

THE STRUCTURE OF FEDERAL PUBLIC DEFENSE: A CALL FOR INDEPENDENCE

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Independence is a foundational requirement for any good system of public criminal defense. The Constitution guarantees anyone charged with a crime the right to a defense attorney regardless of ability to pay, and that attorney has the ethical obligation to provide a zealous defense, free from any conflicting outside influence. And yet the system of federal public defense is funded, managed, and supervised by the very judges in front of whom defenders must vigorously defend their clients. The arrangement creates serious constitutional, ethical, and policy problems. This Article proposes a solution: an independent federal defense agency. The agency proposed, the Center for Federal Public Defense (CFPD), would administer federal defenders' offices, manage the system of appointed private attorneys, and seek funding from Congress for indigent defense services.

In a criminal justice system that relies on its adversarial nature to function properly, it would be inconceivable to have judges decide who is hired in a prosecutor's office, how much they should be paid, or how and whether prosecutors should investigate individual cases. It would be equally problematic to have the Judiciary act as the voice of the Department of Justice in Congress when explaining resource needs and seeking appropriations. And yet the Judiciary currently does all of those things with respect to the defense function. It should not, and the fix is straightforward: the creation of an independent defender organization.

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The Article places the discussion of the proposed organization in the context of other independent agencies that do not fit neatly into a single branch of government, sometimes described as “boundary organizations.” In many ways, federal public defense is ideally suited for placement outside of the formal branches of government. Many congressionally created independent organizations are structurally problematic because of separation-of-powers concerns that arise from the agencies’ enforcement or rulemaking authority. Federal public defense attorneys, however, neither make rules nor enforce them. And because of the nature of their work, they legitimately require insulation from direct government control—including from the Judiciary.

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INTRODUCTION

“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.”¹

The first principle of the American Bar Association’s Ten Principles of a Public Defense Delivery System has long been: “The public defense function, including the selection, funding, and payment of defense counsel, is independent.”² It is a sound and important principle. The Constitution guarantees anyone charged with a crime the right to a defense attorney regardless of ability to pay,³ and that attorney has the ethical obligation to provide a zealous defense, free from any conflicting outside influence.⁴ And yet the system of federal public defense, which provides counsel to over 80% of all federal criminal defendants,⁵ is funded, managed, and supervised by the very judges in front of whom defenders must vigorously defend their clients.

¹ COMM. TO REVIEW THE CRIMINAL JUSTICE ACT PROGRAM, CR-CJAREV-MAR 93, REPORT OF THE JUDICIAL CONFERENCE COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT 50 (1993) [hereinafter PRADO REPORT], <https://cjustudy.fd.org/sites/default/files/Previous-CJA-Studies/Prado%20Committee%20Report%20%28Jan%201993%29.pdf> [<https://perma.cc/VQ32-Q4KY>] (a committee established by Chief Justice William Rehnquist pursuant to the Judicial Improvements Act of 1990).

² AM. BAR ASS’N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 1–2 (2002) (footnote omitted), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf [<https://perma.cc/V9TA-4729>].

³ See *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963); *Johnson v. Zerbst*, 304 U.S. 458, 469 (1938).

⁴ See MODEL RULES OF PROF’L CONDUCT pmbl., r. 1.1–1.10 (AM. BAR ASS’N 2014); NAT’L LEGAL AID & DEFENDER ASS’N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 1.3 (2011).

⁵ JON WOOL ET AL., VERA INST. OF JUSTICE, IMPROVING PUBLIC DEFENSE SYSTEMS: GOOD PRACTICES FOR FEDERAL PANEL ATTORNEY PROGRAMS 2 (2003).

Judicial control over the defense function manifests itself in many ways, both with respect to public defenders and private attorneys appointed to cases from district-wide panels (Panel Attorneys). Federal appellate judges select the federal public defenders in the districts they oversee and can choose to renew them or not every four years.⁶ Federal trial judges require Panel Attorneys on the cases before them to describe and justify the hours they spend on a case.⁷ Those same judges not only decide whether counsel will get paid for the hours but also whether they are permitted to obtain investigative or expert services.⁸ In many districts, the same trial judges decide whether appointed counsel may remain on the Panel.⁹ At the national level, judges determine how much money to seek from Congress for indigent defense funding as a part of the Judiciary's budget even though the defender appropriations requests compete with the courts' own funding requests.¹⁰ The arrangements raise serious constitutional, ethical, and policy concerns.

To be sure, not all is broken with federal public defense. The statute that created the current structure, the Criminal Justice Act (CJA), is likely the greatest piece of federal criminal justice legislation in American history. Enacted soon after *Gideon v. Wainwright*¹¹ expanded the constitutional right to counsel to the states,¹² and arising from decades of efforts by scholars and reform-minded politicians to address the need to fund attorneys for federal indigent defendants,¹³ the CJA created a system for the appointment of paid counsel where none had existed.¹⁴ In short order, federal defendants without the

⁶ See 18 U.S.C. § 3006A(g)(2)(A) (2012).

⁷ See 18 U.S.C. § 3006A(d)(5) ("Each claim shall be supported by a sworn written statement specifying the time expended, services rendered, and expenses incurred . . .").

⁸ See 18 U.S.C. § 3006A(e).

⁹ See 18 U.S.C. § 3006A(a)–(b); WOOL ET AL., *supra* note 5, at 8–9 (describing different methods across districts for selecting Panel Attorneys, many of which involve heavy or exclusive judicial determination).

¹⁰ See, e.g., PRADO REPORT, *supra* note 1, at 47 (describing the "competitive quest for funds" between the CJA program and the other court units).

¹¹ 372 U.S. 335 (1963).

¹² See Geoffrey Cheshire, *A History of the Criminal Justice Act of 1964*, FED. LAW., Mar. 2013, at 46, 53.

¹³ See generally *id.* (explaining briefly the build-up to reform); ATTORNEY GEN.'S COMM. ON POVERTY AND THE ADMIN. OF FED. CRIMINAL JUSTICE, REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE (Feb. 25, 1963) [hereinafter ALLEN REPORT], [https://cjastudy.fd.org/sites/default/files/Previous-CJA-Studies/Allen%20Committee%20Report%20\(1963\).pdf](https://cjastudy.fd.org/sites/default/files/Previous-CJA-Studies/Allen%20Committee%20Report%20(1963).pdf) [<https://perma.cc/AWT2-JRCF>].

¹⁴ 18 U.S.C. § 3006A.

means to afford an attorney went from receiving lawyers who were unpaid for their time or investigative needs and often unschooled in criminal practice, to receiving paid and often highly knowledgeable counsel.¹⁵ There are now federal public defender offices in all but three federal districts.¹⁶ In every federal district, there are panels of private attorneys who are paid to represent any indigent defendant whom the public defender office cannot. While never on equal footing with better resourced federal prosecutors,¹⁷ federal indigent defense under the CJA has fared far better than its counterparts in most state systems.¹⁸

But like many great pieces of legislation, the CJA left important questions unanswered. Foremost among them: where should the provision of federal indigent defense be located within the federal government? Defenders' location within the Judicial Branch was viewed at the time of the CJA's passage as

¹⁵ See, e.g., NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, FEDERAL INDIGENT DEFENSE 2015: THE INDEPENDENCE IMPERATIVE 22–23 (2015) [hereinafter NACDL REPORT] (citing federal judges' high esteem of federal defenders); PRADO REPORT, *supra* note 1, at 6 (discussing the passage of the Allen Report which introduced "the principle of adequate compensation for attorneys performing defense services").

¹⁶ NACDL REPORT, *supra* note 15, at 22. The three districts are the Southern District of Georgia, the Eastern District of Kentucky, and the Northern Mariana Islands. See Robert K. Gordon, *Northern District of Alabama to Get Federal Public Defenders*, AL.COM (Mar. 26, 2010), http://blog.al.com/spotnews/2010/03/northern_district_of_alabama_t.html [<https://perma.cc/H9Y6-N8HC>]; see also *Defender Services*, U.S. CTS., <http://www.uscourts.gov/services-forms/defender-services> [<https://perma.cc/HL39-7JWJ>] (noting that federal defender organizations "serve 91 of the 94 federal judicial districts").

¹⁷ Compare *Judiciary Transmits Fiscal Year 2017 Budget Request to Congress*, U.S. CTS. (Feb. 12, 2016), <http://www.uscourts.gov/news/2016/02/12/judiciary-transmits-fiscal-year-2017-budget-request-congress> [<https://perma.cc/8NS5-UW4W>] (showing the Defender Services Budget request for 2017 is \$1.1 billion) with NATHAN JAMES, CONG. RESEARCH SERV., R44424, FY2017 APPROPRIATIONS FOR THE DEPARTMENT OF JUSTICE (2016) (showing that the budget for the U.S. Attorneys' Offices is approximately \$2 billion, of which approximately \$1.5 billion is for the criminal divisions; U.S. DEP'T OF JUSTICE, FY 2017 BUDGET REQUEST AT A GLANCE (2016), <https://www.justice.gov/jmd/file/821916/download> [<https://perma.cc/7JTA-DANU>] (showing that approximately half of DOJ's \$28 billion budget is for law enforcement); see also *Public Defenders Program and Budget Cuts*, C-SPAN (Aug. 20, 2013), <https://www.c-span.org/video/?314655-1/public-defenders-program-budget-cuts> [<https://perma.cc/3VVQ-DSNG>] (discussing at 39:00 staffing at the Federal Defenders of New York in 2013 (38 attorneys) as compared to the criminal divisions of the U.S. Attorneys' Offices for the same area (approximately 300 attorneys)).

¹⁸ See, e.g., NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 59 (2009), <http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf> [<https://perma.cc/W2BU-FWWV>] (discussing the funding shortages and cutbacks besetting state-run indigent defense programs).

uneasy, but necessary and temporary.¹⁹ It was uneasy because of the obvious tension in an adversarial system of having one set of litigants overseen by the very judges who decide their cases.²⁰ It was seen as necessary because the fledging program needed to gather its bearings within a well-developed bureaucracy before taking flight on its own.²¹

The federal defender system is now well-developed, and yet, over fifty years later, the placement—and the unease—remains. Throughout the country, Panel Attorneys report that their requests for needed services or payment for hours worked are often denied by the judges hearing their cases.²² In some districts the use of outside services, including any sort of investigator or expert, stands at less than 5% of cases handled.²³ In one district the rate is 1%.²⁴ Even when those requests are granted, the process of seeking authorization from the trial judge, which requires Panel Attorneys to describe to the judge the need for any outside service, raises the troubling prospect of breaching attorney-client confidentiality.²⁵ At the national level, the governing bodies of the Judiciary have made budget and policy decisions that have been harmful to defense interests—most dramatically during the budget “sequestration” in 2013, which was brought about by congressional budget cuts but exacerbated by Judiciary actions.²⁶

This Article argues that the time has come to complete the work of the CJA. Greater independence for federal public defense is needed, and the best solution is a separate and independent agency. The agency proposed below, the Center for Federal Public Defense (CFPD), would oversee the federal de-

¹⁹ See PRADO REPORT, *supra* note 1, at 7–11, 43.

²⁰ See *id.*; *infra* subpart I.B.

²¹ See PRADO REPORT, *supra* note 1, at 43; *infra* subpart I.B.

²² See, e.g., NACDL REPORT, *supra* note 15, at 49–51; AD HOC COMM. TO REVIEW THE CRIMINAL JUSTICE ACT, PUBLIC HEARING #2, PANEL 5 (2016) [hereinafter CARDONE HEARING #2]; AD HOC COMM. TO REVIEW THE CRIMINAL JUSTICE ACT, PUBLIC HEARING #5, PANEL 3 (2016) [hereinafter CARDONE HEARING #5]; AD HOC COMM. TO REVIEW THE CRIMINAL JUSTICE ACT, PUBLIC HEARING #6, PANEL 4 (2016) [hereinafter CARDONE HEARING #6].

²³ See CARDONE HEARING #2, *supra* note 22, Panel 1, at 37–38 (2016) (discussing the fact that Panel Attorneys seek experts in an average of 19% of cases nationwide and as low as 1% in one district); *id.*, PANEL 5, at 35 (describing the average as 5.4% in the five districts providing testimony from the 4th and 11th Circuits).

²⁴ See *id.*

²⁵ See *infra* subpart II.B.; NACDL REPORT, *supra* note 15, at 36–37; MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2014).

²⁶ See NACDL REPORT, *supra* note 15, at 24–25.

fenders' offices, manage the Panel Attorneys, and lobby Congress for indigent defense funding.

An independent agency is not the only option. Throughout the fifty years of the CJA's existence, commentators have offered other proposals for reform. Some have suggested enhancing the independence of the defender system while keeping it under the supervision of the bureaucratic arm of the Judiciary—the Administrative Office of the U.S. Courts (AO).²⁷ Others have recommended separating the defender system from the AO while keeping it within the Judicial Branch.²⁸ Still others have proposed creating a defender agency within the Executive Branch.²⁹ As I argue below, however, only complete independence from the Judiciary and Executive and establishment of a congressionally created nonprofit organization will achieve the reform needed for a robust and independent federal public defense.

The Article proceeds in three parts. Part I discusses the history of the defender program, including its basic structure within the Judiciary and its successes and challenges through the years. To place the discussion in context, the Part also briefly explains the Judiciary's own governance structure and the history of its struggle for independent administration. Part II examines the constitutional, ethical, and policy infirmities of the current system of federal public defense. Subpart II.A raises questions about whether Article III allows for the sort of non-adjudicatory role the Judiciary plays in managing the defense function; subpart II.B examines the ethical problems surrounding breaches of attorney-client confidentiality and conflicts of interest that inhere in judicial oversight of defense counsel; and subpart II.C questions as a matter of policy whether judges are best suited to administer the system of public defense and concludes they are not. Part III reviews the

²⁷ See, e.g., CARDONE HEARING #2, PANEL 1, *supra* note 22, at 19 (statement of Thomas McNamara, Federal Public Defender, Eastern District of North Carolina); *id.* at 21 (statement of Louis Allen, Federal Public Defender, Middle District of North Carolina); *id.* at 23–24 (statement of Parks Nolan Small, Federal Public Defender, District of South Carolina); Letter from Richard Coughlin, Fed. Pub. Def., Dist. of N.J., to the Honorable Kathleen Cardone, Chair, Ad Hoc Comm. to Review the Criminal Justice Act Program 11–13 (March 25, 2016), <https://cja.study.fd.org/sites/default/files/hearing-archives/philadelphia-pennsylvania/pdf/richardcoughlinphillywrittentestimony-done.pdf> [<https://perma.cc/7SY4-WFGZ>].

²⁸ PRADO REPORT, *supra* note 1, at 49–50; CARDONE HEARING #6, *supra* note 22, Panel 3, at 6 (statement of Leigh Skipper, Federal Public Defender, Eastern District of Pennsylvania); *id.* at 10–11 (statement of Marianne Mariano, Federal Public Defender, Western District of New York).

²⁹ See *infra* section III.A.3.

most commonly discussed alternative structures and advocates for a public defense agency completely independent from the Judiciary. To that end, I provide a proposed statute in an Appendix.

Some might question the propriety of a congressionally created independent public defender organization within the federal structure. Part III addresses this concern by placing the organization in the context of other independent agencies, particularly those described by Professor Anne Joseph O'Connell as "boundary organizations"—that is, those organizations that do not fit neatly into a single branch of government or even entirely within the government at all.³⁰ Examples of the sort of organizations she discusses include the Legal Services Corporation, the State Justice Institute, and the Smithsonian Institution.³¹ To that list, I add the Public Defender Service for the District of Columbia.³²

In many ways, federal public defense is ideally suited for placement outside of the formal branches of government. The structure of independent agencies can often raise constitutional concerns about separation of powers and the nondelegation doctrine.³³ Those issues, however, arise from the failure to adequately constrain the agencies' enforcement powers or quasi-legislative rulemaking authority.³⁴ Federal public defense attorneys neither make rules nor enforce them. And because of the nature of their work, they legitimately require insulation from direct government control—including from the Judiciary.

Criticism of the Judiciary's governance of federal public defense should not be mistaken for criticism of the individual judges who have played a role in managing the program. Many judges have acted as fierce advocates for the program and are largely responsible for the successes it has enjoyed. The issue is one of structure and professional role, not individual actors. In a criminal justice system that prides itself on its adversarial nature, it would be inconceivable to have judges decide who is hired in a prosecutor's office, how much they should be paid, or how and whether prosecutors should investigate individual cases. It would be equally problematic to have the Judiciary

³⁰ See Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 852–73 (2014).

³¹ See *id.* at 857.

³² See *infra* section III.B.2.

³³ See O'Connell, *supra* note 29, at 897–98.

³⁴ See *id.* at 897–902 (proposing an approach to constraining boundary organizations through mandatory court assessment).

act as the voice of the Department of Justice in Congress when explaining program needs and seeking appropriations. And yet the Judiciary currently does all of those things with respect to the defense function. It should not, and the fix is straightforward: the creation of an independent defender organization.

Lastly, it is worth noting that a fuller discussion of the federal criminal justice system's frequently discussed problems, including racial and class disparities, extreme sentencing severity, too much federal prosecution generally, and a breakdown in the adversarial process, is beyond the scope of this Article. Many commentators, including myself, have written about these issues elsewhere.³⁵ But those issues provide important context for this Article. To the extent that the structure of federal public defense is compromising zealous advocacy, it is also exacerbating those problems.³⁶

³⁵ See David E. Patton, *Federal Public Defense in an Age of Inquisition*, 122 YALE L.J. 2578, 2587 (2013) (describing shifts in the federal criminal justice system over the past fifty years and concluding that "defendants in federal court have become poorer, disproportionately more black and Hispanic, and subject to a system that affords fewer trials and imposes more frequent, lengthier pretrial detention"); see generally Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1278–85 (2005) (describing the political dynamics that have led to increased sentencing severity in federal and state courts); Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 748 (2005) (exploring the "overcriminalization" of morals by the state and federal governments); Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 645–48 (1997) (arguing that the disparate treatment of criminal offenders between state and federal courts could violate the Constitution's equal protection doctrine); Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy Under the Sentencing Guidelines*, 92 CALIF. L. REV. 425, 431 (2004) (studying empirically the "chilling" effects of the federal sentencing guidelines on defenders' advocacy); Ellen S. Podgor, *The Tainted Federal Prosecutor in an Overcriminalized Justice System*, 67 WASH. & LEE L. REV. 1569, 1573 (2010) (discussing the importance of limiting the role of politics at the Department of Justice because of how "[o]vercriminalization, the breadth of many statutes, the increased absence of *mens rea* requirements in criminal offenses, and the ability of prosecutors to use 'short-cut' offenses to proceed with charges with relatively little proof raise concerns when the individuals making the decisions may appear biased") (footnotes omitted); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2548–50 (2004) (arguing that plea bargains do not internalize governing law in the way that civil settlements do, and that as the criminal law has expanded, the law itself has played a diminishing role in allocating criminal punishment); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 132 (2005) (arguing that the federal sentencing guidelines shifted power from the judge to the prosecutor, thus encouraging the growth of guilty pleas).

³⁶ For a recent discussion of public defenders' role in systemic criminal justice reform efforts, see Jonathan A. Rapping, *Retuning Gideon's Trumpet: Telling the Story in the Context of Today's Criminal-Justice Crisis*, 92 TEX. L. REV. 1225, 1232–40 (2014).

I

THE HISTORY AND STRUCTURE OF THE CJA

A. The Right to Counsel Without a Budget: 1938–1964

In 1938, twenty-six years before the passage of the Criminal Justice Act (CJA) in 1964, the Supreme Court established the right to counsel for federal criminal defendants in *Johnson v. Zerbst*.³⁷ During the intervening years, however, the lawyers assigned to represent indigent federal defendants were not paid—not for their time, not for out of pocket expenses, and not even for case-related expenses such as investigators, experts, or interpreters.³⁸

At various times before the CJA was passed, Congress and the courts took steps toward creating a system for the payment of counsel. In 1945, the Judicial Conference recommended the creation of a federal defender program for large cities.³⁹ In 1949, the Senate Judiciary Committee reported out a bill that would have provided payment to counsel for anyone “unable, by reason of poverty, to procure counsel,” and in 1953, the House held hearings on the topic.⁴⁰ However, none of those efforts (or others) were realized.

Meanwhile, across the country, the methods of assigning counsel varied widely. In smaller jurisdictions, the process tended to be highly informal, including the assignment by judges of attorneys who “happen[ed] to be present in the courtroom” regardless of whether they had any criminal law experience.⁴¹ In larger jurisdictions, the methods included mandatory service for any lawyer admitted to the federal bar and the use of volunteer panels.⁴²

In 1962, two *Harvard Law Review* editors studied the state of indigent defense in federal courts.⁴³ They conducted field research, “observing [court] operations and interviewing judges, United States Attorneys, other federal officials, and private attorneys in nineteen major cities.”⁴⁴ They also conducted

³⁷ 304 U.S. 458, 463 (1938).

³⁸ ALLEN REPORT, *supra* note 13, at 17; *see also* Patton, *supra* note 34, at 2583 (explaining that counsel in the early 1960s were not paid to represent indigent clients).

³⁹ Cheshire, *supra* note 12, at 49–50.

⁴⁰ *Id.* at 50 (quoting S. 734, 81st Cong. (1949)).

⁴¹ Bruce J. Havighurst & Peter MacDougall, Note, *The Representation of Indigent Criminal Defendants in the Federal District Courts*, 76 HARV. L. REV. 579, 581 (1963).

⁴² *Id.* at 581–82.

⁴³ *Id.* at 580.

⁴⁴ *Id.*

surveys and compiled data across 90% of federal districts. In reporting about the typical representation, they wrote that “counsel’s role is generally limited to appearances at arraignment and sentencing, discussions with his client and the prosecutor, and occasionally a brief investigation of the case in order to uncover mitigating circumstances.”⁴⁵ The survey responses revealed that assigned counsel typically spent “less than three hours in out-of-court preparation, and in at least three-fifths of the cases he ma[de] only one or two brief appearances in court.”⁴⁶ When a client pleaded guilty, “a hurried ten-minute conference in a corner of the courtroom [was] often the sole prelude” to the plea.⁴⁷ The editors found that the accused routinely received inexperienced and unprepared lawyers: “A prominent defect is the dependence upon young, inexperienced lawyers for all but the most difficult or serious cases. The typical assigned counsel is little versed in the technicalities of the criminal law or the questioning of accused persons, and has had little if any previous courtroom experience.”⁴⁸

Notably, despite those findings, the vast majority of the lawyers and judges surveyed found the performance of assigned counsel perfectly sufficient.⁴⁹ About 93% of respondents to the survey considered the thoroughness of assigned counsel’s preparation “adequate” or “very adequate.”⁵⁰ Almost 80% of judges reported that they had little difficulty finding counsel to appoint, largely because of the “considerable prestige of the federal courts” and the desire of younger lawyers “to become known to the district judge and other federal officials.”⁵¹ The authors also reported that “attorneys would be reluctant to refuse a judge’s request when they might *later* have to appear before him on an *important matter*.”⁵²

In April 1961, Attorney General Robert F. Kennedy created a committee to investigate the state of indigent defense in the federal courts.⁵³ He appointed Professor Francis A. Allen to chair the Attorney General’s Committee on Poverty and the Administration of Federal Criminal Justice, which then studied the federal criminal justice system for two years.

45 *Id.* at 588.

46 *Id.*

47 *Id.* at 589.

48 *Id.* at 596.

49 *Id.* at 588, 599.

50 *Id.* at 588.

51 *Id.* at 591.

52 *Id.* (emphasis added).

53 ALLEN REPORT, *supra* note 13, at 1.

The Allen Report, released in 1963, was damning of the system. It found that the provision of counsel in federal courts was unfair to both counsel and client.⁵⁴ Assigned counsel, who received no pay and no payment for necessary investigators, experts, or even out-of-pocket expenses, were faced with the choice of doing ineffective work or losing a considerable amount of money.⁵⁵ The “consequences [were] serious and unfortunate” for defendants, including instances in which “assigned counsel . . . advise[d] a plea of guilty” because of their lack of resources.⁵⁶ When defendants did go to trial the lack of resources often hamstrung their defense, resulting in sometimes “devastating” consequences.⁵⁷ The Report concluded that “no system of representation worthy of the name can complacently tolerate such consequences.”⁵⁸

B. Passage of the CJA

The Allen Report proposed legislation that became the template for the landmark Criminal Justice Act of 1964 (CJA).⁵⁹ The Report was submitted to Attorney General Kennedy on February 25, 1963,⁶⁰ three weeks before the Supreme Court decided *Gideon v. Wainwright*, which extended the Sixth Amendment right to counsel to all criminal defendants in state courts, regardless of ability to pay.⁶¹ The CJA was passed on August 6, 1964—the day after Clarence Gideon was acquitted on his retrial in Florida state court, this time with the services of a lawyer.⁶²

The CJA was many years in the making and was the product of solid bipartisan support. Although the Allen Report and Robert Kennedy typically receive the credit for the Act, the unsung hero in the process was a highly conservative Republican senator from Nebraska named Roman Hruska, who had sponsored similar bills beginning in 1959.⁶³ He ultimately cosponsored the CJA with Senator James Eastland (D-Miss.) and forcefully advocated for its passage.⁶⁴

⁵⁴ See *id.* at 15.

⁵⁵ See *id.* at 26.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See *id.* at 23–44; Cheshire, *supra* note 12, at 52.

⁶⁰ ALLEN REPORT, *supra* note 13, at i (Letter of Transmittal).

⁶¹ 372 U.S. 335, 343–44 (1963).

⁶² Cheshire, *supra* note 12, at 53.

⁶³ *Id.* at 50.

⁶⁴ See *id.* at 52.

The CJA was not fully completed, however, until 1970.⁶⁵ Despite Senator Hruska's efforts, the original statute did not contain a provision for the creation of federal public defender offices; instead, it relied solely on assigned private attorneys who were paid hourly fees.⁶⁶ The Department of Justice and the Judicial Conference convened another study in 1967, and the subsequent findings, contained in the Oaks Report (named after its author Professor Dallin Oaks), recommended the CJA be amended to include public defender offices.⁶⁷ The Oaks Report was presented to the Senate Judiciary Committee by Senator Hruska in 1968, and in 1970 he cosponsored (together with Senators Barry Goldwater and Ted Kennedy) the legislation implementing its recommendation.⁶⁸ The bill passed,⁶⁹ and aside from occasional minor amendments,⁷⁰ the current structure of federal public defense has remained the same ever since.

The 1970 Congress that finalized the CJA did not expect its structure to remain static. In particular, according to the Senate Report accompanying the passage of the amendments, the placement of the defender program in the Judiciary was deemed temporary, pending the "eventual creation of a strong, independent office to administer the Federal defender program" and the possible "establishment of a new, independent official—a 'Defender General of the United States.'"⁷¹ The temporary placement was felt to be necessary because the creation of an independent office would have been "premature until Congress . . . had an opportunity to review the operations of the defender program over the course of a few years."⁷²

In explaining why independence would eventually be necessary, the Report stated that, "the defense function must always be adversarial in nature as well as high in quality. It would be just as inappropriate to place direction of the de-

⁶⁵ Pub. L. No. 91-447, 84 Stat. 916 (1970).

⁶⁶ See Pub. L. No. 88-455, § 3006A(d), 78 Stat. 552, 553 (1964); Cheshire, *supra* note 12, at 52-53.

⁶⁷ DALLIN H. OAKS, *THE CRIMINAL JUSTICE ACT IN THE FEDERAL DISTRICT COURTS* (1969) [hereinafter OAKS REPORT].

⁶⁸ S. REP. NO. 91-790, at 18 (1970).

⁶⁹ Pub. L. No. 91-447, § 1, 84 Stat. 916 (1970).

⁷⁰ See, e.g., Pub. L. No. 108-447, § 304(a), 118 Stat. 2809, 2894 (2004) (raising maximum amounts of attorney compensation).

⁷¹ S. REP. NO. 91-790, at 18 (1970); see also PRADO REPORT, *supra* note 1, at 9 (recognizing "the desirability of eventual creation of a strong, independent office to administer the federal defender program").

⁷² S. REP. NO. 91-790, at 18.

fender system in the judicial arm of the U.S. Government as it would be in the prosecutorial arm.”⁷³

C. The Structure of Federal Public Defense Within the Judiciary

Several key features of the CJA define the character of the defender program: the program’s location within the Judicial Branch, the use of both public and private attorneys in a hybrid system, and the vesting of significant control over the program at the local and regional level by federal district and circuit court judges. Because of the defender program’s place within the Judiciary, the next section begins the discussion of these features with a general description of the governance of the Judicial Branch.

1. *Background on Judiciary Governance*

At the beginning of the twentieth century, there was no centralized administrative office for the Judicial Branch. The administration of the federal courts fell almost entirely within the province of the Department of Justice, which was responsible for seeking funding for the Judiciary from Congress and administering those funds.⁷⁴

After years of lobbying by Chief Justice William Howard Taft, Congress established the Judicial Conference of the United States in 1922, consisting of the chief justice and the “senior circuit judges” of the then-nine circuit courts of appeals.⁷⁵ The Judicial Conference was established largely to organize the management of transferring judges to or from circuits and districts based on workload needs.⁷⁶ But the Judicial Conference did not take the place of the Department of Justice in administering the Judiciary’s funds. That change came seventeen years later in 1939 when Congress, at the request of the Judicial Conference, created the Administrative

⁷³ *Id.*

⁷⁴ See generally PETER GRAHAM FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 91–104 (1973) (describing the administrative role of the Justice Department); SHELDON GOLDMAN & THOMAS P. JAHNIGE, *THE FEDERAL COURTS AS A POLITICAL SYSTEM* 17–25 (3d ed., 1985) (describing the internal structure of the federal judicial system).

⁷⁵ See generally FISH, *supra* note 74, at 30–33 (describing Taft’s role in establishing the Judicial Conference); see also ALPHEUS THOMAS MASON, *WILLIAM HOWARD TAFT: CHIEF JUSTICE* 97–107 (1964) (describing Taft’s visions of reform and lobbying efforts).

⁷⁶ FISH, *supra* note 74, at 33.

Office of the U.S. Courts (AO) as the bureaucratic arm of the Judiciary.⁷⁷

The AO was created in the wake of President Roosevelt's famous, failed court-packing plan⁷⁸ when the independence of the Judiciary was felt by many judges to be under attack. The creation of the AO was prompted in large part by the desire of the Judicial Conference "to relieve the courts of Executive control over its finances"⁷⁹ and because of the strongly held view that it was "fundamentally wrong for an executive commission to have anything to do with the personnel or employees in the judicial department."⁸⁰ As Attorney General Homer Cummings said in his annual report in 1938:

I believe, too, that there is something inherently illogical in the present system of having the budget and expenditures of the courts and the individual judges under the jurisdiction of the Department of Justice. The courts should be an independent, coordinate branch of the Government in every proper sense of the term.⁸¹

A secondary reason behind the creation of the AO was a genuine desire for better, more efficient management of the Judiciary. At the time, "legion[s]" of critics of federal judges criticized them for their slow pace, long dockets, and "arrogant, domineering[,] and tyrannical" manner.⁸² There was widespread agreement in the legal community, and within the Judicial Conference, that the Judiciary needed better management.⁸³ The creation of the AO thus sprang from two

⁷⁷ See *id.* at 125–30.

⁷⁸ See *id.* at 112–19 (describing how President Franklin Roosevelt famously proposed—as retaliation for the Supreme Court striking down many of his New Deal reforms—to appoint an additional Supreme Court justice for each justice over the age of seventy who had served at least ten years).

⁷⁹ *Id.* at 130 (quoting Charles E. Stewart, Memorandum, May 21, 1939, p.2, Legislative Files, S. 188, 76th Cong.).

⁸⁰ *Id.* at 131 (quoting Kimbrough Stone to Chief Justice and Members of the Judicial Conference, Minority Report, *Report of the Judicial Conference Committee to Consider the Desirability of Extending the Merit System to Cover Personnel of the Clerks Offices* (1942), mimeographed (Administrative Office of the United States Courts, Washington, D.C., pp. 9–10)); see also MITCHEL A. SOLLENBERGER, CONG. RESEARCH SERV., RS21847, ADMINISTRATIVE OFFICE OF THE U.S. COURTS: HISTORY, OPERATIONS, AND CURRENT ISSUES 4 (2004) (noting that the Judiciary, as "one of the great coordinate branches" of government, should not have its budget and administrative functions handled "through the machinery" of the Department of Justice).

⁸¹ U.S. DEP'T OF JUSTICE, ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES: FOR THE FISCAL YEAR 1937, at 6 (1938).

⁸² FISH, *supra* note 74, at 112–13 (quoting 79 CONG. REC. 7536 (1935) (statement of Sen. Young)).

⁸³ See *id.* at 112–19.

goals: to maintain judicial independence and to impose tighter internal controls.⁸⁴

Since the creation of the AO, the size and scope of the Judicial Branch have increased dramatically. At the time the Judicial Conference was established, there were fewer than 150 federal judges spread throughout the country.⁸⁵ The judges had no administrative role other than managing their own chambers and courtrooms.⁸⁶ Today, there are roughly one thousand life-tenured Article III judges and a nearly equal number of magistrate and bankruptcy judges who are appointed by the life-tenured judges.⁸⁷ Altogether, the Judiciary now comprises over 30,000 employees.⁸⁸ The Judicial Conference oversees not only the trial and appellate courts but also the Probation Department and Pretrial Services, Court Security, the U.S. Bankruptcy Courts, the U.S. Court of International Trade, the U.S. Court of Federal Claims and the Administrative Office.⁸⁹ In Fiscal Year 2016, the Judiciary Budget was \$6.8 billion, of which approximately \$1 billion went to Defender Services.⁹⁰

The Judicial Conference now consists of twenty-seven judges with the chief justice presiding.⁹¹ The other members are the chief judges of each of the circuits (including the Federal Circuit), one district judge from each circuit (as elected by all members of the circuit and district judges within the circuit), and the chief judge of the Court of International Trade.⁹² The chief judges serve terms concurrent with their terms as chief. The district judges serve for terms of not less than three nor more than five years.

In order to carry out its administrative functions, the Judicial Conference created committees “to address and advise on a wide variety of subjects such as information technology, per-

⁸⁴ See *id.* at 120–24.

⁸⁵ See ADMIN. OFFICE OF THE U.S. COURTS, THE HISTORY OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS: SIXTY YEARS OF SERVICE TO THE FEDERAL JUDICIARY 4 (Cathy A. McCarthy & Tara Treacy eds., 2000); Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575, 1579 (2006).

⁸⁶ See ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 85, at 3.

⁸⁷ See Resnik & Dilg, *supra* note 85, at 1634.

⁸⁸ See ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 85, at viii.

⁸⁹ *About the Judicial Conference*, U.S. CTS., <http://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference> [<https://perma.cc/YE3F-D728>].

⁹⁰ ADMIN. OFFICE OF THE U.S. COURTS, THE JUDICIARY FY 2017 CONGRESSIONAL BUDGET SUMMARY 8 tbl. “The Judiciary” (2016).

⁹¹ Resnik & Dilg, *supra* note 85, at 1599.

⁹² U.S. COURTS, *supra* note 89.

sonnel, probation and pretrial services, space and facilities, security, judicial salaries and benefits, budget, defender services, court administration, and rules of practice and procedure.”⁹³ The committee vested with the greatest authority is the Executive Committee (EC) which serves as the “senior executive arm of the Conference,” “reviews the jurisdiction of Conference committees,” and sets the agenda and calendars for the Conference.⁹⁴

The chief justice exerts enormous control over the functioning of the Judiciary. He has the sole authority to appoint all committee members, including those on the Executive Committee, and he appoints the director of the AO.⁹⁵

2. Oversight of Defenders by the Judicial Conference

The first important feature of the CJA is that it places national administrative control of the defense function in the hands of the Judicial Conference and the AO. The Judicial Conference is authorized to create rules and regulations governing the operations of the program,⁹⁶ and the director of the AO is charged with supervising the expenditure of appropriated funds.⁹⁷

The Judicial Conference committee charged with overseeing the defender program is the Defender Services Committee (DSC).⁹⁸ Until recently, it supervised all aspects of the defender program, including providing “policy guidance in interpretation and application” of the CJA, recommending overall compensation and staffing for federal defender offices, reviewing budget and staffing requests of individual offices, reviewing the AO reports on CJA attorney appointments and payments, monitoring and analyzing possible legislation affecting defender services, ensuring substantive training of defenders, and proposing “adequate funding and resources to support the defender services program taking into account the overall fiscal situation of the judiciary.”⁹⁹ As discussed more fully below, in 2012 the Executive Committee (EC) removed the DSC’s au-

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*; see also Resnik & Dilg, *supra* note 85, at 1588–91, 1607–08, 1611, 1615–16, 1619–21, 1631 (describing the Chief Justice’s administrative duties and criticizing the concentration of so much authority in part because it “undermines democratic governance that is committed to distributing and accounting for power”).

⁹⁶ 18 U.S.C. § 3006A(h) (2012).

⁹⁷ 18 U.S.C. § 3006A(i).

⁹⁸ NACDL REPORT, *supra* note 15, at 19, app. C at 65 .

⁹⁹ *Id.* app. C at 65.

thority over staffing levels and placed that power in the Judicial Resources Committee (JRC), which serves the same function for all other court units.¹⁰⁰

The day-to-day national management of the defender program, including both Panel Attorneys and federal defender organizations, is handled by the Defender Services Office (DSO), a unit within the AO.¹⁰¹ DSO's primary management responsibilities include working with individual defender offices to develop and maintain their budgets, tracking national CJA expenditures in order to develop the program's budget, providing legal and policy guidance to both groups, maintaining an information technology system for defender offices, and helping establish and maintain training programs.

Lastly, federal defenders and Panel Attorneys have a variety of national advisory and working groups that communicate with DSO in all of those areas but which themselves have no binding authority.¹⁰²

3. *Hybrid System of Public Defenders and Private Attorneys*

The second key feature of the CJA is its embrace of a hybrid system of defense that includes both public defenders and appointed private counsel. The system is recommended by the American Bar Association (ABA) for all public defense systems because it provides the stability of an institutional defender (capable of helping to fashion local policy and develop training and quality assurance) with the flexibility and input of the private defense bar (with its varied perspectives and ability to handle spikes in overall caseloads).¹⁰³ Both components are widely accepted as necessary for a vigorous and healthy defense function.¹⁰⁴

In addition to the hybrid mix of public defenders and appointed counsel, the CJA also allows for two different types of public defenders. A federal district may have either a Federal Public Defender Organization (FPDO), which consists of federal employees and a head of the office, the Federal Public Defender, who is appointed every four years by the circuit in which the district sits,¹⁰⁵ or it may choose a Community De-

¹⁰⁰ *Id.* at 25.

¹⁰¹ *Id.* app. C at 65.

¹⁰² *Id.* at 24.

¹⁰³ See AM. BAR ASS'N, *supra* note 2; NACDL REPORT, *supra* note 15, at 22-23.

¹⁰⁴ AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES 7 (3d ed. 1992).

¹⁰⁵ 18 U.S.C. § 3006A(g)(2)(A) (2012).

fender Organization (CDO), a private nonprofit organization with its own board of directors that selects an executive director to head the office.¹⁰⁶ Functionally, CDOs operate almost identically to FPDOs because the grants provided to CDOs contain conditions that bind them to Judiciary policies, including employee salaries and budgets for non-personnel expenses.¹⁰⁷

4. *Local Oversight of Federal Public Defense*

The last key feature of the CJA is the significant control it vests in the local district and circuit courts. The act requires that each district court, with the approval of the circuit, develop “a plan for furnishing representation for any person financially unable to obtain adequate representation.”¹⁰⁸ These local CJA Plans mean that there is considerable variation nationwide in the governance of defender services. The variation includes how Panel Attorneys are selected and paid (from light judicial involvement to heavy) and how public defender offices are organized (e.g., whether they are constituted as FPDOs or CDOs).¹⁰⁹

Local judicial control looks very different for Panel Attorneys and public defenders. Panel Attorneys are subject to much greater judicial supervision in day-to-day practice. Whereas public defender offices receive an annual budget from the AO, with funding for both salaried employees (including investigators and other support staff) and outside services (such as expert and travel expenses) to be spent at the discretion of the heads of the offices,¹¹⁰ Panel Attorneys must get approval on each case from the individual judge presiding over the case to be paid for their hours or to hire outside service providers such as investigators and experts.¹¹¹ Although in some districts an administrator in the public defender office

¹⁰⁶ 18 U.S.C. § 3006A(g)(2)(B); NACDL REPORT, *supra* note 15, app. A at 62.

¹⁰⁷ 18 U.S.C. § 3006A(g)(2)(B); NACDL REPORT, *supra* note 15, at 14; PRADO REPORT, *supra* note 1, at 14.

¹⁰⁸ 18 U.S.C. § 3006A(a).

¹⁰⁹ See PRADO REPORT, *supra* note 1, at 43.

¹¹⁰ 18 U.S.C. § 3006(A)(g)(2) (2012); see also NACDL REPORT, *supra* note 15, at 14–15.

¹¹¹ § 3006A(d)(1)–(2); see also NACDL REPORT, *supra* note 15, at 36–38 (describing the requirement to obtain approval for compensation). For an excellent review of the different CJA Panel systems of payment and selection around the country, see generally WOOL ET AL., *supra* note 5, at 8–11, 13–15 (outlining selection and payment processes). For an interesting study of a pilot program instituting CJA “Supervising Attorneys,” see generally TIM REAGAN ET AL., THE CJA SUPERVISING ATTORNEY: A POSSIBLE TOOL IN CRIMINAL JUSTICE ACT ADMINISTRATION: REPORT TO THE JUDICIAL CONFERENCE COMMITTEES ON DEFENDER SERVICES, JUDICIAL RESOURCES, AND COURT ADMINISTRATION AND CASE MANAGEMENT (2001).

processes the “vouchers” submitted by Panel Attorneys, all approvals must still come from the trial judge.¹¹² There are also statutory caps for any single case (currently \$10,000 for a non-capital felony) that may be exceeded only upon approval by the circuit court.¹¹³ Finally, in most districts, judges play a heavy role in selecting which attorneys are appointed to be on the CJA Panel.¹¹⁴

For FPDOs (but not CDOs), local control is most directly felt in two ways. First, the circuit hires the head of the FPDO for a four-year renewable term.¹¹⁵ Second, the circuit must approve the overall number of attorney staff in each FPDO—even if the AO has already authorized the staff.¹¹⁶ The heads of CDOs are hired by their own board of directors, and CDOs are not subject to circuit approval on the number of attorney staff—which is governed for them entirely by authorization from the AO.¹¹⁷

D. Growth and Conflict

1. *A Second Look: The Prado Report*

Despite Congress’s stated intent in 1970 to revisit the placement of Defender Services within the Judiciary, it was not until 1990 that a serious effort was undertaken. That year Congress passed the Judicial Improvements Act directing the Judicial Conference, among other things, to study the federal defender program.¹¹⁸ It listed a dozen topics for defender assessment.¹¹⁹ First among them was “the independence of Federal defender organizations.”¹²⁰

¹¹² § 3006A(a); NACDL REPORT, *supra* note 15, at 36–38.

¹¹³ § 3006A(d)(2); NACDL REPORT, *supra* note 15, at 36–38. For a good list of the case compensation maximums over the past ten years for different types of cases, see *Case Compensation Maximums*, U.S. DISTRICT CT. FOR THE N. DISTRICT CAL., <http://www.cand.uscourts.gov/cja/casemaximum> [<https://perma.cc/KW53-L5LD>].

¹¹⁴ § 3006A(d)(2); NACDL REPORT, *supra* note 15, at 36–38; CASE COMPENSATION MAXIMUMS, *supra* note 113.

¹¹⁵ NACDL REPORT, *supra* note 15, at 14–15.

¹¹⁶ § 3006A(g)(2)(A).

¹¹⁷ § 3006A(g)(2)(B).

¹¹⁸ See Pub. L. No. 101-650, tit. III, § 318, 104 Stat. 5089, 5116 (1990).

¹¹⁹ *Id.* § 318(b)(1)–(12).

¹²⁰ See *id.* § 318(b)(1); see also JUDICIAL CONFERENCE, CR-DEFREP-MAR 93, REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE FEDERAL DEFENDER PROGRAM, at 17–19 (1993) [hereinafter JUDICIAL CONFERENCE REPORT] (asserting the importance of defender independence), <https://cjastudy.fd.org/sites/default/files/Previous-CJA-Studies/JCUS%20Report%20%28March%201993%29.pdf> [<https://perma.cc/6E8F-BJPM>].

In response to that congressional directive, the Judicial Conference appointed a committee headed by a district court judge in the Western District of Texas, Edward Prado.¹²¹ His committee engaged in a year-and-a-half-long review of the Defender Services program. The subsequent report, known as the Prado Report, made numerous recommendations, but the most significant was its recommendation for the creation of the Center for Federal Criminal Defense Services (Center)—an independent agency within the Judiciary.¹²² The proposed Center would be governed by a board of directors, eventually including no judges and consisting of only “persons experienced in the defense of federal criminal cases.”¹²³ The details of the proposed structure are discussed below in Part II.

In its evaluation of the defender program, the Prado Report cited as a major problem the inconsistent quality of Panel Attorney representation.¹²⁴ It found that the problems stemmed from inconsistent and sometimes nonexistent performance evaluations, low hourly rates, unexplained cuts in vouchers by judges, delayed payments, and lack of training and organizational support—particularly in those districts without a federal defender office.¹²⁵ With respect to federal defender organizations, the Report’s main criticism was that there were too few of them. The quality of the offices was judged to be high and cost-effective, but only half the federal districts had them.¹²⁶ The Report identified the reasons for so few offices as a combination of the statutory requirement of a 200-case minimum in order to establish an office, which accounted for about half of the districts without an office, and a lack of judicial interest in the remaining districts. The biggest criticism of the defender offices themselves was a lack of diversity, particularly among the heads of the offices. Not a single nonwhite defender headed an office in the continental United States, and only five of the forty heads were women.¹²⁷

In arriving at its recommendation for independence within the Judiciary, the Report detailed the problems inherent in the current structure. It discussed the standards for indigent defense promulgated by the ABA and the National Legal Aid and Defender Association and noted that “[a] recurrent theme

121 PRADO REPORT, *supra* note 1, at 1.

122 *See id.* at 75.

123 *Id.* at 76.

124 *Id.* at 34.

125 *Id.* at 34–39.

126 *Id.* at 39–41.

127 *Id.* at 40.

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.”¹²⁸

The Report quoted several judges who expressed particular discomfort with the system of supervising Panel Attorneys’ payment and selection. One stated, “[i]t 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.”¹²⁹ Another said, “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.”¹³⁰

The Report also expressed concern about the circuit judges selecting the heads of FPDOs. It quoted one circuit judge who disapproved of a system where “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.”¹³¹ On these topics the Report concluded:

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.¹³²

The Report also talked about the budget consequences of the structure: “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.”¹³³ Although the language was diplomatic, the message was clear: at the same time the Judiciary was the sole voice for Defender Services in Congress, the judges viewed a dollar provided for defenders as a dollar taken from the courts.

¹²⁸ *Id.* at 44.

¹²⁹ *Id.*

¹³⁰ *Id.* at 45 (alteration in original).

¹³¹ *Id.*

¹³² *Id.* at 47.

¹³³ *Id.*

The year after the Prado Report was issued, the Judicial Conference, in a report to the House and Senate Judiciary Committees, disagreed with the recommendation for structural change.¹³⁴ Although the Judicial Conference acknowledged problems with the program, particularly with respect to the Panel Attorneys, it felt that those problems were mostly attributable to a lack of sufficient funding from Congress.¹³⁵ The Judicial Conference believed that defenders would be even less favorably positioned for funding as an independent organization. Such an organization it argued, “would subject unnecessarily the entire CJA program to politicization and heightened vulnerability at the national level.”¹³⁶

The Judicial Conference, however, did adopt other recommendations by the Prado Report. It noted the challenges posed by the heavy increase in federal criminal cases in light of a host of new federal prosecutorial initiatives and “substantial numbers of additional assistant United States attorneys and law enforcement agents.”¹³⁷ The number of defendants requiring the appointment of counsel grew from fewer than 10,000 in 1963 to roughly 90,000 in 1993.¹³⁸ In addition, the Report discussed the changing nature of the practice of federal criminal defense. In particular, the advent of the Sentencing Guidelines as a result of the Sentencing Reform Act of 1984 meant that sentencing practice became highly legalized and required far more time and energy for factual and legal research and written advocacy.¹³⁹

Among other things, the Judicial Conference recommended the expansion of federal defender offices, the elimination of the requirement that a district have at least 200 appointments per year in order to qualify for an office, better pay and resources for the Panel Attorneys, greater and more comprehensive training and evaluation of Panel Attorneys and public defenders, and better funding for the program overall.¹⁴⁰

Although it rejected the Prado Report’s recommendation for structural change, the Judicial Conference Report called for the Judiciary to arrange “for a comprehensive, impartial review of the CJA program every seven years.”¹⁴¹

134 JUDICIAL CONFERENCE REPORT, *supra* note 120, at 13.

135 *See id.* at 17.

136 *Id.*

137 *Id.* at 9.

138 *Id.* at 7; NACDL REPORT, *supra* note 15, at 63.

139 JUDICIAL CONFERENCE REPORT, *supra* note 120, at 10.

140 *Id.* at 38–42.

141 *Id.* at 42.

2. Reorganization and Sequestration

Despite the Judiciary's statement to Congress that it would engage in a comprehensive review every seven years, it was not until twenty-two years later, in 2015, that it formed a committee to do so. That committee, as briefly discussed below, is currently undertaking a study of the CJA program,¹⁴² a program that now oversees the appointment of counsel for approximately 230,000 defendants a year, more than twice the number that required counsel at the time of the Prado Report.¹⁴³ The formation of the committee came on the heels of a historically difficult time for the CJA program, precipitated by both congressional budget crises and Judiciary policies. The combination of events exposed conflicts at the national level that until then had remained largely in check.

In 2012, the EC removed staffing authority from the jurisdiction of the DSC and placed it in the Judicial Resources Committee (JRC).¹⁴⁴ To outsiders the change may have seemed a mundane bureaucratic shuffling, but to defenders (and members of the DSC) the change was significant.¹⁴⁵ In part the significance was symbolic. The JRC determines the staffing levels of all court units, including probation and the court clerks' offices. Grouping defenders with the other court units showed a profound lack of appreciation for "the unique role and obligation of defenders" who, unlike the other Judiciary employees, do not exist to serve the judges.¹⁴⁶ The DSC's role in managing defender staffing was meant to recognize that fact and to provide separation between defenders and other units.¹⁴⁷

In addition to the symbolic value provided by a distinct defender committee, the previous structure had served important practical purposes. Members of the DSC did not always have experience as defense lawyers, but because of their explicit mission, they educated themselves on the work of defend-

¹⁴² See generally CARDONE HEARING #2, *supra* note 22 (exploring options for reforming the CJA program); CARDONE HEARING #6, *supra* note 22 (same).

¹⁴³ See *Criminal Justice Act: At 50 Years, a Landmark in the Right to Counsel*, U.S. CTS. (Aug. 20, 2014), <http://www.uscourts.gov/news/2014/08/20/criminal-justice-act-50-years-landmark-right-counsel> [<https://perma.cc/8YY4-87BM>] (noting that there were nearly 230,000 total representations by federal defenders and Panel Attorneys in fiscal year 2013).

¹⁴⁴ NACDL REPORT, *supra* note 15, at 19; CARDONE HEARING #6, PANEL 7, *supra* note 22, at 4, 18.

¹⁴⁵ See NACDL REPORT, *supra* note 15, at 25; CARDONE HEARING #6, PANEL 7, *supra* note 22, at 4, 18.

¹⁴⁶ NACDL REPORTS, *supra* note 15, at 25.

¹⁴⁷ See *id.* at 27.

ers, attended defender trainings and conferences, and spent time hearing from defender representatives.¹⁴⁸ They became aware of how shifting prosecutorial practices or technological changes impacted defense practice.¹⁴⁹ And they worked closely with the DSO in the AO to familiarize themselves with the variety of budget issues specific to defenders.

In February 2013, shortly after the jurisdictional change, the AO informed the heads of federal defender offices that their budgets were being cut by 5% across the board.¹⁵⁰ One month later, in March 2013, Congress imposed large budget cuts across the board, in what was known as “sequestration.”¹⁵¹ The Judiciary in turn imposed the cuts on Defender Services in a manner that was devastating to federal defender offices.¹⁵² In combination with the previous month’s announced cuts, federal defender offices were faced with a 10% cut to their budgets halfway through the fiscal year.¹⁵³

By the end of the 2013 fiscal year, most defender offices were required to lay off staff and impose unpaid furloughs on remaining employees. Nationwide, federal defender offices lost approximately 400 people, roughly 10% of the total staff, and

¹⁴⁸ *Id.* at 23.

¹⁴⁹ *See id.*

¹⁵⁰ *See, e.g.,* Andrew Cohen, *How the Sequester Threatens the U.S. Legal System*, ATLANTIC (Mar. 11, 2013), <http://www.theatlantic.com/national/archive/2013/03/how-the-sequester-threatens-the-us-legal-system/273878/> [https://perma.cc/L47J-GEBD] (noting the extent of cuts on the defender program); *Federal Criminal Justice Act Budget Cuts*, CONST. PROJECT, <http://www.constitutionproject.org/wp-content/uploads/2013/07/Fed-Indigent-Defense-Budget-Cuts-Highlights-7-16-13.pdf> [https://perma.cc/SS95-WKSQ] (same).

¹⁵¹ Cohen, *supra* note 150.

¹⁵² *See, e.g.,* Paul Cassell & Nancy Gertner, *Public Defenders Fall to the Sequester*, WALL ST. J. (Aug. 20, 2013), <http://www.wsj.com/articles/SB10001424127887324635904578644173998221896> [http://perma.cc/A99Z-G66L] (same); Alec MacGillis, *Sequestration’s Latest Victim: The American Justice System*, NEW REPUBLIC (Aug. 23, 2013), <https://newrepublic.com/article/114446/sequestration-hitting-federal-public-defenders-far-too-hard> [http://perma.cc/A9AB-RRW6] (same); Michael S. Nachmanoff, *Sequestration Threatens to Eviscerate Federal Public Defenders*, HILL (July 23, 2013), <http://thehill.com/blogs/congress-blog/judicial/312659-sequestration-threatens-to-eviscerate-federal-public-defenders> [https://perma.cc/JS75-S7ZR] (same); Ron Nixon, *Public Defenders Are Tightening Belts Because of Steep Federal Budget Cuts*, N.Y. TIMES (Aug. 23, 2013), http://www.nytimes.com/2013/08/24/us/public-defenders-are-tightening-belts-because-of-steep-federal-budget-cuts.html?_r=0 [https://perma.cc/X38E-MQJN] (noting the impact of sequestration on the defender program); Sam Stein & Ryan J. Reilly, *Sequestration’s Biggest Victim: The Public Defender System*, HUFFINGTON POST (July 22, 2013), http://www.huffingtonpost.com/2013/07/22/sequestration-public-defender_n_3624111.html [http://perma.cc/TV9H-TWEP] (same).

¹⁵³ *See* NACDL REPORT, *supra* note 15, at 29.

imposed unpaid furloughs equivalent to 20,000 workdays.¹⁵⁴ No other Judiciary unit required anything remotely on that scale.¹⁵⁵ In addition, Panel Attorneys saw their hourly rates cut by \$15 per hour for a six-month period of time. The staffing and rate cuts were imposed over the objection of the DSC and the defender advisory groups, which both advocated for delaying CJA Panel payments rather than imposing cuts.¹⁵⁶

The tensions between the defenders and the Judiciary were further exposed when the AO implemented a reorganization in the middle of 2013 that demoted the Defender Services Office within the AO. In 2004, Defender Services had been elevated to a “distinct high level office” which meant it became part of the executive management group of the AO.¹⁵⁷ As reported by the director of the AO at the time, the elevation was necessary to “recognize[] the unique nature of th[e] program and the importance of its mission.”¹⁵⁸ The demotion of the office, of course, sent the opposite message.¹⁵⁹

3. *The NACDL Report*

In 2014, the National Association of Criminal Defense Lawyers (NACDL), formed a committee to study the state of the Criminal Justice Act in the wake of sequestration.¹⁶⁰ The committee conducted surveys of federal defenders, Panel Attorneys, judges, AO administrators, and private attorneys.¹⁶¹ The report found significant and widespread problems relating directly to the lack of defender independence.¹⁶² The most significant problems surrounded the payment and administration of the CJA Panel.¹⁶³ As the NACDL Report summarized it,

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 30.

¹⁵⁶ *Id.* at 29–30; *see also* Joint Statement of Steven G. Asin & Richard Wolff to Ad Hoc Comm. to Review the Criminal Justice Act 6–10 (Mar. 25, 2016) [hereinafter Cardone Joint Statement], <https://cjastudy.fd.org/sites/default/files/hearing-archives/philadelphia-pennsylvania/pdf/steveasindickwolffphillywrittentestimony-done.pdf> [<https://perma.cc/TC28-J3PM>] (describing the erroneous and damaging premises that guided the actions of the Executive Committee).

¹⁵⁷ NACDL REPORT, *supra* note 15, at 27.

¹⁵⁸ *Id.*

¹⁵⁹ *See id.* at 29 (noting how the demotion of Defender Services could be seen to signal a lack of understanding on the part of the Judiciary of the role of the federal defense).

¹⁶⁰ *Id.* at 5.

¹⁶¹ *Id.* at 5–6.

¹⁶² *Id.* at 33–35.

¹⁶³ *Id.* at 36–40.

“little has changed since the Prado Report was issued two decades ago.”¹⁶⁴

The NACDL Report found the selection process for determining who serves on the CJA Panel deeply flawed in many districts, including some where every lawyer admitted to the court is required to serve, regardless of whether they have any criminal law experience.¹⁶⁵ In other districts “there are no or limited screening mechanisms or minimum standards to become part of the panel.”¹⁶⁶ In places where real screening exists, the trial judges usually have the final say on selection, resulting in some attorneys perceiving the need to “compromise their advocacy” in order to avoid being removed from the Panel.¹⁶⁷

The report also found significant problems with respect to CJA Panel attorney vouchers for payment and outside services. There were numerous accounts from districts throughout the country of judges denying the use of experts and investigators and cutting attorney submissions for payment without providing an explanation.¹⁶⁸ It found the nationwide average for the use of any sort of outside service provider, including investigators or experts, was less than 10%.¹⁶⁹ In many districts it was far lower.

The NACDL Report also recounted the recent jurisdictional changes and budget crises. Although funding was found to be better than most state funding for public defense, the report discussed a troubling dynamic whereby the Judicial Conference governing committees viewed the Judiciary budget as a “zero-sum game” and one in which the EC and Budget Committees felt it necessary to “restrain, control, and reduce the defender budget in order to protect and grow the judiciary’s budget.”¹⁷⁰

4. *A Third Look: The Cardone Committee*

In response to the many calls to examine the CJA program, the Judiciary announced in early 2015 that it was commission-

¹⁶⁴ *Id.* at 36.

¹⁶⁵ *Id.* at 38.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 37.

¹⁶⁸ *Id.* at 44.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 24.

ing another study of the CJA program.¹⁷¹ Chief Justice John Roberts selected thirteen committee members, including the chair, the Honorable Kathleen Cardone, a federal district court judge in the Western District of Texas.¹⁷²

The Cardone Committee held multi-day hearings in seven cities around the country soliciting testimony from judges, federal defenders, Panel Attorneys, law professors, and representatives from a variety of legal organizations.¹⁷³ The committee has gathered a large amount of data, and it is expected to issue a report in the spring of 2017.¹⁷⁴

II

JUDICIAL GOVERNANCE OF THE DEFENSE FUNCTION

This Part examines the potential constitutional, ethical, and policy implications of the Judiciary's governance of the federal defense function. The first subpart considers whether the Judiciary exceeds its Article III authority in managing the defense function in federal courts and begins by discussing the general constitutional limits on federal judges' non-adjudicatory authority. The second subpart discusses specific ethical problems caused by judicial supervision of defense counsel. And the third subpart makes the policy case against judicial administration of the defense function.

A. Constitutional Problems

1. *Federal Courts' Non-Adjudicative Authority*

Article III acts as both a grant of authority to the federal Judiciary and a limit on that authority. It works to ensure that decisions on "core" Article III matters are performed only by life-tenured Article III judges and not by Article I magistrate or bankruptcy judges.¹⁷⁵ It also limits what Article III judges may do other than adjudicating claims legitimately before them. Case law and commentary on the latter category tend to focus on the types of disputes courts may resolve, often in the con-

¹⁷¹ *CJA Study Committee Begins Accepting Comments*, U.S. CTS. (June 8, 2015), <http://www.uscourts.gov/news/2015/06/08/cja-study-committee-begins-accepting-comments> [<https://perma.cc/ZG3R-GZ9S>].

¹⁷² *Id.* (noting that the committee includes five federal judges, a circuit executive, two federal defenders, a CJA Panel attorney, two law professors, and an attorney in private practice).

¹⁷³ See CARDONE HEARING #2, *supra* note 22, at 1.

¹⁷⁴ See U.S. COURTS, *supra* note 171 (noting that the study will take eighteen to twenty-four months to complete).

¹⁷⁵ See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70 (1982).

text of questions about standing,¹⁷⁶ abstention,¹⁷⁷ or political question doctrine.¹⁷⁸

Here, I focus on a narrower set of questions more specifically aimed at the limits on the Judiciary's ability to engage in non-adjudicative work entirely outside the scope of cases before them. The first major challenge in the modern administrative era to federal courts' ability to engage in non-adjudicative activity came in 1941 when the plaintiff in a personal injury action challenged one of the then-new Rules of Civil Procedure.¹⁷⁹ In *Sibbach v. Wilson & Co.*, the plaintiff argued that Congress was prohibited from delegating such rulemaking authority to the Judiciary in the Rules Enabling Act of 1934.¹⁸⁰ Rejecting the challenge, the Supreme Court held that "Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution."¹⁸¹ The Court upheld the particular rule in question (requiring the petitioner to submit to a physical examination) by delineating judicial rulemaking relating to procedure (permissible) from substantive lawmaking (impermissible).¹⁸²

Later opinions examining court-created rules of procedure went further, finding that "matters which relate to the administration of legal proceedings [] [are] an area which federal courts have traditionally exerted strong inherent power, completely aside from the powers Congress expressly conferred."¹⁸³

Perhaps the most famous example of Supreme Court scrutiny of non-adjudicative duties by federal judges was its examination of the independent counsel statute in *Morrison v. Olson*.¹⁸⁴ That statute (since repealed) required a three-judge panel (known as the "Special Division" and comprised of three circuit court judges or justices appointed by the chief justice of the United States) to select an independent counsel upon the attorney general's determination that the counsel was war-

176 See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 555–57 (1992).

177 See *Younger v. Harris*, 401 U.S. 37, 43–51 (1971).

178 See *Baker v. Carr*, 369 U.S. 186, 211 (1962).

179 *Sibbach v. Wilson & Co.*, 312 U.S. 1, 11 (1941).

180 *Id.* at 6–7.

181 *Id.* at 9–10 (footnote omitted).

182 *Id.* at 15–16.

183 *Hanna v. Plumer*, 380 U.S. 460, 472–73 (1965) (quoting *Lumbermen's Mut. Cas. Co. v. Wright*, 322 F.2d 759, 764 (5th Cir. 1963)).

184 487 U.S. 654 (1988).

ranted to investigate possible criminal conduct by certain high-ranking government officials.¹⁸⁵

The Court in *Morrison* began its analysis of whether the powers vested in the courts by the statute violated Article III by announcing that “[a]s a general rule, we have broadly stated that ‘executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution.’”¹⁸⁶ The Court found, however, that the Judiciary could select the independent counsel because the position was an “inferior officer” within the meaning of the Appointments Clause of Article II.¹⁸⁷ The Appointments Clause states that “Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, *in the Courts of Law*, or in the Heads of Departments.”¹⁸⁸ Thus, despite the general prohibition on judges engaging in “executive or administrative duties of a nonjudicial nature,”¹⁸⁹ the Court found that the specific language of the Appointments Clause empowered Congress to vest the authority of selecting the independent counsel in the courts.¹⁹⁰

With respect to other powers given to the Special Division by the Act, the Court found them to be acceptably ancillary to the Appointment Clause authority. According to the Court, the powers neither encroached upon another branch of government (here, the Executive Branch), nor did they pose “any threat to the ‘impartial and independent federal adjudication of claims within the judicial power of the United States.’”¹⁹¹ Features of the Act that supported this finding included the fact that the independent counsel position was temporary and the Special Division’s discretion to determine the counsel’s jurisdiction was greatly restricted.¹⁹²

In 1989, the year after *Morrison* was decided, the Supreme Court in *Mistretta v. United States*¹⁹³ ruled on the constitutionality of the United States Sentencing Commission. The Commission’s authorizing statute deemed it to be an independent agency within the Judiciary.¹⁹⁴ The petitioner, who had been

185 *Id.* at 661 n.3.

186 *Id.* at 677 (quoting *Buckley v. Valeo*, 424 U.S. 1, 123 (1976)).

187 *Id.* at 672 (internal quotation marks omitted).

188 U.S. CONST., art. II, § 2, cl. 2 (emphasis added).

189 *Buckley*, 424 U.S. at 123.

190 *Morrison*, 487 U.S. at 656.

191 *Id.* at 683 (quoting *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 850 (1986)).

192 *Id.* at 679.

193 488 U.S. 361 (1989).

194 *Id.* at 393.

sentenced pursuant to the newly promulgated Sentencing Guidelines created by the Commission, challenged the legitimacy of the Commission on the grounds, among others, that Congress had exceeded its authority to delegate legislative power and that the make-up of the Commission (which includes active federal judges appointed by the president), and its activities, violated separation-of-powers principles.¹⁹⁵

Although the Court noted that the Commission “unquestionably is a peculiar institution within the framework of our Government,” it rejected the challenge.¹⁹⁶ It found that Congress had sufficiently circumscribed the rulemaking authority it had granted to the Commission and placed within the Judiciary, and that it fell within the sort of judicial activity—such as the ability to create rules of procedure under the Enabling Acts—that were historically allowable.¹⁹⁷

In sum, *Morrison*, *Mistretta*, and the cases such as *Sibbach* upholding the federal courts’ authority to enact rules of procedure teach that when called upon to determine the limits of the Judiciary’s authority to engage in non-adjudicative functions, the courts have given themselves permission to do so when: (1) the Constitution specifically allows for the activity (such as under the Appointments Clause); (2) the rulemaking authority provided by Congress is sufficiently limited and confined to traditional areas of judicial competence (such as participation on the Sentencing Commission); or (3) the activity inheres in traditional judicial activity (such as procedural rulemaking).

2. *The Judiciary’s Governance of Defenders*

From one perspective, the role the Judiciary plays in governing the defense function might be seen as perfectly traditional and in line with a judicial history of sometimes determining attorney’s fees and selecting counsel in the civil setting. Examples include § 1983 civil rights cases¹⁹⁸ and the class action context.¹⁹⁹ It might also be argued that the Judiciary’s role in managing the defense function does not encroach on traditional areas of Executive authority, such as those at issue in *Morrison*.

¹⁹⁵ *Id.* at 416 (Scalia, J., dissenting).

¹⁹⁶ *Id.* at 384.

¹⁹⁷ *Id.* at 384–86.

¹⁹⁸ See 42 U.S.C. § 1988 (2012) (containing an attorneys’ fees provision for prevailing parties in federal civil rights actions).

¹⁹⁹ FED. R. CIV. P. 23(g)(1) (providing criteria for choosing “class counsel” in class action suits); FED. R. CIV. P. 23(h) (allowing for the award of attorneys’ fees in same).

On the other hand, although the Judiciary's involvement in managing the defense function may not implicate authority traditionally exercised by the other branches, it certainly raises questions regarding the limits of judicial authority as conferred by Article III. And it may well be seen as a "threat to the 'impartial and independent federal adjudication of claims within the judicial power of the United States'" as discussed in *Morrison*.²⁰⁰

The judicial role in managing the defense function in federal courts far exceeds the role federal judges sometimes play in awarding attorneys' fees or choosing among competing counsel for a class of plaintiffs. The latter duties represent natural extensions of the traditional role of judges as adjudicators of cases and controversies in which prevailing parties seek money from the losing side, or different attorneys make the case in court filings for lead status as class counsel. In those instances, motions are made, and judges rule, settling disputes between and among parties. And the scenarios do not involve the Judiciary spending public dollars outside of the control of one of the parties (not to mention, the dollars of the Judiciary itself). In contrast, when it comes to managing the defense function, judges determine (1) how much money to seek from Congress for the defense program overall (perhaps at the expense of the federal courts' budget), (2) how to apportion those public dollars among Panel Attorneys and public defenders, (3) whether individual Panel Attorneys are permitted to use those dollars to investigate particular cases or engage in other out-of-court preparations; (4) how to apportion those dollars among defender offices nationwide, (5) what policies covering employment, information technology, and administration to apply to public defender offices, and (6) who among the bar is permitted to act as a Panel Attorney or the head of a federal public defender office.²⁰¹

None of those decisions arise in the course of resolving disputes between parties to cases or controversies, and nothing about the activity is inherently "judicial" in nature. Nor is the activity undertaken pursuant to the Appointments Clause of the Constitution. As discussed further below in Part III, public defenders are not officers within the meaning of that clause.

Thus, it is not at all apparent where within the limited jurisdiction conferred by Article III the power of the Judiciary to

²⁰⁰ *Morrison v. Olson*, 487 U.S. 654, 683 (1988) (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850 (1986)).

²⁰¹ See *supra* subpart I.C.

supervise and manage the defense function is found. The sheer scope of the enterprise—managing the budget, payment, and selection of the attorneys for 80% of all federal criminal defendants—is thoroughly unlike any other procedural or administrative duty ancillary to the work of the courts.

And the Article III limits are especially significant in light of competing and well-recognized concerns about the importance of an independent defense function. For instance, the Supreme Court has found that a prisoner suing his public defender under 42 U.S.C. § 1983 cannot prevail because his public defender is not—and should not be—a state actor.²⁰² In that case, the Court discussed the importance of *Gideon*'s requirement of counsel's "guiding hand" and elaborated that "[i]mplicit in the concept of a 'guiding hand' is the assumption that *counsel will be free of state control*."²⁰³ The Court concluded, "[t]here can be no fair trial unless the accused receives the services of an effective *and independent* advocate."²⁰⁴ The Supreme Court emphasized the point in a later case distinguishing between a prison doctor, who it found was acting on behalf of the State, and a public defender whose "professional and ethical obligations require him to act in a role independent of and in opposition to the State."²⁰⁵ It was this "particular professional obligation" that set public defenders apart from other state-employed professionals for purposes of determining whether the person was a state actor.²⁰⁶

Indeed, the Judiciary's role in managing the defense function would seem to raise concerns more troubling than those raised in other contexts involving judicial supervision of the prosecutorial function. For instance, in *United States v. Williams*,²⁰⁷ the Supreme Court held that federal courts could not require prosecutors to disclose exculpatory material to a federal grand jury. The Court stated, "[b]ecause the grand jury is an institution separate from the courts, over whose functioning the courts do not preside, we think it clear that, as a general matter at least, no such 'supervisory' judicial authority exists."²⁰⁸ The question presented there—what outer limit may the courts place on the conduct of prosecutors before a body (the grand jury) that has often been referred to as "an appen-

202 Polk Cty. V. Dodson, 454 U.S. 312, 317–24 (1981).

203 *Id.* at 322 (emphasis added).

204 *Id.* (emphasis added).

205 West v. Atkins, 487 U.S. 42, 50 (1988).

206 *Id.* at 52.

207 504 U.S. 36 (1992).

208 *Id.* at 47.

dage of the court”²⁰⁹—was exceedingly narrow in comparison to the enormous and sprawling power exerted by federal courts over the defense function.

Perhaps the statutory authority conferred under the CJA combined with the now longstanding practice of court involvement in regulating the defense function make it unlikely that courts would divest themselves of that authority by finding they lack constitutional permission. But a traditional reading of Article III and its limits suggests that the arrangement is, at the least, troubling and ripe for examination.

B. Ethical Problems

From the very first American code of legal ethics, lawyers have been duty bound to give “entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability.”²¹⁰ Today’s ethics rules uniformly codify those same sentiments and state that all attorneys, public defenders included, are ethically obligated to provide diligent, zealous, and conflict free counsel to clients they represent.²¹¹ The rules also require attorneys to maintain strict confidentiality with respect to any “information relating to the representation of a client.”²¹²

Those ethical duties are strained, if not violated, on a regular basis by virtue of judicial management of the defense function. Consider the following scenarios.

Scenario 1: A Panel Attorney represents a client in a case with voluminous discovery material in the form of electronically stored information on computers and mobile phone devices.

²⁰⁹ *Brown v. United States*, 359 U.S. 41, 49 (1959).

²¹⁰ CANONS OF PROF’L ETHICS canon 15 (AM. BAR ASS’N 1908) http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/Canons_Ethics.authcheckdam.pdf [<https://perma.cc/5RUE-T6R5>]. Indeed, the sentiment of loyalty and devotion has firmly established roots in English legal tradition, as famously and even more forcefully expressed by Lord Henry Brougham during his defense of the Queen in *Queen Caroline’s Case*:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty

2 CAROLINE & GREAT BRITAIN, *THE WHOLE PROCEEDINGS ON THE TRIAL OF HER MAJESTY CAROLINE AMELIA ELIZABETH, QUEEN OF ENGLAND* 2 (John Fairburn, ed. 1820).

²¹¹ MODEL RULES OF PROF’L CONDUCT pmb1., r. 1.1, 1.3, 1.7, 1.8 (AM. BAR ASS’N 2014). The Supreme Court has also emphasized that “a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client.” *Polk Cty. V. Dodson*, 454 U.S. 312, 321 (1981).

²¹² MODEL RULES OF PROF’L CONDUCT r. 1.6(a).

Because of the time required to review the discovery and the experts required to engage in computer forensic investigation, the attorney easily exceeds the statutory cap on expenses for the case. Because of this, the attorney is required to fill out a form entitled “Supplemental Information Statement for a Compensation Claim in Excess of the Statutory Case Compensation Maximum: District Court.”²¹³ In that form, among other things, the lawyer is asked to “list and describe motions, legal memoranda, jury instructions, and sentencing documents, or legal research not resulting in such” and to “summarize investigation and case preparation (e.g., number and accessibility of witnesses interviewed, record collection, document organization) which are a noteworthy factor in the number of hours claimed.”²¹⁴

In order to be paid for her time and expenses, both the district court and circuit court will need to review and approve the form.²¹⁵ If the attorney is in a jurisdiction with judges who liberally grant such requests, the attorney may be able to answer the questions in a general and vague enough manner sufficient to avoid disclosing confidential information that would obviously prejudice the client (though avoiding the disclosure of all confidential information is impossible). If, however, the attorney works in a jurisdiction with judges who require much more detail, the attorney must choose between disclosing potentially prejudicial confidential information and getting paid. Worse, if the attorney is aware in advance from prior experience that she will be faced with that decision, she must balance her obligation to do the necessary work with the risk of not getting paid for many hours of labor. Lastly, the attorney may practice in a district where judges who select the Panel Attorneys look less favorably on attorneys who spend more money than others, thereby risking her place on the panel for requesting significant funds.

Scenario 2: An attorney represents a client charged with downloading child pornography. The client pleads guilty. The client has no prior convictions, and there are no allegations that the client has ever sexually abused a minor. The attorney is aware that there are generally accepted psychological tests that can measure a person’s risk for engaging in “contact” sex

²¹³ CJA Form 26, U.S. Cts., <http://www.uscourts.gov/forms/attorney-excess-compensation-claims/statement-compensation-claim-excess-statutory-case> [<https://perma.cc/Y5Y8-2LMX>] (last updated Mar. 2012).

²¹⁴ *Id.*

²¹⁵ 18 U.S.C. § 3006A(d)(3) (2012).

offenses with minors. If the client does well on the test, the results will be helpful at sentencing. If the client does not do well, the results, if known, would be highly damaging.

If the attorney is privately retained or works in a federal public defender office, the attorney may order the testing without any outsider's permission, and if the test results are inconclusive or bad, neither the prosecutor nor the judge will ever be aware of them. If the attorney is a Panel Attorney, however, she must receive advanced approval to hire the psychologist to do the testing.²¹⁶ The form she must fill out for the judge asks for the "description of and justification for [the] services."²¹⁷ The instructions for the form state, "[i]f this is a request for an examination by a psychiatrist or psychologist, state specifically the purpose of the examination."²¹⁸ For the Panel Attorney, the request for the service now compromises confidentiality, and it comes with extraordinary risk. If the testing goes poorly, and the attorney never submits the results, the judge, now sentencing the client, is quite likely to be aware of that fact.

Scenario 3: A Federal Public Defender (FPD) is in the last year of a four-year term, and the circuit is conducting its assessment to determine whether to renew the FPD. The assessment relies heavily on the views of the district court judges. While the assessment is taking place, the FPD receives several unrelated phone calls from different district court judges. One judge calls to say that one of the lawyers in the FPDO went "too far" in cross examining a police officer in a suppression hearing. The judge says she understands and respects vigorous advocacy, but the lawyer was unnecessarily combative. She would like the FPD to speak to the lawyer about it. Another judge calls to say that he believes the attorneys in the FPDO are acting unethically when they file appeals of sentences on behalf of clients who have signed appeal waivers in plea agreements which are also signed by the attorney. The FPD explains why he believes it is not unethical and, in fact, is required by law. The judge disagrees and asks the FPD to consider changing the office's policy. A third judge calls to complain about one of the lawyers in the office who has just moved for the judge to recuse herself. The judge is upset that her impartiality has been ques-

²¹⁶ See *supra* notes 111–14 and accompanying text.

²¹⁷ *CJA Form 21*, U.S. DISTRICT CT. FOR THE S. DISTRICT N.Y., <http://www.nysd.uscourts.gov/file/forms/cja-form-21> [<https://perma.cc/EB4G-42FH>] (last updated May 2012).

²¹⁸ *Instructions for CJA Form 21*, U.S. DISTRICT CT. FOR THE S. DISTRICT N.Y., http://www.nysd.uscourts.gov/file/forms_instructions/cja-form-21 [<https://perma.cc/CX45-8SDW>] (last updated Jan. 31, 2013).

tioned, insists that there is no basis for the motion, and asks the FPD to speak with the lawyer about it.

The FPD must decide how to respond to each of those interactions while possibly believing that his prospects for keeping his job may be adversely impacted if the judges ultimately walk away from the encounters unhappy. The FPD may perceive, correctly or not, that he is faced with a choice of keeping his job or discouraging what he otherwise might feel is appropriate, vigorous advocacy.

None of the three scenarios described above is far-fetched. Some version of each takes place on a regular basis.²¹⁹ The problem with scenarios one and two is not that the Panel Attorneys must provide justification for the expenditure of funds; indeed, there must be some system of accountability to safeguard public dollars. The problem is that those explanations are being provided to the very judges overseeing the cases, thereby compromising confidentiality and potentially discouraging the attorneys from seeking necessary services or doing the work required for effective advocacy. The problem with scenario three is not that judges are reaching out to public defenders or other frequent litigants to express concerns about their practice. The problem is that those same judges will directly determine the fate of the FPD's job. Note too that these tensions are different from the many run-of-the-mill tensions that any head of an office faces from either outsiders, or even members of her own board of directors, because the source of the possible pressure, judges, involves people in a position who can directly impact both the clients' cases and the FPD's job.

The conflicts in all of those scenarios, and many others, arise from the nature of the current structure. But the structure implicates more than just discrete scenarios; it has the potential to infect advocacy more generally. Although good relationships with judges often go hand in hand with good advocacy, there are times when tensions exist. Lawyers must sometimes make a record when a judge has clearly heard enough. Good advocacy may require asking questions of witnesses or making arguments at trial with which the judge will strongly disagree. As prominent legal ethicists and law professors Monroe Freedman and Abbe Smith have written:

²¹⁹ See, e.g., PRADO REPORT, *supra* note 1, at 12–29 (reviewing the Criminal Justice Act); NACDL REPORT, *supra* note 15, at 49–53 (arguing that the compensation of Panel Attorneys should be entirely outside of judicial control). These scenarios are also based on the Author's own experiences and discussions with his colleagues.

Along with a great deal of mutual respect between judges and the lawyers who appear before them, there is also a considerable amount of tension. One reason for that tension is the fact that the judge and the advocates have different functions. The lawyers are committed to seek justice as defined by the interests of their clients, while the judge is dedicated to doing justice between the parties. From the perspective of the judge, therefore, at least one lawyer in each case is attempting to achieve something to which her client is *not* entitled. From the perspective of the lawyer, however, the judge is always poised to deprive her client of something to which the client is entitled. In the words of Professor Louis Raveson, “some level of emotional reaction, some degree of temporary animosity, and a measure of turmoil, are part of the natural processes of trial advocacy.”²²⁰

The tensions they describe often require attorneys to make judgment calls about the costs and benefits of pursuing a course that may upset the judge. But in the normal arm’s length relationship between attorney and judge, those judgment calls are made entirely with the best interest of the client in mind. A lawyer may decide to pick her battles and not file a longshot motion because an angry judge may deny other better motions. That sort of strategizing and weighing of risk is part of being an ethical and effective lawyer. Not so, however, when the lawyer is forced to choose between his own job security and pay on the one hand, and the best interests of the client on the other. That is a fundamentally more troubling conflict and one with significant ethical implications—especially when it is built into the very nature of the practice on a regular basis.²²¹

²²⁰ MONROE FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS’ ETHICS 82 (4th ed. 2010) (quoting Louis S. Raveson, *Advocacy and Contempt: Constitutional Limitations on the Judicial Contempt Power, Part One: The Conflict Between Advocacy and Contempt*, 65 WASH. L. REV. 477, 514 (1990)).

²²¹ See, e.g., MODEL RULES OF PROF’L CONDUCT r. 1.7, cmt. 10 (“The lawyer’s own interests should not be permitted to have an adverse effect on representation of a client.”); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 cmt. B (AM. LAW. INST. 2000) (“To the extent that a conflict of interest undermines the independence of the lawyer’s professional judgment or inhibits a lawyer from working with appropriate vigor in the client’s behalf, the client’s expectation of effective representation could be compromised.”) (citations omitted); see also U.S. *ex rel.* U.S. Attorneys v. Ky. Bar Ass’n, 439 S.W.3d 136, 140 (Ky. 2014) (holding that defense counsel may not ethically counsel a client to waive ineffective assistance of counsel in a plea agreement because of the conflict between the attorney’s interest and the client’s interest); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 125 (prohibiting an attorney from representing a client “if there is a substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s financial or other personal interests”); *Ethics Opinion 15-01*, ST. BAR OF ARIZ. (June 2015), <http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=724> [<https://perma.cc/9CCM-4HUM>] (stating that

C. Policy Considerations

Whether the judicial role in supervising the work of defense lawyers is unconstitutional, unethical, or neither, it is surely problematic. Even if the current structure does not strictly violate Article III or ethical codes, the plausible arguments that it does suggest the need to take a hard look at whether change is a good idea.

The current structure implicates a fundamental policy question of institutional competence. Are judges the best actors to administer defense funds? Do they possess particular expertise, and are they best situated, positioned as judges, to make determinations about how funds should be allocated among the various competing demands on the defense function? As compared to an independent administrator, the answers are surely no. First, their position as judges may actually impair their ability to fully vet defense expenditures. To the extent that judges are concerned about potentially breaching attorney-client confidentiality and intruding into defense activities, they are less able to actually scrutinize why and how funds are being used.

Second, few federal judges come to the bench with criminal defense experience.²²² The vast majority of judges who have any criminal law experience have backgrounds as prosecutors rather than defenders.²²³ The lack of prior defense experience does not mean judges are incapable of administering the defense function, but it surely means they are less capable than an administrator whose sole job is to be expert in the area.

Third, judges only see the cases and applications that come before them. They do not necessarily see a broader picture of defense service needs and requests throughout the district or circuit in which they sit. Nor do they play a role in vetting expert service providers or negotiating for better rates in the way a single administrative office could.

Lastly, there are significant concerns at the national level about competing interests between the resource needs of the

conflict of interest rules block defense attorneys from counseling clients to waive their claim of ineffective assistance of counsel).

²²² For example, in the Southern and Eastern Districts of New York, there are a total of seventy-three United States District Court judges. Thirty-three of those judges have no criminal law background. Another thirty-five are former prosecutors. Four of the thirty-five former prosecutors have experience as a criminal defense attorney. Four judges have defense experience and are not former prosecutors. See FED. BAR COUNCIL, SECOND CIRCUIT REDBOOK 2015–16 (Teresa T. Ngo & Joan R. Salzman eds., 2015).

²²³ See, e.g., *id.* (illustrating examples).

courts and the defense program. It is one thing for the Judiciary to make resource allocation decisions between, for example, magistrate judges and the clerks' offices. Those decisions, and the trade-offs they require, represent a natural form of self-government within the judicial branch. If the judges choose to make the sacrifice of having fewer magistrate judges in exchange for having more clerks (or probation officers, bankruptcy judges, or any number of other personnel), they may understandably do so—the personnel work for them and are answerable to them for the assistance they provide the courts. But unlike clerks and other court personnel, defense lawyers, like all lawyers, have a professional obligation to serve their clients, not the judges. A decision by the Judiciary to seek funding from Congress for additional facilities, personnel, or higher pay rather than for the defense function, represents not a trade-off among competing demands within the courts, but a trade-off between two fundamentally different agencies—a decision that should properly lie with Congress. A troubling example of how these tensions can play out occurred during the largest budget crisis to face the CJA Program. When sequestration was imposed by Congress in 2013, the EC of the Judicial Conference disregarded pleas from defenders, the DSO, the DSC, and the chief judges of nearly every federal district to structure cuts in a way that would have avoided the disastrous layoffs and furloughs that cost 400 jobs and thousands of unpaid workdays (from an already overworked and overburdened system).²²⁴

Other less dramatic examples of how Judiciary priorities do not match defender priorities are common: the decision by the AO to prevent defenders from representing their own clients in submitting clemency petitions that were requested by the White House;²²⁵ the constant tug and pull of the AO in attempting to control defender information technology that contains highly sensitive and confidential client information;²²⁶ and the refusal of the Judiciary to request from Congress higher rates for Panel Attorneys when the higher rates are statutorily authorized and recommended by the DSC.²²⁷

²²⁴ See NACDL REPORT, *supra* note 15, at 29–30; Cardone Joint Statement, *supra* note 156, at 9.

²²⁵ NACDL REPORT, *supra* note 15, at 31.

²²⁶ See E-mail from Steven G. Kalar, Fed. Pub. Def. of the N. Dist. Of Cal., to the Honorable Kathleen Cardone, Chair, Ad Hoc Comm. To Review the Criminal Justice Act Program 4–5 (Feb. 17, 2016).

²²⁷ See PRADO REPORT, *supra* note 1, at 37–38.

The policy case for removing the defense function from the management and supervision of judges has been well made by the various committees and groups that have studied it.²²⁸ Judges, whose primary responsibility is to adjudicate matters before them, should not be regularly involved in the hiring and payment of one set of attorneys on those matters. This arrangement can lead to concrete problems such as denials of payment or authorization for investigators by judges who are not sympathetic to the attorney's (or the attorney's client's) position. And it can lead to problems of perception because whether or not a Panel Attorney or FPD experiences actual conflict with a judge, she may be concerned that any conflict will harm her chances for renewal on the CJA Panel or reappointment as the FPD. A troubling sign that attorneys may in fact be pulling their punches or that judges are hostile to defense expenditures is the extraordinarily low rate of Panel Attorneys' use of any sort of outside services, including investigators and experts, which sits below 5% in some districts.²²⁹

All that said, the identification of these problems does not lead to an obvious solution. The tough question from a policy perspective is not whether the current system is ideal, but whether on balance it beats the alternatives. In order to have a discussion about the policy implications of changing structure, it is necessary to consider the plausible options. The next Part does so and weighs the likely costs and benefits.

III

DEFENDER INDEPENDENCE

In this Part, I describe the four broad categories of reform most commonly discussed: (1) improving defender independence within the current structure; (2) creating a quasi-independent agency within the Judiciary; (3) creating an independent agency within the Executive Branch; and (4) creating a congressionally chartered independent organization

²²⁸ See, e.g., *id.* at 33–49, 75–85 (finding that the goals of the CJA would be best served if judicial involvement in the Act's administration were minimized); NACDL REPORT, *supra* note 15, at 21–25 (voicing concern over the pervasive judicial control over the defense function); S. REP. NO. 91-790, at 18 (1970) (“recogniz[ing] the desirability of eventual creation of a strong, independent office to administer the Federal defender program”); Part I *supra* (detailing the historical development of the public defense system).

²²⁹ See CARDONE HEARING #2, *supra* note 22, at 37–38 (discussing the fact that panel lawyers seek experts in an average of 19% of cases nationwide and as low as 1% in one district).

wholly outside of either the Judicial or Executive Branch. I advocate for the fourth option and explains its basic contours. In doing so, I look to various federal agency models, including the quasi-federal, and highly regarded, local public defender office in Washington, D.C.²³⁰ I do not attempt to draw lessons from the multitude of state public defender systems around the country. The wide variation and paucity of research about how the different structures impact the systems' effectiveness preclude such an attempt here.²³¹

A. The Alternatives

1. *Improvements to the Current Structure*

One way to strengthen defender independence and governance is to make improvements within the confines of the current structure. At the very least, those improvements would include a return to the structure that existed pre-2012, including re-elevation of the DSO within the bureaucracy of the AO and the return of jurisdiction over staffing to the DSC.

But any hope of achieving a real impact on defender independence within the current structure would require changes well beyond returning to the pre-2012 state of affairs. At a minimum, they would need to include: (1) greater defender representation within the Judicial Conference by, for instance, having at least one defender representative on the DSC; (2) allowing defenders a direct role in preparing and presenting a budget to Congress; and (3) developing one of several means for better insulating Panel Attorneys from the judges before whom they appear for purposes of vouchers, outside service approval, and selection.

On the third point, proposals have ranged from moving all panel management within the office of the local FPD, to the creation of local boards as recommended in the Prado Report and discussed further below.²³² Panel management is already handled by administrators in federal defender offices in some districts²³³ and can be accomplished in other districts by amendments to individual district CJA Plans. It offers only a partial solution because, by statute, judges must still approve

²³⁰ See *infra* subpart B.2.

²³¹ For a compilation of state public defender structures see BUREAU OF JUSTICE STATISTICS, U.S. DEP'T. OF JUSTICE, INDIGENT DEFENSE SERVICES IN THE UNITED STATES, FY 2008-2012 - UPDATED (2014), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5051> [https://perma.cc/94LD-4QR7].

²³² See *id.* at 4-5; PRADO REPORT, *supra* note 1, at 51-52.

²³³ See CARDONE HEARING #2, *supra* note 22, at 12.

every voucher for hours worked and requests for investigative or expert services. But FPDs who manage CJA vouchers have testified that they believe their initial screening and approval works well and alleviates to some degree judicial involvement.²³⁴

None of these changes would necessarily require statutory amendment; they could all be accomplished through changes to Judiciary policy. The advantage to the proposals is that they are far easier to accomplish than legislative change, and they maintain a familiar structure, bringing with them less risk of unintended and unwanted consequences. The disadvantage is that the changes still leave a system that relies heavily on the Judiciary for governance. Precisely because of the comparative ease with which Judiciary policy can be changed, whatever reforms might be implemented might also be more easily reversed. And regardless of overarching Judiciary policy, individual judges and courts retain tremendous discretion and authority under the current statutory framework. Indeed, even in districts with robust CJA Plans, the plans are often disregarded in practice.²³⁵

Perhaps the biggest downside to relying on reform within the same basic structure is that the Judiciary has not shown any desire to reform the current system. Almost all of the problems identified in this Article were identified in the Prado Report twenty-three years ago,²³⁶ yet the problems persist, and in some instances, have grown worse.²³⁷

2. *Independent Agency Within the Judiciary*

The Prado Report recommended an independent agency within the Judiciary to be called the Center for Federal Criminal Defense Services (Center).²³⁸ The Center would be governed by a board of seven directors appointed by the chief justice “in close consultation with legal organizations interested in the CJA program.”²³⁹ The Prado Report described the make-up of the board as follows:

²³⁴ *Id.* at 24–26.

²³⁵ See CARDONE HEARING #6, PANEL 8, *supra* note 22, at 4 (statement of Professor Cortney Lollar) (noting her research showing that “some jurisdictions deviate substantially from the plan, others only slightly.”).

²³⁶ PRADO REPORT, *supra* note 1, at 33–49.

²³⁷ See NACDL REPORT, *supra* note 15.

²³⁸ See PRADO REPORT, *supra* note 1, at 75.

²³⁹ See *id.* at 76 (stating that the legal organizations to be consulted would include the American Bar Association, the National Association of Criminal Defense Lawyers, the National Legal Aid and Defender Association, the Federal Bar

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.²⁴⁰

The Center would assume the authority and responsibility of the Judicial Conference and the AO in the administration of federal criminal defense functions.²⁴¹ It would be authorized to employ staff—likely something akin to the current DSO—and the AO would be directed to provide any necessary administrative services on a cost reimbursable basis. But the Judicial Center and the AO would no longer play any policy or governing role with respect to the defender program.

The Center would submit annual appropriations requests directly to Congress and defenders would provide views about funding directly to Congress.²⁴² The appropriations requests would not be subject to Judicial Conference amendment or interference.

In discussing the risks that might attend defenders going directly to Congress for funding, the Report stated:

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.²⁴³

In addition to the Center, the Report recommended the creation of local boards, either on a circuit- or district-wide

Association, the NAACP Legal Defense Fund, and the Federal and Community Defenders).

²⁴⁰ *Id.*

²⁴¹ *Id.* at 77.

²⁴² *Id.* at 78.

²⁴³ *Id.* at 79.

basis.²⁴⁴ The local boards would manage local CJA Plans, recommend defender appointments, and administer the CJA Panel. The Committee noted that the local boards could be created with or without the change to the national structure. In other words, even if the current AO model of governance is maintained, local governing boards could be created to administer the CJA in each district.

The Committee described the make-up of the local boards as follows:

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.²⁴⁵

In districts with a CDO, the CDO board would be permitted to function as the local board. The local boards would be responsible for (1) the creation of the local CJA Plan, (2) the nomination of the defender to the national Center for appointment, and (3) selection of a local administrator to manage the CJA Panel, including voucher review and approval of experts and services, and Panel membership selection.²⁴⁶

The Prado Committee was not unanimous in its recommendations. In addition to some on the Committee who were opposed to the creation of the national structure,²⁴⁷ four Committee members wrote a separate statement agreeing with the basic structural recommendations but expressing concern that the proposal for the selection of the national and local board members still left too much control by the judges.²⁴⁸ They proposed that the selections of board members by the chief

²⁴⁴ *Id.* at 80.

²⁴⁵ *Id.* at 81.

²⁴⁶ *Id.* at 81–83.

²⁴⁷ *Id.* at 97 (separate statement of George H. Revercomb).

²⁴⁸ *Id.* at 99–100 (separate statement of Judy Clarke, Tomas W. Hillier, II, Robert Altman, and J. Vincent Aprile, II).

justice and the chief judges of the circuits not be done just “in consultation with” groups aligned with the cause of the criminal defense,²⁴⁹ but that their choices be limited to a list of names provided by those groups (and their state and local counterparts).²⁵⁰

3. *Independent Executive Agency*

On June 10, 2016, Representative Ted Deutch proposed a bill entitled the “Independent and Effective Federal Defenders Act of 2016.”²⁵¹ The bill would create an independent defender agency within the Executive Branch run by a twelve-member commission whose members would be appointed by the president.²⁵² Neither prosecutors nor judges would be allowed to serve as commissioners, a required majority would be former federal public defenders and all would have “significant experience in the legal defense of criminal cases or demonstrated a commitment to indigent defense representation or juvenile defense representation.”²⁵³

The commission would appoint the heads of the federal defender offices around the country, but the individual district courts would still adopt the plans governing the selection of Panel Attorneys. Each district would have a budget analyst, hired by the Commission, who would “mediate any claims for reimbursement payments submitted by private attorneys” and “oversee and approve the use of investigators and experts for cases.”²⁵⁴ The language of the bill, however, makes it unclear who would have final say over the payment of Panel Attorneys’ hourly fees and outside service expenses.

Although the bill responds to the need for defender independence and the problems associated with placement in the Judiciary, it likely substitutes one form of dependence for another. Presidents retain removal power over all presidential appointees, meaning that under this bill, the president could remove the federal defender commissioners either at-will or for cause, depending on the statute’s exact interpretation.²⁵⁵ The

²⁴⁹ *Id.* at 81.

²⁵⁰ *Id.* at 100.

²⁵¹ See Independent and Effective Federal Defenders Act of 2016, H.R. 5449, 114th Cong. (2016).

²⁵² *Id.* at § 2(a)(5)(B).

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ See, e.g., RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 2.5, at 93 (6th ed. 2010) (describing presidential removal power). For a full discussion about why many agencies that are widely considered “independent” are in fact no more independent than traditional Executive branch agencies (and should be

president, constitutionally charged with executing the laws of the United States, appoints the heads of all federal law enforcement agencies, including the attorney general, the secretary of homeland security, the director of the Federal Bureau of Investigation, and each of the ninety-four United States attorneys.²⁵⁶ Housing the defenders under the same roof as those agencies raises a host of troubling questions. Would commissioners who owe their position to the president pressure defenders not to embarrass the administration or the federal prosecutors whom the president has also appointed? Would some future president pressing a law-and-order agenda seek adequate funding for a defender program that is actively attempting to push back on the administration's law enforcement priorities and federal prosecutions? How might defenders' clients perceive their attorneys, knowing that the same official who hires the head prosecutor also indirectly hires the head defender?

In addition, the prospects for politicizing the program in a harmful way seem high when the commissioners are presidential appointees. If a president appoints commissioners who are truly dedicated to criminal defense, then the occasion will surely provide opportunities for grandstanding by rival politicians intent on demonstrating their law enforcement *bona fides*. Further, the politicization would not necessarily need to arise from the specifics of the program. At any given time, a poor relationship between the White House and Congress could result in the defender program's budget being held hostage to larger political battles.²⁵⁷

Lastly, unlike the Prado Report recommendations, the proposed statute does not fully reconcile the trade-offs between national and local control. The bill might give enormous centralized control to the Commission over the selection of individual FPDs, but the Commission would be in a poor position to evaluate local candidates. In what appears to be an effort to address that problem, the bill requires the Commission to

viewed as such), see Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 818–27 (2013).

²⁵⁶ For a list of all current presidential nominations and appointments, see *Nominations & Appointments*, WHITE HOUSE, <https://www.whitehouse.gov/briefing-room/nominations-and-appointments> [<https://perma.cc/YN5F-JWTW>].

²⁵⁷ See, e.g., Charles Riley, *Budget Held Hostage: Day 154*, CNNMONEY (Mar. 3, 2011, 8:46 PM), http://money.cnn.com/2011/03/03/news/economy/budget_shutdown [perma.cc/VMK3-KNZ4] (demonstrating an instance where conflict between the president and Congress resulted in a budget hostage situation).

“tak[e] into consideration the recommendations of the relevant bar or bars of the State, law schools in the State, and other organizations and individuals.”²⁵⁸ Compared to the Prado Report’s proposal for local boards, this broad and unspecified list of sources of nonbinding recommendations provides little concrete guidance for the selection of FPDs. Under such a system, it is not at all clear who would wield the actual authority in the selection process.

With respect to Panel Attorneys, the opposite problem may occur: too much local judicial control over their selection and payment. Although the bill’s language is not clear, it appears that district judges would retain significant authority over many of the areas that presently cause problems.

4. *Independent Organization Outside of the Judiciary*

A still more independent model, and the one that this Article proposes, is an independent corporation wholly outside either the Judicial or Executive branches. The proposal builds on the outline created by the Prado Report and calls for a national Center and local boards. But rather than being housed within the Judiciary, the organization would be established by Congress as a stand-alone nonprofit corporation. The authorizing legislation would establish the process for selecting a board of directors which would then oversee the operations of the federal defense function in the role that the Judicial Conference currently plays.

There are many possible variations on the proposed structure. The statute could roughly mirror Prado’s recommended national Center and local boards, or it could create something else entirely with either greater national or local control. The corporation could also potentially expand the services provided by defenders and allow for the possibility of private grants and fundraising for services not strictly viewed as criminal defense related. The expansion could help federal defenders more closely mirror the better practices of some state public defender offices that are engaged in holistic practices that address the myriad challenges facing criminal defendants (e.g., mental health and substance abuse, housing issues, family law issues, immigration consequences, and a host of other social services aimed at reducing recidivism, enhancing public safety, and im-

²⁵⁸ H.R. 5449 § 2(a)(8)(B).

proving clients' lives).²⁵⁹ Lastly, the organization could provide non-privileged data directly to Congress by drawing upon information and expertise available to defenders but not to other organizations.

The subpart below describes the details of the proposal and places the discussion in the context of other independent organizations, in particular those sometimes referred to as "boundary" organizations.

B. The Independence Model

1. *Administrative Law and Federal Public Defense*

The provision of public defense does not fit neatly into our modern administrative state. Traditional federal agencies and independent commissions are housed in (or near) the Executive Branch and typically engage in rulemaking and enforcement.²⁶⁰ In creating and shaping the contours of these organizations, Congress and the courts attempt to balance accountability and independence, representative democracy and bureaucratic expertise, stability and responsiveness.²⁶¹ Their authority is constrained by Congress and by constitutional doctrines governing nondelegation and separation of powers.²⁶² The typical concern about the structure and functioning of an independent agency is whether the agency's rulemaking or adjudicatory authority exceeds what the Constitution permits.

But public defenders neither make rules nor enforce them. Indeed, criminal defense by definition has a counter-majoritarian mission. Defense lawyers, figuratively and literally, sit on the other side of the aisle from representatives of the Executive Branch where agencies are normally housed. Defense lawyers are meant to push back against prosecutors who in theory act on behalf of the public. So, if defense lawyers have a mission explicitly contrary to the Executive, and the

²⁵⁹ See Robin G. Steinberg, *Beyond Lawyering: How Holistic Representation Makes for Good Policy, Better Lawyers, and More Satisfied Clients*, 30 N.Y.U. REV. L. & SOC. CHANGE 625, 626 (2006).

²⁶⁰ See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1671–76 (1975).

²⁶¹ See, e.g., Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 19–26 (2010) (highlighting specific reasons independent agencies are created); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 444 (1989) (noting that agencies tend to have superior accountability and expertise).

²⁶² See Sunstein, *supra* note 261, at 446.

Judiciary is meant to be a neutral arbiter, whither the placement of public defense?

The next section draws upon the work of Professor Anne O'Connell in describing the sizable world of what she terms "boundary" organizations—those that do not meet the traditional criteria for federal agencies and commissions, and yet serve important functions within the administrative state.

2. *Boundary Organizations*

As Professor O'Connell explains, a large part of the federal bureaucracy lies at the "border" between the federal government and the private sector, between the federal government and other sovereigns, including states, foreign countries and Native American tribes, and between the branches of the federal government.²⁶³ Congress and the president create these hybrid organizations for a variety of reasons usually relating to some preferred combination of political control and competence. By competence, O'Connell refers not just to expertise and efficiency but also democratic legitimacy and general social welfare.²⁶⁴ The latter two concepts provide a positive account of why such organizations are created and a normative metric for evaluating whether the creation of a boundary organization, as opposed to an entirely public or private entity, is desirable.²⁶⁵

Often, of course, there are tradeoffs between democratic legitimacy and social welfare. For instance, greater public accountability can lead to less stability or the potential for interference from special interest groups whose interests do not mirror the public's.²⁶⁶ So too the rigidity often found in government agencies can hinder flexible and innovative practices.²⁶⁷ As O'Connell notes, balancing these concerns turns on the nature of the organization's activities. With respect to ensuring sufficient democratic accountability, she aptly concludes that "[w]e may worry more about boundary organizations engaged in rulemaking and adjudication and less about those engaged in activities common to private market participants."²⁶⁸

Because public defenders provide a fundamentally private-sector function but do so while receiving public payment, ex-

²⁶³ O'Connell, *supra* note 30, at 846.

²⁶⁴ *Id.* at 882–83.

²⁶⁵ *Id.* at 888–92.

²⁶⁶ *Id.* at 888–89.

²⁶⁷ *Id.* at 888.

²⁶⁸ *Id.* at 892.

aming boundary organizations that lie between the federal government and the private sector provides a useful framework for considering a stand-alone defender organization.

One example of a congressionally-created nonprofit organization that lies at the border between the public and private sector is the Legal Services Corporation (LSC). To be sure, there are significant differences between LSC and the CJA program, but the structure and history of LSC are instructive. LSC was created by statute in 1974 as a “private nonmembership nonprofit corporation” established in the District of Columbia for the purpose of “providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance.”²⁶⁹ Unlike the CJA program, LSC only provides support in civil proceedings, and it does so indirectly by providing grants to other actors, including private organizations and state and local governments. LSC is governed by a board of directors consisting of eleven members who are appointed by the president and confirmed by the Senate.²⁷⁰ By statute, “the membership of the Board shall be appointed so as to include eligible clients, and to be generally representative of the organized bar, attorneys providing legal assistance to eligible clients, and the general public.”²⁷¹ There are further requirements that no more than six of the board members be members of the same party, that a majority of the members be “members of the bar of the highest court of any State,” and that no board member be a full-time employee of the United States.²⁷²

LSC was born of the 1960s War on Poverty and grew out of the Office of Economic Opportunity (OEO), which President Lyndon Johnson established in 1964 to provide grants to local organizations delivering civil legal services to the poor and also to fund lawyers engaging in “[a]dvocacy of appropriate reforms in statutes, regulations, and administrative practices.”²⁷³ Nearly from its inception, the latter part of OEO’s mission, law reform, became a subject of political controversy. Republicans soon criticized the law reform efforts of the OEO as partisan

²⁶⁹ 42 U.S.C. § 2996b(a) (2012).

²⁷⁰ 42 U.S.C. § 2996c(a) (2012).

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ William P. Quigley, *The Demise of Law Reform and the Triumph of Legal Aid: Congress and the Legal Services Corporation from the 1960’s to the 1990’s*, 17 ST. LOUIS U. PUB. L. REV. 241, 245–46 (1998) (quoting EARL JOHNSON, JR., JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE AMERICAN LEGAL SERVICES PROGRAM 114–16 (1978)).

with a leftist agenda.²⁷⁴ The OEO's most famous early critic was then-Governor Ronald Reagan. In the late 1960s, Reagan decried the OEO's support of the California Rural Legal Assistance which had won a series of decisions favorable to farmworkers and the poor, costing the state of California hundreds of millions of dollars and hindering Reagan from balancing the state budget.²⁷⁵

LSC was created as the successor to the OEO after a long series of back-and-forth maneuvers between President Nixon and congressional Democrats. The main sticking point was how much law reform work to permit. Eventually, the authorizing legislation allowed for the funding of law reform efforts "so long as the significant issues to be litigated arose out of client service in actual cases."²⁷⁶ Despite the compromise, the law reform piece of LSC's mission continued to be a target for Republicans. During Reagan's presidency, LSC experienced severe funding cuts and constant board appointment battles.²⁷⁷ The biggest blow to LSC came in 1996 when Congress drastically cut its funding and imposed widespread restrictions on the legal activities in which LSC grantees could engage.²⁷⁸

Given the turbulent history of LSC, any supporter of a robust federal public defender system might understandably wonder why LSC's structure would be used as a model. As I discuss further below, however, there are key differences between the missions and structures of the organizations that offer good reasons to believe that a defender organization would fare far better than LSC politically and financially. In addition, the authorizing statute for a federal public defender agency could be drafted to help ensure against some of the problems experienced by LSC.

A second instructive example is the Public Defender Service of Washington, D.C. (PDS), which acts as the local public defender office in the District of Columbia.²⁷⁹ Although the organization is a creature of local D.C. law, in many ways it serves as the most useful model. PDS receives its funding from the federal government, and it seeks its appropriation from

²⁷⁴ Quigley, *supra* note 273, at 255–56.

²⁷⁵ *Id.* at 248–49.

²⁷⁶ See Andrew Haber, Note, *Rethinking the Legal Services Corporation's Program Integrity Rules*, 17 VA. J. SOC. POL'Y & L. 404, 417 (2010) (quoting Roger C. Cramton, *Crisis in Legal Services for the Poor*, 26 VILL. L. REV. 521, 527 (1981) (noting the first LSC chairman's summarization of the political compromise)).

²⁷⁷ *Id.* at 418

²⁷⁸ *Id.* at 420–21.

²⁷⁹ D.C. CODE § 2-1602 (2001).

Congress upon submitting an annual appropriations request to the Office of Management and Budget.²⁸⁰ Its employees look virtually identical to federal employees in that they participate in the federal pension, life insurance, and health care systems, are subject to federal laws relating to workers' compensation, and are paid salaries not to exceed "the compensation which may be paid to persons of similar qualifications and experience in the office of the United States Attorney for the District of Columbia."²⁸¹ The organization is governed by an eleven-member board of trustees. These board members are chosen by a panel consisting of the chief judge of the United States District Court for the District of Columbia, the chief judge of the District of Columbia Court of Appeals, the chief judge of the Superior Court of the District of Columbia, and the mayor of the District of Columbia.²⁸² The board members must consist of at least four non-lawyers who are residents of the District of Columbia. Judges from either the D.C. or federal courts are not permitted to serve as members. PDS is required to arrange for an independent annual audit and must submit an annual report to Congress, the chief judges of the federal and D.C. courts, and to the Office of Management and Budget.²⁸³ Lastly, PDS may also "accept and use public grants, private contributions, and voluntary and uncompensated (gratuitous) services to assist it" in carrying out its duties.²⁸⁴ As I discuss further below, PDS has an outstanding reputation for quality and a successful history of obtaining adequate funding.²⁸⁵

Other organizations at the private/public border include: (1) the Smithsonian Institute, a nonprofit corporation that has a board of regents consisting of the chief justice, the vice president, three senators, three representatives, and nine citizens

²⁸⁰ D.C. CODE § 2-1607 (2001).

²⁸¹ D.C. CODE § 2-1605 (2001).

²⁸² D.C. CODE § 2-1603 (2001).

²⁸³ D.C. CODE § 2-1606 (2001).

²⁸⁴ D.C. CODE § 2-1607(b) (2001).

²⁸⁵ See, e.g., Jeffrey Bellin, *Attorney Competence in an Age of Plea Bargaining and Econometrics*, 12 OHIO ST. J. CRIM. L. 153, 153 (2014) (describing PDS lawyers as "extremely talented"); Robert P. Mosteller, *Protecting the Innocent: Part of the Solution for Inadequate Funding for Defenders, Not a Panacea for Targeting Justice*, 75 MO. L. REV. 931, 938 (2010) (noting that PDS is a "very fine and relatively well-funded defender organization"); Charles J. Ogletree, Jr. & Yoav Sapir, *Keeping Gideon's Promise: A Comparison of the American and Israeli Public Defender Experiences*, 29 N.Y.U. REV. L. & SOC. CHANGE 203, 218-19 (2004) (noting that PDS is "renowned for its uncommonly skilled attorneys who are able to devote sufficient time to their cases").

chosen by Congress;²⁸⁶ (2) the U.S. Institute for Peace, a non-profit corporation with a governing board comprised of the secretary of state (or her designee), the secretary of defense (or her designee), the president of the National Defense University (or the vice president), plus twelve others, with no more than eight board members permitted from one party;²⁸⁷ and (3) the State Justice Institute, a nonprofit corporation governed by an eleven-member board of directors appointed by the president and confirmed by the Senate in which the members must include six state court judges, one state court administrator, and four members of the public (no more than two of whom may be of the same political party).²⁸⁸

The picture that emerges from the structures of these organizations is one of tremendous variety. Federally created and funded organizations can exist with a wide range of governing structures. They can have different methods for selecting the governing boards, and a multitude of criteria restricting board membership based on political affiliation, status as a public official, profession, and professional background. The criteria range from highly specific to broad, and while they often relate to the mission of the organization, they also reflect some amount of political compromise.

3. *An Independent Federal Defense*

Taking these organizations and their structures as a guide, this Article offers a specific proposal below for a new defender organization. Appended to this Article is a proposed statute creating a new defender agency, the Center for Federal Public Defense (CFPD). This section describes its basic features.

In many ways the architecture of the CFPD would be similar to the Prado recommendation. The national structure would include a governing board that would oversee a director and an administration staff. Those bodies would replace the functions now served by the Judicial Conference and the AO—one setting broad policy and the other implementing it. So too, at the local level, there would be district-based boards that would develop a plan for the selection of the FPD and management of the Panel Attorneys (with the exception of voucher

²⁸⁶ OFFICE OF THE FED. REGISTER, NAT'L ARCHIVES & RECORDS ADMIN., THE UNITED STATES GOVERNMENT MANUAL 2014, at 507–16 (2014).

²⁸⁷ *Id.* at 528–29; *Board of Directors*, U.S. INST. PEACE, <http://www.usip.org/aboutus/board.html> [https://perma.cc/XM93-LJFQ].

²⁸⁸ OFFICE OF THE FED. REGISTER, NAT'L ARCHIVES & RECORDS ADMIN., *supra* note 286, at 523.

review which would be handled by a circuit administrator selected by the director of the CFPD).

The primary difference between Prado's recommendation and the CFPD would be the CFPD's status as completely separate and apart from the Judiciary. This would have both symbolic and practical value. The symbolic value comes from the existence of a truly independent body that fully recognizes the importance of an independent defense function. The expression and perception of independence is central to the ideal of a vigorous defense dedicated solely to the service of clients.

The practical value flows from having an organization that is entirely governed by a board untethered to the Judiciary and entirely dedicated to the defense mission. Decisions about program evaluation, resource allocation, training programs, and personnel management would be made solely by experts in the provision of criminal defense. And the national staff of the CFPD would explain the resource needs of the defense function directly to Congress, drawing on their expertise and unencumbered by conflicting interests.

Admittedly, this direct relationship with Congress comes with some amount of added risk. For this reason, I propose an automatic trigger for the funding of the CFPD that is tied to the funding of federal prosecution and law enforcement. The defense function is largely reactive, responding to the number of cases and the resources brought to bear on those cases by the prosecution and law enforcement. It only makes sense that funding decisions about new or different law enforcement initiatives also account for the corollary need for defender funding. A formula could be developed to tie minimum defender funding to prosecution and law enforcement funding. The current ratio (to be determined by whatever metrics are most easily tracked) could be used as a starting point and a floor. For instance, if this year's defender budget represents five percent of total federal prosecution and law enforcement, that percentage would become the floor for future budgets. Although this funding mechanism would be unique, similarly unusual funding methods have been used for other politically vulnerable agencies and would make sense for the CFPD for the same reasons.²⁸⁹

²⁸⁹ For example, the newly created Consumer Financial Protection Bureau is principally funded by amounts that are capped at "pre-set percentages of the total [annual] operating expenses of the Federal Reserve System." See CONSUMER FIN. PROT. BUREAU, THE CFPB STRATEGIC PLAN, BUDGET, AND PERFORMANCE PLAN AND REPORT 9 (Feb. 2016), http://files.consumerfinance.gov/f/201602_cfpb_report_stra

There are many possible ways to select the national and local boards. I propose a method here that attempts to marry significant federal defender and Panel Attorney input while maintaining some role for officials outside of the organization. Because of the obvious tension involving the Executive Branch in the governance of the defense function and to avoid politicizing the selections in Congress, I opt for a (highly limited) judicial role.

4. *The National Board*

The national board of directors would consist of seventeen members. Twelve of the members would be chosen by the chief judges of each circuit, one member from each circuit. The selections would be restricted to a nominating slate of names provided by the federal defenders and Panel Attorney representatives from the districts within the circuit. The remaining five at-large members would be chosen directly by the current Defender Services Advisory Group (DSAG), which consists of federal defender and CJA Panel representatives from around the country. Upon creation of the CFPD, a new advisory board of federal defender and CJA Panel representatives would be created to replace DSAG.

There would also be specific criteria for board members. No member of the board could be a current employee of a federal public defender office or member of a CJA Panel, but one of each would be required as nonvoting, *ex officio* members. No member could be a judicial officer or an employee of a law enforcement or prosecution office, nor could members have been an employee of such for a period of five years preceding their membership. Board members would serve staggered four-year terms with a maximum of one renewal.

The board of directors' duties, among others, would include selecting the director of the CFPD, approving standards for the provision of defense services, hiring an independent auditor, submitting an annual appropriations request to Congress, and providing an annual report to Congress, the chief justice, and the president explaining the financial condition of the organization and the services performed during the prior year.

A potential issue surrounding the appointment of the national board members or the director of the CFPD is whether

they would be considered “Officers of the United States” as that term is used in the Appointments Clause of the Constitution.²⁹⁰ If so, the Clause mandates certain procedures for appointment, including nomination by the president and consent by the Senate. If a member or director is considered an “inferior Officer,” under the meaning of the Clause (and as discussed in *Morrison*²⁹¹), the appointment must be made by “the President alone, . . . the Courts of Law, or . . . the Heads of Departments.”²⁹²

Under well-accepted interpretations of the Appointments Clause, no member of the CFPD would be considered either an “Officer” or “inferior Officer.” The Office of Legal Counsel (OLC) has opined that in order to be subject to the strictures of the Appointments Clause, a federal office must have two essential features: (1) it must be “invested by legal authority with a portion of the sovereign powers of the federal Government” and (2) it must be “continuing.”²⁹³ Although the positions held by board members and director of the CFPD meet the second criteria, they do not meet the first—that of exercising sovereign authority of the United States government. The OLC described the defining characteristics of delegated sovereign authority as “power lawfully conferred by the Government to bind third parties, or the Government itself, for the public benefit,” and that “such authority primarily involves the authority to administer, execute, or interpret the law.”²⁹⁴

Public defense lawyers do not have the authority to bind third parties or the government by administering, executing, or interpreting the law on behalf of the government. The Supreme Court addressed the issue in *Ferri v. Ackerman*,²⁹⁵ albeit in a slightly different context, when it held that Panel Attorneys are not immune to state malpractice suits. The Court distinguished federally appointed counsel from other federal officers such as judges and prosecutors because “[a]s public servants, the prosecutor and the judge represent the interest of society as a whole” whereas “[i]n contrast, the primary office performed by appointed counsel parallels the office of privately retained

²⁹⁰ U.S. CONST. art. II, § 2, cl. 2.

²⁹¹ See *Morrison v. Olson*, 487 U.S. 654, 670–73 (1988).

²⁹² U.S. CONST. art. II, § 2, cl. 2.

²⁹³ Officers of the U.S. Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 87 (2007).

²⁹⁴ *Id.* at 87; see also O’Connell, *supra* note 30, at 903 (“There is consensus that exercising significant federal authority is a necessary condition for being an officer.”).

²⁹⁵ 444 U.S. 193 (1979).

counsel. . . . [H]is duty is not to the public at large.”²⁹⁶ The Court thus concluded that the “primary rationale for granting immunity to judges, prosecutors, and other public officers does not apply to defense counsel.”²⁹⁷

For this reason, the selection of the board members or directors of the CFPD need not adhere to the requirements of the Appointments Clause. Because there is no such constraint, one might reasonably question having the Judiciary (or any other Government officer) play even the small role this Article proposes in selecting board members. An alternative, for instance, could be the direct selection of all members of the board by FPD and Panel Attorney representatives. This Article opts for the structure discussed above because of the benefit conferred to the program in terms of credibility and public confidence by having some role for government officials outside of the program. The insulation between the Judiciary and the defenders provided by the proposed nominating slates from defenders, the lack of any power by the Judiciary to remove CFPD Directors, and the absence of any judicial role at the local level, including most significantly in the selection of the FPD and Panel Attorneys and the review of Panel Attorney vouchers, leaves little room to impair defender independence.

5. *Local Boards*

Local boards would be district-based and the number of board members would range in size depending on the size of the district (or districts if more than one are combined as currently exists with several federal defender organizations). Initial local board members would be chosen by the majority vote of the FPD(s), Panel Attorney representative(s), and the CFPD Director. Thereafter, the board would be self-governing and select its own members. The local boards would select the heads of the federal public defender offices and develop a local plan which would include a system for the selection of Panel Attorneys and assignment of cases. The CFPD could authorize the local board to hire a local administrator and staff as necessary to manage the Panel Attorneys.

A Circuit Administrator, hired by the CFPD Director, with staffing as necessary, would review Panel Attorney vouchers and authorize outside services such as investigators and experts. Under this system of national and local boards and a

²⁹⁶ *Id.* at 202–04.

²⁹⁷ *Id.* at 204.

Circuit Administrator, the Panel Attorney budgets would be circuit-based. Initial circuit budgets could be based on historical figures, but the national governing board and the CFPD Director would be authorized to set the amounts and adjust funding throughout the year depending on need. Circuit-based funding would accomplish two goals. First, it would provide some measure of accountability and oversight for expenditures. Currently, the Panel Attorney budget is a national budget,²⁹⁸ meaning there is no restriction on the amount spent by any individual district. This means that some districts and circuits may spend large sums and others may spend very little, but there is no incentive or disincentive to be on either end of that spectrum. Although the system works well for those jurisdictions that allow for adequate spending, it obscures those places that deny needed funding. Circuit-based funding combined with removing the judges from the approval process would provide greater rationality along with a conflict-free and independent mechanism for paying counsel.

Second, circuit-based funding, as opposed to district-based funding, is flexible enough to address spikes in resource needs occasioned by large, unexpected cases. While any individual district may see heavy increases, it is less likely that all of the districts in a circuit would experience a sharp increase all at once. And the national budget could be organized in such a way (as it currently is) to leave some room for the CFPD to shift funds or hold some amounts in reserve to disperse as needed throughout the fiscal year.

6. *The Risks and Benefits of an Independent Agency*

Any large-scale programmatic change comes with risk, and that is especially so for a program that is not thoroughly broken. Assigned counsel in the federal system, whether public defenders or Panel Attorneys, are widely regarded as competent, zealous advocates.²⁹⁹ And the funding of federal public defense, while far from perfect, is also far from the state of constant crisis that exists in many state public defense systems.³⁰⁰ Those who are wary of, or opposed to, significant structural change have cited three primary reasons: (1) the

²⁹⁸ WOOL ET AL., *supra* note 5, at 13–14.

²⁹⁹ See, e.g., Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317, 325–27 tbl. 4 (2011) (showing that federal district judges on average rated federal public defenders 4.323 on a five-point scale and ranking them the highest among criminal lawyers, ahead of prosecutors, Panel Attorneys, and privately retained defense counsel).

³⁰⁰ See, e.g., NAT'L RIGHT TO COUNSEL COMM., *supra* note 18, at 59.

current system works pretty well;³⁰¹ (2) the defender program is better situated under the umbrella of the Judiciary rather than out in the open with Congress;³⁰² and (3) an independent agency is not a realistic option.³⁰³

With respect to the first concern, I agree that the system of federal public defense on the whole, and as compared to many horribly overburdened state systems, seems to provide quality service. That said, the quality of lawyering and of public defender systems is notoriously hard to measure. Indeed, the history of federal criminal defense before the enactment of the CJA offers a cautionary tale about complacency and satisfaction with a system that is later understood to have been badly dysfunctional. Judges and attorneys in the pre-CJA world overwhelmingly considered that system to be “adequate” or “very adequate” in its service of clients despite the system’s obvious and significant failings.³⁰⁴ Although the current system may be similarly well regarded, the problems detailed in the Prado and NACDL Reports are real and constant over time. Especially in the absence of objective measures demonstrating how well defenders are performing, the misaligned incentives and tensions created by the current structure should be deeply concerning. As discussed above, even when actual conflicts between judges and defenders are avoided, the tensions created by the very structure of judicial supervision of the defense function are pervasive.

The second concern, dealing directly with Congress, raises the problem of how best to administer and fund a politically vulnerable but vital government service. The two independent organizations most similarly situated to the federal defense system and discussed above, LSC and PDS, offer contrasting lessons. One, LSC, has a history of funding difficulties and appointment battles while the other, PDS, has achieved a status as a well-funded, model public defender office. No one can say for sure which is the better analogy or how Congress might treat an independent federal defense agency, but there are good reasons to think that PDS offers the more likely path. LSC’s most controversial activities related to its funding of law reform efforts, which often involved suing state and local gov-

³⁰¹ See, e.g., PRADO REPORT, *supra* note 1, at 97 (discussing the advances made under the current public defense system).

³⁰² See NACDL REPORT, *supra* note 15, at 36.

³⁰³ See, e.g., PRADO REPORT, *supra* note 1, at 52 (citing lack of empirical support as one reason for opposition to the creation of an independent federal defense agency).

³⁰⁴ See *supra* subpart I.A.

ernments on highly charged political issues such as welfare, immigration, redistricting, and labor policy.³⁰⁵ Its direct services mission was far less controversial—though it too was severely impacted by the cuts.

Federal public defense, like PDS and unlike LSC, is not an optional government service, and it does not engage in litigious law reform activity. The mission, representing poor people accused of committing federal crimes, is constitutionally mandated,³⁰⁶ and it has significant bipartisan support. The leading sponsors of the CJA included the highly conservative Senators Roman Hruska and Barry Goldwater.³⁰⁷ During sequestration, one of the leading voices to better fund federal public defense was the conservative Senator Jeff Sessions from Alabama.³⁰⁸ Liberals, conservatives, and libertarians have all expressed support for a robust federal public defense as a check on overreaching federal law enforcement.³⁰⁹

In addition, the proposed CFPD would not be a brand new federal agency in any practical sense. As the Prado Report noted, and as is still true today, the Defender Services line in the Judiciary budget is already highly visible.³¹⁰ It is the second largest account in the Judiciary budget at an annual appropriation of approximately one billion dollars.³¹¹ To the extent there is risk that the CFPD would be vulnerable to political interference or backlash, that risk already exists. An independent agency would bring the advantage to defenders of dealing directly with Congress and avoiding the cuts that come from the Judiciary before the Defender Services budget even makes it to appropriators.

Lastly, the statute I propose includes a safeguard for funding by linking a minimum amount of defender funding to a percentage of federal law enforcement and prosecution funding. It also avoids the appointments battles of LSC because the selection of board members is largely decentralized and does not involve the president or Congress.

The third objection, that the creation of the CFPD is not realistic, may well be true. But nearly all significant pieces of legislation are unrealistic—until they are not. The CJA itself took many years to accomplish. For twenty-six years, federal

305 See Quigley, *supra* note 273, at 261.

306 *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963).

307 See *supra* subpart I.A.

308 Nixon, *supra* note 152.

309 See *id.*

310 PRADO REPORT, *supra* note 1, at 47.

311 *Id.* at 79, app. at III-1.

defendants had a constitutional right to counsel that came with no meaningful backing.³¹² Even passage of the CJA in 1964 did not include federal public defender offices; they had to wait another six years and followed another major study and report.³¹³ The Prado Report's recommendation for independence was issued twenty-three years ago.³¹⁴ It was rejected, but once again, the Judiciary is studying the issue.³¹⁵ The time has come.

CONCLUSION

In 1964, Congress gave the Judiciary the task of managing the federal public defense function. Given the constraints of that arrangement, the Judiciary has largely succeeded in building a quality program. But the constraints are real, and the structure is ultimately untenable. Just as the Judiciary itself guards and treasures its own independence, so too there are vital reasons for an independent defense function. Many of the same arguments that the Judicial Conference made in the 1930s about the wisdom and feasibility of the Judiciary operating outside of the administration of the Department of Justice apply with equal, if not greater, force to the need for defenders to operate free of judicial control.

This Article has shown that models for an independent federal defense organization exist. There are thoughtful and concrete precedents for the sort of independent organization I propose. Indeed, of the many functions that a government agency might serve, battling the government surely ranks high among the reasons to assure an independent structure.

³¹² Compare *Johnson v. Zerbst*, 304 U.S. 458, 469 (1938) (establishing the right to counsel for federal criminal defendants), with ALLEN REPORT, *supra* note 13, at 12–30 (describing the goal of protecting this right that eventually resulted in passage of the CJA twenty-six years later).

³¹³ See NACDL REPORT, *supra* note 15, at 15.

³¹⁴ PRADO REPORT, *supra* note 1.

³¹⁵ The Cardone Committee's work is ongoing. See *supra* section I.B.4.

APPENDIX

PROPOSED LEGISLATION

To establish a Center for Federal Public Defense (Center), and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE

This Act may be cited as the “Center for Federal Public Defense Act.”

SECTION 2. PROVISION OF FEDERAL PUBLIC DEFENSE

(a) **In General.** — Chapter 201 of title 18, United States Code, is amended by striking § 3006A and inserting the following:

“§3006A. Center for Federal Public Defense

(a) **ESTABLISHMENT.** — There is established in the District of Columbia a private nonmembership nonprofit corporation, which shall be known as the Center for Federal Public Defense for the purpose of assuring high quality criminal defense services to all persons charged with a federal crime who are unable to afford effective representation.

(b) **BOARD OF DIRECTORS.** —

(1) **NUMBER AND APPOINTMENT.** — The Center shall be governed by a Board of Directors, which shall consist of seventeen members appointed as follows within one year of the passage of this Act:

(A) Twelve members shall be appointed by the chief judges of the United States Courts of Appeals (except for the chief judge of the United States Court of Appeals for the Federal Circuit) each of whom shall appoint one member from among a list of five names submitted to each chief judge by the heads of the Federal Public and Community Defender Offices and Panel Attorney representatives within each circuit who shall select the five nominees by a majority vote. For the selection of the initial members, if the heads of the Federal Public and Community Defender Offices and Panel Attorney representatives do not provide a list of nominees to the chief judge of their circuit within 180 days of the passage of this Act, the chief judge of the circuit may make a selection without regard to nominations.

(B) Five members of the Board shall be appointed by the Defender Advisory Board as established in section (o) of this Act. The Defender Advisory Board shall also select a Federal Public Defender and a Panel Attorney to serve as non-voting, ex-officio members of the Board.

(2) RESTRICTIONS ON MEMBERSHIP. — No member of the Board, at the time of membership, may be any of the following:

(A) An employee of a Federal Public or Community Defender Office, except as an ex-officio member;

(B) A Panel Attorney, except as an ex-officio member;

(C) A judge or employee of any court;

(D) A prosecutor or an employee of a prosecutor's office or anyone who has held such position in the three years prior to appointment;

(E) A law enforcement officer or an employee of a law enforcement agency or anyone who has held such position in the three years prior to appointment;

(F) An employee of the Center or a Local Board member.

(3) TERM OF MEMBERSHIP. — The term of a member of the Board shall be four years, except that the terms of the initial members shall be staggered so that four members serve a one-year term, four members serve a two-year term, four members serve a three-year term, and five members serve a four-year term. No member of the Board shall serve more than two terms, except that a person appointed to serve a one-year term may be appointed to two additional four-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.

(4) VACANCIES. — Upon a vacancy on the Board, the heads of the Federal Public and Community Defender Offices and Panel Attorney representatives from the circuit vacated shall provide five names to the chief judge of the circuit who shall select the new board member from among those names. The names shall be provided to the chief judge no later than ninety days after the vacancy after which time the chief judge may make a selection without regard to nominations. If the vacancy arises from one of the board member positions selected by the Defender Advisory Board, the Defender Advisory Board shall appoint a new board member within ninety days of the vacancy.

(5) RATES OF PAY; TRAVEL EXPENSES. — Members shall hold part-time positions and shall be paid at the daily rate at which judges of the United States courts of appeals are compensated. No member shall be paid for more than ninety days in any calendar year. Each member shall receive travel expenses, including per diem in lieu of subsistence, in accordance with applicable provisions under subchapter I of chapter 57 of title 5, United States Code.

(6) **CHAIRPERSON.** — The Chairperson of the Board shall be elected by the members. The term of office for the Chairperson shall be two years, and may be renewed once for an additional two years.

(7) **REMOVAL OF MEMBERS.** — The members of the Board may, by a vote of nine members, remove a member of the Board for malfeasance in office, persistent neglect of or inability to discharge duties, or an offense involving moral turpitude.

(8) **QUORUM.** — Nine members of the Board shall constitute a quorum for the purpose of conducting business.

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

(c) **DUTIES OF CENTER'S BOARD.** The Center's Board shall —

(1) appoint a Director of the Center, who shall serve at the pleasure of the Board;

(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 and maintain standards for the provisions of defense services;

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

(6) review the implementation of plans approved by the 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 Panel Attorneys providing representation under this section compensation rates to cover reasonable 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;

(9) establish procedures for the reimbursement of reasonable expenses of attorneys, investigators, experts, and other per-

sons providing defense services under sections (l) and (m) of this Act;

(10) approve staffing levels and budgets for Federal Public Defender Offices;

(11) approve staffing levels and budgets for the Center;

(d) **POWERS OF CENTER'S BOARD.** The Center's Board may –

(1) delegate any of the duties in subsections (c)(2)–(11) to the Director in whole or in part;

(2) provide to Congress information regarding the federal criminal justice system that the Board considers relevant to the purpose of the Center;

(3) authorize studies or reports that relate to the purpose of the Center;

(4) combine Local Boards or divide the area served by a Local Board, if the Center's Board determines that such action is necessary to better effectuate the purposes of this section;

(5) remove, by a vote of at least nine members, a member or members of a Local Board for malfeasance in office, persistent neglect of or inability to discharge duties, or an offense involving moral turpitude;

(6) seek, accept, and use public grants, private contributions, and voluntary and uncompensated (gratuitous services) to assist it in carrying out the purposes of this act and other services related to those purposes; and

(7) take any other action reasonably necessary, not inconsistent with the Act, to carry out the purposes of the Act.

(e) **DIRECTOR OF THE CENTER.**

(1) **REQUIREMENTS FOR THE DIRECTOR.** — The Director shall be experienced in the representation of criminal defendants and shall not be a member of the Board.

(2) **DUTIES OF THE DIRECTOR.** — The Director shall —

(A) appoint and fix the compensation of employees of the Center;

(B) 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;

(C) employ such personnel as necessary to advance the purposes of the Center subject to staffing and budget approval of the Board;

(D) provide an annual report to the Board on the activities of the Center;

(E) provide such periodic reports and work product to the Board sufficient for the Board to fulfill its duties in section (c).

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

(G) appoint an Administrator for each circuit (except for the Federal Circuit) to administer and approve, subject to the policies established by the Board, the payment of funds necessary for Panel Attorney representation, including Panel Attorney compensation, investigators, experts and other providers of defense services, and any other necessary expenses for adequate representation.

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

(f) EMPLOYEES OF THE CENTER. —

(1) Employees of the Center shall be treated as employees of the federal government solely for purposes of any of the following provisions of title 5, United States Code: subchapter 1 of chapter 81 (relating to compensation for work injuries), chapter 83 (relating to retirement), chapter 84 (relating to Federal Employees' Retirement System), chapter 87 (relating to life insurance), and chapter 89 (relating to health insurance).

(2) The Center shall make contributions under the provisions referred to in paragraph (1) of this subsection at the same rates applicable to agencies of the federal government.

(3) Employees of the Center may make an election under § 8351 or § 8432 of title 5, United States Code, to participate in the Thrift Savings Plan for federal employees.

(g) ESTABLISHMENT OF LOCAL FEDERAL DEFENSE BOARDS.

(1) ESTABLISHMENT. — The Center shall ensure the establishment of a Local Federal Defense Board (Local Board) for each judicial district or group of districts as determined by the Center.

(2) COMPOSITION OF LOCAL BOARD. — A Local Board shall consist of not less than five nor more than fifteen members. Except as provided in subsection (n)(2), the initial members shall be selected by the majority votes of the Federal Public and Community Defenders and the Panel Attorney representatives of the district or districts to be served and the Director of the

Center. Thereafter, the Local Board shall select its own members consistent with its bylaws as approved by the Center.

(3) QUALIFICATIONS OF MEMBERS. —

(A) No member shall be an employee of a Federal Public Defender Office, but the Federal Public Defender in the district(s) served shall be a non-voting, ex officio member;

(B) No member shall be a current judicial officer of the United States or a state, territory, district, possession, or commonwealth of the United States.

(C) No member shall be employed as a prosecutor or law enforcement official, or by a prosecutorial or law enforcement agency, or have held such a position in the three years prior to appointment.

(4) TERM OF MEMBER OF LOCAL BOARD. — Members shall serve four year terms, except that the terms of the initial members shall be staggered so that the term of no more than one-half of the members expire in any year. No member shall serve more than nine years on the 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.

(5) COMPENSATION OF MEMBER OF LOCAL BOARD. — Members 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 Board as determined by the Center.

(6) CHAIR OF LOCAL BOARD. — The 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.

(7) REMOVAL OF MEMBER OF LOCAL BOARD. — The Board, by a majority vote of the full membership, may remove a member of the Board but only for malfeasance in office, persistent neglect of or inability to discharge duties, or an offense involving moral turpitude.

(8) QUORUM OF LOCAL BOARD. — A majority of the full membership of the Board shall constitute a quorum for the purpose of conducting business.

(9) LOCAL BOARD GOVERNANCE. — The Board shall adopt bylaws governing the operation of the Board, which may include provisions authorizing other officers of the Board and proxy voting.

(10) DISSOLUTION OF LOCAL BOARDS. — The Center's Board, upon a two-thirds vote, may dissolve a Local Board for good

cause. Upon dissolution, the Center shall ensure that a new Local Board is established within ninety days of dissolution. The new members shall be selected by the majority votes of the Federal Public Defenders and the Panel Attorney representatives of the district or districts to be served and the Director of the Center.

(h) DUTIES OF LOCAL BOARDS.

(1) LOCAL PLAN. — The Local Board shall develop and submit to the Center a Local Plan for the provision of defense services for the area served by the Local Board and implement the Local Plan approved by the Center. The Local Board may modify the plan at any time with the approval of the Center and shall modify the plan when so directed by the Center. Each Local Plan shall provide for the appointment of counsel in a timely manner consistent with sections (j) and (k) below

(2) PANEL ATTORNEYS. — Each Local Plan shall provide for:

(A) the appointment of qualified private attorneys from a defense services panel (Panel Attorneys) in a substantial proportion of the cases and not less than 25% of cases in a district;

(B) implementation of standards established by the Center for the minimum qualifications for Panel Attorneys;

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

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

(2) there is early entry of counsel, including representation as soon as practical after a defendant's arrest, and at a minimum, before the initial appearance before a magistrate or District Court; and

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

(D) the avoidance of conflicts of interest;

(E) equal employment opportunity for both the employees of Federal Public Defender Offices and Panel Attorneys;

(3) LOCAL ADMINISTRATOR. — Upon approval by the Center, the Local Board shall appoint a Local Administrator and such staff as necessary to assist the Local Board in administering the selection and appointment of the Panel Attorneys.

(4) FEDERAL PUBLIC DEFENDER. — The Local Board shall:

(A) select the Federal Public Defender for the district or districts served by the Local Board who shall serve at the pleasure of the Local Board;

(B) evaluate the performance of the Federal Public Defender;

(C) transmit to the Center the evaluation of the Federal Public Defender at such times established by the Center;

(i) **DUTIES OF CIRCUIT ADMINISTRATOR.** The Circuit Administrator shall —

(1) review, and certify for payment, vouchers received from Panel Attorneys to compensate them for their time spent representing clients appointed to them under this Act and for investigators, experts, and other providers of defense services for work performed on behalf of Panel Attorney clients;

(2) authorize reasonable expenditures for transcripts and the services of paralegals and other legal support personnel as necessary;

(3) prepare, at the direction of the Center, an annual budget for the provision of defense services under this Act, except for defense services provided by a Federal Public Defender Office; and

(A) implement procedures established by the Center, permitting a Panel Attorney or other defense service provider under this Act to appeal a decision of the Circuit Administrator concerning compensation or reimbursement; and

(B) perform other duties related to the authorization, payment, and budgeting of expenses related to Panel Attorneys as assigned by the Director of the Center.

(j) **REPRESENTATION OF FINANCIALLY ELIGIBLE PERSONS.**

(1) The Local Board shall establish procedures for the appointment of counsel for a person who is financially unable to obtain adequate representation and who

(A) is charged in federal court with a felony or 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 of 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) The Local Board shall establish procedures for the appointment of counsel for a person who is financially unable to obtain adequate representation whenever the Local Administrator, a United States magistrate judge or the court determines that the interests of justice so require who –

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

(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;

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

(D) otherwise requires counsel for good cause consistent with the purpose of this Act.

(k) **APPOINTMENT OF COUNSEL.**

(1) When the United States Attorney's Office, the magistrate judge, or other court official, becomes aware that a person may meet the criteria set forth in (j)(1)(A)-(J) for the appointment of counsel, they shall notify the Local Administrator (or her designee) and 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.

(2) Unless the person waives representation by counsel, the Local Administrator, upon notification that a person may meet the criteria set forth in (j)(1)(A)-(J), shall appoint counsel in accordance with the Local Plan if satisfied after appropriate inquiry that the person is financially unable to obtain counsel. Such appointment may be made retroactive to include any representation furnished prior to appointment. The Local Administrator shall appoint separate counsel for persons having interests that cannot properly be represented by the same counsel, or when other good cause is shown.

(3) If at any time after the appointment of counsel the Local Administrator finds that the person represented is financially able to obtain counsel or make partial payment for the representation, the Local Administrator, with permission of the

Court, may terminate the appointment of counsel or authorize payment as provided in paragraph (4), as the interests of justice may dictate. If at any stage of the proceedings, including an appeal, the Local Administrator finds that the person is financially unable to pay counsel whom he had retained, the Local Administrator may appoint counsel consistent with the provisions of this Act.

(4) Whenever the Local Administrator finds that a person represented under this Act has sufficient funds available to contribute to the costs of the person's representation, the Local Administrator may authorize or direct that such funds be paid to the Center for deposit in the Treasury as a reimbursement to the Center's appropriation, current at the time of payment, to carry out the provisions of this Act. 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 this Act.

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

(1) COMPENSATION AND REIMBURSEMENT OF EXPENSES OF COUNSEL.

(1) At the conclusion of the representation or any segment thereof, a Panel Attorney appointed under this Act shall be compensated at a rate established by the Center's Board for time expended, including time spent in travel, reasonably incurred, including the cost of transcripts and services or paralegals and law students authorized by the Circuit Administrator.

(2) A separate claim for compensation and reimbursement shall be submitted to the Circuit Administrator by the Panel Attorney for each representation, or segment of a representation, furnished by the Panel Attorney under this Act. 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 Circuit Administrator makes a final decision regarding the claim within thirty days of submission. The Circuit 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 Circuit Administrator shall notify the claimant in writing of the intent to approve less than the amount claimed and the reasons therefore, and provide the claimant an opportunity to respond within a reasonable time in writing. Such notification shall toll the thirty-day time limit in this paragraph until the claimant responds. In the event of such reduction, the claimant may appeal the decision of the Circuit Administrator to the Center in accordance with the procedures established for such appeals by the Center.

(4) For purposes of compensation and other payments authorized by this Act, 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 this Act 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.

(m) SERVICES OTHER THAN COUNSEL.

(1) APPOINTED COUNSEL. — Counsel appointed under this Act may obtain investigative, expert, or other services necessary for adequate representation pursuant to procedures established by the Center. Such services may include travel, lodging and subsistence expenses of the persons represented where necessary for attendance at or preparation for any proceeding, the costs of copying discovery materials in the possession, custody, or control of the government, and other costs reasonably related to the person's representation.

(2) OTHER COUNSEL. — Private 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 (A), may request from the Local Administrator a determination of financial eligibility. Upon finding that the person is financially unable to obtain such services, the Local Administrator shall authorize payment for 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, shall submit 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 Circuit Adminis-

trator along with that attorney's claim for compensation and reimbursement.

(n) FEDERAL PUBLIC DEFENDER OFFICES.

(1) IN GENERAL. — A Federal Public Defender Organization or Community Defender Organization in existence prior to the enactment of this Act shall continue in operation, and the Federal Public Defender or Executive Director then in office may continue to serve in that capacity for at least one year from the enactment of this Act. Upon the establishment and appointment of a Local Board for the district or districts served by a Federal Public Defender or Community Defender Organization, the Local Board shall establish a Federal Public Defender Office. A Federal Public Defender Office shall be established in every district though a single Federal Public Defender Office may serve more than one district as determined by the Center.

(2) EXISTING COMMUNITY DEFENDER OFFICE BOARDS. — The Board of a Community Defender Organization in existence at the time of the passage of this Act may establish itself as the Local Board for the district or districts it covers if the Community Defender Organization Board petitions the Center in writing to become the Local Board and the Center so approves the petition.

(2) FEDERAL PUBLIC DEFENDER. — A Federal Public Defender Office 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 Local Board and approved by the Center, without regard to the provisions of title 5 governing appointments in the competitive service. The Federal Public Defender shall serve at the pleasure of the Local Board but may be removed by the Director of the Center for malfeasance in office, persistent neglect or inability to discharge duties, or an offense involving moral turpitude.

(3) COMPENSATION OF THE FEDERAL PUBLIC DEFENDER. — The compensation of the Federal Public Defender shall be equal to the compensation established for 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.

(4) EMPLOYEES. —

(A) 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 Center 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 not to exceed that paid to attorneys and other personnel of similar qualifications and experience in 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.

(B) Employees of the Federal Public Defender Office shall be treated as employees of the federal government solely for purposes of any of the following provisions of title 5, United States Code: subchapter 1 of chapter 81 (relating to compensation for work injuries), chapter 83 (relating to retirement), chapter 84 (relating to Federal Employees' Retirement System), chapter 87 (relating to life insurance), and chapter 89 (relating to health insurance).

(C) The Federal Public Defender Office shall make contributions under the provisions referred to in paragraph (1) of this subsection at the same rates applicable to agencies of the federal government.

(D) Employees of the Federal Public Defender Office may make an election under § 8351 or § 8432 of title 5, United States Code, to participate in the Thrift Savings Plan for federal employees.

(5) **OUTSIDE PRACTICE OF LAW PROHIBITED.** — Neither the Federal Public Defender nor any attorney so appointed by him may engage in the private practice of law.

(6) **MALPRACTICE AND NEGLIGENCE SUITS.** — The Center 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.

(o) **DEFENDER ADVISORY BOARD.**

(1) Within ninety days of the enactment of this Act, the Administrative Office of the U.S. Courts in consultation with the Defender Services Advisory Group shall establish a Defender Advisory Board which shall consist of one Federal Public Defender representative from each circuit as selected by the Federal Public Defenders within each circuit and one Panel Attorney Representative from each circuit as selected by the District Panel Attorney Representatives within each circuit.

(2) Members shall serve two year terms except that the terms of the initial members shall be staggered so that the term of no more than one-half of the members expire in any year. No

member shall serve more than six consecutive years on the 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.

(3) Members of the Defender Advisory 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 Board. The Board shall establish bylaws, select a chairperson and other such officers as it deems necessary, and meet at least once a year.

(p) **TRANSITION.**

(1) After the passage of this Act, the Administrative Office of the United States Courts shall ensure that the Center is established consistent with the provisions of the Act, including the expenditure of funds from the Defender Services account and other authorized funds necessary for the establishment of the Center and the orderly transition of all Defender Services functions to the Center.

(q) **AUTHORIZATION OF APPROPRIATIONS.**

(1) There are authorized to be appropriated to the Center, out of money in the Treasury not otherwise appropriated, sums necessary to carry out the provisions of this Act, including funds for the establishment of the Center, the transition from the Administrative Office of the U.S. Courts to the Center, the ongoing operation of the Center, and continuing education and training of persons providing defense services under the Act. 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 Center.

(2) In no year shall there be appropriated to the Center a sum less than the amount equal to the "prosecution-defense ratio" as defined in this section.

(3) The prosecution-defense ratio is to be determined by the Office of Management and Budget by calculating the sum appropriated to the Defender Services account of the Judiciary budget for the year prior to the enactment of this Act and dividing that number by the combined appropriated sums for the year prior to the enactment of this Act of federal law enforcement and prosecution agencies, including those amounts contained in the budgets of the Criminal Divisions of the Department of Justice and the United States Attorney's Offices, the Federal Bureau of Investigation, the Drug Enforcement Agency, the Bureau of Alcohol, Tobacco, Firearms and Explo-

sives, the United States Marshals Service; and the Department of Homeland Security for U.S. Customs and Boarder Protection, U.S. Immigration and Customs Enforcement, and the Federal Law Enforcement Training Center. If the law enforcement or prosecutorial functions of those agencies or offices at the time of the enactment of this Act are performed by different offices or agencies in future years, the Office of Management and Budget will use the amount appropriated for those functions in calculating the prosecution-defense ratio.

