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Committee on Defender Services**  
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January 5, 2006

Honorable Thomas F. Hogan  
Chair, Executive Committee of the  
Judicial Conference  
United States Courthouse  
333 Constitution Avenue, N.W.  
Washington, DC 20001

Re: Exploration of Whether the Defender Services Program Should be Placed Outside the  
Judiciary

Dear Judge Hogan:

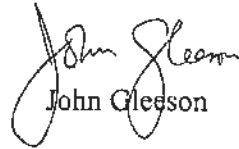
At its meeting in December 2005, the Committee on Defender Services reviewed the enclosed report from its Subcommittee on Long-Range Planning and Budgeting, summarizing efforts over the past 18 months to examine the Executive Committee's suggestion that the Defender Services Committee consider whether the Defender Services program should be placed outside the judiciary.

The Committee on Defender Services determined, consistent with the recommendations set forth in Section XIV of the report, that (1) the program should retain its current status within the judiciary and (2) systemic issues implicating the independence of the defense function should continue to be addressed by the Committee on Defender Services' Long-Range Planning and Budgeting Subcommittee.

Honorable Thomas F. Hogan  
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If you have questions regarding the report or the Committee's position, I would be glad to discuss them with you.

Sincerely,



John Gleeson

Enclosure

## **Should the Structure of the Defender Services Program be Changed?**

### **Report to the Committee on Defender Services of the Judicial Conference of the United States**

#### **I. INTRODUCTION**

In April 2004, as part of a comprehensive cost-containment effort for the entire judiciary, the Executive Committee of the Judicial Conference of the United States suggested that the Committee on Defender Services consider whether Defender Services should be a separate program outside the judiciary. This paper presents the results of the collaborative study of this question conducted by the Committee on Defender Services' Subcommittee on Long-Range Planning and Budgeting, the Office of Defender Services, federal defenders, and Criminal Justice Act (CJA) panel attorneys. Its purpose is to assist the Committee in responding to the Executive Committee's request.

#### **II. BACKGROUND**

As articulated by then-Executive Committee Chair, Chief Judge Carolyn Dineen King:

The long-range budget projections for Defender Services suggest that growth rates that have averaged over 13 percent per year since fiscal year 2001 likely will continue through fiscal year 2009, under current policies and practices.... This projected growth in requirements may not be sustainable in the current budget environment. At a minimum, it could result in Congress having to appropriate funds for the Defender Services account at the expense of other judiciary accounts, particularly the Salaries and Expenses account....

.... [W]e are particularly interested in your committee's analysis of the following ideas.... Consider whether the Defender Services program should be a separate program outside of the judiciary....

(Memorandum from Chief Judge Carolyn Dineen King, Chair, Executive Committee, to Judge Patti B. Saris, Chair, Committee on Defender Services, April 29, 2004.)

In June 2004, the Committee on Defender Services referred the Executive Committee's suggestion to its Subcommittee on Long-Range Planning and Budgeting for a comprehensive review. The Subcommittee was asked to address whether there is a programmatic need to change the organizational status of the Defender Services program and, if so, to identify alternative, optimal structures for accomplishing the mission. The issues were to be explored with the assistance of federal defenders and CJA panel attorneys, as part of the Committee's long-range

strategic planning process. In July 2004, a small study group<sup>1</sup> was identified to focus the participation of federal defenders and CJA panel attorneys on what has come to be referred to as “the independence study.”

At its September 21, 2004 session, the Judicial Conference approved a cost-containment strategy for the judiciary, which included studying the placement of the Defender Services program. (JCUS-SEP 04, pp. 5-7.) In December 2004, the Committee on Defender Services approved a project plan for the initiative, providing that:

[B]ased upon a comprehensive review of the Defender Services program’s history, mission, and current performance, and a careful exploration of possible alternatives for change, the ... Committee’s Long-Range Planning and Budgeting Subcommittee will advise the ... Committee as to whether it would be in the best interests of the Defender Services program to pursue structural changes, within or outside the judiciary. This will include consideration of whether the program should be: (a) a separate program outside of the judiciary, (b) a separate program within the judiciary, or (c) remain in its current status as a program under the auspices of the Judicial Conference with the assistance of its Committee on Defender Services and the Administrative Office.

The scope of this review and its guiding principles are outlined in sections III and IV below. Sections V through VII summarize the program’s structural history, governance and administration, and how its appropriation is requested and managed. Section VIII provides an evaluation of program performance, including survey results and study group observations. Sections IX and X introduce the American Bar Association’s standards for developing optimal public defender systems and briefly describe reviews of state systems. Section XI presents aspects of the structure, governance, and funding of the Federal Judicial Center (FJC) and the United States Sentencing Commission (USSC), two entities that operate independently within the judiciary. Sections XII and XIII describe the views of representatives from the Administrative Office’s Office of Finance and Budget about the likely impact of restructuring upon the Defender Services appropriation, and perspectives from federal defenders and panel attorneys about the need to make improvements without jeopardizing program funding. Section XIV provides recommendations for responding to the Executive Committee.

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<sup>1</sup> The study group is composed of four federal defenders and two CJA panel attorneys, who are also members of the Administrative Office’s Defender Services Advisory and/or Performance Measurement Working Groups. The federal defenders participating include the chair of the Advisory Group, Kathleen M. Williams (FL-S); a co-chair of the Working Group, Barry J. Portman (CA-N); R. Fletcher Peacock (FL-M); and Susan M. Otto (OK-W). The CJA panel attorney district representatives involved are John Lentine (AL-N), who is the chief panel attorney member of the Advisory Group, and Gordon Blackman (LA-W), who is the panel attorney member of the Working Group. From August 2004 through February 2005, Claire Rauscher (NC-W) assisted the group as the chief panel attorney member of the Advisory Group.

### III. SCOPE OF COLLABORATIVE REVIEW

With guidance from the Long-Range Planning and Budgeting Subcommittee, the study group and ODS staff reviewed the program's history, mission, and current performance and discussed possible alternatives for change.<sup>2</sup> In doing so, they considered the results of surveys of judges, CJA panel attorneys, and federal defenders about the Defender Services program and the opinions expressed by other federal defenders and CJA panel attorneys at national conferences and strategic planning meetings. The study group's observations are included in Section VIII. B below.

The question of whether the Defender Services program should be placed outside the judiciary was presented to federal defenders and/or CJA panel attorneys at the annual Federal Defender Conference (December 6-7, 2004), at a joint session of federal defenders and the Committee on Defender Services (December 8, 2004), and at the Tenth National Conference of CJA Panel Attorney District Representatives (February 13-14, 2005). Over the past year and a half, the independence study has also been discussed at the semi-annual meetings of the Long-Range Planning and Budgeting Subcommittee and of the Administrative Office's Defender Services Advisory and Performance Measurement Working Groups.

The Long-Range Planning and Budgeting Subcommittee included this initiative as a major discussion topic at its meetings in October 2004, February 2005, August 2005, and September 2005. In October 2004, the Subcommittee reviewed historical reports about the Defender Services program, American Bar Association guidelines, and Judicial Conference policies, and agreed upon a proposed project plan. In February 2005, the Subcommittee received a report from the study group on its preliminary observations with respect to program performance issues that have independence implications and considered comments made at recent conferences by federal defenders and CJA panel attorney district representatives about the initiative.

At its meeting in August 2005, the Subcommittee considered relevant aspects of state systems for the delivery of defense services and reviewed the structure, governance, and statutory bases of two independent organizations within the federal judiciary: the Federal Judicial Center and the United States Sentencing Commission. Representatives of indigent defense systems in three states presented overviews of their respective state programs (Virginia, North Carolina, and Oregon).<sup>3</sup> The Subcommittee received reports of interviews with individuals who recently held

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<sup>2</sup> The study group met by telephone with ODS staff on more than 10 occasions over the past year to discuss this initiative; at the Administrative Office with the Chair of the Long-Range Planning and Budgeting Subcommittee on November 17, 2004; and with the full Subcommittee on February 22, August 3, and September 28, 2005.

<sup>3</sup> The study group interviewed personnel from other state indigent defense organizations (e.g., Massachusetts and Florida); a defender provided an oral report regarding the Massachusetts system at the August 2005 Subcommittee meeting.

or are now holding senior positions in the Federal Judicial Center and the United States Sentencing Commission. Additionally, staff from the Administrative Office's Office of Finance and Budget provided their views with respect to the possible impact of restructuring the Defender Services program upon future appropriations.

#### **IV. GUIDING PRINCIPLES**

The right to the effective assistance of counsel is a constitutionally mandated, critical component of the criminal justice system and the foundation upon which the liberty of all Americans is protected. In exploring structural issues, the mission of the Defender Services program must be the central objective:

The mission of the Defender Services program is to ensure that the right to counsel guaranteed by the Sixth Amendment, the Criminal Justice Act (18 U.S.C. § 3006A), and other congressional mandates is enforced on behalf of those who cannot afford to retain counsel and other necessary defense services. By fulfilling its mission, the Defender Services program helps to (a) maintain public confidence in the nation's commitment to equal justice under law and (b) ensure the successful operation of the constitutionally-based adversary system of justice by which both federal criminal laws and federally guaranteed rights are enforced.

*(Outline of the Defender Services Program Strategic Plan, approved by the Committee on Defender Services, December 2002.)*

The evaluation of possible alternatives is guided by the following statement of priorities, as articulated by Judge Patti B. Saris, then-Chair of the Committee on Defender Services:

While we must be responsive to our fiscal environment and responsible stewards, we must not lose sight of our essential mission and core values. For the judiciary it is justice; for the Defender Services program, it is effective representation guaranteed by the 6<sup>th</sup> Amendment to our Constitution. With respect to CJA panel attorneys, the challenge remains the same: to ensure that compensation is fair and that vouchers not be arbitrarily reduced because of the fiscal environment. As for FDOs (federal defender organizations), they are the Defender Services program's flagship in terms of quality and cost-effectiveness, and therefore our top priority is to maintain their integrity.

*(Memorandum of June 24, 2004, from Judge Patti B. Saris, Chair of the Committee on Defender Services, to Chief Judge Carolyn Dineen King, Chair of the Executive Committee, reporting on the results of the Defender Services Committee's cost-containment discussions at its meeting on June 14-15, 2004.)*

Any alternative structure must not compromise the rights of individuals under the U.S. Constitution or other federal law, nor diminish the quality of representation provided under the CJA and related statutes.

## V. STRUCTURAL HISTORY

### Historical Background

In passing the Criminal Justice Act of 1964, the Congress established within the judicial branch a program to provide compensation and expense reimbursement for attorneys appointed to represent individuals with limited financial means in federal criminal proceedings. Until then, there was no authority to compensate appointed counsel for their services, and federal judges depended on the professional obligation of lawyers to provide *pro bono publico* representation to defendants unable to retain counsel.

The goal of the Criminal Justice Act of 1964 was to ensure the Sixth Amendment right to effective assistance of counsel and equal access to justice in the federal courts. The Act adopted many of the recommendations included in the *Report of the U.S. Attorney General's Committee on Poverty and the Administration of Criminal Justice ("Allen Report")*, submitted to Congress in March 1963, with respect to financial eligibility for representation, compensation and reimbursement of appointed counsel for out-of-pocket expenses, provision of necessary defense services other than counsel, and the requirement that each federal district court and court of appeals 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 these alternatives. The Congress deferred adoption of other proposals, such as the *Allen Report's* recommendation for creation of federal defender organizations (FDOs).

In 1967, the Department of Justice and the Judicial Conference commissioned Professor Dallin H. Oaks of the University of Chicago Law School to evaluate the initiatives implemented by the Criminal Justice Act of 1964. The *Oaks Report (The Criminal Justice Act in the Federal Courts, December 31, 1967)*<sup>4</sup> recommended statutory amendments and changes in the administration of the Act, to include establishing federal public defender and community defender organizations as options for the district courts' plans. As a result, Congress amended the Act in 1970 to provide for two types of FDOs, public defender organizations and community defender organizations. The former are federal offices staffed by federal employees and funded through a federal budget process. The latter are, generally, private non-profit corporations that are staffed by private employees and funded through a grant process. In authorizing FDOs, Congress recognized the need for a strong, independent federal defender program and emphasized the need for ongoing congressional review of its structure:<sup>5</sup>

The committee recognizes the desirability of eventual creation of a strong, independent office to administer the federal defender program. It considered as a

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<sup>4</sup> Reprinted in Senate Committee on the Judiciary, 90<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (1969).

<sup>5</sup> Senate Report No. 91-790, 91<sup>st</sup> Cong., 2<sup>nd</sup> Sess., April 23, 1970, at 18.

possibility the immediate establishment of a new, independent official - a "Defender General of the United States." It also considered establishing a special directorate for defender programs within the Administrative Office of the United States.

The committee, however, does not recommend founding an independent office at this initial stage. Such a step would be premature until Congress has had a[n] 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 next step.

In 1991, as required by the Judicial Improvements Act of 1990 (Pub. L. No. 101-650), the Committee to Review the Criminal Justice Act was established to conduct a comprehensive analysis of the CJA program. This special Judicial Conference committee, chaired by Judge Edward C. Prado (then a district court judge in the Western District of Texas and a member of the Defender Services Committee), was appointed by Chief Justice William H. Rehnquist.

Almost all recommendations presented in the *Prado Report (Report of the Committee to Review the Criminal Justice Act, January 29, 1993)*<sup>6</sup> were adopted by the Judicial Conference. However, the "centerpiece" of the Committee's recommendations - to create within the judicial branch a new Center for Federal Criminal Defense Services - was not.<sup>7</sup> In March 1993, the Judicial Conference rejected the idea in its *Report of the Judicial Conference of the United States on the Federal Defender Program (Judicial Conference Report, page 18)*, advising Congress that

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<sup>6</sup> Reprinted in *The Criminal Law Reporter (Bureau of National Affairs)*, Vol. 52, no. 22, March 10, 1993.

<sup>7</sup> The proposed Center, to be governed by a board of directors, would have established policy and provided direction with respect to the appointment of counsel and the provision of legal services for financially eligible individuals in federal criminal proceedings. It would have been located in the judicial branch, but would have operated outside the Judicial Conference. Responsibilities of the Center would have included providing essential management and administrative support for the program, policy guidance and other staffing support to the board. It also would have developed and presented the annual congressional appropriation requests, and formulated and executed the program's annual appropriation spending plan. Most federal defenders who reviewed the proposal and a majority of the members of the Committee on Defender Services opposed creating the Center.



“National leadership and administration of the CJA program should remain with the Judicial Conference of the United States, assisted by its Committee on Defender Services and the Administrative Office of the United States.”<sup>8</sup>

The *Judicial Conference Report* (pp. 16-17) explained that the Prado Committee’s recommendations “were justified on the assumption that there is a ‘perceived’ need for complete independence of defenders from the federal judiciary” and that the Prado Committee “had presented no empirical data to support its recommendation.” It asserted that (a) creation of the Center “would subject unnecessarily the entire CJA program to politicization and heightened vulnerability,” (b) “criminal defense programs have no constituency, no power base, and no better champion than the judiciary,” (c) creation of a new Center would result in “elimination of involvement by the judiciary in CJA issues and a diminution in the degree of judicial support for CJA appropriations requests and programs,” and (d) the money required to establish the Center “would be better spent on funding more new federal defender offices.”

The Prado Committee had also recommended that a comprehensive review and evaluation of the CJA program be undertaken every seven years, and that legislation should be enacted to ensure this would happen. The *Judicial Conference Report* stated (p. 37) that there was no need for such legislation, concluding instead that “the judiciary should arrange for a comprehensive, impartial review of the CJA program every seven years.”

## **VI. PROGRAM GOVERNANCE AND ADMINISTRATION**

Various entities provide control, oversight, guidance, or assistance with respect to program management or the delivery of representational services under the CJA and related statutes. The oversight and operational structure of the program is outlined below.

### **Administration and Management of the Defender Services Program**

- *The Judicial Conference*, as the policy making body for the federal judiciary, promulgates guidelines and policies for the administration of the CJA and related statutes.<sup>9</sup>
- *The Judicial Conference’s Committee on Defender Services* is the primary body charged with national policy formulation for and fiscal and administrative oversight of the program. It recommends policies and funding priorities and monitors the expenditure of CJA funds, advises the Judicial Conference of developments that require additional

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<sup>8</sup> See also, United States Courts: Selected Reports, Reports of the Proceedings of the Judicial Conference of the United States (1993), Activities of the Administrative Office of the United States Courts, Judicial Business of the United States Courts, Section I, pp. 23-28.

<sup>9</sup> The CJA provides that the Judicial Conference may issue rules and regulations governing the operation of plans formulated under the Act. 18 U.S.C. § 3006A(h).

resources, and, when the budget is being prepared, proposes funding requests to support the program. The Committee makes legislative and policy recommendations to the Conference, including proposals to amend the CJA Guidelines. While the Conference has delegated to the Committee the authority to approve funding for individual FDOs, it retains the ultimate authority to approve guidelines, policies, or funding for the Defender Services program. (See Volume 7 of the *Guide to Judiciary Policies and Procedures*.)

- *The CJA Guidelines* are non-binding statements of Judicial Conference policy that are intended to guide judges and attorneys with respect to implementation of the Act.
- *The Administrative Office of the U.S. Courts* is the administrative component of the federal judiciary. Its Director is responsible for overseeing the expenditure of funds appropriated by Congress for the administration and operation of the federal appellate and district courts, and various programs and activities placed under the judiciary's supervision, including the Defender Services program.<sup>10</sup>
- *The Office of Defender Services*, Administrative Office of the U.S. Courts, functions as the primary administrator of the Defender Services program and provides policy, legal, management, and fiscal advice on related matters to the Director, the Committee on Defender Services, judicial officers and employees, private attorneys, and federal defenders and their staffs. The Office's responsibilities include continuing education and training for persons providing representational services under the Act.
- *The Courts of Appeals* are authorized by the CJA to appoint federal public defenders (for each district within their respective circuit that has a CJA plan establishing a federal defender organization) to four-year terms, after considering recommendations of judges from the relevant district courts; fix each federal public defender's salary at a level not to exceed that of the U.S. Attorney for the district served; and approve the number of full-time attorneys the federal public defender may hire. 18 U.S.C. § 3006A(g).
- *The Judicial Councils of the Circuits* make orders for the effective and expeditious administration of justice within their respective circuits. The CJA provides that district court CJA plans must be approved by the judicial council for the circuit, and that prior to doing so, the council shall supplement the district plan with provisions for representation on appeal. 18 U.S.C. § 3006A(a)(3).

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<sup>10</sup> The Administrative Office, circuit councils, and circuit conferences were created in 1939 by "An Act to Provide for the Administration of the United States Courts, and for Other Purposes," 53 Stat. 1223. The legislation shifted budgetary and personnel responsibility for the federal courts from the Department of Justice to the newly created Administrative Office and directed it to function under the supervision of the Judicial Conference.

- *District Courts* are responsible under the Act for establishing a plan for furnishing representation under the Act. Subject to the approval of the circuit judicial council, the district court determines whether to rely exclusively upon the appointment of private panel attorneys or to seek the creation of a federal public or community defender organization. The district court retains authority over the appointment of counsel and associated compensation and reimbursement of expenses of panel attorneys at that level, subject to the approval of the chief circuit judge (or circuit judge delegate) for payment of excess compensation claims. 18 U.S.C. § 3006A(a)(3), (d)(3), (g)(1).
- *Other Judicial Conference Committees.* See Section VII. B-D with respect to the authority of the Executive and Budget Committees regarding Defender Services funding matters. The Committees on Security, Space and Facilities, Criminal Law, Judicial Resources, and Codes of Conduct also have jurisdiction with respect to substantive areas affecting Defender Services personnel and resources.

## VII. FUNDING FOR THE DEFENDER SERVICES PROGRAM

### A. Overview

Funding for the Defender Services program is provided by Congress through a separate “no-year” appropriation, within the judiciary’s annual appropriations bill.<sup>11</sup> It includes monies for the operation of FDOs and for the compensation and reimbursement of panel attorneys and other persons who furnish services under the CJA.

The CJA program has grown dramatically over the past 40 years. Since the Act was amended in 1970, there have been 74 FDOs established to serve 85 of the 94 judicial districts. At the time the *Prado Committee Report* was completed in 1993, the number of CJA appointments had risen to about 80,000 from about 16,000 per year in 1964. Over those 29 years, the annual resource needs of the program had increased from approximately \$1 million to at least \$295 million. Twelve years later, the Consolidated Appropriations Act of 2005 included \$5.43 billion for the judiciary, with \$667.3 million for Defender Services, to support over 169,000 representations. For FY 2006, the forecasted requirements are \$744.5 million for 171,400 representations.

The Executive Committee’s cost-containment focus on the placement of the Defender Services program arises from the perceived potential adverse impact of the program’s continuing

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<sup>11</sup> The accounts appropriated to the judiciary are the: (1) Supreme Court, (2) Court of Appeals for the Federal Circuit, (3) Court of International Trade, (4) Courts of Appeals, District Courts, and Other Judicial Services (Salaries and Expenses, Defender Services, Fees of Jurors and Commissioners, and Court Security), (5) Administrative Office of the U.S. Courts, (6) FJC, (7) Payment to Judicial Retirement Funds, and (8) the U.S. Sentencing Commission. (See *Guide to Judiciary Policies and Procedures*, Volume 1, Chapter 7, Part B, section 2, paragraph 2.4.)

growth on “other” judiciary accounts. Tables 1 and 2 below provide a cost context for those concerns. Table 1 illustrates the growth of the Defender Services program over the past four fiscal years (2002 - 2005), including its rate of increase within the overall judiciary appropriation, and the annual caseload.

Table 1. Defender Services Program Growth

	FY 2002	FY 2003	FY 2004	FY 2005
Judiciary	\$4,740,398,000	\$4,922,164,000	\$5,157,305,000	\$5,425,992,000
Defender Services	\$500,671,000	\$552,189,000*	\$624,100,000*	\$667,321,000
CJA Program Percentage	10.6%	11.2%	12.1%	12.3%
Representations	132,845	147,869	162,298	162,609 (est.)

\* Includes supplemental appropriations of \$17.228 million in FY 2003 and \$26.0 million in FY 2004.

Table 2 compares the rate of increase in the judiciary appropriation and in the Defender Services account over the past three fiscal years (2003 - 2005).

Table 2. Relative Rates of Increase in Judiciary and Defender Services Appropriations

	FYs 2002 - 2003	FYs 2003 - 2004	FYs 2004 - 2005
Judiciary	3.8%	4.8%	5.2%
Defender Services	10.3%	13.0%	6.9%

## B. Preparing the Budget Request<sup>12</sup>

28 U.S.C. § 605 requires the Director, under the supervision of the Judicial Conference, to submit budget estimates for the federal courts to the Office of Management and Budget (OMB). The estimates must be approved by the Judicial Conference, with some exceptions (e.g., those for the U.S. Supreme Court).

The Committee on Defender Services reviews and approves national budget estimates for the Defender Services program about 16 months in advance of the fiscal year being considered. The Committee Chair will discuss the estimates with the Budget Committee of the Judicial Conference and its Economy Subcommittee. The Economy Subcommittee makes specific

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<sup>12</sup> See *Guide to Judiciary Policies and Procedures*, Volume 1, Chapter 7, Part B, section 2.

recommendations to the Budget Committee on funding for the Defender Services and other accounts appropriated to the judiciary (except for those that do not fall under the jurisdiction of the Judicial Conference). After considering the Economy Subcommittee's recommendations and following consultations with committee chairs, the Budget Committee recommends a judiciary budget, which is forwarded to the Judicial Conference.<sup>13</sup>

The Judicial Conference considers and approves the budget request at its September meeting, 12 months in advance of the start of the fiscal year under consideration. The budget request is then submitted to OMB for inclusion without change in the President's budget, as required by 31 U.S.C. § 1105(b). Generally, the President's budget is transmitted to Congress in February, about eight months prior to the start of the fiscal year, and Congress holds oversight hearings on the judiciary budget request between February and April.

If it becomes apparent that appropriated funds will not be sufficient to meet the needs of the judiciary, it may be necessary to submit a revised request. This generally occurs if there is new legislation that requires additional resources or if workload exceeds that projected in the original budget submission. If the request is made before the appropriation is approved, a budget amendment is submitted to Congress and is included in deliberations on the original budget submission. If the appropriation has been approved by Congress and signed by the President, the request takes the form of a supplemental request, and it is submitted to Congress, where it is usually considered as a part of a government-wide supplemental appropriations bill.

### **C. Interaction with Congress**

The Administrative Office, through its Office of Finance and Budget (OFB), manages the accounting, budgetary, economic, and congressional liaison functions associated with financial management of the judiciary.<sup>14</sup> OFB assists the Budget Committee's Subcommittee on Congressional Outreach and acts as the single point of contact between the judiciary and congressional staff with respect to all judiciary appropriations requests. As a matter of practice, Judicial Conference committee chairs and staff, other than the Budget Committee, do not meet or communicate with congressional appropriations staff unless it has been pre-arranged by OFB.

The Chair of the Budget Committee and the Director of the Administrative Office appear before Congress annually to present and explain the judiciary's budget needs for each fiscal year. ODS staff provide position papers and other information explaining the Defender Services budget request to the Chair of the Budget Committee, through OFB. Spending committee chairs, including the Chair of the Committee on Defender Services, do not testify at appropriation

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<sup>13</sup> When the Defender Services and Budget Committees disagree, the Defender Services Committee can take its position to the Judicial Conference.

<sup>14</sup> See *Guide to Judiciary Policies and Procedures*, Volume 1, Chapter 7, Part A, section 2.

hearings. OFB personnel work closely with congressional staff to brief them on the judiciary budget request and, with the aid of Administrative Office program representatives, to answer their questions before the hearings. OFB staff also draft testimony for the Chair of the Budget Committee and the Director (which is circulated within the Administrative Office for comment) and meet with them before the hearings.<sup>15</sup>

#### **D. Managing the Appropriation - The Financial Plan and Funds Allocations<sup>16</sup>**

The Executive Committee of the Judicial Conference approves the judiciary financial plans, which allocate the resources provided by enacted appropriations. The financial plans distribute funds by category of expense in accordance with the priorities established by the Executive Committee, program committees, and the Director of the Administrative Office (who, as indicated below, obtains advice from the Administrative Office's Budget Review Committee), with input from various components of the judiciary. Based on the approved financial plans, the appropriations are divided into allocations that constitute the authority to incur obligations.

The Administrative Office's Budget Review Committee (BRC) provides advice to the Director on budget matters, including on formulating allocation (spending) plans for the Salaries and Expenses, Defender Services, Fees of Jurors and Commissioners, Court Security, and Administrative Office appropriations. The BRC is composed of members of the Administrative Office's Executive Management Group, including the Assistant Director for Defender Services. The BRC "makes every effort to negotiate resolution of differences in opinion within the framework of the BRC" and submits a "group" recommendation for all financial plans to the Director. The BRC makes recommendations for apportioning projected funding shortfalls between the federal defender and panel attorney components of the Defender Services program. The BRC's recommendations are based upon global, judiciary-wide considerations. While the views of the various Assistant Directors on their particular programs are given due consideration, the BRC need not adopt the position of the Assistant Director of Defender Services or the determination of the Committee on Defender Services with respect to the recommended apportionment that would best accomplish the mission.

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<sup>15</sup> In March 2005, the Congress reorganized its appropriation committee structures. The judiciary was moved from the Commerce, Justice, State, the Judiciary and Related Agencies subcommittees to the Transportation, Treasury, HUD, the Judiciary, DC and Independent Agencies subcommittees.

<sup>16</sup> See *Guide to Judiciary Policies and Procedures*, AOUSC Administrative Manual, Chapter 6, Subchapter A, sections A-E.

## VIII. EVALUATION OF PROGRAM PERFORMANCE

### A. Survey Results

In March 2004, consistent with the Committee's long-range strategic planning process, the Administrative Office contracted with a private research company to survey judges, federal defenders and panel attorneys, and others about the Defender Services program. A survey of judges (distributed to over 460 circuit, district, and magistrate judges) was completed in November 2004. The surveys of over 500 panel attorneys were completed in late March 2005; preliminary results from the federal defender survey were compiled in late August 2005. The combined results provide a "snapshot" of the quality of representation provided by federal defenders and CJA panel attorneys, and a glimpse at problem areas that are affecting the availability of qualified CJA panel attorneys – key factors to be considered in making long-range planning decisions for the program.

#### Judge and Panel Attorney Surveys

Quality of Representation. The judges were asked to assess the quality of CJA representation provided by panel attorneys and federal defenders who had practiced before them in non-capital cases since May 1, 2002, as "excellent, very good, average, below average, or inadequate." Their overall evaluations were favorable, with 99.1% of the judges describing panel attorneys' representation and 100% viewing federal defenders' performance as "average" or better. However, there were significant differences reported between panel attorneys and federal defenders in the quality of representation that they furnish, with panel attorneys identified as providing markedly lower-quality services. The percentage of judges rating panel attorneys' performance as "very good or excellent" was 71.3%, while 93.3% evaluated federal defenders as "very good or excellent," an overall gap of 22% in quality at this level.

Availability of Qualified Panel Attorneys. On May 1, 2002, a congressionally approved increase to \$90 in the hourly rate at which panel attorneys may be compensated was implemented. Surveyed judges indicated that, although the overall impact of the \$90 rate has been positive, significant difficulties persist in obtaining the services of qualified panel attorneys. Over half of the judges reported that their courts are currently experiencing difficulty identifying enough qualified and experienced panel attorneys to "some, a moderate, or a great" extent. About half of the panel attorney district representatives surveyed also reported such difficulties within their districts, particularly in locating an adequate number of qualified panel attorneys with the necessary qualifications and experience, given the complexity of the cases. Furthermore, about half of the panel attorney district representatives reported that their districts are having trouble keeping qualified and experienced attorneys from leaving their panels.

Adequacy of Panel Attorney Compensation Rates. More than one-third of the panel attorneys surveyed (38%) reported that since the hourly compensation rate had increased to \$90 in May 2002, they had nevertheless declined to accept a non-capital CJA appointment. Other

than workload, the most frequently cited reasons were related to the low level of CJA panel attorney compensation and concerns about voucher reductions.

An analysis of survey data on panel attorney overhead rates reveals that they net an average \$26 per hour in non-capital CJA cases. A large number (70.1%) of CJA attorneys said that an increase in the \$90 hourly rate is needed for them to accept more non-capital CJA cases; if it were increased by \$40 per hour, 83.3% of them indicated they would accept more non-capital CJA cases.

Observations. The surveys show that the failure to fund the panel attorney program adequately, including fair and reasonable compensation rates, has adversely impacted the willingness and availability of qualified private attorneys to accept CJA appointments.

### **Federal Defender Survey**

The federal defender survey asked the heads of federal public and community defender offices about the administration and management of the Defender Services program. Overall responses were very positive with respect to the level of resources, funding, and training support available to them. All federal defenders responding to the survey “agreed or strongly agreed” that, over the past three years, they had been consistently able to obtain the necessary funding and support services for client representation. With respect to training, 87.5% “agreed or strongly agreed” that their organization had received sufficient funding to meet the training needs of all staff; however, 7.1% disagreed this was true for their FDO.

The federal defenders also reported on their ability to manage their offices without experiencing interference with case assignments, allocation of office resources, or the supervision of office staff. A strong majority (95.8%, 97.2%, and 94.4%) “agreed or strongly agreed” they were able to assign cases, supervise offices, and allocate resources, respectively, without interference. Over three-quarters (83.4%) of federal public defenders “agreed or strongly agreed” that circuit processes for appointment and reappointment of the federal public defender promote the independence of the defense function; a slightly higher percentage (91.3%) of community defenders indicated the processes for appointing their executive directors do so.

The surveys identified some difficulties with respect to the capacity of FDOs to meet their districts’ appointment needs at certain times. About half (41/72 – 56.9%) reported their FDO had declined or asked not to receive non-capital appointments (other than because of a conflict of interest), mostly because of existing case demands and current workload (39/41). About 10% (4/41) indicated resources were not available because they had been requested by the defender but not authorized by either the circuit, the Office of Defender Services, or the Committee on Defender Services.

For capital cases, 10.9% (7/64) reported their FDO had declined or asked not to receive appointments for capital prosecutions or appeals (other than because of a conflict of interest),



mostly due to existing case demands and current workload (5/7); three noted that none of the available attorneys in the office was qualified for capital representation, and one said resources were not available because they had not been authorized. For capital habeas corpus cases, 17.0% (8/47) reported their FDO had declined such cases (other than because of a conflict of interest), mostly because of existing case demands and current workload (6/8), and/or none of the attorneys available in the office was qualified to take the case (2/8).

Observations. The federal defender survey results indicate that funding levels must be sustained (or increased) for FDOs to continue to meet their districts' needs consistently and maintain the high-quality representation reported by the judges surveyed. Some strain on FDO capacity has occurred to the extent that more than half of the FDOs are declining or have asked not to receive non-capital appointments, one-tenth (10.9%) have done so for capital prosecutions or appeals, and almost one-fifth (17.0%) for capital habeas corpus cases.

## **B. Study Group Review**

The study group's objective was to assist the Subcommittee in assessing strengths and weaknesses of the Defender Services program, with respect to its mission. The group's approach was to identify problem areas with independence implications and to explore possible solutions. It did so by referring to the mission, goals, and strategies approved by the Committee on Defender Services in December 2002. The four program goals are to: (1) timely provide assigned counsel services to all eligible persons, (2) provide appointed counsel services that are consistent with the best practices of the legal profession, (3) provide cost-effective services, limiting increases in costs to those due to inflation and those necessary to respond to changes in the law or changes in prosecutorial, judicial, or law enforcement practices, and (4) protect the independence of the defense function performed by assigned counsel so that the rights of individual defendants are safeguarded and enforced.

The group identified areas in need of improvement, which are summarized below.

### **Program-wide Concerns**

- **There are inherent tensions in the appropriations process.** Independence concerns are raised by the judiciary's responsibility to request appropriations for the operation of both the courts and the Defender Services program. Questions could arise about whether enough time is spent discussing Defender programs and issues with Appropriations Committee staff and whether there is an inherent conflict in having to advocate for funding for both court operations and defender services.

### **Federal Defender Issues<sup>17</sup>**

- **There are concerns about the procedures associated with federal defender requests for additional funding to provide representation in “mega-cases.”** A federal defender’s budget may not be able to absorb extraordinary costs associated with providing representation in a particular case. When this occurs, the Committee on Defender Services’ Budget Subcommittee determines whether to provide the defender with additional funding. Commonly, the Subcommittee makes additional funding available but requires that the defender periodically return to the Subcommittee, report on developments in the case, reaffirm the continued need for additional funds, and request permission to continue to expend funds on the representation. In the view of many federal defenders, this process permits the Subcommittee to substitute its judgment for that of the defender with respect to case-specific and/or FDO resource management decisions and, consequently, interferes with a federal defender’s ethical obligation to exercise independent professional judgment in representing its clients.

Recent Initiative. These concerns have been communicated to the Defender Services Budget Subcommittee.

### **CJA Panel Attorney Issues<sup>18</sup>**

- (1) **Judicial or Court Review of Panel Attorney Funding Requests.** Panel attorneys assert that there is interference with counsel’s professional judgment in defending the CJA client, where decision makers are not experienced in defending criminal cases or do not otherwise have an understanding of the work necessary and cost of providing such representation. Judges and court personnel may be unfamiliar with criminal defense matters in general, and with a criminal defendant’s need for and cost of expert services in particular.

Possible Solutions. Encourage courts to delegate, to the maximum extent possible, the administrative responsibilities for review and approval of panel attorney funding requests and CJA vouchers to a specialist (CJA Panel Administrator/Supervisory Attorney) to administer the court’s CJA program with the assistance/oversight of a Supervising Committee. If necessary, pursue an amendment to the CJA to expand permissible delegations of authority.

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<sup>17</sup> These issues were discussed by federal defenders at their annual conference and joint session with the Committee in December 2004.

<sup>18</sup> These concerns were reported by CJA panel attorney district representatives at their annual conferences in February 2004 and February 2005 and are reflected in the March 2005 panel attorney survey results.

Current Initiatives. In September 2003, the Judicial Conference approved seeking legislation to expand the authority of the circuit chief judge to delegate approval of vouchers in excess of the statutory case compensation maximums beyond active circuit judges (JCUS-SEP 03, p. 20). Since then, the judiciary's proposed courts improvement bills have included provisions authorizing such delegations.

In June 2005, the Committee endorsed seeking a three-year pilot project for the Defender Services program to fund up to three circuit positions to support the case-budgeting process. The Judicial Conference approved the pilot project in September 2005 (JCUS-SEP 05, p. 21). The functions associated with these positions could result in improvements in the review of panel attorney funding requests and excess compensation vouchers at the district and circuit levels.

- (2) **Voucher Cutting.** Judges are reportedly cutting vouchers (and denying pre-approved funding requests) based on a perception that they need to reduce payments to panel attorneys in order to contribute to the overall judiciary cost-containment effort. Many panel attorneys perceive that the decision whether to pay a voucher in full is not always based on an assessment that the hours worked for which payment is sought were not reasonable and necessary to provide a defense. Consequently, voucher cuts frequently are viewed as arbitrary, especially when, as discussed below, no reason is given for making the reduction.

Recent Initiatives. In memoranda dated July 31 and August 12, 2003, each marked "Important and Urgent," Judge Carolyn Dineen King, Chair of the Executive Committee, advised all federal judges of the concerns expressed to the Committee on Defender Services that, when faced with a shortfall, judges might reduce or delay vouchers to help the budget situation. She urged them to process vouchers under the standards that are always applicable.

- (3) **Absence of Meaningful Voucher Review and Reconsideration Processes.** CJA panel attorneys continue to express concerns about: (1) unfair voucher reductions at district and appeals court levels and (2) the lack of a meaningful administrative review of their payment claims, including (a) the unwillingness of courts to notify attorneys of the reasons for reducing vouchers and (b) the absence of mechanisms for reconsideration of a reduction decision.

- These problems were identified by the Prado Committee in 1993 (*Prado Report*, page 39) and noted by the Vera Institute of Justice in December 2002 in its report, *Good Practices for Federal Panel Attorney Programs (Vera Report)*, pp. 13-14 and 30. In 2002, only 21 of 94 district plans provided for notice and/or an explanation of voucher reductions; 11 of them provided attorneys an explicit right to request review of the reduction.

- In December 2003, the Committee approved “Core Principles for CJA Panel Management and Administration,” which were widely disseminated to judges throughout the judiciary and encouraged courts to “[E]stablish procedures for reconsideration of compensation denials or reductions by the judge who made the denial or reduction.”<sup>19</sup>

Results from the recent surveys of judges and CJA panel attorneys confirm that these voucher review issues continue.

- *Panel Attorney Survey.* One-third of the panel attorneys (33.7%) surveyed in February 2005 reported having a voucher reduced (for reasons other than administrative or mathematical inaccuracies) at either the district or circuit level since May 2002. Of the panel attorneys stating their vouchers had been reduced, 84.1% indicated reductions of *less than 30%* at the district level; 72.9% said that level of reduction occurred at the circuit level. Reductions of *30% or more* were reported by 15.9% of those panel attorneys experiencing them at the district level and 27.1% at the circuit level.
- *Judges' Survey.* 70.9% of judges responding said counsel in their district or circuit are notified “always or often” of the reasons for reducing the voucher; 59.3% indicated counsel are “always or often” given an opportunity for reconsideration; 24.9% reported that the attorneys are “rarely or never” given an opportunity for reconsideration.
- *Panel Attorney Survey.* In contrast, more than half of the panel attorneys surveyed reported they were “rarely or never” informed of the reasons for voucher reductions at the district (63.3%) and circuit (66.0%) levels. Further, three-fourths of them (75.0%) reported they are “rarely or never” given an opportunity for reconsideration of a voucher reduction at the district level, and more (86.3%) report the same is true at the circuit level.

Possible Solution. Pursue revisions to the CJA Guidelines to establish a nationwide practice whereby courts notify appointed attorneys of the reasons for voucher reductions and provide them an opportunity for reconsideration.

Current Initiative. The Long-Range Planning and Budgeting Subcommittee has reviewed draft amendments to the Guidelines for the Administration of the Criminal Justice Act and Related Statutes (CJA Guidelines), Volume 7, *Guide to Judiciary Policies and Procedures*, which currently provide (in paragraph 2.22D) that judges “may wish to

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<sup>19</sup> It has been observed by panel attorneys that an opportunity for reconsideration “by the judge who made the reduction decision” is not nearly as meaningful as an opportunity for reconsideration by someone else, who could possibly offer a fresh, objective review.

notify appointed counsel” of the voucher reduction and “provide an explanation of the reason.” Proposed changes will be considered by the Committee on Defender Services at its meeting in December 2005.

- (4) **Arbitrary Appointment of Counsel.** In some districts, the appointment of attorneys is reported to be arbitrary, rather than consistent with a process that includes making an effort to match the attorney’s skills with the nature/complexity of the case involved. There needs to be a strong management presence overseeing the local panel program; systemically, arbitrary appointments will adversely impact the quality of representation provided.

Possible Solutions. Continue to encourage local efforts at improving administration and management of CJA panels, to include the use of a CJA Panel Administrator/Supervisory Attorney to effectuate appointments.<sup>20</sup> If necessary, pursue an amendment to the CJA to expand permissible delegations of appointment authority.

Current Initiative. The pilot circuit case-budgeting positions may, depending on how they are utilized, result in improved panel selection processes at the district and circuit levels.

- (5) **Continuity of CJA Counsel on Appeal.** Policies or practices that require CJA panel attorneys appointed at the trial level to continue representation on appeal should be reexamined because they may adversely impact the quality of representation provided. Some panel attorneys request leave to withdraw from appointment on appeal because they lack appellate defense skills/qualifications; others because of caseload or scheduling difficulties. In some circuits, leave to withdraw is presumptively denied; in others, it is very difficult to obtain.

Current Initiative. This is a major issue identified in the Vera Institute’s study of circuit CJA plans and practices; when the final report is completed, it will be reviewed to evaluate possible improvement initiatives.

### C. Observations about Prospects for Change

The study group observed that (1) the hortatory nature of the CJA Guidelines limits their effectiveness in producing judiciary-wide change; (2) legislative initiatives require Judicial Conference support; and (3) proposals to amend the CJA to permit expanded, discretionary delegations of judicial authority may garner greater Judicial Conference support than initiatives to statutorily change the ultimate appointment and voucher approval authorities.

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<sup>20</sup> The Model CJA Plan, endorsed by the Committee and included in the CJA Guidelines, Appendix G, provides guidance for effectively managing panel attorney appointments by utilizing a local CJA Committee; the December 2002 *Vera Report* also articulates “good practices” in this area.

## IX. AMERICAN BAR ASSOCIATION STANDARDS AND GUIDANCE

The American Bar Association has published guidance for developing optimal systems for the delivery of public defense services. Ensuring the independence of the defense function is a critical component, as described in *The Ten Principles of a Public Defense Delivery System*, adopted by the ABA House of Delegates on February 5, 2002. A summary of the independence principle (Principle One)<sup>21</sup> provides that:

The public defense function, including the selection, funding, and payment of appointed counsel, is independent. The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safeguard independence and promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems. Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense. The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff.

Observations. The ABA standards call for greater independence in program oversight and in the selection, funding, and payment of appointed counsel than is present in the Defender Services program as currently structured. For example, the fact that CJA panel attorneys are subject to a greater degree of judicial supervision than retained counsel is inconsistent with ABA standards and guidance for the delivery of public defense services.

## X. REVIEW OF RELEVANT ATTRIBUTES OF STATE SYSTEMS

The study group considered the ABA's recent review of 22 state defender systems, entitled, "*Gideon's Broken Promise: America's Continuing Quest for Equal Justice*,"<sup>22</sup> which was based on testimony submitted during a series of public hearings held in 2003. The review found that state systems are plagued by two major problems: the lack of adequate funding and inadequate legal representation. Common structural deficiencies include (1) independence issues arising from undue political and judicial influence, (2) the absence of oversight to ensure uniform, quality services, and (3) failures to provide counsel early enough or at all, despite the clear mandates imposed by relevant Supreme Court decisions.<sup>23</sup>

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<sup>21</sup> The elements of independence summarized in Principle One are extracted from the more detailed *ABA Standards for Providing Public Defense Services*, Standard 5-1.3, Professional Independence (Third Edition, 1992).

<sup>22</sup> *Gideon's Broken Promise* is available at [www.indigentdefense.org](http://www.indigentdefense.org).

<sup>23</sup> *Id.*, pp. 7-14 and 20-26.

A major recommendation for improving state public defense systems was to establish an oversight organization, such as an indigent defense commission, governed by an independent board of directors or trustees, to oversee the delivery of services within the state. Consistent with the *ABA Standards for Providing Public Defense Services*, Standard 5-1.3, Professional Independence, the oversight authority should be comprised of persons dedicated to excellence in defense services, but should not include judges or prosecutors. Preferably, the commission should administer directly all funds for indigent defense services in the state (or, alternatively, provide payments of state funds in order to augment local programs), monitor and enforce compliance with statewide standards, and collect and maintain data on the system.<sup>24</sup>

*Gideon's Broken Promise* identified several states that had integrated model approaches to the delivery of defense services, including creation of an independent oversight commission. However, the report notes that "unfortunately, ... the overall level of funding is still very inadequate."<sup>25</sup>

To determine whether attributes of certain state systems could be relevant in reviewing the structure of the Defender Services program, the study group focused on three states that had established independent oversight commissions over the past five years: Virginia (2004), North Carolina (2000), and Oregon (2003). Representatives from those states presented overviews of the structure, governance, and funding of their respective systems at the August 3, 2005, Long-Range Planning and Budgeting Subcommittee meeting. Major advantages attributed to the commission model and related to securing adequate program funding include (1) its effectiveness as a centralized program advocate, (2) the authority to submit a proposed statewide budget request to the state legislature (generally through the Governor, but not otherwise subject to reduction), and, most importantly, (3) direct access to state appropriators, including the appearance of a commission representative at hearings to explain the budget request. Each speaker viewed his or her state's system to be stronger, more independent, better funded, and more cost-effective after being restructured with an independent commission. While two representatives reported some short-term interruptions had occurred in the level of defense services available during the transition period due to inadequate funding, both expressed the view that their funding would have been less if they were still operating under their previous model.

## **XI. REVIEW OF OTHER JUDICIARY-RELATED PROGRAMS**

In July 2005, ODS staff reviewed the structure, governance, and funding of the Federal Judicial Center and the United States Sentencing Commission and interviewed Center and Commission representatives.

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<sup>24</sup> *Id.*, pp. 42-43.

<sup>25</sup> *Id.*, p. 36.

#### **A. The Federal Judicial Center (FJC)**

The FJC is an entity within the judiciary, established by Congress in 1967 (see 28 U.S.C. §§ 620 et seq.). Its mission is to further the development and adoption of improved judicial administration in the courts of the United States. The Center provides education and training for judges and employees of the federal courts, conducts empirical and exploratory research into different aspects of judicial administration, studies federal judicial history, and provides assistance to foreign judiciaries.

The Center is governed by a nine-member board chaired by the Chief Justice. The Board consists of seven elected members and two permanent members, the Chief Justice and the Director of the Administrative Office. The Judicial Conference elects seven members, but otherwise has no direct control over the Center's operations, which involve approximately 130 Center employees. The Director of the FJC appears before the biannual meetings of the Judicial Conference at the invitation of the Chief Justice.

The Center provides research support to Judicial Conference committees and must submit an annual report of its activities to the Conference. It must also transmit to Congress and the Attorney General copies of all reports and recommendations submitted to the Conference. However, the Center's structure and governance give it a high degree of formal independence, which primarily services its mission to provide unbiased, objective research and education on matters of interest to and affecting the work of the judiciary.

The Center staff prepare its budget request, which is reviewed and approved by the Center Board and is not subject to formal oversight or amendment by either the Judicial Conference or the Administrative Office. By mutual consent, the Judicial Conference's Budget Committee and the Administrative Office present and defend the Center's appropriation request, as a separate line item within the overall judiciary request. While the Center could access Congress directly regarding its appropriation and submits a statement to the appropriations subcommittees in conjunction with the annual hearings, the Committees on Appropriations have indicated their preference to consider the Center's request as part of the overall judiciary submission. As such, the appropriations staff expects the Administrative Office to be the judiciary's primary point of contact, unless the staff chooses otherwise to communicate directly with the Center.

The Center's FY 2005 appropriation is \$21,446,000. The Center has experienced a 28% reduction in its spending power since 1992. Rather than being seen as a function of its status as an independent judicial branch entity, this reduction is viewed as a product of a lower priority that funding for training (including associated travel expenses) typically is given during times of limited budgets and constrained resources.



## **B. The United States Sentencing Commission (USSC)**

The United States Sentencing Commission is an independent commission within the judiciary, established by Congress as part of the Sentencing Reform Act of 1984, 28 U.S.C. § 991. Its mission is to establish sentencing policies and practices for the federal courts; advise and assist Congress, the federal judiciary, and the executive branch in the development of effective and efficient crime policy; and to collect, analyze, research, and distribute a broad array of information on federal crime and sentencing issues.

The Commission consists of seven voting members and one nonvoting member. Voting members are selected by the President with the advice and consent of the Senate and serve staggered six-year terms. Not more than three of the commissioners may be federal judges and not more than four may be members of the same political party. The Attorney General, or the Attorney General's designee, is an ex-officio member of the Commission, as is the Chair of the U.S. Parole Commission. The Chair and Vice Chairs of the Commission hold full-time positions and are compensated at the rate paid federal appellate judges. Other commissioners hold part-time positions and are compensated at the daily rate paid federal appellate judges. The Commission appoints the Staff Director, who supervises day-to-day operations and about 100 employees, coordinates all agency functions, and serves at the pleasure of the Commission.

The Commission is required to make an annual report to Congress (28 U.S.C. § 994). Neither the Judicial Conference nor the Administrative Office exerts any direct control over the Commission. The Chair of the Commission appears before the biannual meetings of the Judicial Conference at the invitation of the Chief Justice.

The Commission staff prepares its budget request, which is not subject to formal oversight or amendment by either the Judicial Conference or the Administrative Office. While the Commission could access Congress directly regarding its appropriation, it has chosen to allow the Judicial Conference's Budget Committee and Administrative Office to present and defend its appropriation request, as a separate line item within the overall judiciary request. The Commission's FY 2004 appropriation was \$12,224,000; for FY 2005 it was \$13,126,000. As with the FJC, the Appropriations Committees have indicated their preference to consider the Commission's request as part of the overall judiciary package and that all contacts be coordinated through the Administrative Office, unless they choose to contact the Commission directly.

The Commission meets with congressional staff at least once each year to brief them on the Commission's activities, and informally with staff or congressional members on an occasional basis. It views this direct contact as essential to accomplishing its mission.

The Commission's structure and governance give it a high degree of formal independence, which is very important since the Commission's work often involves controversial issues with a high public profile. Nevertheless, the Commission's decisions are not insulated from the possibility that Congress may disagree with Commission recommendations and provide funding at less than the requested level.

### **C. Observations**

As statutorily created, independent entities within the judicial branch, the FJC and USSC have three major distinctions vis-à-vis the Defender Services program: (1) their budget estimates are not subject to amendment by the Budget Committee, Administrative Office, or Judicial Conference, (2) their ability to communicate directly with congressional staff and appropriations committees is not limited by the Administrative Office or the Judicial Conference, and (3) their operational and policy decisions are not subject to being revised or overruled by the Administrative Office or the Judicial Conference.

In recent years, the FJC and USSC have not been invited to appear before Congress to defend their budget requests. Their statements are provided by the judiciary witness and become a part of the hearing record, but the programs are not discussed at any great length during the hearing. This does not mean the same would be true for Defender Services if it were to become an independent entity within the judiciary, given the much larger size of its appropriation.

Under the current arrangement, at hearings and in meetings with congressional staff, the Defender Services program is a major topic of discussion. Defender Services personnel have briefed Appropriations Committee staff directly on the program and its budget requirements as well as provided roundtable presentations so Appropriations Committee staff can hear directly the concerns of federal defender and panel attorney representatives. Also, during congressional site visits, meetings are arranged with federal defender offices to discuss the defender program at the local level.

## **XII. VIEWS PROVIDED BY OFB REPRESENTATIVES**

Representatives from the Administrative Office's Office of Finance and Budget, who serve as the financial liaisons with Capitol Hill on appropriations matters, were invited to join the Subcommittee meeting on August 3, 2005, to contribute an OFB perspective. The Subcommittee elicited their views about whether the Defender Services appropriation would face increased financial vulnerabilities if restructured to become more independent, either within or outside the judiciary. Their opinions are summarized below.

**QUESTION:** How would the Defender Services program fare if it were restructured (within or outside the judiciary) to have a more active voice in dealing with Congress?

**OPINION:** If the Defender Services program were structured outside the judiciary (and without judiciary sponsorship), there would be a risk to the funding of the program. Historically, it has been difficult for Congress to spend limited funds on a function that has no apparent political benefit to the members.

**QUESTION:** What if the Defender Services program remained within the judiciary, but became more independent, like the Federal Judicial Center?

- OPINION: If the program became an independent entity within the judiciary, there would be no real difference in its funding circumstance. Although the budget estimates of the Federal Judicial Center and U.S. Sentencing Commission are not subject to revision by the Budget Committee or the Judicial Conference, the Chair of the Budget Committee presents them to Congress, with the Judicial Conference estimates, as part of an overall judiciary request.
- QUESTION: Would there be any advantage to the judiciary, in terms of securing more money for the other judiciary accounts, if Defender Services were a separate entity, but still within the judiciary?
- OPINION: No. Even if the Defender Services program were independent within the judiciary, the overall circumstance would not change for the judiciary or for the Defender Services program. Congress views all the judiciary accounts as a whole; all the accounts would still be competing together for the same pot of money.
- QUESTION: What if the Defender Services program were an independent entity within the judiciary, the Committee on Defender Services became its governing Board of Directors, and the Committee Chair presented and explained the Defender Services budget request to Congress?
- OPINION: It would be better for the Defender Services program if OFB advocated for its funding because the Defender Services program needs a buffer with Congress. It would be more palatable to Congress for OFB, which is somewhat removed from the program, to advocate on its behalf; if Defender Services presented its own budget request it would be perceived as self-serving and the appropriation would be more at risk than if OFB were the advocate.
- QUESTION: Why should the Defender Services Committee's budget estimates and judgment with respect to program requirements be subject to revision by the Budget Committee?
- ANSWER: These revisions are necessary control measures to ensure the overall judiciary budget request is credible.

Subsequent to the August 3, 2005 meeting, in response to an inquiry regarding the impact of moving the Defender Services program outside the judiciary altogether, the Office of Finance and Budget advised the Office of Defender Services (via e-mail on September 7, 2005): "If the Defender Services program/account were moved out of the judiciary's appropriation, OFB does not believe it would make a material difference in the funding level appropriated for the salaries and expenses account."

Observations. Recent history suggests that the Defender Services appropriation benefits significantly from direct contact between congressional staff and representatives of the program. Indeed, program representatives (such as the Chair of the Defender Services Committee and members of the Office of Defender Services and the defender community) have proven to be especially effective in explaining Defender Services requirements to congressional staff and appropriators and in educating them about the program, its critical role in maintaining the integrity and credibility of the U.S. criminal justice system, and about how well it is managed (i.e., its cost-effectiveness).

Greater direct access to appropriators could benefit the Defender Services program even if it were not restructured as an independent entity within the judiciary. Similarly, the opportunity to make Congress aware of the Defender Services Committee's determination with respect to Defender Services requirements (its annual budget estimate) could improve the prospects for receiving a more responsive appropriation.

For example, during FY 2004, appropriations staff (1) participated in roundtable discussions with Office of Defender Services personnel, federal defender and CJA panel attorney representatives, and members of the Committee on Defender Services, and (2) conducted an on-site interview of defender employees and local CJA attorneys at a federal defender office.<sup>26</sup> Subsequent to these meetings, the following language was included or referenced in congressional reports supporting the FY 2005 Defender Services appropriation:<sup>27</sup>

*Office of Court Administration and Defender Services* - The Federal Defender's Office [FDO] in the Southern District of Florida has developed a highly successful program to train, supervise, provide continuing education and mentor public defenders. This has resulted in a high degree of expertise in the Defender's Office and in the CJA panel attorneys in this district. The Federal Public Defender, the staff attorneys and the administrative staff are to be commended for their professionalism, dedication, and successes while building a program that is a model for the rest of the judiciary. This Committee enthusiastically supports the program this office has built and highly encourages the judiciary to use their complete program as a guide for other FDOs to follow.

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<sup>26</sup> OFB personnel arranged for the roundtable opportunity and accompanied the appropriations staff on the visit to the federal defender organization.

<sup>27</sup> Congress approved the judiciary's request for an increase to the maximum capital hourly rate, from \$125 to \$160, and higher non-capital case compensation maximums when it enacted the Omnibus Appropriations Act, Fiscal Year 2005, Pub. L. No. 108-447, 118 Stat. 2809 (December 8, 2004). (See the Joint Explanatory Statement of the Committee on the Conference, 150 Cong. Rec. H10235-01, November 19, 2004, 2004 WL 2658652, and SEN. REPORT NO. 108-344, 2<sup>nd</sup> Sess. 2004, 2004 WL 3044802.)

*Criminal Justice Act Panel Attorney Rates* - CJA panel attorney representations and pay rates have been thoroughly examined by this Committee. As a result, the Committee believes in order to maintain a high quality of panel representations, both the hourly rates and case compensation maximums must be addressed. Within the amounts provided herein, and effective January 1, 2005, this Committee recommends the hourly rates payable to capital case attorneys be increased to \$160 per hour.

In addition, the case compensation maximum amounts presently in effect are creating an unnecessary hardship on panel attorneys, court staff, and judges. Many judges administratively reduce the requested compensation on panel attorney vouchers in order to not exceed the statutory maximum and thereby reduce the administrative burden on chief judges. As a result, many panel attorneys in non-capital cases receive less compensation than they deserve. To make the representation compensation more accurately reflect actual expenses, this Committee increases the maximum compensation limits as outlined in section 304 of the accompanying Act.

### **XIII. FEDERAL DEFENDER AND CJA PANEL ATTORNEY PERSPECTIVES**

Consensus. Federal defenders have reported high levels of satisfaction with the oversight, resources, and funding provided for FDO operations. CJA panel attorneys, as noted above, report great dissatisfaction with the administration of local CJA panel attorney programs and the lack of adequate national funding to fairly compensate panel attorneys.

Collectively, the federal defenders and panel attorneys advocate for pursuing substantial changes in the CJA panel attorney program, but caution that any restructuring should not adversely impact, but rather enhance, the prospects for securing the congressional funding necessary to accomplish the mission. They are not in favor of adopting structural attributes of state systems which, as a whole, are perceived to be in substantial financial distress.

### **XIV. RECOMMENDATIONS FOR RESPONDING TO THE EXECUTIVE COMMITTEE**

QUESTION: Should the Defender Services program be placed outside the judiciary, as a judiciary cost-containment measure?

RECOMMENDED ANSWER: No.

Placement of the Defender Services program within the judiciary should be maintained. First, it is the opinion of the Administrative Office's Office of Finance and Budget (*supra*, p. 25) that moving the Defender Services program out of the judiciary and its funding out of the

judiciary's appropriation would not make a material difference in the funding level appropriated for the Salaries and Expenses appropriation. Second, even if such a structural change were perceived as helpful to the judiciary in securing funding, those benefits would likely be offset, and perhaps outweighed, by costs – both financial and institutional – associated with a significantly impaired defense function. There is ample reason to believe that funding for the Defender Services program would be jeopardized if any change were made to the responsibility of the Judicial Conference for the implementation of the Criminal Justice Act through its oversight and management of the program. The resulting diminution in the quality of appointed counsel provided to approximately 85% of federal defendants would necessarily impair the courts' ability to administer justice.

QUESTION: Should the Defender Services program be a separate program within the judiciary?

RECOMMENDED ANSWER: No.

The OFB financial liaisons with Congress believe that establishing Defender Services as a separate program *within* the judiciary would not provide any advantage to the judiciary in terms of securing more funding for its other accounts. Nor would it provide any funding advantage to the Defender Services program. Adequate funding is critical to the success of the program, and the Judicial Conference has a strong record of obtaining sufficient funding from Congress to permit the judiciary to expand the number of federal defender organizations and fund them at a level that has resulted in high quality representation for their clients. The Judicial Conference oversight adds credibility to Defender Services funding requests and protects the program from attacks stemming from the disfavor in which criminal defendants are held.

Even so, this Subcommittee strongly urges OFB to facilitate direct contact between congressional appropriations staff, ODS personnel, and defender community representatives. The roundtable discussions and on-site visit referenced previously (*supra*, p. 26) were positive experiences for all participants. The information exchanged was critical in informing the appropriation process and making the dollar figures submitted by OFB personnel to the Congress about the Defender Services program both relevant and reasonable to decision-makers. Moreover, as a result of these direct encounters, laudatory remarks regarding the program were included in congressional language supporting the FY 2005 appropriation, demonstrating Congress' commitment to maintaining a high quality of CJA representation.

There are a number of ways in which the Defender Services program could be enhanced, especially with respect to representation provided by panel attorneys. For example, the quality of representation has been adversely impacted by failure to follow Judicial Conference policy regarding qualification standards for panel membership and to develop some administrative process for panel attorneys when vouchers are reviewed and approved for payment at less than the requested amount. The research and interviews conducted this past year also clearly underscore problems with the appointment and payment of panel attorneys. The Committee on Defender Services' Subcommittee on Long-Range Planning and Budgeting will be developing

proposals that are intended to address the problematic aspects of the Defender Services program that stem from the judiciary's responsibilities for the program and the roles assigned to courts in carrying them out.

QUESTION: Should the Defender Services program remain in its current status as a program under the auspices of the Judicial Conference with the assistance of its Committee on Defender Services and the Administrative Office?

RECOMMENDED ANSWER: Yes.

The Subcommittee recommends that the Defender Services program retain its current status within the judiciary and that systemic issues implicating the independence of the defense function continue to be addressed by the Committee on Defender Services' Long-Range Planning and Budgeting Subcommittee.