

**COURTS OF APPEALS, DISTRICT COURTS, AND OTHER JUDICIAL SERVICES**

*Defender Services*

**SUMMARY STATEMENT OF ACCOUNT REQUIREMENTS**

<b>Fiscal Year 2019 Assumed Appropriation</b>	<b>1,157,390,000</b>
<b>Fiscal Year 2020 Appropriation Request</b>	<b>1,234,574,000</b>
<b>Requested Increase from Fiscal Year 2019 Assumed Appropriation</b>	<b>\$77,184,000</b>

**APPROPRIATION LANGUAGE**

**COURTS OF APPEALS, DISTRICT COURTS, AND OTHER JUDICIAL SERVICES**

**DEFENDER SERVICES**

For the operation of Federal Defender organizations; the compensation and reimbursement of expenses of attorneys appointed to represent persons under 18 U.S.C. 3006A and 3599, and for the compensation and reimbursement of expenses of persons furnishing investigative, expert, and other services for such representations as authorized by law; the compensation (in accordance with the maximums under 18 U.S.C. 3006A) and reimbursement of expenses of attorneys appointed to assist the court in criminal cases where the defendant has waived representation by counsel; the compensation and reimbursement of expenses of attorneys appointed to represent jurors in civil actions for the protection of their employment, as authorized by 28 U.S.C. 1875(d)(1); the compensation and reimbursement of expenses of attorneys appointed under 18 U.S.C. 983(b)(1) in connection with certain judicial civil forfeiture proceedings; the compensation and reimbursement of travel expenses of guardians ad litem appointed under 18 U.S.C. 4100(b); and for necessary training and general administrative expenses, [~~\$1,157,390,000~~]*\$1,234,574,000*, to remain available until expended.

(H.R. 6147 - Financial Services and General Government Appropriations Act, 2019, updated to reflect the judiciary's FY 2019 assumed appropriation)

**SUMMARY OF REQUEST  
DEFENDER SERVICES  
FISCAL YEAR 2020  
(Dollar amounts in thousands)**

<u>Page</u>		<u>FTEs</u>	<u>Amount</u>
<b><u>Fiscal Year 2020 Resource Requirements:</u></b>			
	<b>Fiscal Year 2019 Total Obligations (Including Encumbered Carryforward) .....</b>	<b>3,019</b>	<b>1,195,678</b>
	Less encumbered carryforward from FY 2018 into FY 2019 .....	-	(1,288)
	<b>Fiscal Year 2019 Total Obligations (Excluding Encumbered Carryforward) .....</b>	<b>3,019</b>	<b>1,194,390</b>
	Less assumed unencumbered available carryforward from FY 2018 into FY 2019 .....	-	(37,000)
	<b>Fiscal Year 2019 Assumed Appropriation .....</b>	<b>3,019</b>	<b>1,157,390</b>
<b><u>Adjustments to Base to Maintain Current Services:</u></b>			
<b>A. PERSONNEL</b>			
<i>Pay and Benefit Adjustments</i>			
5.25	1. Annualization of assumed 2019 pay adjustments:		
5.25	a. Federal pay adjustment (1.9% for three months) .....	-	2,641
5.25	b. Panel attorney capital rate adjustment (from \$188 per hour to \$190 per hour) .....	-	200
5.25	c. Panel attorney non-capital rate adjustment (from \$140 per hour to \$142 per hour) .....	-	4,389
5.26	2. Promotions and within-grade increases .....	-	3,463
5.26	3. Benefits increases		
5.26	a. Health benefits .....	-	501
5.26	b. FICA adjustment .....	-	446
5.26	c. FERS adjustment .....	-	11,701
5.27	4. One more compensable day .....	-	1,796
<b>B. Other Adjustments</b>			
<i>General Inflationary Adjustments</i>			
5.27	5. Inflationary increases in charges for contracts, services, supplies, and equipment .....	-	3,193
5.27	6. Inflationary increase in GSA space rental costs .....	-	1,927
<i>Workload and Financing Adjustments</i>			
5.27	7. Annualization of FDO positions .....	28	6,756
5.27	8. Annualization of three reimbursable positions .....	-	186
5.27	9. Change in projected panel attorney workload .....	-	8,943
5.28	10. Increase in appropriation needed to maintain FY 2019 requirements due to a decrease in non-appropriated source of funds .....	-	7,000
	<b>Subtotal, Adjustments to Base to maintain current services .....</b>	<b>28</b>	<b>53,142</b>
	<b>Total Current Services Appropriation Required .....</b>	<b>3,047</b>	<b>1,210,532</b>

**Page**

**FTEs**

**Amount**

**C. Program Increases:**

5.28	11. Non-capital panel attorney hourly rate increase (from \$142 per hour to \$149 per hour) .....	-	2,195
5.29	12. Change in Projected Workload		
5.29	a. Continued implementation of the FDO staffing formula .....	75	18,240
5.29	b. CJA panel management positions .....	2	672
5.29	c. National positions .....	3	415
5.29	13. Reimbursable Positions .....	-	620
5.30	14. Information technology requirements .....	-	1,900
	<b>Subtotal, program increases .....</b>	<b>80</b>	<b>24,042</b>
	<b>Total Fiscal Year 2020 Appropriation Required .....</b>	<b>3,127</b>	<b>1,234,574</b>
	<b>Total Appropriation Increase, Fiscal Year 2019 to Fiscal Year 2020 .....</b>	<b>108</b>	<b>77,184</b>

**D. Financing the Fiscal Year 2020 Request:**

	<b>Total Appropriation Required .....</b>	<b>3,127</b>	<b>1,234,574</b>
5.30	15. Anticipated carryforward from FY 2019 and prior years into FY 2020 .....	-	30,000
	<b>Estimated Obligations, Fiscal Year 2020 .....</b>	<b>3,127</b>	<b>1,264,574</b>

**COURTS OF APPEALS, DISTRICT COURTS, AND OTHER JUDICIAL SERVICES**  
**DEFENDER SERVICES**  
**Obligations by Activity**  
**(\$000)**

Activity	FY 2018 Actual	FY 2019 Assumed Obligations	FY 2020 Request
<b>CJA Representations &amp; Related Expenses Obligations</b>	<b>1,114,487</b>	<b>1,182,609</b>	<b>1,250,950</b>
<b>Program Administration Obligations</b>	<b>10,593</b>	<b>13,069</b>	<b>13,624</b>
<b>Total Obligations (including Encumbered Carryforward)</b>	<b>1,125,080</b>	<b>1,195,678</b>	<b>1,264,574</b>
Encumbered Carryforward	(857)	(1,288)	-
Unencumbered Carryforward	(76,905)	(42,720)	(30,000)
Unobligated Balance, Start of Year <sup>1</sup>	(77,762)	(44,008)	(30,000)
Prior Year Recoveries	(12,374)	(13,151)	-
Offsetting Collections	(239)	-	-
Other Adjustments to Budgetary Resources	-	5,720	-
Anticipated Financial Plan Savings	-	(16,849)	-
Unobligated Balance, End of Year	44,008	30,000	-
<b>Available Appropriation</b>	<b>1,078,713</b>	<b>1,157,390</b>	<b>1,234,574</b>

1/ Includes encumbered and unencumbered carryforward.

**COURTS OF APPEALS, DISTRICT COURTS, AND OTHER JUDICIAL SERVICES  
DEFENDER SERVICES**

**Obligations by Budget Object Class (\$000)**

Description	FY 2018 Actual	FY 2019 Assumed Obligations	FY 2020 Request
1100 Personnel compensation	334,665	352,525	371,765
1200 Personnel benefits	111,882	119,284	133,486
1300 Benefits for former personnel	387	537	601
2100 Travel	13,804	14,662	15,415
2200 Transportation of Things	248	253	260
2310 Rental payments to GSA	40,736	42,906	45,210
2320 Rental payments to others	573	584	608
2300 Communications, utilities & misc.	8,498	9,219	9,534
2400 Printing and reproduction	80	82	85
2500 Other services	442,223	472,344	491,864
2600 Supplies and materials	1,640	1,716	1,761
3100 Equipment	15,173	16,562	18,326
4100 Grant Payments (to Community Defender Organizations)	155,171	165,004	175,659
<b>Total Obligations (Including Encumbered Carryforward)</b>	<b>1,125,080</b>	<b>1,195,678</b>	<b>1,264,574</b>
Encumbered Carryforward	N/A	(1,288)	
Total Obligations (Excluding Encumbered Carryforward)	1,125,080	1,194,390	1,264,574
Anticipated Financial Plan Savings/Prior Year Recoveries	N/A	(30,000)	-
Revised Obligations	1,125,080	1,164,390	1,264,574

**Full Time Equivalents (FTEs) by Activity**

	FY 2018 Actual	FY 2019 Assumed Level	FY 2020 Request
<b>CJA Representations &amp; Related Expenses<sup>1</sup></b>	<b>2,932</b>	<b>3,008</b>	<b>3,116</b>
<b>Program Administration</b>	<b>10</b>	<b>11</b>	<b>11</b>
<b>Total, FTEs</b>	<b>2,942</b>	<b>3,019</b>	<b>3,127</b>

<sup>1</sup> The FTEs listed are attributable to Federal Public Defender Organization staff.

**COURTS OF APPEALS, DISTRICT COURTS, AND OTHER JUDICIAL SERVICES  
DEFENDER SERVICES**

**Relation of Obligations to Outlays (\$000)**

	<b>FY 2018 Actual</b>	<b>FY 2019 Assumed Levels</b>	<b>FY 2020 Request</b>
Total Obligations	1,125,080	1,195,678	1,264,574
Obligated Balance, Start of Year	54,286	65,372	69,474
Obligated Balance, End of Year	(65,372)	(69,474)	(73,833)
Prior Year Recoveries	(12,374)	(13,151)	0
Offsetting Collections	(239)	0	0
Other Adjustments to Budgetary Resources	0	5,720	0
<b>Total Outlays</b>	<b>1,101,381</b>	<b>1,184,145</b>	<b>1,260,215</b>

## **GENERAL STATEMENT AND INFORMATION**

The right to effective assistance of counsel for persons financially unable to obtain adequate representation is constitutionally-mandated. It is a critical component of the criminal justice system and one of the foundations of liberty in America. Funds appropriated for the Defender Services account support the appointment of counsel and other related services and are required to be provided under the United States Constitution; the Criminal Justice Act (CJA), 18 U.S.C. § 3006A; and other statutes. Funds also provide for the continuing education and training of persons who furnish representational services under the CJA.

The constitutional right to the assistance of counsel is a cornerstone of the criminal justice system. In *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), the United States Supreme Court wrote: “The right of one charged with [a] crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.” The mission of the Defender Services program is to ensure that the Sixth Amendment right to counsel is available to those who cannot afford to retain counsel and other necessary defense services.

The goals of the Defender Services program are to:

- provide timely counsel services to all eligible persons;
- provide assigned counsel services consistent with the best practices of the legal profession;
- provide cost-effective services; and
- protect the independence of the defense function performed by assigned counsel so that the rights of individual defendants are safeguarded and enforced.

By fulfilling its mission, the Defender Services program helps to:

- ensure the successful operation of the constitutionally-based adversarial system of justice by which both federal criminal laws and federally guaranteed rights are enforced; and
- maintain public confidence in the nation’s commitment to equal justice under law.

The Defender Services account funds the operations of federal defender organizations (FDOs), payments to private attorneys appointed under the provisions of the CJA, and program administration costs. The fiscal year (FY) 2020 request of \$1,234.6 million includes the funding needed to permit FDOs to accept appointments; retain necessary expert services; undertake case-related travel;

support the cyclical replacement of information technology equipment and software; allow for promotions and salary increases; and meet space-related requirements.

The request will support:

- (1) a \$7 increase (above the FY 2019 assumed rate) to the non-capital hourly rate paid to panel attorneys;
- (2) additional FDO staffing to maintain 98 percent of the staffing formula requirements (caseload adjusted);
- (3) additional CJA panel management positions;
- (4) national position increases to support Defender Services information technology (IT) security and other initiatives;
- (5) additional staff in the Administrative Office of the U.S. Courts (AO) to carry out oversight responsibilities in the areas of budget, defender office program reviews, CJA panel attorney management, IT data management, and FDO operational support;
- (6) additional staff in the AO to implement additional training programs and to continue to provide substantive information on federal criminal law and procedure for FDO staff and others who furnish representational services under the CJA; and
- (7) cyclical replacement of the FDO national server infrastructure.

### **TYPES OF COUNSEL**

The CJA authorizes the appointment of counsel, who are either (1) attorneys employed by an FDO or (2) private attorneys retained to represent clients (these private attorneys are known as “panel attorneys”). Each is described below.

#### **Federal Defender Organizations**

The CJA authorizes two types of FDOs:

- federal public defender organizations (FPDOs), which are part of the judiciary; and
- community defender organizations (CDOs), which are private, state-chartered, non-profit corporations funded by annual federal grants from the judiciary.

An FDO (whether an FPDO or a CDO) may be established in any district (or combination of adjacent districts) in which at least 200 appointments are made annually. There are currently 81 FDOs authorized to serve 91 of the 94 judicial districts. (Georgia-Southern



and Kentucky-Eastern meet the requisite number of appointments but do not have an FDO. Northern Mariana Islands does not meet the requisite number of appointments.)

FDOs are the flagship of federal criminal defense, delivering high-quality representation at reasonable costs while safeguarding the rights of individuals under the Constitution. They recruit, train, and retain lawyers with skills comparable to those who prosecute criminal matters in U.S. Attorneys' offices. Because of their expertise and efficiencies, they have developed as law offices focused exclusively on federal criminal practice. FDOs provide cost-effective defense services consistent with the best practices of the legal profession.

FDO attorneys are available for appointment on short notice, ensuring that the rights of the accused are protected and that the operations of the courts are not disrupted. FDOs also make optimal use of national resources by sharing their expertise and best practices with other FDOs and panel attorneys.

FDO staff improve the overall quality of CJA representation within the districts they serve by providing expert advice, training, and other assistance to panel attorneys in complex legal and technical areas such as sentencing, mitigation, litigation support, and cases involving death penalty issues.

### **Panel Attorneys**

A "panel attorney" is a private lawyer who serves on a panel of qualified counsel maintained by the district or appellate court and is appointed by the court to represent eligible individuals in accordance with the CJA. The CJA specifies that in all judicial districts (including those served by an FDO), private attorneys shall be appointed "in a substantial proportion of the cases." 18 U.S.C. § 3006A(a)(3).

Panel attorneys are utilized for three primary reasons.

- (1) Ethical standards prohibit appointing FDOs in conflict-of-interest situations, *e.g.*, an FDO is precluded from representing more than one defendant in a multi-defendant case and is disqualified from accepting a new appointment that may present a conflict with the interests of previously represented clients.
- (2) The workload demands in some FDOs limit the ability of that FDO to accept new representations.

(3) As noted above, a small number of districts do not have an FDO. In situations where federal defenders are unavailable due to FDO conflicts or workload demands, or where the district is not served by an FDO, panel attorneys must be appointed to represent eligible individuals.

Nationally, almost 90 percent of CJA panel attorneys are in small law firms (with five or fewer lawyers), and approximately 60 percent are sole practitioners. The CJA provides that these attorneys shall be reimbursed for their expenses and compensated for their services at authorized hourly rates.

**CJA CASELOAD AND WORKLOAD TRENDS**

CJA attorneys provide constitutionally-required defense services in a wide variety of complex criminal cases, including international and domestic terrorism; cybercrime; child exploitation and obscenity; complex fraud cases (health care, identity theft, public corruption, and bank and investment fraud); environmental crimes; drug cases; immigration matters; and human trafficking. CJA workload is based on the number of FDO and panel attorney representations.

First, regarding FDO representations, as the chart below describes, the number of FDO weighted representations has shown a significant increase between 2015 and 2019. For the 12-month period ending on March 31, 2018, weighted representations increased by 8.9 percent. In 2019, weighted representations are projected to increase by 6.3 percent.

Workload Factor	12 months ending March 31, <sup>1</sup> 2015 Actual	12 months ending March 31, 2016 Actual	12 months ending March 31, 2017 Actuals	12 months ending March 31, 2018 Actual	12 months ending March 31, 2019 Projected
FDO Weighted Representations	121,060	128,767	131,024	142,750	151,700
Year-to-Year Change		6.4%	1.8%	8.9%	6.3%

<sup>1</sup> FDO caseload is measured for the 12-month period ending March 31 of each year. FDO workload forecasts, as with all other judiciary workload projections, are prepared by the AO’s Judiciary Data and Analysis Office.

To determine FDO staffing requirements, the judiciary uses a staffing formula that examines a five-statistical-year average of FDO weighted representations.<sup>2</sup> For FY 2020 requirements, workload data from 2015 through 2019 is used.

Second, regarding panel attorney representations, these representations are projected to increase from an assumed level of 80,700 in FY 2019 to 85,200 in FY 2020.<sup>3</sup>

Workload Factor	12 months ending March 31, 2015 Actual	12 months ending March 31, 2016 Actual	12 months ending March 31, 2017 Actuals	12 months ending March 31, 2018 Actual	12 months ending March 31, 2019 Projected	12 months ending March 31, 2020 Projected
Panel Attorney Representations	81,240	80,043	79,352	77,130	80,700	85,200
Year-to-Year Change		-1.5%	-0.9%	-2.8%	4.6%	5.6%

In general, changes in technology, prosecution tactics and priorities, legislation, sentencing policy, and case law all add to the challenge of providing competent representation to eligible individuals in federal courts. CJA attorneys must necessarily respond to changing priorities in federal law enforcement such as the heightened immigration enforcement, the opioid crisis, and violent crimes initiatives. While providing representation in these complex matters, CJA attorneys also must be able to respond rapidly to changes in law and practice.

For example, on April 6, 2018, the Attorney General issued a memo to all federal prosecutors along the Southwest border directing them to adopt a zero-tolerance policy for all offenses referred by the Department of Homeland Security (DHS) for criminal prosecution under 8 U.S.C. § 1325(a), which prohibits illegal entry and attempted illegal entry into the United States by an alien. The heightened rate of prosecutions for criminal immigration offenses has resulted in an unanticipated workload increase for the Defender

<sup>2</sup> Since FY 2016, the Defender Services program has used a comprehensive set of staffing formulas to determine FDO staffing requirements. These staffing formulas, developed using the same procedures used for all other judiciary staffing formulas, establish a fair, equitable, and rigorous basis for calculating and allocating the staffing resources of FDOs. The judiciary uses a weighted caseload methodology for the federal defender portion of the Defender Services appropriation request to account for the complexity and resource intensity of FDO caseload. This methodology more precisely determines FDO staffing requirements. Instead of using raw case numbers, the formula uses a five-statistical-year average of FDO weighted representations to calculate the number of positions for each office. Using a five-statistical-year average provides a measure of protection against volatility in caseload.

<sup>3</sup> The judiciary relies on a forecast of unweighted cases for estimating the panel attorney portion of the appropriation request. This projection is based upon a count of one for each case.

Services program, particularly for the offices and panel attorneys practicing in the border districts of Western and Southern Texas, Southern California, New Mexico, and Arizona.

Furthermore, the Defender Services program must be responsive to changes in law. As recently as December 21, 2018, the First Step Act was passed into law resulting in several new causes of action for defender and panel attorneys. Likewise, in 2018, the United States Supreme Court decided *Sessions v. Dimaya*, 584 U.S. \_\_\_, 138 S.Ct. 1204 (2018), expanding the application of *Johnson v. United States*, 135 S.Ct. 2551 (2015), in which the Supreme Court deemed a similar residual clause in the "violent felony" definition of the Armed Career Criminal Act (ACCA) to be void for vagueness. The *Johnson* decision was later determined to be retroactive resulting in many appointments of counsel for petitions for relief. The United States Sentencing Commission also amended, on an expedited basis, the United States Sentencing Guidelines consistent with the court's holding, causing changes to many pending cases.

### **FISCAL YEAR 2019 APPROPRIATIONS ASSUMPTION**

In the absence of an enacted FY 2019 appropriation, the judiciary developed its FY 2020 Defender Services budget request from the FY 2019 assumed appropriations level of \$1,157.4 million. The FY 2019 assumed level is based on the FY 2019 requested appropriation, excluding the \$6 above Employment Cost Index (ECI) increase to the hourly non-capital panel attorney rate. This amount, combined with \$37.0 million in unobligated carryforward balances from FY 2018 and prior years, funds FY 2019 requirements.

For bill language, the judiciary used the language from H.R. 6147, the House-passed FY 2019 Financial Services and General Government (FSGG) appropriations bill, updated with the assumed funding level as described above, as the closest approximation of eventual enacted appropriations language.

After full FY 2019 appropriations are enacted, the judiciary will re-estimate its FY 2020 budget request and transmit to the Appropriations Committees any changes to FY 2020 appropriations requirements and language.

### **SIGNIFICANT ISSUES FOR FISCAL YEAR 2020**

#### ***Update on CJA Review Study***

In April 2015, Chief Justice John G. Roberts, Jr., established the Ad Hoc Committee to Review the Criminal Justice Act to conduct a comprehensive and impartial review, consistent with Judicial Conference policy, of the administration and operation of the CJA

program. The Judicial Conference had determined that such a study should be conducted periodically. The Ad Hoc Committee was asked to examine the effectiveness of current policies and governance structures and their impact on the appointment and compensation of counsel, quality of representation, program administration, and adequacy of funding. Over the course of its two-and-one-half year study, the Ad Hoc Committee conducted seven public hearings across the country and solicited written submissions from judges, federal defenders, panel attorneys, the larger criminal defense community, and organizations with an interest in public defense. They also conducted two surveys of attorneys who receive appointments under the CJA.

In November 2017, the Ad Hoc Committee submitted its findings and recommendations to the Judicial Conference. The Ad Hoc Committee recommended establishing an independent Federal Defender Commission within the judicial branch, but outside the oversight of the Judicial Conference, with sole authority to set policy and practices related to the provision of federal defense. Recognizing that the creation of an independent commission would require an act of Congress and could not be implemented immediately, the Committee also made 35 interim recommendations designed to give the defender program more authority and autonomy within the current structure. The full text of the Committee's findings and recommendations may be found online.<sup>4</sup>

Due to the scope of the Ad Hoc Committee's recommendations, Judicial Conference committees implicated by the recommendations were asked to review and provide their input on the 35 interim recommendations for consideration at the Conference's September 2018 session. The consideration of the Ad Hoc Committee's independent commission recommendation was deferred to a future session of the Conference. The Judicial Conference approved over half of the interim recommendations at its September 2018 session. A report summarizing the Ad Hoc Committee's findings and recommendations, as well as the status of the Judicial Conference's consideration and implementation of those recommendations, was provided to the House and Senate Committees on Appropriations on October 15, 2018. Other interim recommendations were deferred for further consideration before judiciary action. Most of the deferred recommendations will be considered by the Conference at its March 2019 meeting.

The interim recommendations approved by the Judicial Conference relate to, among other things, providing additional training opportunities, encouraging the establishment of Capital Habeas Units, increasing staff and funding for litigation support activities, and adequately funding and staffing the National Information Technology Operations and Applications Division within the Defender Services program. The judiciary is currently examining the most efficient way to implement these recommendations.

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<sup>4</sup> See [https://www.uscourts.gov/sites/default/files/2017\\_report\\_of\\_the\\_ad\\_hoc\\_committee\\_to\\_review\\_the\\_criminal\\_justice\\_act-revised\\_2811.9.17.29\\_0.pdf](https://www.uscourts.gov/sites/default/files/2017_report_of_the_ad_hoc_committee_to_review_the_criminal_justice_act-revised_2811.9.17.29_0.pdf).

### ***Ensuring Necessary Cybersecurity Protection***

Federal defenders are committed to the efforts underway within the judiciary to create greater cybersecurity awareness, train employees in cybersecurity best practices, and allocate the necessary resources to monitor and protect the network environment. The decentralized organizational structure of the federal courts is mirrored in the federal defender program and presents many of the same challenges, with the additional challenge that the defender system is bifurcated, with 64 federal public defender organizations run by employees of the judiciary, and 17 community defender organizations, which are grant-funded non-profit organizations. In addition to a diverse and independent structure, federal defenders have the added professional responsibility to safeguard privileged information, client confidences, and other sensitive matters from unauthorized disclosure, which includes taking appropriate measures to keep that data separate from other components of the judiciary.

With the ongoing widespread government and private sector data breaches, cybersecurity has continued to be a critical priority for the Defender Services program as well as the entire judiciary, and every FDO is currently protected by a firewall. As part of the cybersecurity initiative implementation, the Defender Services program assumed centralized firewall control and management responsibilities and controls for approximately 90 percent of all FDOs with the long-term goal of 100 percent centralized firewall management. The Defender Services program collaborates with other judiciary information technology offices to share information regarding critical vulnerabilities and threats, indicators of system compromise, and best practices.

In terms of more specific activities, the judiciary has initiated the process of procuring a defender services managed security operations center (MSOC) capability, which would provide a centralized IT security monitoring capability for all FDOs. The MSOC will work in conjunction with a security incident response team (SIRT) to significantly increase the information technology security posture of the federal defender program. The FY 2020 budget request includes six additional national IT positions. Three of these six positions are for the SIRT to address cybersecurity needs. The three other positions (two operating systems administrators and one information technology/software trainer) would address non-cybersecurity requirements. These positions are necessary to ensure defender IT systems are mission-capable at or above judiciary standards.

### ***Non-Capital Hourly Rate for Panel Attorneys***

The Defender Services program is organized as a hybrid system of FDOs and panel attorneys drawn from the private criminal defense bars of the 94 federal districts. The 14,000-plus attorneys currently serving on CJA panels constitute a critical component of the

program, accepting appointments in conflict situations, and providing a strong connection to the private bar and the communities where they practice. On a national basis, panel attorneys represent eligible individuals in approximately 40 percent of appointments made pursuant to the CJA.

The judiciary is grateful to Congress for providing a \$6 increase above the Employment Cost Index (ECI) to the non-capital hourly rate in FY 2018. This increase resulted in a new hourly rate of \$140 per hour for work performed on or after March 23, 2018. In developing the FY 2020 request, the judiciary currently assumes approval of a 2019 Employment Cost Index (ECI) adjustment, which would increase the non-capital hourly rate from \$140 to \$142 in FY 2019. In FY 2020, there is no assumed ECI adjustment to the non-capital rate. However, the judiciary is seeking a \$7 per hour increase above the assumed FY 2019 hourly rate of \$142 to reach the statutorily authorized non-capital hourly rate (from \$142 to \$149 per hour). If Congress ultimately provides more than an ECI adjustment for FY 2019, the judiciary would require a smaller rate increase in FY 2020 to achieve the statutory maximum of \$149 per hour.

The judiciary is cognizant of pressures on the Congress to manage or reduce the federal budget. However, providing the statutory maximum rate will enable the recruitment and retention of a sufficient number of qualified CJA panel attorneys to accept CJA appointments. This proposed rate increase will improve the availability and quality of panel attorney representation and increase the number of qualified and experienced private attorneys willing to accept appointment in CJA cases. It is well established that a meaningful public defense system, and compliance with the constitutionally- and statutorily-mandated right to the effective assistance of counsel, cannot function without qualified and experienced attorneys willing to provide representation.

The current CJA panel attorney hourly rate of \$140 in non-capital cases is \$9 below the \$149 per hour authorized by the 99<sup>th</sup> Congress in the Criminal Justice Act Revision of 1986 (P. L. 99-651), over 30 years ago. Although the 1986 amendments authorized the Judicial Conference to implement annual inflationary increases or (ECI adjustments) for panel attorneys, rate increases have not always been funded. This has produced a gap between the current rate and the authorized rate that can only be closed through funding rate increases beyond an annual inflationary adjustment. The \$6 above ECI increase Congress provided in FY 2018 is the largest increase received since FY 2010, when the non-capital hourly rate increased from \$110 to \$125.

Panel attorneys are overwhelmingly (almost 90 percent) solo and small law firm practitioners and, therefore, small business owners. These small business owners pay their own salary and benefits, rent, staff salaries, and other overhead expenses from the CJA hourly rate. The CJA rate is meant to cover both overhead and a fair hourly wage. According to a nationwide survey conducted by a professional research firm in 2015, panel attorneys billed, on average, \$281 per hour for privately retained criminal cases and incurred

overhead costs of \$85 per hour. Therefore, with an hourly rate of \$140, after reducing it for the \$85 per hour for costs of overhead expenses, CJA counsel net only \$55 of compensation per hour before taxes. By comparison, the U.S. Department of Justice (DOJ) pays \$300 per hour to retain private counsel to represent current or former federal employees in civil, congressional, or criminal proceedings. Compared to market rates and the rates paid by other parts of the federal government, the current CJA non-capital panel rate is not competitive.

Other relevant information about the 2015 survey includes:

- 39.5 percent of the federal judges who completed the survey experienced difficulty identifying panel attorneys for appointment with the necessary qualifications and experience, given the complexity of the cases before them. Judges reported that the primary cause of this challenge was the insufficiency of the current non-capital hourly rate of panel attorney compensation.
- There was a significant increase in the percentage of panel attorney district representatives<sup>5</sup> reporting that their districts were experiencing difficulty preventing qualified and experienced attorneys from resigning from the panel (up from 39.0 percent in 2009 to 61.9 percent). Similarly, there was a significant increase in the number of panel attorney district representatives reporting difficulty replacing attorneys leaving the panel with attorneys of similar qualifications and experience (up from 35.3 percent in 2009 to 59.8 percent). The survey also indicated that this difficulty was largely attributed to insufficient panel attorney hourly rates, which provide panel attorneys with pre-tax, post-overhead compensation well below privately retained counsel and attorneys funded by other government agencies
- More than half of the panel attorney district representatives (56.2 percent) disagreed or strongly disagreed that the current rate of panel attorney compensation for non-capital cases was sufficient to replace attorneys leaving the panel with attorneys of similar qualification and experience.

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<sup>5</sup> A panel attorney district representative is an attorney selected from among the members of the CJA panel in each of the 94 judicial districts to serve as a liaison between the CJA panel and the court, federal defender, and the AO.



### ***Update on the Potential Impact of “Opt-In” and Proposition 66 on the Judiciary’s Resource Requirements***

As explained below, there are two laws – Opt-In and Proposition 66 – that accelerate judicial review of state-imposed death sentences and may seriously impact future funding requirements for the Defender Services program. However, given the uncertainty of the timing of the impact, no requirements are included in the FY 2020 budget request for the impact of these two laws on CJA workload.

- **Opt-In**

Under the Antiterrorism and Effective Death Penalty Act of 1996, states may apply to “opt in” to a system of expedited federal habeas corpus review of state death penalty cases. Upon approval by the U.S. Attorney General of a state’s application for “opt-in” certification, federal capital habeas corpus cases from that state will be subject to new, expedited habeas review that will sharply reduce the amount of time that CJA appointed counsel have to prepare, investigate, and litigate these cases. The implementation of “opt in” in a state will also generate new litigation about the appropriate application of the new expedited review process in individual cases. Both factors will lead to increased workload for FDOs and CJA panel attorneys and result in the need for additional resources.

Texas and Arizona have applications for “opt in” certification pending before the Attorney General, and additional states are expected to apply. The FY 2020 budget request does not currently include resources associated with “opt in” implementation because the Arizona and Texas applications remain pending and it is unknown when they will be decided. However, the judiciary will closely monitor this situation and will keep the Appropriations Committees apprised of major actions and their expected impact on the judiciary’s resource requirements.

- **Proposition 66**

Prop 66 is a California ballot initiative approved in 2016, now in force, which seeks to eliminate long delays between imposition and effectuation of California death sentences by speeding up state-court review of California capital judgements. Prop 66 creates both a short-term and longer-term need for additional resources to provide federal capital habeas representation in California. DSO is monitoring the need for additional staff in the California FDOs as implementation of Prop 66 develops.

### ***FDO Staffing Formulas***

For several decades, the judiciary has employed a process of work measurement studies to develop statistically sound staffing formulas to estimate the number of employees required to accomplish its mission. In September 2015, the Judicial Conference approved the first formulas for calculating staffing requirements in FDOs for use beginning in FY 2016.

The FY 2020 request allows FDOs to increase staffing levels to maintain 98 percent of the projected Judicial Conference approved-staffing formulas (caseload adjusted) resulting from that comprehensive work measurement study. Due to increasing workload requirements, this FY 2020 request seeks funding for 203 additional positions (190 staffing formula-related, seven for panel attorney management, and six national positions).

### ***Criminal Justice Act Electronic Vouchering System***

The judiciary's automated "eVoucher" application facilitates electronic submission, management, and approval of CJA panel attorney and service provider vouchers. It includes local reporting capabilities and strengthens judge and court staff management and oversight of the CJA payment process. The eVoucher system is deployed on centralized servers and all court units process vouchers electronically through the system. The AO provides ongoing development, guidance, training, and technical support for the eVoucher system. Enhancements to the system are ongoing. Recent additions include internal control and national reporting features, as well as the collection of more detailed information about claims paid and CJA operations across the country.

### ***AO/Executive Branch Joint Task Force on the Southwest Border***

The judiciary took several steps in 2018 to address the large increase in immigration filings in courts on the U.S.-Mexico border stemming from the Administration's zero-tolerance policy. The AO convened a conference of officials from the affected border districts in Southern California, Arizona, New Mexico, and Western and Southern Texas. District judges, magistrate judges, federal defenders, chief probation and pretrial services officers, and district court clerks have met to discuss how best to manage the logistical challenges of processing the flood of cases. They also received briefings from Executive Branch officials.

AO leadership also worked with DOJ officials to establish the Task Force on Southwest Border Issues. The Joint Task Force has held two in-person meetings – the first in July 2018 in Washington, DC and the second in September 2018 in McAllen, Texas. Items discussed at its initial meeting included locating separated family members, returning migrant's identification documents and other critical property, interpreter needs, and improved communication on material changes to criminal case filings so resource needs could

be anticipated. Participants included representatives from several Judicial Conference committees, two federal defenders, a panel attorney, and a chief probation officer. Executive branch task force members included two U.S. Attorneys, as well as senior officials from Border Patrol, Immigration and Customs Enforcement, the Department of Health and Human Services, and the U.S. Marshals Service.

### ***Reimbursable Positions for Program Oversight and Training***

The AO is committed to conducting program oversight and maintaining a robust training program. The FY 2020 request includes eight additional AO positions funded by the Defender Services appropriation. Six of these positions are for program oversight and two are for training.

Within the AO's Defender Services Office (DSO), the Program Operations Division is responsible for budget, program reviews of defender offices and CJA panel management, information technology data management, and FDO operational support. The six positions requested for program oversight include a branch chief, three staff to conduct program reviews, and two data analytics positions.

- The branch chief would help oversee the wide range of diverse subject areas assigned to this division.
- The three analyst positions would support the periodic reviews DSO conducts of FDOs and CJA panel management in all 94 districts. These reviews are the AO's primary oversight tool for these two programs. The program review process began in 1994, when there were 54 operational FDOs, with 1,265 personnel on board. Currently, there are 81 operational FDOs employing approximately 3,800 people, increases of 50 percent and 200 percent, respectively. Staffing increases since 1994 have not been commensurate with the workload increase. In addition, the scope of the reviews has increased dramatically, most notably by placing as much emphasis on the CJA panel attorney program as on FDOs and by adding an information technology component. Furthermore, since the FDO staffing formulas were implemented, the review teams have begun evaluating case management practices and data integrity in defender offices to ensure the accuracy of the FDO staffing formulas.
- Two positions are requested to support the Defender Services data analytics function. The primary duties of the new staff would include ensuring quality and consistency in caseload data, conducting analysis and updates to case weights, analyzing

and developing work measurement formulas, and providing FDO training on data management and case opening procedures. They will also provide guidance to the above-mentioned program review teams in their onsite evaluations of data integrity. Since the implementation of the staffing formulas in FY 2016, the work necessary to maintain data quality and consistency has continued to increase. These additional team members will be critical in the successful implementation of upcoming work measurement studies and FDO staffing formulas.

The DSO's Training Division provides robust training programs for both FDOs and panel attorneys, including over 50 national training programs per year. The two positions requested for training are for a branch chief and an administrative analyst in this division.

- The branch chief position is requested to help oversee the principal tasks of the division, as well as to assist in more traditional attorney advisor responsibilities.
- The administrative analyst position is requested to assist the division with several tasks to include out-of-district travel requests, procurements for national training programs, travel arrangements, and distribution of training materials. Additional tasks would include helping attorney advisors maintain communications with program participants and coordinating advance materials necessary for a successful training program.

### **COST CONTAINMENT INITIATIVES**

The judiciary has implemented various cost-containment initiatives across the Defender Services program without compromising its constitutional mandate. Funding decisions are made with a keen awareness of the budget challenges facing the nation and the need to continue cost-containment measures in every aspect of the Defender Services program.

Key cost-containment initiatives include, but are not limited to:

- (1) promoting the use of case budgeting to control expenditures in capital and other high-cost CJA panel attorney representations;
- (2) supporting distance learning initiatives to optimize the accessibility of CJA attorney training opportunities;
- (3) improving DOJ procedures for making decisions not to seek the death penalty in death-eligible cases; and
- (4) identifying more cost-effective means of handling increasingly large and complex discovery in CJA representations.

### ***Case Budgeting of CJA Panel Attorney Representations***

Defender Services funding supports eleven case-budgeting attorney positions. These attorneys are assigned to federal judicial circuits across the country and work to identify cost drivers, monitor case expenditures, assist the courts and CJA panel attorneys with individual case budgeting and voucher review, and promote representation consistent with the best practices of the legal profession. The case-budgeting attorneys focus their attention on “high-cost” representations, defined as all capital cases and those non-capital representations where it can be anticipated that there will be more than 300 attorney hours or total expenditures are expected to exceed 300 times the prevailing non-capital hourly rate, rounded up to the nearest thousand, for an individual defendant. To address these high-cost cases, the judiciary continues to promote the nationwide use of case budgeting techniques to help ensure that, in all capital and other high-cost panel attorney cases, the expenses of representation are anticipated, substantiated, monitored, and, where appropriate, limited before they are incurred. Case-budgeting attorneys funded by Defender Services currently serve the following ten of the 12 circuits: First, Second, Third, Fourth, Fifth, Sixth, Seventh/Eighth (shared position), Ninth (two positions), and Tenth.

### ***Distance Learning***

The Defender Services program continues to develop and produce distance learning programs as part of its robust training program. Beginning in October 2010, substantive criminal defense video training sessions have been made available to CJA practitioners, including CJA panel attorneys and defender staff, expanding the reach of the programs without the necessity of additional live training events. At this time, more than 60 training sessions presented at national and local programs over the last several years may be viewed by FDO staff and panel attorneys through the Training Division’s website, [www.fd.org](http://www.fd.org). Each year, between 1,000 and 2,000 practitioners access the videos. Since 2013, the Training Division has also presented 27 webinars, with two live presentations for each. Each live webinar had between 60 and 200 registrants. The actual number of participants viewing the webinars is likely much higher because many FDOs hold a viewing for a large group, with only one person registering. The FY 2018 webinars provided quality training on a variety of criminal defense topics including immigration, circuit splits, CJA resources, and a four-part series focusing on the Supreme Court’s decision in *Sessions v. Dimaya*. The training made available through distance learning provides an additional resource to improve the quality of representation provided by CJA counsel and enables live training programs to have a greater impact nationally. For example, FDOs are using the webinars as part of their efforts to train panel attorneys locally, which increases the availability of training without incurring additional costs.

### ***Improvement in DOJ Procedures for Making Decisions Not to Seek the Death Penalty in Death-Eligible Cases***

The judiciary continues to urge DOJ to streamline its procedures for evaluating and making decisions *not* to seek the death penalty in cases where the government can quickly conclude that the death penalty is inappropriate. In the vast majority of death-eligible cases, the local U.S. Attorney does not recommend, and the U.S. Attorney General does not authorize, seeking the death penalty. In FY 2018, the U.S. Attorney General reviewed approximately 199 cases of defendants indicted with death-eligible offenses and decided whether or not each case would proceed as a capital case. Of these 199 cases, only eighteen defendants (9 percent of the total) were approved to proceed as a death penalty case. Until DOJ notifies counsel and the court that it does *not* intend to seek the death penalty for an eligible defendant, which can take years to determine, defense counsel must assume that the death penalty will be pursued. Pending DOJ's decision, the judiciary is obligated to bear the substantial cost of the statutorily-required two capital-qualified defense counsel – compensated at the higher hourly capital rate of \$188 – who must undertake the intensive, time-consuming work required to attempt to persuade the government *not* to seek the death penalty, and prepare for a capital trial and sentencing proceeding. An early decision by the Attorney General *not* to seek the death penalty could achieve significant cost savings for the Defender Services program, DOJ, and the courts.

Steps toward improvement include:

- The *Guide to Judiciary Policy*, Volume 7A, Chapter 6, Section 670 (Scheduling of Federal Death Penalty Case Authorization to Control Costs), which was jointly developed with DOJ staff and approved by the Judicial Conference in September 2007, is intended to promote cost savings by having DOJ decide earlier in the process when it will *not* seek the death penalty. The guideline encourages courts to set reasonable deadlines for stages of the death penalty authorization process (subject to extension for good cause).
- In April 2014, DOJ revised its death penalty authorization protocol to require U.S. Attorneys to submit all potential capital cases to DOJ for review *before* indictment, absent extenuating circumstances. The extent of cost savings to the Defender Services program depends upon the level of implementation and compliance with the revised protocol at both the local and national levels. At the June 2018 Defender Services Committee meeting, the Deputy Attorney General expressed support for continuing DOJ collaboration with DSO representatives on this issue.

### *Discovery Costs*

Each year, the data associated with individual CJA representations expands in size and complexity. CJA attorneys—both FDO staff and panel attorneys—require new tools and strategies to help them organize, review, and manage the large amounts and variety of information provided by the prosecution as discovery material. There are a number of critical issues defense counsel must address to adequately manage and review e-discovery, including the large volume of information, the variety of sources from a multitude of digital devices and locations, proprietary formats, hidden information such as metadata and embedded data, and software and hardware limitations. Evidence encompasses not only discovery materials produced by the government, but those gathered by third parties and the defense. Federal defenders and panel attorneys require sufficient litigation resources, including national staff, to meet the challenge presented by DOJ’s e-discovery and litigation support capabilities. Even in “simple,” single defendant prosecutions, discovery can include electronic stored information (ESI, or e-discovery) extracted from client computers and mobile devices. Law enforcement officers review social media sites, like Facebook, Instagram, and Twitter, to capture possible incriminating materials. Video discovery is common and may include months of pole-camera recordings, business security videos, and hours of concealed camera footage. Additional discovery may include data from cell phone wiretaps, body wires, and GPS tracking devices.

To illustrate the volume of information, in a recent racketeering fraud case, the government provided “rolling” discovery (more than 30 productions) totaling more than 6,500,000 documents including word processing, spreadsheets, text, PowerPoints, PDFs, images, emails and audio video files. Though an exact page count is not known, if one assumes a technology support industry average of three to five pages per file, this equates to 19.5 million to 32.5 million pages of discovery. The judiciary anticipates the number of discovery-intensive cases will continue to grow.

Three major initiatives are in place to address this issue:

- (1) The DOJ/AO Joint Working Group on Electronic Technology in the Criminal Justice System (JETWG) addresses various issues related to e-discovery and discovery production between the prosecution and the attorneys for defendants charged in federal criminal cases. In 2012, the working group produced “Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases.” This comprehensive, national guidance is designed to facilitate a more predictable, cost-effective, and efficient management of electronic discovery, and a reduction in the number of disputes relating to ESI, by encouraging early discussion of electronic discovery issues through “meet and confers” between the prosecution and defense; the exchange of data in standard or reasonably useable formats; and resolution of disputes without the

necessity of court involvement, where possible. In 2017, the Judicial Conference Advisory Committee on Criminal Rules recommended that the Committee on Rules of Practice and Procedure approve Rule 16.1, a new rule to address large e-discovery cases. On September 13, 2018, the Judicial Conference approved Rule 16.1 in its current form and agreed to transmit the proposed new rule to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress. The accompanying Committee Note to Rule 16.1 states that counsel should be familiar with best practices and lists as an example of best practices the “Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases.” In addition, two separate JETWG subcommittees published a pocket guide on criminal electronic discovery as a supplement to the federal judiciary’s bench book and released a set of best practices for providing incarcerated clients with access to e-discovery.

- (2) Contracts with five national coordinating discovery attorneys are in place to advise panel attorneys and defender offices on cost-effective ways to manage large volumes of documents in the most complex cases to increase the quality of representation. As of November 2018, these five attorneys have been appointed in approximately 75 currently active cases, and because nearly all the cases have multiple defendants, these five attorneys are able to provide services to over 800 panel attorneys and assistant federal defenders nationally.
- (3) The Defender Services program has procured national licenses for software applications and tools to allow for the more efficient capture, organization, analysis, review and management of case-related electronic data by CJA panel attorneys and FDO staff thereby generally avoiding the higher cost alternative of purchasing software in multiple individual cases year after year.



## JUSTIFICATION OF CHANGES

The FY 2020 request for the Defender Services account is \$1,234.6 million, an increase of \$77.2 million, or 6.7 percent, over the FY 2019 assumed appropriation of \$1,157.4 million. The request will fund current services, as well as allow program increases for a \$7 increase above the assumed FY 2019 rate to the non-capital panel attorney hourly rate; FDO staffing increases to maintain 98 percent of the formula requirements (caseload adjusted); staffing increases for the DSO's Program Operations and Training Divisions; cyclical replacement of the FDO national server infrastructure; national position increases to support Defender Services IT security and other initiatives; and additional FDO panel management positions.

## ADJUSTMENTS TO BASE TO MAINTAIN CURRENT SERVICES

### A. PERSONNEL

#### *Pay and Benefit Adjustments*

#### 1. Annualization of assumed 2019 pay adjustment

##### a. Federal pay adjustment

**Requested Increase: \$2,641,000**

The requested increase provides for the annualized costs of an assumed 2019 pay adjustment for Employment Cost Index

(ECI) and locality pay adjustments. Based on FY 2019 appropriations action to date, federal pay rates are assumed to increase by an average of 1.9 percent, effective as of January 2019. The requested increase provides for the cost of three months (from October 2019 to December 2019) of the assumed 2019 pay increase in FY 2020. (If Congress ultimately does not enact a 2019 pay adjustment for federal civilian workers, or if one is provided at a rate different than 1.9 percent, the judiciary will revise this line item in its FY 2020 budget re-estimate.)

#### b. Panel attorney capital rate adjustment

**Requested Increase: \$200,000**

The requested funding annualizes the assumed FY 2019 panel attorney capital rate cost-of-living increase from \$188 to \$190 per hour. A rate increase to the capital hourly rate impacts six months of costs in FY 2019. The requested increase annualizes this rate increase for the first six months of FY 2020. (If Congress ultimately does not enact a 2019 pay adjustment for panel attorneys, the judiciary will revise this line item in its FY 2020 budget re-estimate.)

#### c. Panel attorney non-capital rate adjustment

**Requested Increase: \$4,389,000**

The requested increase annualizes the assumed FY 2019 panel attorney non-capital cost-of-living increase from \$140 to \$142

per hour. A rate increase to the non-capital hourly rate impacts three months of costs in FY 2019. The requested increase annualizes this for the first nine months of FY 2020. (If Congress ultimately does not enact a 2019 pay adjustment for panel attorneys, the judiciary will revise this line item in its FY 2020 budget re-estimate.)

## **2. Promotions and within-grade increases**

**Requested Increase: \$3,463,000**

The requested increase provides for promotions and within-grade increases for personnel. The FDO salary plans provide for periodic within-grade increases for staff who receive at least a satisfactory performance rating.

## **3. Benefits increases**

### **a. Health benefits**

**Requested Increase: \$501,000**

Based on information from the Office of Personnel Management, health benefit premium contributions are expected to increase by an average of 1.2 percent both in January 2019 and January 2020. The requested increase annualizes the 2019 premium increase and includes a nine-month provision for the increase anticipated for FY 2020.

## **b. FICA Adjustment**

**Requested Increase: \$446,000**

Based on information from the Social Security Administration, employer contributions to the Old Age, Survivor, and Disability Insurance (OASDI) portion of the FICA tax will increase in 2019. The salary cap for OASDI is projected to increase from \$128,400 to \$132,900 in January 2019. The requested amount is needed to pay the agency contribution in FY 2020.

## **c. FERS adjustment**

**Requested Increase: \$11,701,000**

Consistent with guidance from the Office of Management and Budget, funds are requested for an increase in the agency contribution rate to Federal Employee Retirement System (FERS) plans for FY 2020. For most employees, the agency contribution rate will increase from 13.7 percent to 16.0 percent. Any FERS increase is in accordance with revised estimates of the cost of providing benefits by the Board of Actuaries of the Civil Service Retirement and Disability System.

**4. One more compensable day**

**Requested Increase: \$1,796,000**

There is one more compensable day in FY 2020 than in FY 2019. The requested amount increases personnel compensation and benefits associated with one more compensable day for biweekly paid employees.

**B. OTHER ADJUSTMENTS**

*General Inflationary Adjustments*

**5. Inflationary increases in charges for contracts, services, supplies, and equipment**

**Requested Increase: \$3,193,000**

Consistent with guidance from the Office of Management and Budget, this request of \$3,193,000 is required to fund inflationary increases of 2.0 percent for operating expenses such as travel, communications, printing, contractual services, supplies and materials, and furniture and equipment.

**6. Inflationary increase in GSA space rental costs**

**Requested Increase: \$1,927,000**

This request represents a 3.47 percent inflationary increase and adjustments in the cost of GSA space rental charges for space for FY 2020.

*Workload and Financing Adjustments*

**7. Annualization of FDO positions:**

**Requested Increase: \$6,756,000**

**FTE: 28**

The requested increase will annualize costs for 56 federal public defender organization positions (28 FTE) and 14 community defender organization positions that are assumed to be approved in FY 2019.

**8. Annualization of three reimbursable positions**

**Requested Increase: \$186,000**

The requested increase would annualize costs for three reimbursable positions in DSO's Training Division that are assumed to be approved in FY 2019. The additional staff will be added to successfully implement additional training programs and workshops.

**9. Changes in projected panel attorney workload**

**Requested Increase: \$8,943,000**

The requested increase is mostly due to a projected change in panel attorney caseload (\$8.1 million). Panel attorney representations are projected to increase from an assumed level of 80,700 in FY 2019 to 85,200 in FY 2020. Historically, panel attorney caseload has proved difficult to predict. Thus,

caseload projections and requirements will be re-assessed as more information becomes available. This request would also fund additional resource counsel contracts (\$0.8 million) to assist in meeting the increase in federal capital prosecutions.

**10. Increase in appropriations needed to maintain FY 2019 requirements due to a decrease in non-appropriated sources of funds**

**Requested Increase: \$7,000,000**

The judiciary has been able to reduce its Defender Services appropriation request using unobligated no-year funds carried forward in this account from prior fiscal years. In FY 2019, \$37 million in balances from FY 2018 will be used to finance FY 2019 requirements. In developing the FY 2020 request, the judiciary expects \$30 million to carry forward from FY 2019 into FY 2020 and be available to finance FY 2020 requirements. Because the judiciary anticipates having \$7 million less in carryforward funding available in FY 2020, it requests \$7 million in funding to substitute direct appropriations for base expenses previously funded from carryforward balances.

**C. PROGRAM INCREASES**

**11. Non-capital panel attorney hourly rate increase**

**Requested Increase: \$2,195,000**

The requested funding is to support an increase to the current statutorily authorized maximum hourly rate for non-capital cases in FY 2020. The current hourly rate is \$140. In developing the FY 2020 request, the judiciary assumes that the hourly rate will increase to \$142 in FY 2019. The FY 2020 request would provide for a \$7 per hour increase over the assumed FY 2019 rate to the statutory maximum of \$149 per hour in FY 2020. If Congress ultimately provides more than an ECI adjustment for FY 2019, the judiciary would require a smaller rate increase in FY 2020 to achieve the statutory maximum of \$149 per hour.

The rate increase is needed to ensure that courts can retain and recruit qualified and experienced criminal defense practitioners for their CJA panels to ensure compliance with the constitutionally- and statutorily-mandated right to the effective assistance of counsel. As discussed previously, a national survey for the judiciary found that an increasing number of courts are reporting difficulty finding and retaining sufficient counsel for their panels. The survey also indicated that this difficulty is largely attributed to insufficient panel attorney hourly rates, which provide panel attorneys with pre-tax, post-overhead compensation well below privately retained counsel and attorneys funded by other government agencies.

The request assumes a January 2020 implementation date and a three-month impact on FY 2020 non-capital panel attorney costs. The annual cost of a \$7 increase in FY 2021 is \$17.6 million. For more information on the non-capital attorney rate, see page 5.14.

**12. Change in projected workload**

**a. Continued implementation of the FDO staffing formulas**

**Requested Increase: \$18,240,000 FTE: 75**

The requested increase supports the continued implementation of the FDO staffing formulas in FY 2020. The work measurement study found that many FDOs were significantly understaffed relative to their workload. Given the inability of the FDOs to hire all the recommended positions in one fiscal year, the judiciary has implemented a multi-year plan to reach full-formula requirements. This request is for 190 additional FDO staff funded for six months (150 FPDO positions/75FTE, and 40 CDO positions) to support the equivalent of 98 percent of the staffing formulas in FY 2020.

**b. CJA panel management positions**

**Requested Increase: \$672,000 FTE: 2**

The requested increase is for seven additional FDO panel management positions (4 positions/2.0 FTE for FPDOs and three positions for CDOs). These positions are necessary for FDOs to administer the CJA panel effectively and efficiently in districts where that responsibility is held by the FDO.

**c. National positions**

**Requested Increase: \$415,000 FTE: 3**

The requested increase supports six new national positions (3.0 FTE) related to information technology. Of these positions, three are to address cybersecurity needs—a top priority of the judiciary—by establishing a security incident response team (SIRT), and three positions, including two operating systems administrators, and one information technology/software trainer, would address non-cybersecurity requirements. These positions are necessary to ensure defender IT systems are mission-capable at or above judiciary standards while also containing costs and avoiding unnecessary duplication of efforts.

**13. Reimbursable positions**

**Requested Increase: \$620,000**

The requested increase supports eight additional positions at the AO funded by the Defender Services appropriation for DSO's Program Operations and Training Divisions. Six of these positions are in the Program Operations Division and include a branch chief, three additional analysts for Defender Services program reviews, and two data analytics positions. Two of these positions are in the Training Division and include a branch chief, and an additional management analyst.

The Program Operations Division positions are requested to improve management oversight of the Defender Services

program, address the growth and changing scope of program reviews, ensure data quality, and support a robust training program. The Training Division positions are necessary to maintain efficiencies in the administration of the Defender Services program as well as to support federal defender staff and panel attorneys in effective representation of their clients. For more information on these reimbursable positions, see page 5.19.

#### **14. Information technology requirements**

##### **Requested Increase: \$1,900,000**

The requested increase would fund cyclical replacement of the FDO server infrastructure used to support national programs and services. The current servers were last replaced in FY 2015 and current life cycle (based on recommended industry and judiciary practices) for this infrastructure is five years. Cyclical replacement of the server infrastructure improves information technology asset management practices by ensuring server capacity is available to support new initiatives. Further, without cyclical replacement, there is a risk that

vendors will stop supporting the infrastructure which would put judiciary data at risk.

#### **D. FINANCING THE FISCAL YEAR 2020 REQUEST**

##### **15. Anticipated carryforward from FY 2019 and prior years into FY 2020**

##### **Estimated funds available: \$30,000,000**

The judiciary projects \$30 million will be available through anticipated carryforward from FY 2019 and prior years into FY 2020 to offset the FY 2020 appropriation request for the Defender Services program. The judiciary will advise appropriations subcommittee staff of any changes to this estimate.