to districts in which these organizations do not exist:

We recommend that every district should have a resident federal defender organization. Each of our districts now has a defender organization, and these have been beneficial to the districts. As the criminal caseload has become more complex, with the advent of Sentencing Guidelines and minimum mandatory sentences, these districts have reached out to their federal defenders for assistance in educating the criminal bar and responding to these new developments. Two years ago, we worked out an arrangement whereby our only district without a federal defender was able to receive support from an adjoining district. That district still does not qualify under the current statistical standards for an independent office, but continues to receive dedicated support from that adjoining district. (Letter from Chief Judge Dolores K. Sloviter, United States Court of Appeals for the Third Circuit, dated March 24, 1992.)

Jeffrey Weiner, then President of the National Association of Criminal Defense Lawyers, testified before the Committee at the Indianapolis hearing:

However, one thing that we are very, very pleased with, even though you did decide it prior to this meeting, is the fact that there will be [recommended] apparently from what I have heard, local administrators or at least a local presence in every district in the country. This is something that NACDL supports and has supported for quite some time.

We recognize that many districts have arrangements where the federal defenders, the community defenders, are very much involved. Other districts do it very informally where the judges essentially do their own thing, but the

fact of the matter is there are too many instances where there is no coordination and support for CJA-appointed counsel. (Indianapolis Hearing Tr. 11-12.)

Marshall Hartman, General Counsel, National Defender Institute, and former National Director of Defender Services of the NLADA, appeared before the Committee in Chicago and asserted the need for resource centers in all districts that do not have defender organizations. He stated that these "back-up" centers should be appropriately staffed and funded, and would support panel attorneys by providing the services of investigators, psychiatrists and other expert witnesses, as well as litigation assistance; would have a brief bank housing materials on the sentencing guidelines and other issues which have been litigated for the use of panel attorneys; and would act as a training coordinator. (See Chicago Hearing Tr. 353-57.)

Loren E. Weiss, representing the Utah Association of Criminal Defense Lawyers CJA Evaluation and Recommendation Committee, wrote:

A support system needs to be established. The majority of Panel Lawyers recommend establishing an FPD or a CDO. Even without a defender office, it is recommended that funds be made available to establish local support to help with research and other legal issues, experts, forensics, and witness management and fees. (Letter dated November 4, 1991.)

Anthony Natalie, a sole practitioner in West Palm Beach, Florida, stated:

We need to have some type of a delivery system where the counsel can have access to the necessary experts and the necessary investigative resources so they can do the job and have the case properly prepared. (Atlanta Hearing Tr. 188.)

Richard Kamman, a panel attorney in Indianapolis, Indiana, said:

It seems to us that in areas that where the case load is not in and of itself sufficient to justify a defender office, community defender, federal defender, that a regional office of an existing defender perhaps be utilized. And I understand that that is happening in some areas where the defender office, in fact, goes across district lines or even circuit lines in some cases.

[O]ne person or an office that is staffed part time to expand the reach of the defender offices, which we see as being very, very positive. If that is not appropriate, there may well be some circumstances where the case load and the distances are such that that is not appropriate, then a resource type office is warranted. (Atlanta Hearing Tr. 203.)

cc. Chief Judge Stephen Breyer of the First Circuit Court of Appeals spoke in Boston about the unavailability of funding to increase panel attorneys' compensation:

[I]n those areas of the country where defense attorneys are supposed to be paid \$75.00 an hour for in court time and for out of court time, please help us get the money. So that we can actually do that, because I think one of the most important things to being certain that defendants who are indigent in criminal cases in fact receive adequate representation as the Constitution requires...is to make certain that the defense bar who will represent them is paid, and paid sufficiently. (Boston Hearing Tr. 7.)

Judge Douglas Woodlock of the District of Massachusetts, and first Chair of the Commonwealth of Massachusetts Committee for Public Counsel Services, stated:

We recognize that unless you substantially increase the level of compensation you will not be properly compensating people, so what you are looking for is a level of compensation that is adequate to ensure vigorous representation. (Boston Hearing Tr. 140.)

dd. For example, in St. Louis, six attorneys obtained a stay of a case prior to the trial when the appropriated funds available to pay CJA-appointed attorneys had been completely expended by June 1992 and it was unclear when the attorneys would receive compensation. The court concluded that a four to five month delay in compensation, coupled with the demands of an unusually complex and lengthy RICO trial, would essentially destroy the law practices of the attorneys and preclude effective assistance of counsel. The court rejected the implication of the government that the attorneys might own stocks or bonds which could be sold or that there would be property or other assets which could be borrowed against, declaring "[d]uty to provide effective assistance in an appointed case does not carry to such an extreme." *U.S. v. Lewis-Bey, et al.*, No. 91-00001CR(6) (E.D. Mo.), Memorandum Opinion filed July 16, 1992, p. 9 n.6.

(See also, e.g., Chicago Hearing Tr. 327-29.)

ee. Of the numerous letters received by the Committee from panel attorneys throughout the country, nearly 70% of them addressed the issue of adequacy of compensation under the CJA. Many stated that they were forced to withdraw from panels due to the financial hardships created. Some examples follow:

I have taken my name off the Federal Court appointment list, and I know I am not alone. Many experienced criminal defense attorneys will no longer accept court appointed work due to the failure of certain judges to approve reasonable requests for payment and their refusal to discuss the problem. As a result, lesser experienced counsel are receiving appointments. They are not expending the necessary time and effort on the defense of these cases because they know they will not be compensated for their work. As a consequence, a standard of mediocrity is invited and accepted by the Courts. Criminal defendants are not receiving adequate legal representation and we are all the worse for it. (Letter to Committee dated February 21, 1992.)

Fees of \$40 per hour out-of-court and \$60 per hour in-court are unacceptable. My firm has asked me to stop accepting appointments because the present rates do not even cover overhead. (Letter from Virginia Lee, Boston, Massachusetts, dated January 13, 1992.)

[D]espite the relatively poor rate of pay for Criminal Justice Act Attorneys I have continued to accept appointments and provided competent and aggressive representation. Unfortunately, a great many of my colleagues who are equally experienced in criminal law do not express the same view, i.e., that there is an obligation on the part of some Attorneys to represent indigents, however inadequate the pay may be. Many Attorneys I have tried cases with who had hitherto accepted appointments are now unwilling to do so because of the poor payment structure as well as the lack of uniformity of payments between neighboring jurisdictions. (Letter from David Solomon, Baltimore, Maryland, dated December 24, 1991.)

[I] requested that my name be removed from the appointment list due to the inadequacy of the compensation for the legal services provided. Since the hourly rate for out-of-court work was approximately less than half my normal charge and because many of the federal cases these days require substantial hours of work, I found it to be a situation where I was simply losing money by taking criminal appointments. (Letter from Rob J. Aiken, Springfield, Missouri, dated December 4, 1991.)



The low hourly rate is an injury to the attorney and to the indigent client. It places severe pressure on the attorney to provide the simplest defense with the least amount of hours.

When the federal courts do not even pay the quoted hourly rate for the approximately 200 hours which are required for a normal case, the federal courts add insult to injury. Most attorneys who go through this experience simply refuse to take additional appointments under the Criminal Justice Act. (Letter from Richard L. Darst, Indianapolis, Indiana, dated April 8, 1992.)

As our practice begins to grow, and our time becomes at a greater premium, continued CJA appointment work at the current hourly rate must be reviewed. It is our desire to continue to represent indigent defendants here in the Eastern District as long as we can afford to do so. Thus, my primary response to the issues the committee will be addressing deal with the adequacy of the compensation under the Criminal Justice Act. The basic premise which I wish you to consider is that there are probably several attorneys, who like the attorneys in our firm, have considerable amount of experience but due to their growing practices may not be in a position to continue to provide representation under the current compensation rates. I feel that raising the rate to approximately \$75.00 an hour with careful scrutinizing would permit more experienced attorneys to remain active on the panel. (Letter from Gene V. Primono, Muskogee, Oklahoma, dated October 16, 1991.)

We very much enjoy federal criminal defense work and genuinely believe it is our duty and obligation to undertake indigent work. However, the difficulties we face in the current economy have caused us to cut back on our CJA participation such that after the end of this year, no one in our firm will [be] seeking appointment except for those clients we have represented pre-indictment who have run out of money and for whom we feel an obligation to maintain continuity of counsel. (Letter from John P. Martin, Los Angeles, California, dated November 15, 1991.)

Attorneys withdrawing from the panel is a serious problem in the Eastern District of Washington, as the Chief Judge and three other judges in that district informed the Committee:

We have been able to keep up with our needed appointments only because our attorneys recognize their obligations as officers of the court. However, it is becoming apparent that unless approval is granted for a flat \$75/hour rate and funding is provided therefor, we will be unable to continue to obtain adequate representation for the 50 percent of the cases which the Community Defender cannot handle due to conflicts. (Letter from Chief Judge Justin L. Quackenbush dated November 7, 1991.)

For the last three or four years past, this district has led the nation in criminal filings per judge. Whatever comment that might inspire on the issue of who's winning the war on drugs, the same time period has seen our panel of lawyers willing to undertake the unpopular responsibility, shrink by more than 40%. The principal reason offered for their reluctance to continue was the low pay. Even though the young lawyers may well have accepted the challenge in a *pro bono* spirit or for the experience it might provide, those associated with firms, are pressured to avoid the undertaking because of the obvious overhead problems. (Letter from Judge Alan A. McDonald dated April 1, 1992.)

During my six-month tenure, the only duty I have had difficulty dispensing has been the appointment of counsel to represent the indigent. In this district, although action was taken to increase the out-of-court rate of \$40.00/hour and in-court rate of \$60.00/hour to \$75.00 per hour, there has been no funding to implement those rate increases. Accordingly, we are losing members from our CJA panel, and other persons who remain on the panel have refused to take new appointments, unless and until a rate increase is funded. As a result, there are days in which it is very difficult to appoint counsel. I recall one incident in which a member of my staff made phone calls for two hours before being able to locate a panel member who would accept an appointment. The CJA panel member graciously did so only because he believed it was his duty, and despite the fact he already had accepted several other recent appointments. (Letter from United States Magistrate Judge Cynthia Imbrogno dated April 1, 1992.)

There are presently only 14 attorneys on the CJA panel for the entire southern portion of our district. Of these 14, several of the most experienced ask periodically to be relieved for a time while they pursue more financially rewarding matters. Others of the 14, although desperately needed because of the small number, are found by the court to be wanting in their abilities to provide effective representation.

As a judicial officer, it is a great concern that when an indigent defendant is provided counsel, it be adequate counsel. Surely everyone agrees the number one difficulty in maintaining an effective CJA panel is that well qualified attorneys can no longer afford to take court appointments at the outdated rates currently in use. (Letter from United States Magistrate Judge James B. Hovis dated April 1, 1992.)

II. At the Committee's Boston hearing, Judge Gerard L. Goettel of the Southern District of New York talked about voucher reductions:

Attorneys complain very often about having their vouchers lowered. I don't believe a Judge should reject a portion of a voucher from an attorney without telling him or her why it is being rejected and hearing their response.

That, however, is not the main problem. The main problem is that there really is no appeal from what the Judge decides on the voucher. (Boston Hearing Tr. 91-92.)

David L. Lewis, President of the New York State Association of Criminal Defense Lawyers (NYSACDL), chronicled complaints of unsupported voucher reductions and stated that "among a certain group of judges, the CJA voucher is used as a whip to force defense lawyers to choose between their economic interest and the clients." (Testimony of David L. Lewis, President, NYSACDL, before the Committee to Review the Criminal Justice Act, pp. 2-3; see also Boston Hearing Tr. 241-47, 299-300.)

Martin Pinales, a Cincinnati, Ohio panel attorney who served on the Panel Attorney Advisory Committee to the Defender Services Committee, described voucher reduction problems:

Although the rates are extremely low, many judges are the keeper of the treasury and routinely cut vouchers. This has caused a great deal of discontent among panel members. Many panel members have removed their names from the panel list because of routine voucher cutting. At the present time there is no course of redress for the panel members to put forth their point of view and support the time sheets. The cutting of vouchers is arbitrary and without due process. (Synopsis of Testimony before the CJA Review Committee of Martin Pinales, Chicago, Illinois, March 13, 1992, p. 5.)

An attorney in Springfield, Massachusetts, wrote:

Like many attorneys in this community, I have stopped accepting CJA appointments as a result of arbitrary reductions of my compensation requests by the trial judge. The rates in effect at the time of my last federal appointed case, \$60.00 for in court time and \$40.00 for out of court time, although higher than the state rates for non-murder cases, were nevertheless meager. (Parenthetically, the differential for the two kinds of work is irrational.) The reductions imposed upon my bill in that six-week-long conspiracy case resulted in a loss to me of \$7260.00, and an effective rate of \$20.00 per hour for the whole case. At that level of compensation, I cannot justify the disruption to my practice occasioned by a major federal trial.

I was particularly offended that, having sworn under oath that my billing was correct, my compensation was reduced with neither a preliminary inquiry into the nature and necessity of the services provided, nor recourse to any meaningful review process. (Letter to the Committee dated March 11, 1992.)

A Seattle, Washington panel attorney wrote a Committee member detailing his dissatisfaction with respect to a judge's reduction in his voucher, concluding:

[O]nly upon receiving payment did I realize that [the judge], although authorizing payment in excess of the \$3,500 statutory maximum cut my requested compensation by more than one-half -- from \$10,150.80 to \$4,315.80.

As I am sure you can imagine, I am very frustrated and upset by this turn of events. I feel that I have been treated unfairly and should be provided some recourse or avenue for review.

I have talked with numerous members of the CJA panel about this situation and about CJA compensation in general. All of the other CJA panel attorneys that I have talked with agree that given the relatively low hourly rate provided in CJA cases and the delay in payment in those cases, unless full payment is regularly provided by the Court, it would be very difficult to continue accepting a significant number of CJA appointments. (Letter to Thomas Hillier from Scott J. Engelhard dated November 19, 1991.)

Other attorneys also cited problems with voucher reductions and lack of recourse. (See, e.g., Boston Hearing Tr. 281-82; 364-65.)

22. In 1967, Professor Oaks found that district judges were "extremely conscientious" in reviewing CJA vouchers and that delays in the payment of vouchers were not a problem since payment was generally received within one month, and no longer than two months, of submission of vouchers by the claimants. Unfortunately, with the extraordinary growth of the CJA program over the past 25 years, delays in payments have become a significant problem. Attorneys may experience lengthy waiting periods, in some instances of six months or longer, between the completion of a case and payment of a voucher.

The Committee heard testimony at its hearings concerning inordinate delays in the voucher approval process. (See, e.g., Boston Hearing Tr. 280-81; 314-15.) One panel attorney testified in May 1992 that he had not yet received payment for an interim voucher submitted in June 1990 or a final voucher submitted in December 1990. (Indianapolis Hearing Tr. 100-12.) A substantial proportion of the letters received by the Committee from panel attorneys commented on the need for procedures to assure the prompt payment of vouchers. For example, Terri Wood, a panel attorney from Eugene, Oregon, wrote:

The greatest hardship is caused by extremely long delays in receipt of payment for cases; I only wish IRS could be counted on [to] be as understanding if I didn't pay my taxes on time. (Letter to the Committee dated December 20, 1991.)

In a recent survey of Montana panel attorneys (79 responses out of about 120 surveyed), approximately 50 percent disagreed with the proposition that they received prompt payment of CJA vouchers, with some complaining that they waited for months. (See Letter to Charles Ogletree, Jr., Reporter to the Committee, from Daniel Donovan, CJA Training Coordinator for the District of Montana, dated April 9, 1992.)

The Administrative Office has, through decentralization and automation of the payment process and changes in audit procedures, succeeded in substantially reducing processing of approved vouchers. In April 1992 the Evaluation and Assessment Division (EAD) of the AO presented its "Survey Report on the Review of the CJA Voucher Processing and Payment Process." EAD reviewed a sample of 317 vouchers processed by four different district courts in three randomly selected months of 1991. While the EAD report revealed that panel attorneys and experts are being paid more quickly as a result of decentralization, it also indicated that the process is still quite lengthy, as attorneys and experts often do not submit their vouchers promptly and many judges do not act on submitted vouchers promptly. This review showed that time from date of



submission by the attorney to date of approval by the presiding or chief judge averaged about 3 weeks in one district, 7 weeks in the second district, 8 weeks in the third district, and 15 weeks in the fourth district. The total elapsed time from end of representation to voucher payment averaged between 15 and 26 weeks for the four districts.

The Eighth Circuit submitted the results of a review of vouchers processed by the courts in the circuit between June 1989 and August 1990, which was prepared for them by the AO. (Letter to Judge Prado from June L. Boadwine, Circuit Executive, dated September 1, 1992.) About 50 vouchers were reviewed for each court; when the length of time between the attorney signature and the court signature was more than 1-1/2 months, those vouchers were listed. There are examples cited in districts throughout the circuit of vouchers remaining unsigned by the presiding judge from 2 to 15 months.

Information obtained by the Committee from the Fifth Circuit provides some insight into the extent of delays in processing vouchers from that court's CJA caseload. The Fifth Circuit submitted approximately one year (July 1991 to July 1992) of hand-written ledger sheets tracking vouchers from the date of case completion to the date of payment approval. (Letter to the Committee from Gilbert F. Ganucheau, Clerk, United States Court of Appeals for the Fifth Circuit, dated August 6, 1992.) Of the 322 vouchers listed, 207 (64%) were submitted by attorneys within 45 days after case completion, as provided in the *CJA Guidelines*. Of those timely-submitted vouchers, date of approval by the judge ranged from the same date as submission to as long as 11 months, with 30 percent of them taking more than one month. A further breakdown follows, showing the number and percentage of vouchers that were approved by the court within various time frames after submission by counsel:

<u># of Vouchers</u>	<u>1 Month or Less</u>	<u>1 - 3 Months</u>	<u>3 - 6 Months</u>	<u>More than 6 Months</u>
207	145 (70%)	45 (22%)	11 (5%)	6 (3%)

For the vouchers that were submitted by attorneys after the 45-day limit, the following applies as to the timeliness of review by the court:

<u># of Vouchers</u>	<u>1 Month or Less</u>	<u>1 - 3 Months</u>	<u>3 - 6 Months</u>	<u>More than 6 Months</u>
115	68 (59%)	31 (27%)	7 (6%)	9 (8%)

In sum, both CJA counsel and the court appear to have contributed to delays in voucher processing.

hh. In its Interim Report, the Committee noted that concerns were voiced about the lack of empirical data to support some of its findings. Areas of particular concern related to the timeliness of processing panel attorneys' vouchers and to judicial reductions in the amounts claimed by attorneys via submission of vouchers. The Committee attempted to gather additional statistical data regarding these areas, including a request to the courts for any relevant information (some of which is referred to in the previous endnote), the generation of reports from the AO's CJA voucher database, and potential assistance from the Federal Judicial Center. However, definitive data pertaining to these subjects generally could not be retrieved from within the court system.

Implementation of the AO's decentralized CJA voucher system began in March 1987 but all districts and circuits were not on-line until the end of 1989. The previous system did not provide for entry of the same information as the present system, so historical comparisons are not feasible.

The reliability of data retrieved from the system depends on several factors, the most important of which is consistency in inputting the information contained in the vouchers into the system. In reviewing the various schedules prepared by the AO at the Committee's request, it was discovered that entry inconsistencies exist.

Efforts to obtain empirical documentation regarding voucher reductions were hindered by these problems. The previous system provided for the entry of the amount approved/paid, and not the amount claimed on the voucher, rendering detection of voucher reductions impossible. Although the new system allows for the entry of both amounts claimed and approved, several districts continue to enter only the amount approved, making an accurate assessment of voucher reductions impossible.

Statistical data relating to the timeliness of voucher processing is not accessible in the AO's CJA database. The Committee's request for retrieval of such data from existing databases could not be fulfilled, as explained in a memorandum from the Federal Judicial Center's Research Division:

The Center conducted computer searches of both the Integrated Database (IDB) and the AO CJA voucher database....[T]he Committee's questions related to time elapsing between voucher submission and approval or payment could not be answered because neither the IDB nor the AO databases contain the date of voucher submission by the CJA attorney. Furthermore, the precision of feasible surrogate variables such as, time from end of service to voucher approval, is not sufficient to provide even an indirect examination of these issues. (Memorandum from Scott A. Gilbert, Statistician, to William B. Eldridge, Director of Research, Federal Judicial Center, dated January 4, 199[3].)

ii. Although many judges disagree with having a federal defender organization in some districts, support for this position was presented by Judge Gerard L. Goettel of the Southern District of New York:

I think that every District ought to have some form of Federal Defender organization.

Now I know going back to the days when I was on the [Defender Services] Committee, that there are some Districts that are quite small and it is difficult -- and they don't even need one Federal Defender, but they have in the past put together two or more Districts to create a sufficient size. I think you do need a Federal Defender operation in every District. Just as the law requires that you have panel attorneys. (Boston Hearing Tr. 96-97.)

He further stated:

Obviously, if you had a Federal Defender covering every District, you would reduce enormously the need for panel attorneys, and you wouldn't have to draft everybody who gets admitted to the Bar to do it.

It is obviously a denial of due process to assign to a criminal defendant, somebody who has just gotten out of law school and has never tried a case. It shouldn't happen. (Boston Hearing Tr. 100.)

The judges of the Third Circuit also recommend a federal defender organization in every district. (See Letter from Chief Judge Dolores K. Sloviter, United States Court of Appeals for the Third Circuit, dated March 24, 1992, *quoted in* Endnote bb.)

jj. The status report is in the form of a June 18, 1992 Memorandum to the Chair and Members of the Defender Services Committee regarding Equal Employment Opportunity Programs of Federal Public and Community Defender Organizations. Data from the status report is detailed below.

The total number of FPD office employees grew from 525 in October 1989 to 748 in October 1991. The number of women employed increased from 267 (51%) to 412 (55%). The number of Black employees increased from 36 (7%) to 66 (9%). The number of Hispanic employees increased from 90 (17%) to 149 (20%). The number of Asian employees increased from 12 (2%) to 14 (2%). The number of American Indian employees remained the same at 3 (less than 1%). The number of disabled employees declined from 2 to 1 (less than 1%).

The total number of employees for CDOs grew from 152 employees in October 1989 to 201 employees in May 1992. The number of women employed increased from 89 to 111 but the percentage declined from 59% to 55%. The number of Black employees increased from 29 to 33 but the percentage declined from 19% to 16%. The number of Hispanic employees increased from 23 (15%) to 39 (19%). The number of Asian employees increased from 3 (2%) to 5 (2%). The number of American Indian employees increased to 1 (less than 1%). CDOs reported no employees with disabilities in 1989 or 1992.

Death Penalty Resource Centers employed 179 persons in 1992. Of these employees, 103 (58%) were women, 24 (13%) were Black, 8 (4%) were Hispanic, 3 (2%) were Asian and 1 (less than 1%) was American Indian. No employees with disabilities were reported by DPRCs.

With respect to attorney positions, FPD offices employed 276 attorneys in October 1989 and 374 attorneys by October 1991. The number of women attorneys increased from 82 (30%) to 127 (34%), the number of Black attorneys increased from 12 (4%) to 25 (7%), and the number of Hispanic attorneys increased from 32 (12%) to 49 (13%). The number of Asian attorneys increased from 2 (1%) to 3 (1%). The number of American Indian attorneys remained unchanged at 1 (.3%), and the number of attorneys with disabilities declined from 2 (.5%) to 1 (.3%).

There were 89 attorneys employed by Community Defender Organizations in 1989 and 104 attorneys in 1992. The number of women attorneys employed by CDOs changed from 34 (42%) in 1989 to 43 (41%) in 1992. The number of Black attorneys increased from 8 (10%) to 11 (11%). The number of Hispanic attorneys increased from 3 (4%) to 6 (6%). There were no Asian or American Indian attorneys employed by CDOs in 1989. In 1992, there was 1 Asian attorney and 1 American Indian attorney (less than 1 % in each category). No attorneys with disabilities were reported by CDOs in 1989 or 1992.

In 1992, DPRCs employed 102 attorneys, of whom 45 (44%) were women, 10 (10%) were Black, 2 (2%) were Hispanic, 1 (1%) was Asian, and 1 (1%) was American Indian.

Among the 37 FPDs serving in October 1991, there were 4 (10.8%) women, 1 (2.7%) Black, 1 (2.7%) Hispanic and 1 (2.7%) person with a disability. One position was vacant.

Among the 8 directors of CDOs, 3 (37.5%) were women. No minority or person with a disability served as a director of a traditional CDO.

Of the 18 DPRC directors, 3 (16.6%) were women and 2 (11.1%) were Black.

There were no DPRC directors who were Hispanic, Asian, American Indian or persons with a disability.

**kk.** See Chicago Hearing Tr. 300-02, 312-15; Boston Hearing Tr. 323-28; Denver Hearing Tr. 255-57, 259-60.

**ll.** Denver Hearing Tr. 7.

**mm.** Atlanta Hearing Tr. 124-25.

**nn.** Peer reviews have been conducted for the federal defender offices of the Northern District of Florida, the Western District of Missouri, the District of New Mexico, the District of Minnesota, the Northern District of Texas, the Northern District of Georgia, and the combined FPD office for the Central and Southern Districts of Illinois and the Eastern District of Missouri. (*See generally* Atlanta Hearing Tr. 105-07, 111-14; Chicago Hearing Tr. 293-95, 299-300, 309-11; Boston Hearing Tr. 337-38; Letter to Judge Prado from David R. Freeman, FPD for Central and Southern Illinois and Eastern Missouri, dated March 23, 1992.) Judge Arthur L. Alarcon of the Ninth Circuit said that he has encouraged use of peer review in his circuit, but without results thus far. (Denver Hearing Tr. 54.)

**oo.** The American Bar Association has set the tone in proposing standards to ensure the independence of public defenders from judicial influence, as its Standards for Criminal Justice for Providing Defense Services state. Standard 5-1.3. on professional independence provides in part:

(a) The legal representation plan for a jurisdiction should be designed to guarantee the integrity of the relationship between lawyer and client. The plan and the lawyers serving under it should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice. The selection of lawyers for specific cases should not be made by the judiciary or elected officials, but should be arranged for by the administrators of the defender, assigned-counsel and contract-for-service programs.

The need for an independent Board, to provide support, guidance, and develop policy, free of judicial influence, is also embodied in the Standards, as stated in subpart (b) of Standard 5-1.3.:



(b) An effective means of securing professional independence for defender organizations is to place responsibility for governance in a board of trustees. Assigned-counsel and contract-for-service components of defender systems should be governed by such a board. Provisions for size and manner of selection of boards of trustees should assure their independence. Boards of trustees should not include prosecutors or judges. The primary function of boards of trustees is to support and protect the independence of the defense services program. Boards of trustees should have the power to establish general policy for the operation of defender, assigned-counsel and contract-for-service programs consistent with these standards and in keeping with the standards of professional conduct. Boards of trustees should be precluded from interfering in the conduct of particular cases. A majority of the trustees on boards should be members of the bar admitted to practice in the jurisdiction.

In addition, Standard 5-4.1. states that "[s]election of the chief defender and staff by judges should be prohibited."

At the Committee's public hearing in Denver, Kim Taylor, the ABA representative, highlighted the need for professional independence of the defender system:

One final matter which I would like to raise today relates to the development of policy. It is our understanding that under the federal Criminal Justice Act, overall policy is established by the U.S. Judicial Conference. To establish policy, the Judicial Conference has established the Defender Services Committee which in turn makes policy recommendations to the Judicial Conference. The members of this committee are appointed by the Chief Justice of the United States Supreme Court, and also all of the members are federal judges. Thus, apart from the U.S. Congress' responsibility to review the CJA itself, all policy decisions over the federal Criminal Justice Act are made by federal judges. This plan runs in direct conflict with the cornerstone of the ABA criminal justice standards requiring professional independence of the defender system. We feel strongly the [CJA Review] Committee should carefully review the current system in light of these standards. (Denver Hearing Tr. 207.)

Mary Broderick, a former public defender and Director of the Defender Division of the National Legal Aid and Defender Association, stressed the importance of independence to her membership:

NLADA and other organizations have considered the issue of the independence of indigent defense systems a number of times and have reached the same conclusion – that when defender, assigned counsel and contract programs are being established, the Sixth Amendment right to counsel is best preserved by a program that is governed by an independent commission or board of directors, rather than by the executive, legislative or judicial branches. This type of system protects the integrity and independence of the program while at the same time guaranteeing program accountability. (Written testimony of Mary Broderick at the Committee's public hearing in Boston, March 27, 1992, p. 2.)

pp. As Mary Broderick stated:

Judges don't decide whether or not there will be a U.S. Attorney's Office within the District. They can't eliminate the U.S. Attorney's Office once it has been established. They don't appoint, reappoint or remove U.S. Attorneys. They don't have a say in the budgets of the U.S. Attorneys. They don't appoint individual U.S. Attorneys to cases. They don't have a say in how much the U.S. Attorneys get paid. And they don't have a say in what kinds of resources or how many resources the U.S. Attorneys have access to.

As a result, we feel as a result of judicial participation in the indigent defense and also obviously as the result of the funding, we feel that the U.S. Attorney's Offices have an unfair advantage. Especially in assigned counsel cases. (Boston Hearing Tr. 158-59.)

James Krasnoo, a Massachusetts panel attorney and Federal Bar Association member, contrasted his ability to represent retained clients versus CJA clients, concluding:

And the [CJA] client's perception of it, because I tell him what it would have been if he had money, is I'm not getting a fair shot. And he is absolutely right. (Boston Hearing Tr. 360; *see generally id.* 356-66.)

qq. Chief Judge Monroe G. McKay of the Tenth Circuit Court of Appeals stated:

I simply do not know how we can write the opinions we do, both as to counsel and as to judge in conflicts of interest cases, and persist in having judges hire and fire lawyers who are going to appear before them at both from the CJA panels...and in the appointment and discharge of Public Defenders.

I have nominees all over the country from U.S. Attorneys' offices who would be fired if the same judges had had the power to do so and that would be considered intolerable by anybody. (Denver Hearing Tr. 6-7.)

Richard Wilson, a law professor who has served as Reporter for the Third Edition revisions to the American Bar Association's standards for the provision of defense services, testified:

I think that the arguments that are made by the folks who take that position [against separation from the judiciary] are essentially that there have not been any documented instances of blatant intervention by judges in the day-to-day operation or the tactical choices made by lawyers in individual cases.

It is my view that that control, the aspect of control, with all due deference to the federal judiciary who I believe has attempted to be respectful of that, cannot help but affect the individual attorney, the panel attorney, who may be dependent on that judge for fees, or the defender services attorney who knows somewhere in his or her consciousness that his judge controls the operation and selection of the chief defender in that office and the dozen aspects of the day-to-day operation of the program...that that does affect the representation that is provided in individual cases. (Indianapolis Hearing Tr. 95-96.)

James Neuhard, the Michigan Public Defender, appeared before the Committee in Chicago. He stated that a defender delivery system's need for independence is "five times greater than anything else on the list, and everything else diminishes comparatively." (Chicago Hearing Tr. 86.)

He further commented:

The most critical thing is that the lawyer in the courtroom must appear to be independent to me. Whether they are or not, in fact somewhere down in back someone may be pulling my chain or pulling someone else's chain, the lawyer in the courtroom has to believe they are independent. That's the beginning of quality representation.

What I have seen when I have done evaluations is frequently bad management is justified by the manager saying, or the Defender saying, I

can't do that because if I do that the judges will get me, or the county will get me, or the governor will get me.

The threat of that far exceeds the reality of it....The threat, the appearance of it, is incredibly important as much as the reality of whether a judge would or would not do it. (Chicago Tr. 91-92.)

John LaChance, of the Massachusetts Association of Criminal Defense Attorneys, described the deleterious effect on the attorney/client relationship when clients with CJA-assigned counsel learn of the court's role regarding the defense attorney's involvement in the case:

With respect to independence. I think our view is that Judges, especially District Court judges, should not be the entities that approve or disapprove bills. And I think that for a number of reasons, but the most important being that that procedure fosters, at least the appearance of a conflict to the client.

I don't know how many of the people who have spoken to you have mentioned this, but on a regular basis, clients will inquire, well who is paying your fee? When you tell them the United States Government, they ask then, who decides how much you get, who approves it?

When the answer is the Judge that is trying the case, the eyes roll back, they glaze over and you can see them wondering how am I going to get a fair shot because the person who is getting paid in this case, the attorney, who I didn't know until five or ten minutes ago, who I will get to know only over a relatively short period of time, is going to have his bill determined by the individual who is trying this case.

So if he works real hard for me, and if he stands up and fights with him over an issue, maybe he is going to be worried, not about me, but about whether or not the Judge is going to cut his fee. Or whether or not some Judge in the Court of Appeals is going to cut that fee at some point in time.

So I suggest the real issue isn't really what happens in the real world in terms of our relationship with the Judges, because in general, in this District at least, the bills that are submitted are generally paid, they are generally paid quickly.

The problem comes with the relationship between the CJA attorney and the indigent client, and what this relationship, you know, fosters and the doubts.

[T]he fact that you are getting paid by the Government and that Judge is approving the bills, and the Judge is determining what experts you get, or is at least attempting to approve that, and I think that the perception of justice is what is affected. And I think that is a real real problem. (Boston Hearing Tr. 349-51.)

Steve Kinnard, an attorney practicing in Atlanta, Georgia, asserted:

I have two basic points to make regarding the provision of defense services under the Criminal Justice Act. One. There is a need for independence from the judiciary for both the federal defender and panel attorney programs. And two, at the same time, there must be specific assurances that whatever form an independent defense services organization takes, there must be sufficient support from the judiciary that adequate resources are allocated each year for the provision of defense services.

The need for administrative and budgetary independence from the judiciary is not in any way to disparage the judiciary. The judiciary is an essential component of the tenets of our democracy. The judiciary should therefore do what it was designed to do and what it does best, judge; to check and balance the other two branches of our government, to insure that our laws as prescribed by the legislative branch are just and fair and reasonably interpreted, and to see that the executive branch is exercising its policy and procedures in accordance with our laws. (Atlanta Hearing Tr. 158.)

rr. Statement to the CJA Review Committee of Judge Stephanie K. Seymour, United States Court of Appeals for the Tenth Circuit, April 10, 1992.

ss. Letter to the CJA Review Committee from Chief Judge J. Clifford Wallace, United States Court of Appeals for the Ninth Circuit, dated November 6, 1991.

tt. Statement of Magistrate Judge Richard Kopf, District of Nebraska (Denver Hearing Tr. 100.)



uu. The foregoing discussion and endnotes are illustrative. Judge Arthur L. Alarcon, a new member of the Defender Services Committee, appeared at the Denver hearing on behalf of the Ninth Circuit Standing Committee on Federal Public Defenders supporting the creation of an independent center to carry out the mandate of the Criminal Justice Act. In his written statement to the Committee, he recommended that the board of this center

...would appoint all federal public defenders and would assume oversight responsibility for the administration of the Criminal Justice Act in each district. (See Remarks of Circuit Judge Arthur L. Alarcon, p. 4.)

In his presentation at the hearing, concerning the appointment of federal defenders, he said:

[I]t would be just as wrong for us to appoint the United States Attorney or have the power to select or remove the United States Attorney. It seems to me there is a conflict of interest. (Denver Hearing Tr. 34.)

Chief Judge William O'Kelley of the Northern District of Georgia stated:

I frankly didn't like appointing the CJA panelists....I prefer that to be independent. I don't usually even know when the lawyers appear before me whether they're appointed or employed. And I don't care to know and don't need to know. And I feel uncomfortable. I have appointed lawyers in positions before when I had to and I later was embarrassed by some of the rulings I had to make and how I put them in a situation where then I had to get them, and it's an uncomfortable situation and I think the court ought not to have to do that. (Atlanta Hearing Tr. 146-47.)

He further declared:

I wish I never had to handle vouchers. To me it's not judicial activity. I'd much rather be in the courtroom trying a case. (Atlanta Hearing Tr. 148.)

Magistrate Judge Richard Kopf of the District of Nebraska maintained:

[I]t's desirable to take district judges and magistrate judges out of the day-to-day process of the administration of the act. Whether done by the defender or an independent body, it's preferable that the court not select particular panel attorneys in a given case or involve itself in the process of

approving excess compensation requests, entering interim fee orders or review, viewing or even approving vouchers. (Denver Hearing Tr. 96.)

Norman Lefstein, Dean of Indiana University School of Law and former chair of the ABA Criminal Justice Standards Committee task force on the third edition of standards dealing with providing defense services, testified at the Indianapolis hearing. He stated:

What I suppose I can offer to your committee is some perspective on the evolution of independence for defense representation in the United States, and I say that because I've seen gradually, it seems to me, a movement toward recognizing the proposition that lawyers in criminal cases for the poor ought not to be appointed by judges, compensation ought not to be approved by judges, and that the defenders themselves ought to be as independent as possible.

I think that we have gradually come to a recognition not only in the standards but to a greater degree in actual practice with statutes to recognition of the fact that the defense function is like a prosecution function, it's the other side of the adversarial process, the judge is in the middle, and there ought not to be judicial control, that you ought to try to find a way to have the same situation for the defense as you would have for a retained lawyer where the judge is in no way involved. (Indianapolis Hearing Tr. 119-20.)

A CJA panel attorney in Savannah, Georgia, wrote:

[T]he judiciary should [not] be involved in the selection of either panel attorneys or experts under the Criminal Justice Act. To allow the judge to select the lawyers who are going to represent defendants and then also have a hand in selecting experts who will testify destroys even the appearance of impartiality on the part of the court. In these times when the legal profession is being so closely scrutinized by the public and when the confidence level in our profession is probably at an all time low, I do not think that it behooves the bar or the justice system to adhere to any practices which erode the confidence of the general public. Judicial participation in the selection of particular attorneys and/or experts only sends a message to the public that the judiciary is partial or biased in making those determinations. (Letter to the Committee dated November 18, 1991.)

A New York panel attorney opined:

The more Judges are involved in C.J.A. Panels, the greater the likelihood that they will misuse their power for purposes of patronage or vindictive conduct. It is far better to leave them out of it entirely. (Letter to the Committee dated March 2, 1992.)

vv. The Defender Services Committee has supported a proposal to shift portions of the defender services appropriation from the discretionary to the mandatory category in the federal budget. This could be beneficial because while the Balanced Budget and Emergency Deficit Control Act of 1985, as amended by the Budget Enforcement Act, sets funding ceilings for both discretionary and mandatory programs, the Act permits the ceiling for mandatory programs to increase to accommodate workload-driven program growth. A funding level is set for mandatory programs commensurate with current operations. If the programs grow in size an adjustment is made to the total amount of funding that is available in order to accommodate that growth. One drawback to a mandatory program is that when legislation is required to increase the scope of such a program, the congressional committee authorizing such legislation must find a way to pay for the increase either by raising revenues or by cutting another mandatory program.

ww. See "Review of Provisions for State Indigent Defense Systems," Draft Paper prepared by The Spangenberg Group (Newton, Mass.), December 31, 1991.

Edward F. Hennessey, retired Chief Justice of the Massachusetts Supreme Court, appeared before the Committee in Boston, and discussed his experience in Massachusetts, stating:

[W]e decided...that the system had to be, in terms of defense of the indigent, it had to be independent of the Courts.

[I] don't know that there is any constitutional impediment to having the Court monitor and appoint and decide the compensation of lawyers on the defense side, but constitution or otherwise we felt it was incongruous to have the Court intruding into the defense function, whether they were indigent defendants or defendants who paid their lawyers.

The principal consideration there, and I said amen to this when my colleagues agreed with me, the principal consideration that I had in mind personally from my experience on the trial bench, was that, at the very least, the suspicion arises that someone who was appointed by the Court and to be compensated by public funds may be, and this is a suspicion that is very

unsettling, it may be Judge pleasers. That has been mentioned here this morning.

That is no way to run a criminal defense structure, and we also decided, and I think rightly and never changed our minds, that as [to] policy matters including a rate of compensation, these again should be decided by an independent body who would [be] charge[d] with preparing a proposed budget and defending that proposal in the political process. (Boston Hearing Tr. 37-38.)

xx. The historical development of the Army's separation of the defense function is chronicled in "TDS: Establishment of the U.S. Army Trial Defense Service," by Lieutenant Colonel John R. Howell, Judge Advocate General's Corps, U.S. Army.

yy. See Pub. L. No. 76-299, 53 Stat. 1223, ch. 501 (Aug. 7, 1939).

At a Senate hearing on the legislation, Chief Justice D. Lawrence Groner of the United States Court of Appeals for the District of Columbia, who chaired a committee of judges appointed by the Chief Justice of the United States to assist in drafting the bill, explained the Judicial Conference's recognition of the need to separate administration of the courts from the Department of Justice:

I think perhaps I can express the idea by saying there was a recognition of the fact that, in the interest of maintaining the general and universal confidence of the people in the courts, it was incumbent upon the courts themselves, the judges of the courts, to clean their own house, rather than be subject to the embarrassment and destruction of our theory of government by having it done by someone else.

...[The bill's primary purpose is] the separation of the appropriations made for the support of the courts from the Department of Justice, and turning it over to the courts themselves through some administrative organization created by Congress; and also to provide machinery whereby the work of the courts could be regulated, and statistics compiled and brought to the attention of some organization, if I may use that word, to be created within the courts, looking to a better and more prompt administration of justice. (*Hearings on S. 188 before a Subcommittee of the Senate Committee on the Judiciary*, 76th Cong., 1st Sess. 9 (April 4 and 5, 1939). Statement of D. Lawrence Groner, Chief Justice, United States Court of Appeals for the District of Columbia.)

**zz.** Letter to Judge Edward Prado, Chair, Committee to Review the Criminal Justice Act, from J. Michael McWilliams, President, ABA, December 21, 1992.

**aaa.** See Letter to Judge Gustave Diamond, Chair, Committee on Defender Services, from Lonnie A. Powers, President, NLADA, January 11, 1993.

**bbb.** See *The Champion*, Vol. XVII, No. 1, Jan./Feb. 1993, "NACDL News," p. 56.

**ccc.** At its November 20, 1992 meeting, the Defender Services Committee voted its support for most of the recommendations in the Interim Report. The federal defenders also have communicated their approval of most of the recommendations. (See Letter to Chief Justice William H. Rehnquist from Henry A. Martin, Chair, Federal Defender Ad Hoc Committee on Review of the Criminal Justice Act, September 9, 1992.)

**ddd.** *CJA Guidelines*, Appendix G, at G-12 and 13.

**eee.** Letter to the Committee from a panel attorney, dated December 19, 1991.

**fff.** After the issuance of the Interim Report, the Committee received several inquiries regarding what the qualifications standards should be. There has been substantial development in the area of qualification standards for court-appointed counsel by the American Bar Association, the National Legal Aid and Defender Association and many state court systems.

The American Bar Association Standard rejects the notion that every member of the bar admitted to practice in a jurisdiction should be required to provide representation and suggests that the members of the bar qualified for appointments are those who are "experienced and active in trial practice and familiar with the practice and procedure of the criminal courts." The standard does not contemplate an application procedure. (See ABA Standards for Criminal Justice, Third Edition, Standard 5-2.2.)

Standards adopted by the National Legal Aid and Defender Association provide for a graduated series of attorney experience and ability levels which qualify attorneys to represent eligible persons whose cases fall into specified categories. The standards state that attorney qualifications should include criteria reflecting the "experience and training required for assignment in cases of different levels of seriousness, and a requirement that attorneys have the proficiency and commitment necessary to provide the quality representation mandated ...." After an attorney has gained increased expertise, he or she



may apply for reclassification as eligible to handle cases in additional categories. Only attorneys who seek admission to the roster will be considered, thereby avoiding "conscripting" of unwilling attorneys and placing the burden of showing eligibility on the attorney rather than on the program. (See National Legal Aid and Defender Association, Standards for the Administration of Assigned Counsel Systems (1989), Standards 4.1 and 4.1.1.)

The commentary to the NLADA Standards lists factors which should be considered in evaluating and classifying attorneys: length of all legal practice, practice in the jurisdiction and practice in the area of criminal law (or other types of law for which appointments may be made, such as mental health law), appropriate specialized legal training, and other applicable specialized training. Criminal defense experience may be more definitively categorized by reference to factors such as: the number of times an attorney has represented a client accused of crime, the number of times the attorney acted as sole counsel in criminal cases, and the seriousness of the offenses charged in those cases, the number of cases tried before a judge and before a jury. Consideration should also be given to how current the relevant qualifications are.

Several state statutes have provisions charging the governing board or agency responsible for provision of defense services with establishing qualification requirements for assigned counsel. (Indiana, Georgia, Maryland, Massachusetts, Oklahoma, Oregon and Wisconsin have such provisions.) Some states have very specific standards detailing the number of years and trials an attorney must have for a particular class of case. Some state standards allow for equivalent experience in lieu of the specific requirements. (See Review of Provisions for State Indigent Defense Systems, Draft Paper prepared by the Spangenberg Group, December 31, 1991.)

A member of the Criminal Justice Act Panel Ad Hoc Committee for the District of Connecticut testified at the Committee's hearings. The Connecticut Committee also recommended the adoption of qualification requirements such as federal bar membership, prior federal and/or state criminal trial experience, significant involvement in serious or complex criminal cases, knowledge of the sentencing guidelines and the Bail Reform Act, and knowledge of other relevant areas of federal criminal practice. The Report of that Committee suggests that clinical experience or participation in trial advocacy programs, as well as attendance at seminars on federal criminal practice, should be considered. In addition, the Report recommends a pending applications list of lawyers who have applied for membership on the panel but who do not yet possess sufficient skill or experience. Pending final approval of their applications, such attorneys would receive training and would serve without compensation in a second chair capacity to a panel attorney on a given case. The Report states that this will help ensure that only lawyers who have a high level of motivation will apply to be on the panel. Finally, the Report calls for the establishment of application, suspension and removal procedures rather than informally dropping attorneys from the panel through non-assignment. (See Report of the Criminal

Justice Act Panel Ad Hoc Committee, District of Connecticut, transmitted to the Committee by a letter from William M. Bloss dated March 25, 1992.)

The Committee also received comments expressing concern over the imposition of qualification standards.

The [Interim] Report also suggests in its language and tone that many attorneys are anxious to be appointed in federal criminal cases, thus requiring a panel to select only the most qualified to serve as appointed counsel. While lawyers in this district have generally been more than willing to accept appointments, we have not observed such enthusiasm as to suggest that a more selective process is either practical or necessary....Currently, we receive no more than five inquiries a year from attorneys who seek appointments. (Letter to Committee from Chief Judge Barefoot Sanders, Northern District of Texas, dated August 26, 1992.)

ggg. For example:

The ABA Standards for Criminal Justice (Third Edition) Chapter 4: The Defense Function, "are intended to be used as a guide to professional conduct and performance." (Standard 4-1.1.) These standards cover topics such as: the function of defense counsel; delays, punctuality and workload; public statements; a trial lawyer's duty to administration of justice; communication; prohibited referrals; interviewing the client; fees; conflicts of interest; duty to keep the client informed; relations with prospective witnesses; control and direction of the case; plea discussions; courtroom professionalism; opening statements; argument to the jury; sentencing; and appeal.

The NLADA Standards for the Administration of Assigned Counsel Systems (1989) provide:

Standard 2.9 - Standards for Performance of Counsel

(a) the Assigned Counsel Program shall identify, and enforce adherence to minimum standards for the performance of counsel and shall assist counsel in meeting and striving to exceed those standards.

In Massachusetts, the Committee for Public Counsel Services has issued Performance Guidelines for appointed attorneys. The guidelines provide that an attorney shall promote and protect the best interests of the client; honor the attorney/client privilege; keep the client informed of the progress of the case and the options available; consult on a prompt and timely basis with the client; afford sufficient time, resources, knowledge and experience to a case; maintain a thorough, organized and current file;

avoid conflicts of interest; allow the client to make the decisions that appropriately are only the decision of the client; explain trial strategy decisions to the client; cooperate with successor counsel; and appear promptly for court and other appointments.

The Superior Court for the District of Columbia has released for comment proposed Defense Practice Standards. If adopted, these standards would become part of the CJA plan for the court. These very detailed standards set out the duty of counsel at each stage of litigation and often provide a list of possible actions counsel should consider. For instance, Standard 1.6 - Motions states:

Counsel has the duty in each case to take prompt legal action to protect the rights of the accused. At a minimum counsel should consider the appropriateness of filing motions to:

- (a) Discover evidence not released voluntarily by the government.
- (b) Suppress tangible evidence.
- (c) Suppress identification.
- (d) Suppress statements taken from the defendant.
- (e) Sever defendant's case from that of co-defendants.
- (f) Sever counts in a multiple count information or indictment.
- (g) Dismiss charges on speedy trial or other grounds.
- (h) Challenge the validity of the charging document.
- (i) Obtain appropriate rulings *in limine*.

hhh. *Oaks Report* at 273-74.

iii. Paragraph 2.31 of the *CJA Guidelines* provides:

A. Law Student. In some districts and circuits, arrangements have been made for the use of qualified law students to assist assigned counsel in trial preparation and in drafting briefs and arguments on appeal. Payment under the CJA in such instances may be made to assigned counsel only for compensable time spent by counsel plus allowable expenses. Allowable expenses for the attorney may include compensation paid to law students for legal research, but do not include reimbursement for expenses incurred by a law student in assisting appointed counsel.

iii. Provision of counsel at these stages not only serves the interests of justice but often may prove to be cost-effective as well. As one attorney related:

It has been my experience in the Western District of New York that our local magistrates freely assign counsel at any stage of a criminal proceeding. Presentation of a formal charge is not necessary. I recall many instances as a prosecutor when Magistrate Judge Maxwell permitted the assignment of counsel at both the investigatory and grand jury stages. In most instances, his willingness to do so served to expedite the process and, in all probability, reduced the overall expense to the Government. (Letter from Rodney O. Personius to Jonathan W. Feldman, Federal Public Defender, dated August 31, 1992.)

kkk. Letter to Committee from Margaret P. Levy, Esq., dated December 18, 1991.

III. Mark Kaplan, President of the Vermont Association of Criminal Defense Lawyers, raised the point at the Committee's Boston hearing regarding the imbalance in requiring CJA panel attorneys, but not the prosecution, to obtain the court's authorization to subpoena witnesses:

And I mean the other problem is that once you get into the Judge's chambers on that ex parte hearing, his secretary knows, the Clerk knows, the Marshals then take the subpoena, they know, and our Marshals spend as much time in the U.S. Attorney's Office as I think they do in their own office. So, it's really, to me it's -- I've ended up in most cases just paying for my own subpoenas, it's easier.

MR. HILLIER: I agree with you wholeheartedly. The effect ultimately is that they have access to our witnesses, [and] we don't to theirs.

MR. KAPLAN: That's right. (Boston Hearing Tr. 285; *see also id.* 363.)

mmm. As an example of analogous services in another criminal justice context, *see* National Institute of Corrections, 18 U.S.C. § 4351 (1974), which created an Institute within the Bureau of Prisons to provide human resource development assistance to correctional efforts.

nnn. One attorney offered the following explanation of the need for a local administrator:

The Committee must be very sensitive to the potential for, or appearance of, praise (through future appointments to cases) or punishment (by reducing the request for compensation on a case voucher) for actions taken by

defense counsel in one or more cases. Under the present system, there clearly is an appearance problem with District Judges appointing specific attorneys and reviewing vouchers. A CJA Administrator, separate from either the [Federal Public Defender or the Community Defender Organization], who is an attorney, can review the claims and rule on them. Some manner of review, perhaps to the Chief Judge of the particular court, could insure further process if complaints arise. It would, however, be very important for the CJA Administrator to be appointed by the independent Board. (Letter to Committee from Francis D. Carter, Esq., dated March 26, 1992.)

ooo. See Letter to Theodore Lidz, Chief, Defender Services Division, Administrative Office of the U.S. Courts, from Anthony Edwards, Solicitor, London, England, dated April 13, 1992.

ppp. Paragraph 2.01(D) of the *CJA Guidelines* states, in part, that:

[W]hen the district judge presiding over the case...determines that the appointment of an attorney, who is not a member of the CJA panel, is in the interest of justice, judicial economy or continuity of representation, or there is some other compelling circumstance warranting his or her appointment, the attorney may be admitted to the CJA panel *pro hac vice* and appointed to represent the CJA defendant.

qqq. Letter to CJA Review Committee from Denis J. Hauptly, Director, Judicial Education Division, Federal Judicial Center, dated September 1, 1992.

rrr. One extreme illustration of this problem, reported to the Defender Services Division, was the case of an attorney appointed by the District Court for the Northern District of California to represent a CJA defendant at a sentencing hearing. The attorney's sole contact with the defendant was a telephone call to set up an appointment. The defendant did not keep the appointment, jumped bail and failed to appear at his sentencing. After being apprehended and incarcerated, the defendant filed suit naming the attorney as defendant. The attorney referred the matter to his professional liability insurance carrier, which provided him with legal representation at a cost of almost \$6,000. The case was dismissed with prejudice. The carrier billed the attorney for the \$1,000 deductible, which he paid. Also, as a result of the claim, the carrier increased the attorney's malpractice premium by \$2,000. He received only a minimal fee of \$124 for work he did in preparation for his scheduled appointment with the client. (See Memorandum to Chair



and Members of the Defender Services Committee prepared by the Defender Services Division, regarding "Payment of Malpractice Insurance Deductibles of Panel Attorneys Sued by Former CJA Clients," dated May 23, 1988.)

## APPENDICES

### APPENDIX I

CHAPTER I. CRIMINAL JUSTICE ACT (PUBLIC LAW 88-455, APPROVED AUGUST 20, 1964) TITLE 18, UNITED STATES CODE, SECTION 3006A AS AMENDED BY PUBLIC LAW 90-578, APPROVED OCTOBER 17, 1968; PUBLIC LAW 91-447, APPROVED OCTOBER 14, 1970; PUBLIC LAW 93-412, APPROVED SEPTEMBER 3, 1974; PUBLIC LAW 97-164, APPROVED APRIL 2, 1982; PUBLIC LAW 98-473, APPROVED OCTOBER 12, 1984; PUBLIC LAW 99-651, APPROVED NOVEMBER 14, 1986; PUBLIC LAW 100-182, APPROVED DECEMBER 7, 1987; PUBLIC LAW 100-690, APPROVED NOVEMBER 18, 1988.

#### **3006A. Adequate representation of defendants.**

- (a) **Choice of Plan.** - Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation in accordance with this section. Representation under each plan shall include counsel and investigative, expert, and other services necessary for adequate representation. Each plan shall provide the following:
- (1) Representation shall be provided for any financially eligible person who--
- (A) is charged with a felony or with a Class A misdemeanor;
  - (B) is a juvenile alleged to have committed an act of juvenile delinquency as defined in section 5031 of this title;
  - (C) is charged with a violation of probation;
  - (D) is under arrest, when such representation is required by law;
  - (E) is charged with a violation of supervised release or faces modification, reduction, or enlargement of a condition, or extension or revocation of a term of supervised release;
  - (F) is subject to a mental condition hearing under chapter 313 of this title;
  - (G) is in custody as a material witness;
  - (H) is entitled to appointment of counsel under the sixth amendment to the Constitution;
  - (I) faces loss of liberty in a case, and Federal law requires the appointment of counsel; or
  - (J) is entitled to the appointment of counsel under Section 4109 of this title.

- (2) Whenever the United States magistrate or the court determines that the interests of justice so require, representation may be provided for any financially eligible person who--
  - (A) is charged with a Class B or C misdemeanor, or an infraction for which a sentence to confinement is authorized; or
  - (B) is seeking relief under section 2241, 2254, or 2255 of title 28.
- (3) Private attorneys shall be appointed in a substantial proportion of the cases. Each plan may include, in addition to the provisions for private attorneys, either of the following or both:
  - (A) Attorneys furnished by a bar association or a legal aid agency.
  - (B) Attorneys furnished by a defender organization established in accordance with the provisions of subsection (g).

Prior to approving the plan for a district, the judicial council of the circuit shall supplement the plan with provisions for representation on appeal. The district court may modify the plan at any time with the approval of the judicial council of the circuit. It shall modify the plan when directed by the judicial council of the circuit. The district court shall notify the Administrative Office of the United States Courts of any modification of its plan.

- (b) **Appointment of Counsel.** - Counsel furnishing representation under the plan shall be selected from a panel of attorneys designated or approved by the court, or from a bar association, legal aid agency, or defender organization furnishing representation pursuant to the plan. In every case in which a person entitled to representation under a plan approved under subsection (a) appears without counsel, the United States magistrate or the court shall advise the person that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel. Unless the person waives representation by counsel, the United States magistrate or the court, if satisfied after appropriate inquiry that the person is financially unable to obtain counsel, shall appoint counsel to represent him. Such appointment may be made retroactive to include any representation furnished pursuant to the plan prior to appointment. The United States magistrate or the court shall appoint separate counsel for persons having interests that cannot properly be represented by the same counsel, or when other good cause is shown.
- (c) **Duration and Substitution of Appointments.** - A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate or the court

through appeal, including ancillary matters appropriate to the proceedings. If at any time after the appointment of counsel the United States magistrate or the court finds that the person is financially able to obtain counsel or to make partial payment for the representation, it may terminate the appointment of counsel or authorize payment as provided in subsection (f), as the interests of justice may dictate. If at any stage of the proceedings, including an appeal, the United States magistrate or the court finds that the person is financially unable to pay counsel whom he had retained, it may appoint counsel as provided in subsection (b) and authorize payment as provided in subsection (d), as the interests of justice may dictate. The United States magistrate or the court may, in the interests of justice, substitute one appointed counsel for another at any stage of the proceedings.

**(d) Payment for Representation. -**

- (1) Hourly Rate. -** Any attorney appointed pursuant to this section or a bar association or legal aid agency or community defender organization which has provided the appointed attorney shall, at the conclusion of the representation or any segment thereof, be compensated at a rate not exceeding \$60 per hour for time expended in court or before a United States magistrate and \$40 per hour for time reasonably expended out of court, unless the Judicial Conference determines that a higher rate of not in excess of \$75 per hour is justified for a circuit or for particular districts within a circuit, for time expended in court or before a United States magistrate and for time expended out of court. The Judicial Conference shall develop guidelines for determining the maximum hourly rates for each circuit in accordance with the preceding sentence, with variations by district, where appropriate, taking into account such factors as the minimum range of the prevailing hourly rates for qualified attorneys in the district in which the representation is provided and the recommendations of the judicial councils of the circuits. Not less than 3 years after the effective date of the Criminal Justice Act Revision of 1986, the Judicial Conference is authorized to raise the maximum hourly rates specified in this paragraph up to the aggregate of the overall average percentages of the adjustments in the rates of pay under the General Schedule made pursuant to section 5305 of title 5 on or after such effective date. After the rates are raised under the preceding sentence, such maximum hourly rates may be raised at intervals of not less than 1 year each, up to the aggregate of the overall average percentages of such adjustments made since the last raise was made under this paragraph. Attorneys shall be reimbursed for expenses reasonably incurred, including the costs of transcripts authorized by the United States magistrate or the court.

- (2) **Maximum Amounts.** - For representation of a defendant before the United States magistrate or the district court, or both, the compensation to be paid to an attorney or to a bar association or legal aid agency or community defender organization shall not exceed \$3,500 for each attorney in a case in which one or more felonies are charged, and \$1,000 for each attorney in a case in which only misdemeanors are charged. For representation of a defendant in an appellate court, the compensation to be paid to an attorney or to a bar association or legal aid agency or community defender organization shall not exceed \$2,500 for each attorney in each court. For representation of an offender before the United States Parole Commission in a proceeding under section 4106A of this title, the compensation shall not exceed \$750 for each attorney in each proceeding; for representation of an offender in an appeal from a determination of such Commission under such section the compensation shall not exceed \$2,500 for each attorney in each court. For any other representation required or authorized by this section, the compensation shall not exceed \$750 for each attorney in each proceeding.
- (3) **Waiving Maximum Amounts.** - Payment in excess of any maximum amount provided in paragraph (2) of this subsection may be made for extended or complex representation whenever the court in which the representation was rendered, or the United States magistrate if the representation was furnished exclusively before him, certifies that the amount of the excess payment is necessary to provide fair compensation and the payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active circuit judge.
- (4) **Filing Claims.** - A separate claim for compensation and reimbursement shall be made to the district court for representation before the United States magistrate and the court, and to each appellate court before which the attorney provided representation to the person involved. Each claim shall be supported by a sworn written statement specifying the time expended, services rendered, and expenses incurred while the case was pending before the United States magistrate and the court, and the compensation and reimbursement applied for or received in the same case from any other source. The court shall fix the compensation and reimbursement to be paid to the attorney or to the bar association or legal aid agency or community defender organization which provided the appointed attorney. In cases where representation is furnished exclusively before a United States magistrate, the claim shall be submitted to him and he shall fix the compensation and reimbursement to be paid. In cases where representation is furnished



other than before the United States magistrate, the district court, or an appellate court, claims shall be submitted to the district court which shall fix the compensation and reimbursement to be paid.

- (5) **New Trials.** - For purposes of compensation and other payments authorized by this section, an order by a court granting a new trial shall be deemed to initiate a new case.
- (6) **Proceedings before Appellate Courts.** If a person for whom counsel is appointed under this section appeals to an appellate court or petitions for a writ of certiorari, he may do so without prepayment of fees and costs or security therefore and without filing the affidavit required by section 1915(a) of title 28.

**(e) Services Other Than Counsel. -**

- (1) **Upon Request.** - Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.
- (2) **Without Prior Request. -**
  - (A) Counsel appointed under this section may obtain, subject to later review, investigative, expert, and other services without prior authorization if necessary for adequate representation. Except as provided in subparagraph (B) of this paragraph, the total cost of services obtained without prior authorization may not exceed \$300 and expenses reasonably incurred.
  - (B) The court, or the United States magistrate (if the services were rendered in a case disposed of entirely before the United States magistrate), may, in the interest of justice, and upon the finding that timely procurement of necessary services could not await prior authorization, approve payment for such services after they have been obtained, even if the cost of such services exceeds \$300.
- (3) **Maximum Amounts.** - Compensation to be paid to a person for services rendered by him to a person under this subsection, or to be paid to an organization for services rendered by an employee thereof, shall not exceed \$1,000, exclusive of reimbursement for expenses

reasonably incurred, unless payment in excess of that limit is certified by the court, or by the United States magistrate if the services were rendered in connection with a case disposed of entirely before him, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active circuit judge.

- (f) **Receipt of Other Payments.** - Whenever the United States magistrate or the court finds that funds are available for payment from or on behalf of a person furnished representation, it may authorize or direct that such funds be paid to the appointed attorney, to the bar association or legal aid agency or community defender organization which provided the appointed attorney, to any person or organization authorized pursuant to subsection (e) to render investigative, expert, or other services, or to the court for deposit in the Treasury as a reimbursement to the appropriation, current at the time of payment, to carry out the provisions of this section. Except as so authorized or directed, no such person or organization may request or accept any payment or promise of payment for representing a defendant.

(g) **Defender Organization.** -

- (1) **Qualifications.** - A district or a part of a district in which at least two hundred persons annually require the appointment of counsel may establish a defender organization as provided for either under subparagraphs (A) or (B) of paragraph (2) of this subsection or both. Two adjacent districts or parts of districts may aggregate the number of persons required to be represented to establish eligibility for a defender organization to serve both areas. In the event that adjacent districts or parts of districts are located in different circuits, the plan for furnishing representation shall be approved by the judicial council of each circuit.

(2) **Types of Defender Organizations.** -

- (A) **Federal Public Defender Organization.** - A Federal Public Defender Organization shall consist of one or more full-time salaried attorneys. An organization for a district or part of a district or two adjacent districts or parts of districts shall be supervised by a Federal Public Defender appointed by the court of appeals of the circuit, without regard to the provisions of title 5 governing appointments in the competitive service, after considering recommendations from the district court or courts to be served. Nothing contained herein shall be deemed to authorize more than one Federal Public Defender within a

single judicial district. The Federal Public Defender shall be appointed for a term of four years, unless sooner removed by the court of appeals of the circuit for incompetency, misconduct in office, or neglect of duty. Upon the expiration of his term, a Federal Public Defender may, by a majority vote of the judges of the court of appeals, continue to perform the duties of his office until his successor is appointed, or until one year after the expiration of such Defender's term, whichever is earlier. The compensation of the Federal Public Defender shall be fixed by the court of appeals of the circuit at a rate not to exceed the compensation received by the United States attorney for the district where representation is furnished or, if two districts or parts of districts are involved, the compensation of the higher paid United States attorney of the districts. The Federal Public Defender may appoint, without regard to the provisions of title 5 governing appointments in the competitive service, full-time attorneys in such number as may be approved by the court of appeals of the circuit and other personnel in such number as may be approved by the Director of the Administrative Office of the United States Courts. Compensation paid to such attorneys and other personnel of the organization shall be fixed by the Federal Public Defender at a rate not to exceed that paid to attorneys and other personnel of similar qualifications and experience of the Office of the United States Attorney in the district where representation is furnished or, if two districts or parts of districts are involved, the higher compensation paid to persons of similar qualifications and experience in the districts. Neither the Federal Public Defender nor any attorney so appointed by him may engage in the private practice of law. Each organization shall submit to the Director of the Administrative Office of the United States Courts, at the time and in the form prescribed by him, reports of its activities and financial position and its proposed budget. The Director of the Administrative Office shall submit, in accordance with section 605 of title 28, a budget for each organization for each fiscal year and shall out of the appropriations therefore make payments to and on behalf of each organization. Payments under this subparagraph to an organization shall be in lieu of payments under subsection (d) or (e).

- (B) **Community Defender Organization.** - A Community Defender Organization shall be a nonprofit defense counsel service established and administered by any group authorized by the plan to provide representation. The organization shall be eligible to furnish attorneys and receive payments under this

section if its bylaws are set forth in the plan of the district or districts in which it will serve. Each organization shall submit to the Judicial Conference of the United States an annual report setting forth its activities and financial position and the anticipated caseload and expenses for the next fiscal year. Upon application an organization may, to the extent approved by the Judicial Conference of the United States:

- (i) receive an initial grant for expenses necessary to establish the organization; and
  - (ii) in lieu of payments under subsection (d) or (e), receive periodic sustaining grants to provide representation and other expenses pursuant to this section.
- (3) **Malpractice and Negligence Suits.** - The Director of the Administrative Office of the United States Courts shall, to the extent the Director considers appropriate, provide representation for and hold harmless, or provide liability insurance for, any person who is an officer or employee of a Federal Public Defender Organization established under this subsection, or a Community Defender Organization established under this subsection which is receiving periodic sustaining grants, for money damages for injury, loss of liberty, loss of property, or personal injury or death arising from malpractice or negligence of any such officer or employee in furnishing representational services under this section while acting within the scope of that person's office or employment.
- (h) **Rules and Reports.** - Each district court and court of appeals of a circuit shall submit a report on the appointment of counsel within its jurisdiction to the Administrative Office of the United States Courts in such form and at such times as the Judicial Conference of the United States may specify. The Judicial Conference of the United States may, from time to time, issue rules and regulations governing the operation of plans formulated under this section.
- (i) **Appropriations.** - There are authorized to be appropriated to the United States courts, out of any money in the Treasury not otherwise appropriated, sums necessary to carry out the provisions of this section, including funds for the continuing education and training of persons providing representational services under this section. When so specified in appropriation acts, such appropriations shall remain available until expended. Payments from such appropriations shall be made under the supervision of the Director of the Administrative Office of the United States Courts.

- (j) **Districts Included.** - As used in this section, the term "district court" means each district court of the United States created by chapter 5 of title 28, the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, and the District Court of Guam.
- (k) **Applicability in the District of Columbia.** - The provisions of this section shall apply in the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit. The provisions of this section shall not apply to the Superior Court of the District of Columbia and the District of Columbia Court of Appeals.



## APPENDIX II

**Judicial Improvements Act of 1990, 104 Stat. 5116, Public Law No. 101-650.**

### **Sec. 318. Study of the Federal Defender Program**

(a) **STUDY REQUIRED** - The Judicial Conference of the United States shall conduct a study of the Federal defender program under the Criminal Justice Act of 1964, as amended (enacting section 3006A of title 18, United States Code).

(b) **ASSESSMENT OF PROGRAM** - In conducting the study, the Judicial Conference shall assess the effectiveness of the Federal defender program, including the following:

- 1) The impact of judicial involvement in the selection and compensation of Federal public defenders and the independence of Federal defender organizations, including the establishment and termination of Federal defender organizations and the Federal public defender and the community defender options.
- 2) Equal employment and affirmative action procedures in the various Federal defender programs.
- 3) Judicial involvement in the appointment and compensation of panel attorneys and experts.
- 4) Adequacy of compensation for legal services provided under the Criminal Justice Act of 1964.
- 5) The quality of the Criminal Justice Act of 1964 representation.
- 6) The adequacy of administrative support for defender services programs.
- 7) Maximum amounts of compensation for attorneys with regard to appeals of *habeas corpus* proceedings.
- 8) Contempt, sanctions, and malpractice representation of panel attorneys.
- 9) Appointment of counsel in multidefendant cases.
- 10) Early appointment of counsel in general, and prior to the pretrial services interview in particular.

- 11) The method and source of payment of the fees and expenses of fact witnesses for defendants with limited funds.
- 12) The provisions of services or funds to financially eligible arrested but unconvicted persons for noncustodial transportation and subsistence expenses, including food and lodging, both prior to and during judicial proceedings.

(c) **REPORT** - No later than March 31, 1992,<sup>\*</sup> the Judicial Conference shall transmit to the Committees on the Judiciary of the Senate and the House of Representatives a report on the results of the study required under subsection (a). The report shall include -

- 1) any recommendations for legislation that the Judicial Conference finds appropriate;
- 2) a proposed formula for the compensation of Federal defender program counsel that includes an amount to cover reasonable overhead and a reasonable hourly fee; and
- 3) a discussion of any procedural or operational changes that the Judicial Conference finds appropriate for implementation by the courts of the United States.

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<sup>\*</sup> The Technical Corrections Act of 1991, Pub. L. No 102-198, 105 Stat. 1623 (1991) amended the Judicial Improvements Act to extend the due date for the Report to March 31, 1993.



# THE JUDICIARY

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**BUDGET ESTIMATES FOR FISCAL YEAR 1993  
CONGRESSIONAL SUBMISSION**

APPENDIX III

# THE JUDICIARY

## Summary of Budgetary Requirements for Fiscal Year 1993

APPROPRIATION ACCOUNT	Appropriated 1991	Appropriated 1992	Supplemental Request	Adjusted Appropriation 1992 (Est)	Proposed Increase	Estimate 1993
Supreme Court	\$22,536,000	\$24,588,000	\$0	\$24,588,000	\$1,309,000	\$25,897,000
Court of Appeals for the Federal Circuit	9,762,000	10,775,000	0	10,775,000	2,333,000	13,108,000
Court of International Trade	8,757,000	9,432,000	0	9,432,000	1,593,000	11,025,000
Courts of Appeals, District Courts, and Other Judicial Services:						
<i>Salaries and Expenses</i>	1,657,854,000	1,875,000,000	0	1,875,000,000	344,045,000	2,219,045,000
<i>Defender Services</i>	132,761,000	190,621,000	24,500,000	215,121,000	59,925,000	275,046,000
<i>Fees of Jurors and     Commissioners</i>	63,597,000	70,000,000	0	70,000,000	4,000,000	74,000,000
<i>Court Security</i>	71,791,000	81,048,000	0	81,048,000	14,952,000	96,000,000
<b>Subtotal</b>	<b>1,926,003,000</b>	<b>2,216,669,000</b>	<b>24,500,000</b>	<b>2,241,169,000</b>	<b>422,922,000</b>	<b>2,664,091,000</b>
Administrative Office of the U.S. Courts	39,850,000	44,681,000	0	44,681,000	8,958,000	53,639,000
Federal Judicial Center	15,551,000	17,795,000	0	17,795,000	3,559,000	21,354,000
Payments to Judiciary Trust Funds	5,000,000	6,500,000	0	6,500,000	2,020,000	8,520,000
<b>Total, The Judiciary</b>	<b>2,027,459,000</b>	<b>2,330,440,000</b>	<b>24,500,000</b>	<b>2,354,940,000</b>	<b>442,694,000</b>	<b>2,797,634,000</b>
U. S. Sentencing Commission	8,422,000	9,000,000	0	9,000,000	200,000	9,200,000
<b>GRAND TOTAL</b>	<b>\$2,035,881,000</b>	<b>\$2,339,440,000</b>	<b>\$24,500,000</b>	<b>\$2,363,940,000</b>	<b>\$442,894,000</b>	<b>\$2,806,834,000</b>

## **APPENDIX IV**

### **Judicial Impact Statement**

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# **Report of the Committee to Review the Criminal Justice Act**

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**Prepared by:**

**The Administrative Office of the U.S. Courts**

**February 24, 1993**



# **JUDICIAL IMPACT STATEMENT**

## **REPORT OF THE COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT**

### **EXECUTIVE SUMMARY**

On January 29, 1993, the Committee to Review the Criminal Justice Act (CJA) issued its final report with recommendations to change the CJA program.<sup>1</sup> This impact statement estimates the cost of implementing the final recommendations of the committee. The report recommended changes in seven major areas: (1) selection, training, appointment and support of panel attorneys; (2) compensation and evaluation of panel attorneys; (3) litigation; (4) personnel; (5) funding; (6) structure and administration; and (7) other.

The analysis estimated two types of costs for implementing the report, resource and budget. The resource cost represents the cost of the time (or work years) and support associated with carrying out CJA activities. The budget cost represents actual spending, tied to the amount of funding that would be needed from Congress to run CJA activities. As explained below, the net resource cost of implementing the recommendations would be \$49.2 million and the net budget cost would be \$55.3 million.

The total annual resource cost of the defender services program if the committee's recommendations were implemented would be \$283.1 million. This would be offset by the resource cost of the current program, which was about

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<sup>1</sup> In July 1992, the Committee to Review the Criminal Justice Act issued an interim report with recommendations to change the CJA program. These recommendations were revised in October 1992. A Judicial Impact Statement was prepared based on the October report and was distributed to the committee in December 1992 and to the Judicial Conference in January 1993.

**\$233.9 million in 1992. Therefore, the net annual resource cost of the recommendations would be \$49.2 million.** The time that Article III and magistrate judges currently spend on CJA activities is considered a resource cost of the current program. Article III and magistrate judge time is not a resource cost of the proposed system, because the judges would not be spending time on CJA activities. Of the net cost of \$49.2 million, \$15.4 million is associated with revamping the structure and administration of defender services, \$31.8 million is associated with increased compensation for panel attorneys, and \$2 million is associated with increased compensation for Federal Public Defender employees. There would also be a one-time start up cost of about \$4.7 million for the new administrative structure (See Table 1, page 4).

The total annual budget cost of the defender services program if the committee's recommendations were implemented would be \$289.2 million, including \$6.1 million associated with the continuing costs for Article III and magistrate judges. Under this costing method, the cost of Article III and magistrate judges salaries and other similar costs are considered to be a part of both the current and the new system, because funds to pay the judges would be sought from Congress under either system. No judges would be removed from office because their CJA-related workload diminished. **The cost of the current system is \$233.9 million; therefore, the net annual budget cost of implementing the recommendations would be \$55.3 million.** (See Table 4, page 7).

All costs include the funds needed to support positions, such as rent, utilities, space alterations, telephones, etc.

The cost of some recommendations could not be ascertained and are not included in the above costs. Some of these recommendations could be quite expensive, depending on how they are implemented. Examples include establishing panel attorney resource centers, compensating panel attorneys for travel time, providing counsel earlier in proceedings, making grand jury witnesses and individuals who believe they are targets of investigations eligible for counsel, and, in appropriate circumstances, providing transportation and maintenance expenses for defendants who lack funds for travel and subsistence during court proceedings. One recommendation, allowing CJA counsel to employ paralegals and law clerks at a reduced rate, could result in significant savings in the total cost of panel attorney compensation. Another recommendation, creating Federal Defender Organizations (FDOs) in certain districts or combinations of districts, could result in savings or costs, depending on the final structure and realized efficiency of such organizations.

Other recommendations were not expected to have a significant cost, such as providing indemnification coverage for panel attorneys, establishing "second chair" programs, allowing defendants a limited choice of counsel, safeguarding the

procedure for paying the expenses of fact witnesses, developing EEO policies, employment policies, grievance procedures and evaluation and removal procedures for federal defender organizations, and reviewing the CJA program every seven years.

Many of the recommendations of the report could be implemented under either the current structure of the program or the recommended structure, and their cost would be unaffected. This includes costs or savings associated with compensation for panel attorneys, expanded use of paralegals and law clerks, increased compensation for Federal Public Defenders, and other similar recommendations. On the other hand, recommendations for additional training and support services for CJA programs would be affected by the recommended change in administrative structure. These costs were estimated assuming those structural changes were put into place.

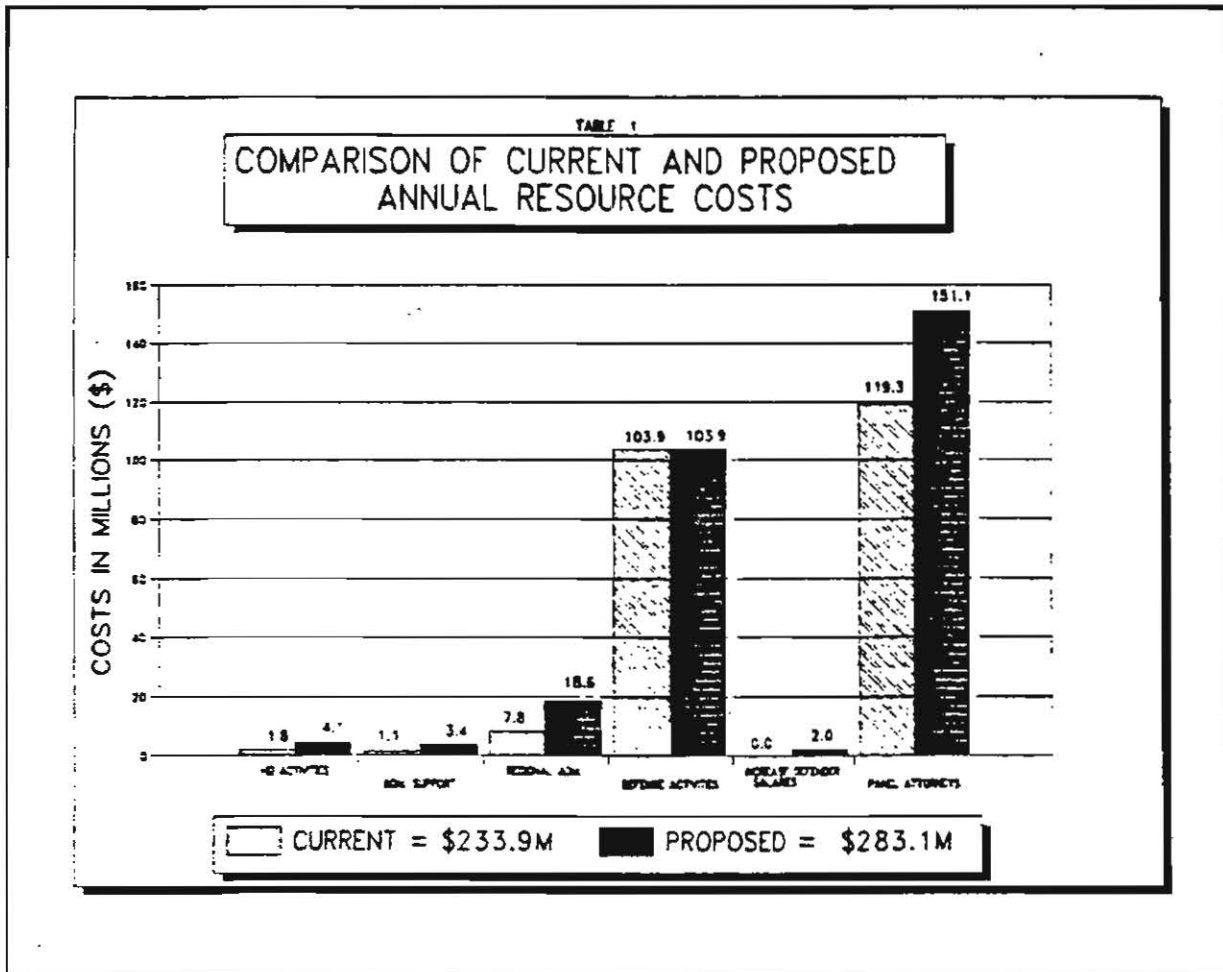
Because of these differences in the nature of the recommendations, the analysis does not follow the order of the recommendations as presented in the report. Rather, it first addresses the cost for a new administrative system and the recommendations that would be affected by this structure, and then addresses those recommendations unaffected by the administrative structure of the CJA program.

Attachment 1 is a list of those recommendations that were analyzed and their associated costs.

## COST SUMMARY

### Resource Cost

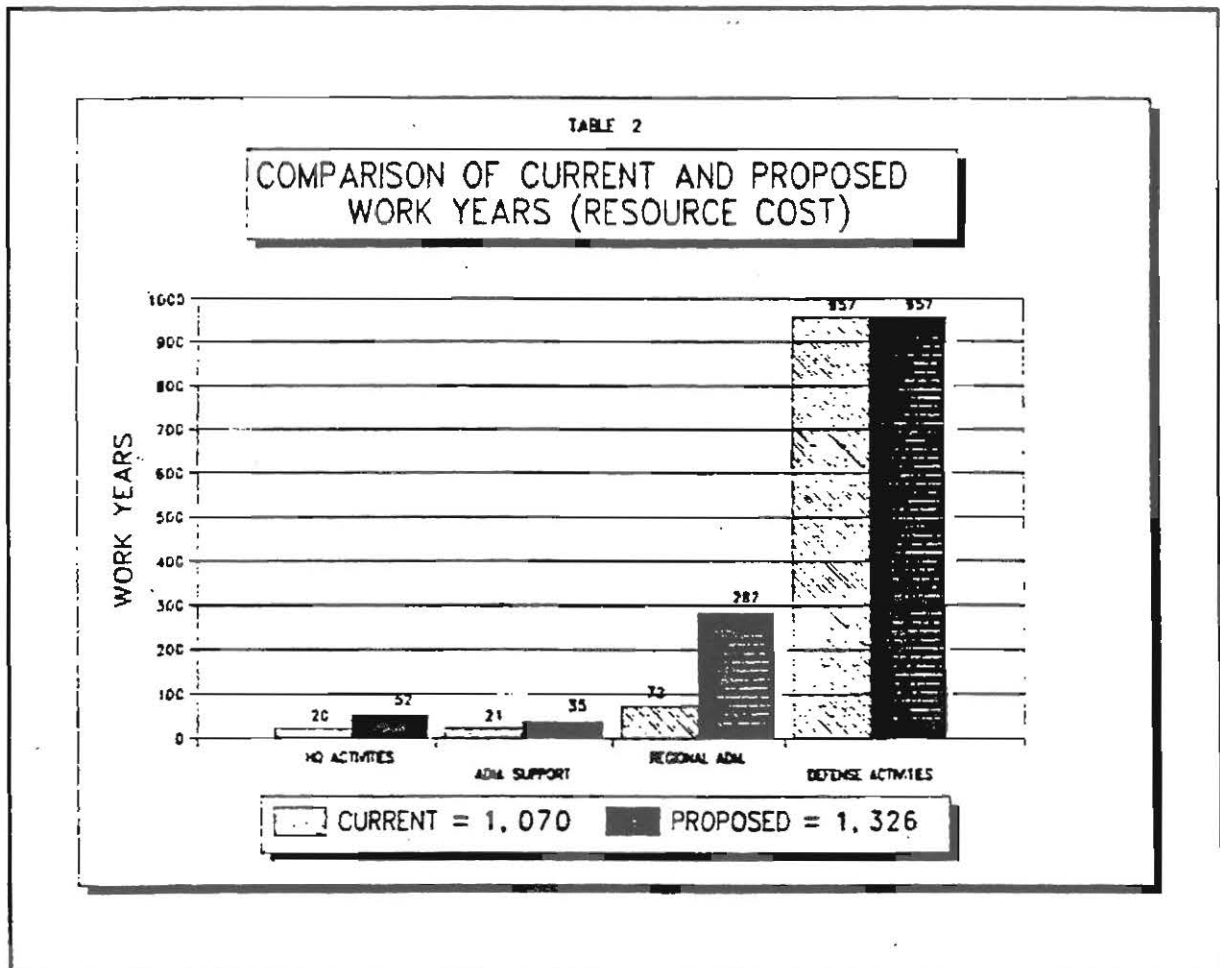
Table 1 below compares the annual resource cost, in dollars, of the committee recommendations and the current system.



Headquarters Activities includes the current functions of the Defender Services Division in the AO, as well as the proposed program, training, and policy functions of the new National Center. The current cost of training provided by the Federal Judicial Center (FJC), as well as support in areas such as personnel, budget, accounting, and procurement provided by the Administrative Office of the U.S. Courts (AO) have been incorporated into the category Administrative Support. For the proposed structure, this category includes administrative support for the National

Center. Regional Administration includes the value of Article III and magistrate judges and clerks' offices support under the current system and the cost of the proposed regional structure for the recommended system. Defense Activities includes the cost of Federal Public Defender offices, Community Defender Organizations, and transcripts and expert services. Increased Defender Salaries represents the proposed increase for employees of Federal Public Defender offices. Panel Attorney costs includes hourly compensation for these attorneys, and in the case of the proposed system, the hourly overhead supplement. All costs associated with positions include support such as rent, utilities, telephones, and security, as well as salaries and benefits.

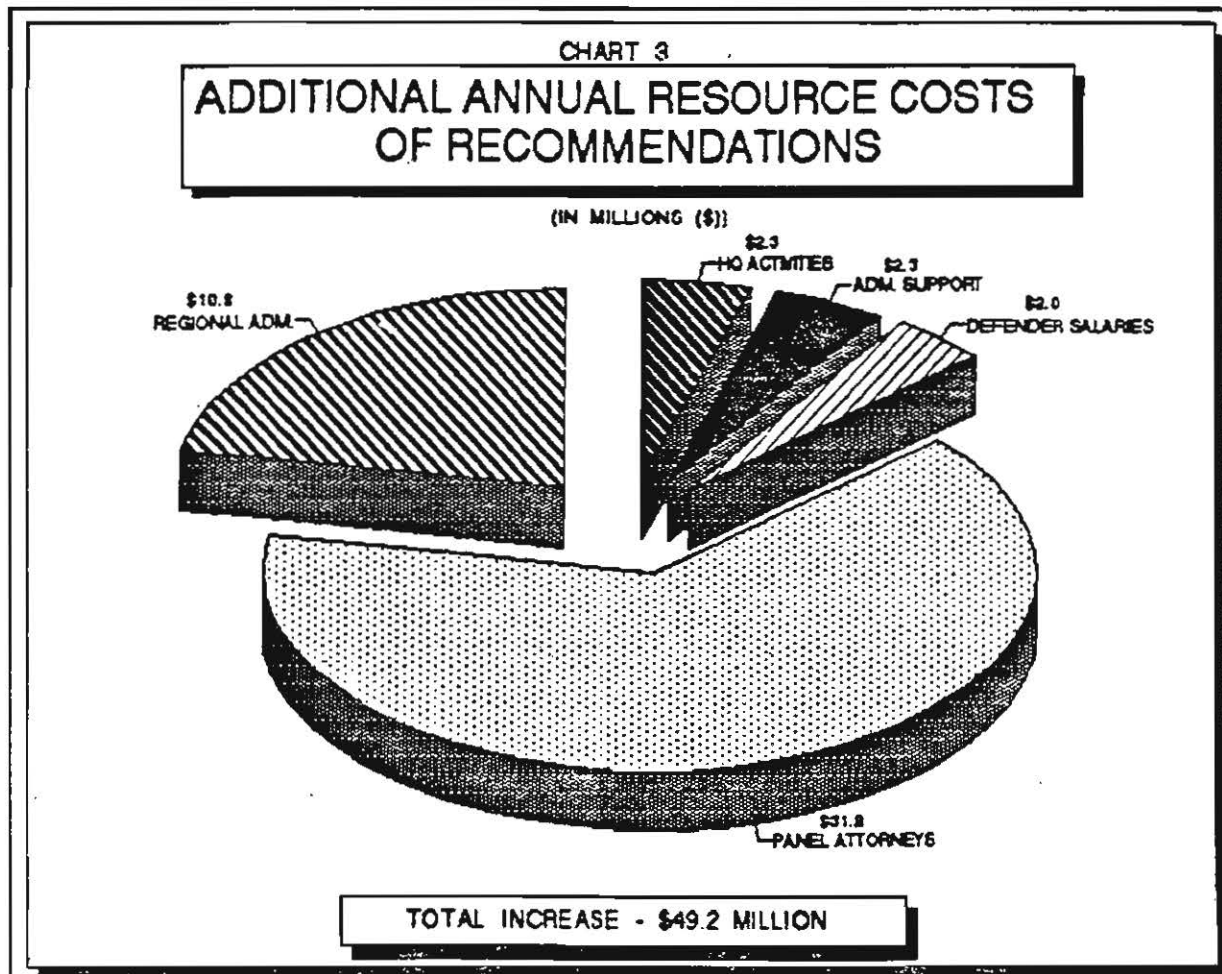
Table 2 below compares the annual resource cost in work years of implementing the committee recommendations and the current system.





Regarding the increase in staffing in the headquarters of the recommended new Defender Services Center, the Defender Services Division in the AO believes that it is currently understaffed by about 24 positions. Therefore, 24 of the 32 position increase for policy, programs, and training functions in the new Center are needed under the current system and have been requested by the Division for FY 1994, although that level of staffing has never been implemented.

Table 3 (pie chart) below breaks out the areas of increased resource cost over the current system that would result from implementing the committee's recommendations.



## Budget Cost

Table 4 below compares the annual budget cost in dollars of implementing the committee recommendations and the current system. The budget cost of the committee recommendations is \$6.1 million higher than the resource cost due to the expenses associated with Article III and magistrate judges, who would no longer be devoting time to CJA activities, but whose salaries would still be funded by Congress if the recommendations were implemented. This cost is in the Regional Administration category.

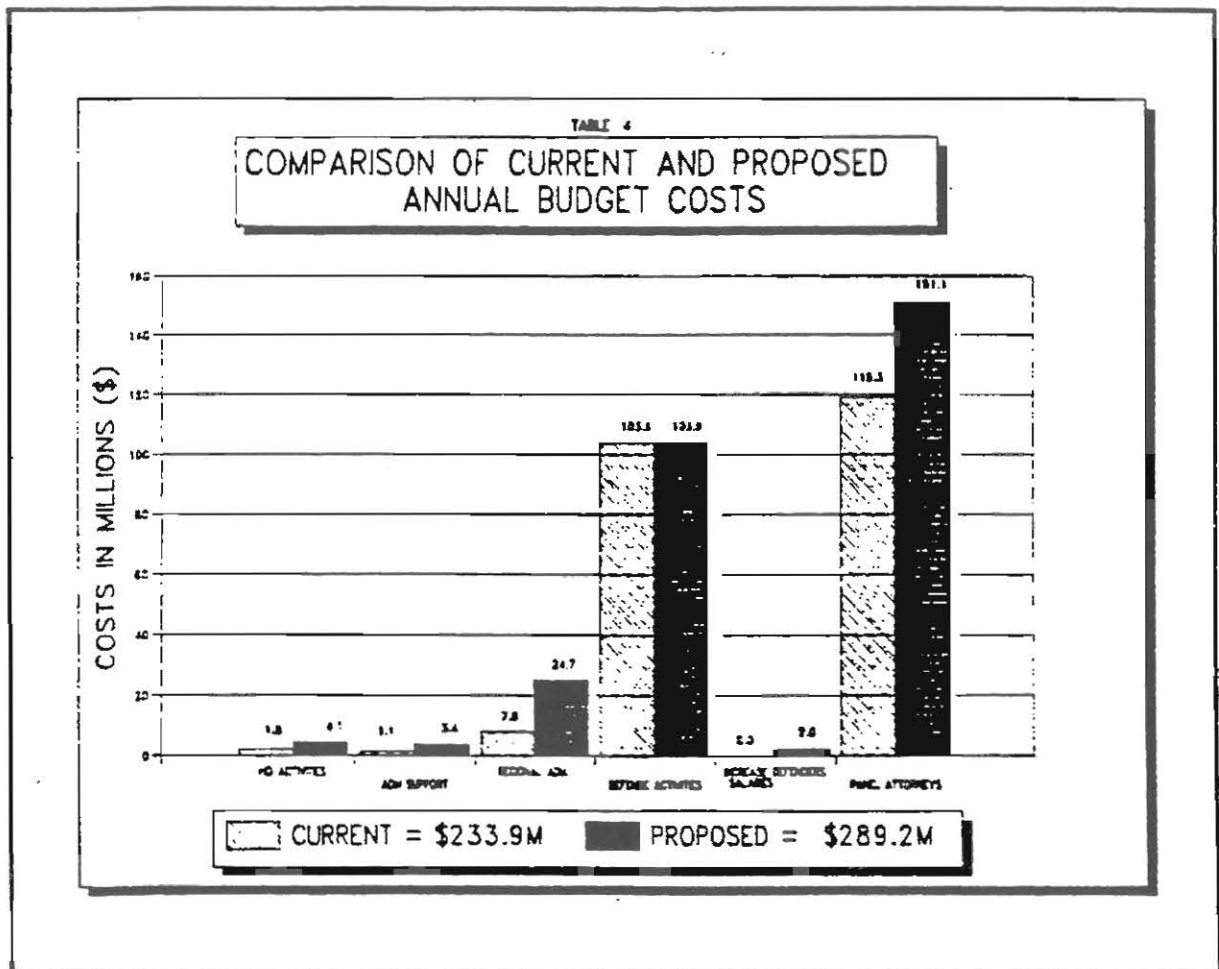


Table 5 compares the annual budget cost in work years of implementing the committee recommendations and the current system. Again, the work years associated with judicial officer time spent on CJA activities are a budget cost of the recommended system, because judges would still be paid for this time by the judiciary even if the recommendations were implemented.

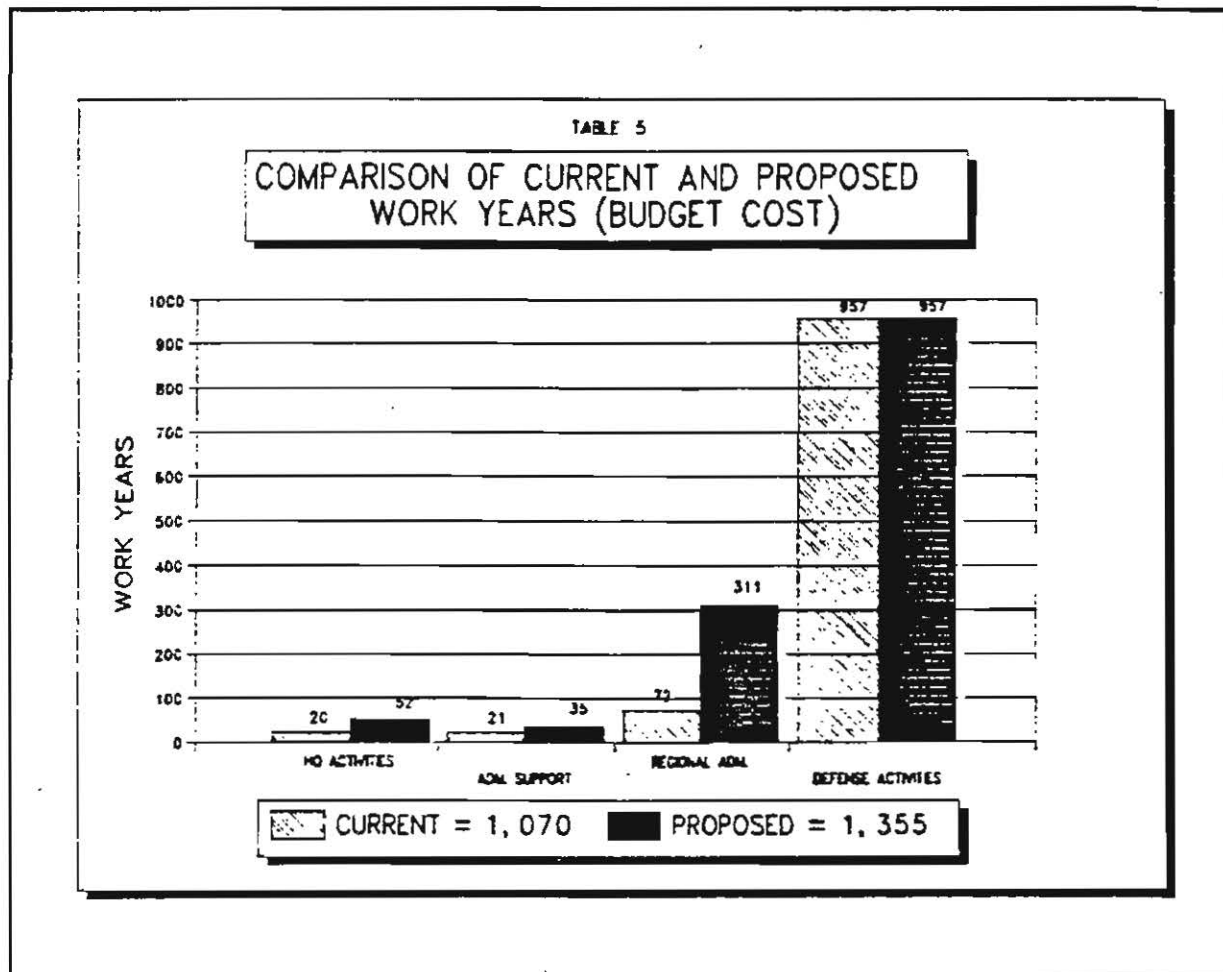
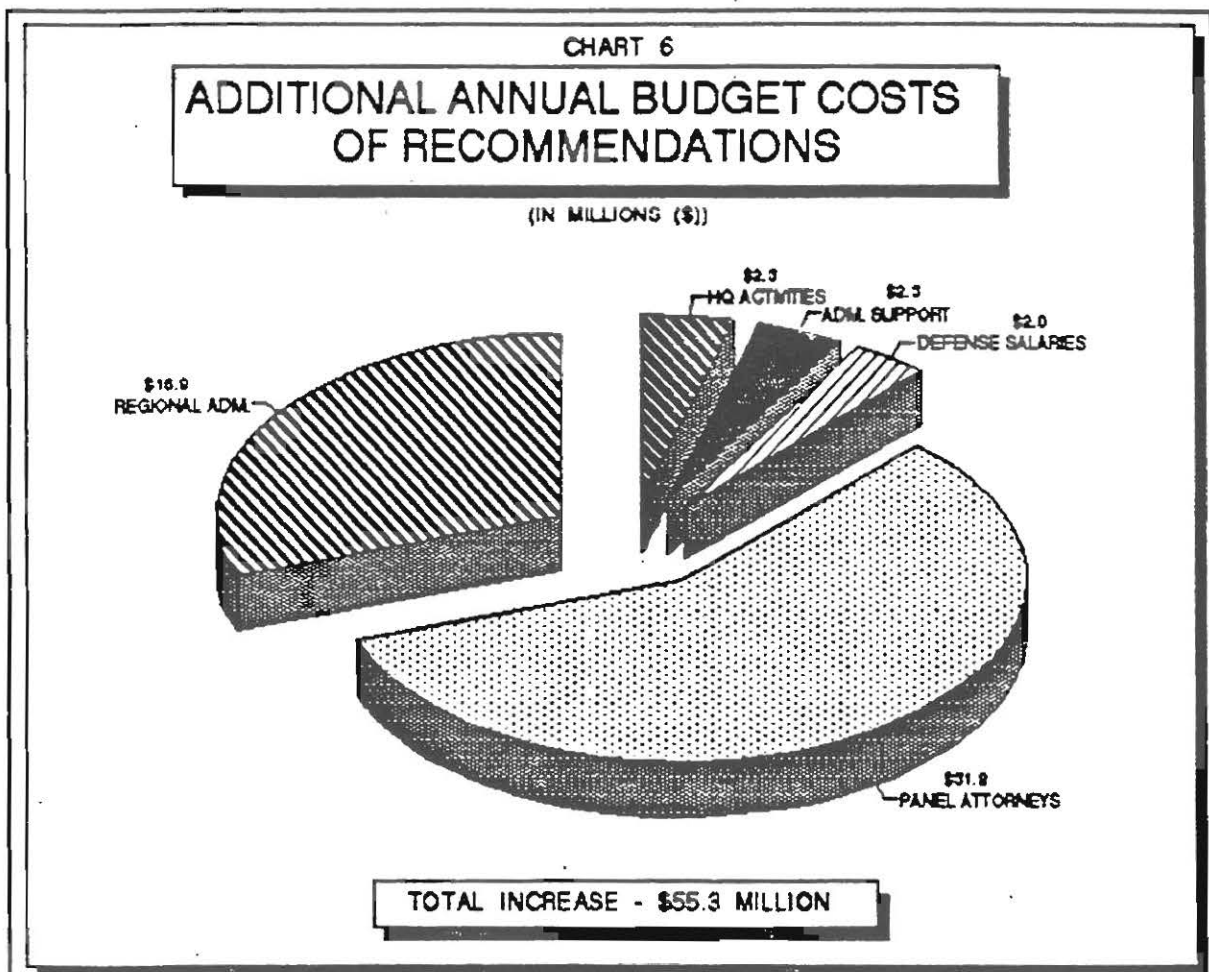


Table 6 (pie chart) below breaks out the areas of increased budget cost for implementing the committee recommendations. Again, the \$16.9 million budget cost of Regional Administration is \$6.1 million higher than the resource cost of \$10.8 million, due to the funding for judicial officers and support staff that would still need to be provided to the Judiciary by Congress even if the proposed recommendations were implemented.



## **DETAILED ANALYSIS**

This section of the impact analysis provides background material on the committee recommendations and how the cost estimates were derived. All costs are based on Fiscal Year 1992 salary and spending levels.

### **Structure, Administration, Support and Training**

#### **Recommendations A-2, F-1, G-1, G-2 and G-3 (Net Budget Cost: \$21.5 million).**

These recommendations address an administrative structure for the national and local management of the CJA program, as well as additional training and support services for panel attorneys.

The report recommends that a new Center for Federal Criminal Defense Services be established within the Judiciary. The Center would be supervised by a Board of seven directors who would be reimbursed for their expenses but would otherwise serve without compensation. The Board would be authorized to employ staff as it deems necessary.

The role of the Center would be to assume the authority and responsibility for criminal defense functions currently vested in the U.S. Judicial Conference. Its duties would be to (1) establish policy and provide direction with respect to CJA programs; (2) establish, promulgate, and ensure that minimum standards in critical CJA program areas are met nationwide; (3) plan, supervise, and coordinate the delivery of CJA legal services; (4) secure adequate funds for CJA programs from Congress; (5) provide for training of defense counsel; and (6) ensure appropriate management controls and administrative support for the CJA program.

In addition to the Center, one or more boards would be established within each circuit, on a district or regional basis to supervise the local CJA program and the appointment and compensation of CJA counsel. The members of each local board would be non-salaried. The local boards would be responsible for developing a plan for the appointment of counsel and provision of other CJA services, which would be submitted to the Center for approval.

The boards would also appoint a local paid administrator of the CJA panel program on a full-time or part-time basis and could provide local administrators with federal employment status. The local administrator would: (1) recruit panel members; (2) screen and appoint panel attorneys; (3) review, audit and approve all interim and final CJA panel vouchers within a specified time period; and (4) review



and approve vouchers for experts, investigators, and all other non-lawyer fee services.

The committee also recommended that a resource and support presence for panel attorneys be available for every division of each federal judicial district. The committee stated that each district should have flexibility to tailor a program to its needs. The local boards would be responsible for creating and maintaining the resource presence with the assistance of the national Center. In districts with a federal defender organization, the committee suggests that office should be given sufficient personnel to carry out this function. For those districts or division where no federal defender exists, the district plan should either seek affiliation with a FDO in an adjoining district or division, or establish a "resource counsel" on a full or part-time basis. The committee states that a single attorney could possibly provide all of the services of the panel administrator and resource counsel, or these functions could be divided, as best suits the needs of the particular district.

The local administrator might also be involved in organizing and implementing increased training programs. However, the committee has not specified a structure under which the recommended increased training would take place. The committee staff envisioned that training would be coordinated centrally by the new Center, although courses might be available from a variety of training institutes, such as the FJC and universities. The analysis assumed that panel attorneys would not be compensated for time spent in training. The report did not address how the additional training would be paid for; i.e. whether panel attorneys would pay tuition for courses and absorb the expense, or whether Federal funds would be sought to support courses. Because of this lack of information, a cost for training could not be estimated beyond the cost of personnel in the Center.

In addition, the report is not specific about how certain services would be provided, such as personnel and payroll, space and facilities management, financial, budgetary and program management, automation and related support, and other administrative activities. Although the report states that the Administrative Office of the U.S. Courts (AO) should be authorized and directed to provide many of these services, the extent to which the new Center would want to relinquish control over these functions, as well of the willingness of the AO to provide them on a reimbursable basis has not been clearly defined. In addition, the Center would be authorized to establish a data processing center and provide technological support to local organizations. This analysis assumed that these functions would be performed by the Center rather than the AO, and they are reflected in the line in the table below called Administration. This assumption has a minor effect on the cost of the new Center, because even if administrative services were contracted out, the Center would still have to pay for them.

The table below shows the estimated costs of the recommended structure. All support costs for personnel, such as for space, furniture, equipment, supplies, etc. have been included in these costs. The table is further explained below.

### PROPOSED ANNUAL RECURRING COSTS

	<u>\$ In M</u>	<u>Work Years</u>
<u>National Center</u>		
Policy and Programs	2.62	30
Training	1.43	22
Administration	3.44	35
Board of Directors	<u>.02</u>	<u>NA</u>
Subtotal	7.51	87
<u>Regional Centers</u>		
Local Administrators	9.75	94
Support Staff	8.77	188
Local Boards	<u>.09</u>	<u>NA</u>
Subtotal	18.61	282
<b>TOTAL</b>	<b>\$26.12</b>	<b>369</b>

**NOTE:** There would be an additional one time cost of \$4.72 million for start up costs such as furniture and ADP purchases, space (new and alterations), etc.

Creation of the Center would absorb the entire staff of the current Defender Services Division (20 positions). An additional 67 positions would be needed as follows: policy and program related activities: 10; training: 22; and administrative support: 35. The cost of these 87 positions would be about \$7.51 million.

The estimates for policy, program, and training positions are based on discussions with the staff of the current Defender Services Division in the AO. The division envisions expanded support for current staff efforts in: (1) executive direction; (2) policy and program direction; (3) management and program analysis and evaluation; (4) statistics; (5) legislative and public affairs; (6) support to board of directors; (7) supervision of defender organizations and local administrators and boards; and (8) training. An estimated 22 positions (11 of which would be in the circuits) would be dedicated to training for the approximately 10,000 CJA panel attorneys.

The estimates for administrative support are based on a pro-rated share of AO resources currently spent to support program activities, with special adjustments for ADP requirements, CJA voucher examination and payment, and additional management. These costs would vary depending on the precise requirements of the Center, which are, as yet, undetermined, and whether any of these functions would be contracted out. However, the estimates provide a reasonable starting point.

Although the report is not specific as to the nature and support required for local administrators, this analysis assumed that there would be an average of 94 full time local administrators, who would be experienced attorneys. Each administrator would be supported by a mid-level staff assistant qualified to review vouchers and a secretary. This average, based on discussions with Defender Services Division staff, considered that the local administrator structure may not be uniform between districts. In some areas, the staff would need to be much larger. In other areas, the function might be performed by contractors and part-time workers or included in the overall responsibilities of a new or existing federal defender organization. Regardless of who is doing the work, however, it still needs to be paid for. If the workload shifts from judicial officers to contractors or federal defender organizations, more people will need to be paid or hired. This analysis assumed that the work in this area currently being done by federal defender organizations would continue. Therefore, what is being measured is the shift of work from judicial officers and other court personnel to workers under the proposed new structure, regardless of how they are organizationally categorized. An average of three people per district was thought to provide a baseline estimate of the staffing needed to handle that workload shift on a nation-wide basis. In addition, some of the functions, such as providing advice and orientation, may be assumed by volunteers.

The analysis assumed that there would be no future role in CJA activities at all for court personnel currently involved in the program. For example, the local administrators would be sufficiently informed as to the nature of each case to determine whether a voucher was accurate without having to consult with the judge or magistrate involved in the case. If such consultations were to take place, the resource cost would increase due to additional judge time being allocated to CJA activities. However, the budget cost would not increase, because the judges are already being paid.

## Comparable Structures

In order to provide a context for the implementation needs estimated by the Defender Services Division, the structures of the Legal Services Corporation (LSC), the U.S. Attorneys, and the U.S. Army Trial Defense Service (TDS) were examined. Comparisons were made, where possible, of the headquarters and regional staffing levels, costs, and services provided. A brief description follows.

Legal Services Corporation. LSC has a staff of about 130 overseeing a \$540 million program (\$350 million in Federal funds). It spends about 4 percent or \$22 million on administrative and management functions, with the bulk of funds being given out in grants to local service providers and training agencies. Its functions include: (1) providing staff support for the eleven member board of directors; (2) setting and monitoring compliance with regulations for local organizations, including periodic audits and on-site reviews; (3) setting performance standards and accountability requirements; and (4) internal management and administration. The monitoring function is the largest. The LSC uses a pool of outside consultants who work in teams of 3-12 members. All of the approximately 323 grant recipients are audited once every two years.

U.S. Attorneys. The Executive Office of the U.S. Attorneys is part of the Department of Justice and has a staff of about 213 overseeing an approximately \$800 million program. Its functions include: (1) providing the offices of U.S. Attorneys with technical assistance and supervision in legal counsel, personnel, and training; (2) administering the Attorney General's Advocacy Institute; (3) developing and implementing policy and procedures for collecting criminal fines; and (4) internal administrative activities such as budgeting, EEO, systems support, procurement, etc. The largest function is providing support to the field offices. Current staffing includes about 40 positions in personnel, 13 in budget, 27 in training, and the remainder in other administrative, professional, and management areas. There are approximately 9,399 field personnel in 94 district offices. Certain administrative functions, such as small procurements and check disbursements have been delegated to the field.

U.S. Army Trial Defense Service. TDS has a headquarters staff of 7 positions to oversee five regional and three overseas offices with 184 defense attorneys. The functions of TDS are to: (1) provide defense counsel services for Army personnel; (2) promote the effective and efficient use of defense counsel resources; and (3) enhance qualifications of defense service personnel. All administrative and financial support is provided by the Legal Services Agency, which provides similar administrative services to the prosecutorial function. Funding information for TDS was not available.

Proposed Structure. The new defender services structure would have a staff of 369, including 87 in headquarters and 282 in the field, to administer a \$283 million program (based on FY 1992 expenditures). It would oversee about 957 Federal Public Defender employees, 28 operating Community Defender Organizations (including 19 Death Penalty Resource Centers), and approximately 10,000 panel attorneys. This mix of personnel could change if more federal defender organizations are established.

### Current Costs

Except for the \$6.08 million in costs for judicial officers and their support staff, current costs would cease under the recommended structure and must be considered savings that would offset the \$26.12 million cost outlined above. The current cost of administering the program is \$10.68 million and 113 staff years, as shown below. All support costs, such as for space, furniture, equipment, supplies, etc. have been included in these costs.

### **CURRENT ANNUAL RECURRING BUDGET COSTS**

	<u>\$ in M</u>	<u>Work Years</u>
Defender Services Division	1.78	20
AO Support	.89	20
FJC Training	.20	1
Article III Judges and Support	5.78	28
Magistrate Judges	.30	1
Circuit Executives Offices	.12	2
Clerks' Offices	<u>1.61</u>	<u>41</u>
<b>TOTAL</b>	<b>10.68</b>	<b>113</b>

The estimate for the Defender Services Division is based on the number of positions in the division at the end of FY 1992. The estimate for AO support is based on a pro-rated share of AO resources devoted to various program areas. The estimate for FJC support is based on the amount of training provided in FY 1992.



Article III judges, directly and through the Judicial Conference, the judicial councils of the circuits, and defender services committees of the districts are responsible for: (1) approving district defender services plans; (2) reviewing and evaluating the work of panel attorneys, community defender organizations, and Federal Public Defenders; (3) searching for and hiring new Federal Public Defenders; (4) reviewing and challenging some CJA vouchers; (5) selecting panel attorneys; and (6) making policy decisions to support CJA activities. The average judge spends about 1 hour a week on CJA activities, equating to about 18 work years in total for all judges. Also, an estimated 10 work years of judges' staff support are spent on CJA activities.

Magistrate judges are currently responsible for: (1) taking and reviewing some resource affidavits; (2) reviewing and challenging some CJA vouchers; and (3) recommending and selecting some panel attorneys for some misdemeanors and felony cases. The annual time spent nationally is an estimated 1.2 work years.

Circuit executives offices expend about 1.8 staff years to assist in the management and execution of various CJA activities, including some voucher review, some review of district CJA plans, and helping in selection of Federal Public Defenders.

The clerks' offices (districts and, to a lesser extent, circuits) are currently responsible for: (1) reviewing vouchers; (2) managing lists of attorneys; (3) addressing CJA inquiries; (4) handling various usage and expense reports; and (5) performing other support functions. The current work measurement formula for district clerks suggests that the time required to support the average panel attorney voucher and associated activities requires about 1.54 hours of clerk time per unit of output. Based on the handling of about 46,500 vouchers annually, the clerks' offices spend about 41 work years supporting CJA activities.

Federal public defenders currently spend some time reviewing vouchers, conducting or organizing training and performing other tasks associated with panel administration. This is not expected to change under the committee's recommendations. Therefore, the cost of this work was not included as a cost of either the existing or the proposed system, as it was difficult to quantify and would balance out anyway, with no significant effect on net costs.

### Net Cost

The new structure would cost approximately \$21.5 million more per year to operate than the existing one and involve about 285 additional work years. About \$4.8 million of this increase would be spent to support the National Center's policy, program, training, and administration activities. Another \$10.6 million of the increase would be expended on field activities supported by the regional centers. The remaining \$6.1 million is attributable to salaries and support costs for judges and their staff who would no longer be spending time on CJA activities, but whose expenses would still need to be paid by the Judiciary. Although these costs would not appear directly as funds needed to support the new defender program, these are costs that would be incurred regardless of whether or not the judges are involved in the CJA program, because judges would not be removed from office as a result of this proposal.

It is possible that future judgeship costs might be avoided if judges were not spending time on CJA activities, and, as a result, future judgeship needs reduced. However, this potential effect could not be quantified.

### PANEL ATTORNEY COSTS

The CJA review committee made several recommendations regarding panel attorneys that could be implemented regardless of whether or not the overall structure of the CJA program remained the same. The following provides the cost of these recommendations.

**Recommendation B-1 - Compensation (Cost: \$31.8 million).** The committee recommended that fair compensation should be paid to all panel attorneys providing representation under the CJA, including reasonable overhead and hourly fees. Also, the compensation rate should be the same for in-court and out-of-court time. The cost of implementing this recommendation in its entirety could be as much as \$31.8 million annually.

Different compensation formulas have been proposed. The first calls for a statutory change to create a national presumptive overhead figure, such as \$25.00 per hour. The compensation fee, such as \$50.00 per hour would be added to this, for a total reimbursement, in this instance, of \$75.00 per hour. The attorneys would be able to challenge the overhead rate for their district as too low, within a specified limit, such as up to \$50.00 per hour.

Another formula would set a national hourly rate for compensation that would include an unspecified amount for overhead. Attorneys in districts designated as "high cost" would receive an overhead supplement of, for example, \$25.00 per hour.

The committee has not made any determinations as to how many or which districts might be considered low, average, or high cost locations under this proposal. It has stated that case maximums and the exact formulation of hourly rates should be determined by the entity administering the CJA on the national level, structured broad enough to allow for local differences. The CJA Revision Act of 1986 authorized the Judicial Conference to establish attorney compensation rates of up to \$75 per hour for in-court and out-of-court services in those districts in which CJA rates of \$60 and \$40 per hour for in-court and out-of-court work, respectively, are inadequate. Pay cost adjustments of \$75 per hour have been approved for 88 judicial districts. However, Congress has provided appropriations for these pay cost adjustments sufficient for only 16 of the 88 districts, at a total increased cost of approximately \$23 million.

If all of the remaining 78 judicial districts were designated as eligible to receive the \$25 per hour overhead increase as recommended by the committee report, total compensation costs would increase by approximately \$31.8 million. An increased compensation cost of \$2.36 million would be expected for every additional five percent of cases brought in high-cost designated areas (2100 cases times 45 average hours spent on cases times \$25).

**Recommendation B-2 - Travel Demands (Cost: Unknown).** The committee recommended that special attention should be given to compensation for extended travel demands placed on panel attorneys due to meetings with clients or court appearances. However, the committee staff was unable to estimate an amount of time spent on such travel by panel attorneys. If in every one of the approximately 40,000 representations by panel attorneys compensation was given for just one hour of such travel, at \$40 per hour, the total cost would be \$1.6 million annually. By way of comparison, in 1992, \$1.86 million was paid to panel attorneys for all authorized travel-related time and costs, under existing regulations and procedures. Because an estimate of travel hours could not be made, the potential cost of this recommendation was not included in the total cost of implementing the report, although it could be quite high.

**Recommendation B-3 - Paralegals and Law Clerks (Savings: Unknown, Potentially Significant).** The committee recommended amendment of the CJA to allow appointed counsel to employ paralegals and law students to conduct a full range of legal support, such as document and tape review, investigations, interviews and trial preparation, at a reduced hourly rate or through law school credit. CJA

attorneys are now allowed to charge, as an expense, the cost of having law students do legal research.

As the committee noted, this proposal would result in significant cost efficiencies. For example, if a paralegal was paid half the rate that panel attorneys receive for out-of-court work, and could perform 20% of the responsibilities associated with a particular case, there would be a net savings of \$270.00 per case (45 average hours spent by a panel attorney on a case times \$50.00 average hourly compensation = \$2250.00. If, instead, 36 hours were spent by the attorney and 9 hours by the paralegal, the total costs would be \$1980.00: (36 hours times \$50.00 average hourly compensation) + (9 hours times \$20.00 paralegal reimbursement) = \$1800 + \$180 = \$1980.00). If paralegals were used at this level in all panel attorney-assigned cases, the savings could be more than \$11,000,000: (42,000 panel attorney cases times 45 average hours spent on case times \$50.00 average hourly compensation = \$94,500,000. (42,000 times 36 hours times \$50.00) + (42,000 times 9 hours times \$20.00) = \$75,600,000 + \$7,560,000 = \$83,100,000).

The potential savings could be even greater if law clerks are used extensively in place of paralegals, as they would probably be paid lower compensation or just receive credit. However, the likely percentage of use of law clerks and paralegals could not be accurately defined. It could also not be determined what percentage of law clerk or paralegal time is currently non-compensated and effectively written off by the panel attorney. Presumably, in these instances, the average compensation per case would increase as panel attorneys start submitting vouchers for work by individuals that has been performed on a regular, on-going basis but for which reimbursement was always precluded. For these reasons, the total amount of potential savings could vary widely and could not be quantified further than is presented in this analysis.

**Recommendation I-3 - Indemnification (Cost: Minimal)** . The committee recommended that panel attorneys should be indemnified for the cost of expenses associated with defense representation for civil malpractice and related actions or any compensatory or punitive damages arising from their CJA representation, if increased compensation for overhead was not implemented.

A definitive cost for this indemnification could not be estimated. Therefore, this cost has not been included in the overall cost of the recommendations. However, for illustrative purposes, in 1991, there were about 12 malpractice suits brought against Federal Defender organizations, costing about \$50,000 in representation. There has never been an adverse judgment in these cases.

## **FEDERAL PUBLIC DEFENDER COSTS**

**Recommendation C-1 - Federal Defender Organizations (Cost or Savings: Unknown).** The committee recommended that federal defender organizations should be established in all districts, or combinations of districts, where such an organization would be cost effective, where more than a specified minimum number of appointments is made each year, or where the interests of effective representation otherwise require establishment of such an office. The national entity administering the CJA would determine the need for a federal defender organization and its geographic boundaries.

Federal defender organizations should render more cost-efficient defender services than relying solely on panel attorneys. There would always be some necessary reliance on panel attorneys, however, especially when conflicts of representation arise or if a sudden surge in cases would overwhelm the workload of the federal defender. Variables such as the set number of appointments made each year in a given district that would require creation of a federal defender organization or the possible geographic boundaries that an organization may cover are to be determined by the national entity administering the CJA. For these reasons, a definitive savings could not be estimated. Therefore, this potential savings has not been included in the overall cost of the recommendations.

**Recommendation C-6 - Salary Parity (Cost: \$2 million).** The committee recommended that Federal defender and support staff salaries should be equal to those of personnel with similar responsibilities in the U.S. Attorney's Office. Salaries for employees of Federal Public Defender offices vary from district to district. However, on average, they are an estimated four percent below that of the U.S. Attorney's Offices nationwide. Salary parity, an increase of about four percent over the current \$52.5 million cost for salaries and benefits, would cost an additional \$2 million annually. (The cost of this recommendation does not include the potential additional cost if Recommendation C-1 is adopted).



## **OTHER RECOMMENDATIONS**

**Recommendations A-1 and A-3 - Qualification Standards, Second Chair Programs, and Performance Standards (Cost: Minimal).** The committee recommended that minimum qualification standards be set for a district and circuit's appointed counsel. Also, the committee encouraged the development of a second chair program in which more experienced attorneys are matched with less experienced, but qualified, counsel to provide guidance and experience, as well as on-the-job training. Also, performance standards should be established at the national level so that attorney representation can be evaluated and attorneys disqualified if minimum standards are not met.

The report recommends that the administration of these local panel attorney qualification and performance standards should be vested in a local administrator, under the overall supervision of the entity responsible for national administration of the CJA.

The cost of implementing the second chair suggestion would also be minimal. It is already common procedure to appoint a second panel attorney in cases that are particularly complex, lengthy, or involve several serious offenses. Out of approximately 42,000 cases assigned to panel attorneys in 1991, only five percent or 2,100 went to trial. The staff of the committee estimates that no more than ten percent or 210 of these cases would have been assigned a second chair. The time spent by the second chair on each of these cases is projected to be significantly less than the time spent by the primary counsel and mostly limited to final preparation and actual courtroom phases of litigation.

If a second chair counsel were to spend an average of fifteen hours, or one-third of the average 45 hours per assigned case, the cost of this proposal would be about \$157,500 annually, based on the projected 210 case level and average compensation of \$50.00 per hour. There may also be some unquantifiable savings if the experience gained by the primary counsel takes the place of training that might otherwise be needed.

**Recommendation D-1 - Earlier Availability of Counsel (Cost: Unknown).** This recommendation states that the CJA should provide for early appointment of counsel to cover, at a minimum, representation at the pretrial services interview. In addition, counsel should be provided to qualifying grand jury witnesses and to those who believe they are targets of investigation. The committee stated that the assessment of the right to counsel for such individuals should be construed liberally.

If counsel is made available earlier in the proceedings, some extra hours of work would be added to the average time spent on a case. However, some of this time would be spent regardless of when counsel was first made available. In addition, earlier availability of counsel could lead to more efficient case management overall, thus leading to potential savings.

Estimates were not available on the number of grand jury witnesses or individuals who believe they are targets of investigation who would both qualify for and seek CJA counsel. Therefore, a cost for this could not be determined.

### **Miscellaneous Recommendations.**

There were several recommendations in the report for which a cost was not estimated, either because they were nonquantifiable or because they were not expected to have much cost. In the first category were the following recommendations:

- B-4. Vouchers for fees and expenses of panel attorneys, experts and other providers of services should be processed and paid in an expeditious manner.
- D-2. In appropriate circumstances, transportation and maintenance expenses should be provided for CJA eligible defendants who lack sufficient funds to travel to and from court and for subsistence during court proceedings.
- D-3. The prosecution should be required to provide copies of relevant discovery material to a defendant represented by appointed counsel and the expenses of duplication should be reimbursed from CJA funding.
- E-1. Congress should adequately fund the CJA program.

In the second category were the remaining recommendations:

- C-2. EEO and Affirmative Action policies should be developed and more closely monitored for compliance in the federal defender and appointed counsel programs.
- C-3. Federal defender organizations and local boards should have evaluation procedures to monitor attorney and staff performance.

- C-4. Federal defender offices should develop and monitor management, employment and grievance policies and procedures.
- C-5. Clearly defined procedures should be implemented for removal of federal defenders.
- D-4. Safeguards should be put in place to prevent inappropriate discovery by the prosecution of defense strategies through the procedure of paying the expenses of fact witnesses.
- E-2. Funds appropriated for CJA activities should not be used for other judicial branch activities. CJA appropriation requests should be submitted directly to Congress rather than through the Judicial Conference.
- H-1. Death Penalty Resource Centers should continue to be funded.
- I-1. Certain defendants should be offered a limited choice in the selection of CJA counsel.
- I-2. A study should be conducted to determine whether reimbursement to the CJA program is being pursued.
- I-4. A comprehensive review and evaluation of the CJA Act should be undertaken every seven years.

# ATTACHMENT 1

## COST OF COMMITTEE RECOMMENDATIONS

<u>Recommendation</u>	<u>Description</u>	<u>Total Program Cost in \$ Millions</u>	<u>Net Cost in \$ Millions</u>
A-1	Qualification Standards	minimal	minimal
A-2, F-1, G-1, G-2, G-3	Nat'l & Local Structure, Sup- port & Training	26.1	21.5 <sup>1</sup>
A-3	Performance Strnds	minimal	minimal
B-1	Panel Atty Pay	151.1	31.8 <sup>2</sup>
B-2	Panel Atty Travel	unknown	unknown <sup>3</sup>
B-3	Paralegals/Clerks	savings	savings
B-4	Expedited Voucher Payment	minimal	minimal

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<sup>1</sup> There would be an additional one time cost of \$4.72 million for start up costs such as furniture and ADP purchases, space (new and alterations), etc.

<sup>2</sup> The total and net cost of any increases in panel attorney compensation could be significantly diminished by implementation of Recommendation B-3 (charge for use of paralegals and law clerks) and Recommendation C-1 (increased use of federal defender organizations).

<sup>3</sup> The total amount of travel by panel attorneys due to meetings with clients or court appearances that would be eligible for compensation under this recommendation could not be estimated. For comparative purposes, in 1992, \$1.86 million was paid to panel attorneys in travel cost reimbursements.

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<u>Recommendation</u>	<u>Description</u>	<u>Total Program Cost in \$ Millions</u>	<u>Net Cost in \$ Millions</u>
C-1	Federal Defender Organizations	unknown	unknown
C-2	EEO Policies	minimal	minimal
C-3	Evaluation Standards	minimal	minimal
C-4	Employment/Grievance Standards	minimal	minimal
C-5	Removal Procedures	minimal	minimal
C-6	Public Defender Salaries	54.5	2.0
D-1	Early Counsel	unknown	unknown
D-2	Transport. Expenses for Defendants	unknown	unknown
D-3	Discovery Expenses	unknown	unknown
D-4	Discovery Safeguards	minimal	minimal
E-1	Adequate Funding; Impact Statements	minimal	minimal
E-2	Limitations on Use of CJA Appropriations	none	none
H-1	Death Penalty Resource Centers	11.5	none <sup>4</sup>

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<sup>4</sup> Total costs are based on Fiscal Year 1992 expenditures. Because this is an ongoing program, the recommendation to continue the program was not considered to have any additional cost over existing policy.



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<u>Recommendation</u>	<u>Description</u>	<u>Total Program Cost in \$ Millions</u>	<u>Net Cost in \$ Millions</u>
I-1	Choice of Counsel	minimal	minimal
I-2	Reimbursement Study	minimal	minimal
I-3	Panel Atty Indemn.	minimal	minimal <sup>5</sup>
I-4	Seven-Year Review	minimal	minimal

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<sup>5</sup> If compensation for panel attorneys is increased, this recommendation will have no cost. If not, indemnification coverage should be made available at minimal cost.

