CHAPTER 7

INDIGENT DEFENSE:
ENSURING THE CONSTITUTIONAL RIGHT TO COUNSEL

THE ISSUE

In the landmark case *Gideon v. Wainwright*, the Supreme Court acknowledged the "obvious truth" that "lawyers in criminal courts are necessities, not luxuries" given that "[g]overnments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime."[1] Yet, almost fifty years later, the promise of *Gideon* remains unfulfilled. According to *Justice Denied*, a 2009 report of the Constitution Project's National Right to Counsel Committee, public defense systems—which handle the vast majority of representation for defendants in criminal cases—fail to provide adequate representation for those the government accuses of crimes.[2] Public defenders' offices are understaffed, underfunded, undertrained, and overworked, and they often lack the oversight necessary to ensure constitutionally adequate representation for indigent defendants. As experts from the Cato Institute observed, "the great majority of defender systems are understaffed and underfunded; they cannot provide their clients with even the basic services that a non-indigent defendant would consider essential for a minimally tolerable defense."[3]

When the government accuses, convicts, and incarcerates its citizens without providing them adequate counsel, it disrupts the basic structure of our adversarial system, endangering both its people's constitutional rights and the rule of law. The inevitable consequence of a dysfunctional system is the conviction and incarceration of innocent people. Wrongful convictions not only unjustly deprive people of their liberty, but also risk public safety by allowing the real perpetrators to remain free. Moreover, without proper representation, many non-violent offenders are sentenced to inappropriately lengthy prison terms, unnecessarily driving up taxpayer costs.

The Administration and the members of the 112th Congress have an important opportunity to address the current crisis in indigent defense, and to realize the promise of the constitutional right to counsel. Reforms should be adopted to strengthen public defender training; increase transparency in federal grants to state criminal justice systems; create accountability for inadequate provision of representation to state indigent defendants; and increase independence for federal defenders. Each of these reforms is both constitutionally required and long overdue.

HISTORY OF THE PROBLEM

1. **The Constitutional Right to Counsel**

The Constitution affords people charged with crimes due process, the presumption of innocence, and equal access to a fair day in court. The Founders understood the danger of a

[1] Gideon v. Wainwright, 372 U.S. 335, 344 (1963).
[2] CONSTITUTION PROJECT, NATIONAL RIGHT TO COUNSEL COMMITTEE, JUSTICE DENIED, 49-101 (2009), *available at* http://www.constitutionproject.org/pdf/139.pdf.
[3] Stephen J. Schulhofer & David D. Friedman, *Reforming Indigent Defense: How Free Market Principles Can Help to Fix a Broken System*, CATO INST., 7 (Sept. 2010). *available at* http://www.cato.org/pubs/pas/pa666.pdf.

powerful government exercising arbitrary control over the freedom of the People through mechanisms of the justice system and criminal law. For this reason, the Sixth Amendment guarantees, among other fundamental rights, that "[i]n all criminal prosecutions, the accused shall enjoy the right…to have the Assistance of Counsel for his defence [*sic*]." Although the Sixth Amendment's right to counsel provision was originally interpreted to apply only in federal prosecutions, in the twentieth century the Supreme Court interpreted the due process clause of the Fourteenth Amendment to also apply the Sixth Amendment right to counsel in state prosecutions.

In the 1932 case *Powell v. Alabama*, the Supreme Court held that defendants in capital cases, even at the state level, were entitled to due process, including the right to counsel.[4] Justice Sutherland wrote in his majority opinion that the right to counsel is among the "immutable principles of justice which inhere in the very idea of free government…"[5] In 1963, the Supreme Court issued the landmark decision *Gideon v. Wainwright*, holding that states are required to provide representation for defendants who cannot afford private counsel in felony cases. Since then, the right to counsel has been consistently extended to any case that may result in a person's potential loss of liberty.[6]

In addition to a basic right to counsel, a defendant in a criminal case has a right to "effective assistance of counsel" under the Supreme Court's decision in *Strickland v. Washington*.[7] In practice, courts have set a very low standard for effective assistance of counsel,[8] and it is difficult for defendants to meet the Supreme Court's demand that they affirmatively prove that their attorney's errors were "so serious" that her or his performance fell below an "objective standard of reasonableness." Under the *Strickland* standard, defendants are also required to affirmatively prove that the result of the proceeding would have been different with more effective counsel.[9] These nearly insurmountable standards have undermined the right to effective counsel necessary for our adversarial system of justice to operate properly.

2. **Indigent Defense Systems**

The method by which a government provides indigent defense services varies by jurisdiction. At the federal level, public defenders are provided in two ways: federal public

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[4] Powell v. Alabama, 287 U.S. 45 (1932)
[5] *Id.* at 68 (quoting Holden v. Hardy, 169 U.S. 366, 389 (1898).
[6] *Gideon* established the right to counsel for felony trials. Subsequent cases extend that right. *See*.Douglas v. California, 372 U.S. 353 (1963) (direct appeals); Miranda v. Arizona, 384 U.S. 436 (1966) (custodial interrogation); In Re Gault, 387 U.S. 1 (1967) (juvenile proceedings resulting in confinement); Coleman v. Alabama, 399 U.S. 1 (1970) (critical stages of preliminary hearings); Argersinger v. Hamlin, 407 U.S. 25 (1972) (misdemeanors involving possible imprisonment); Shelton v. Alabam*a*, 535 U.S. 654 (2002) (misdemeanors involving a suspended sentence).,
[7] Strickland v. Washington, 466 U.S. 668 (1984).
[8] *See*, *e.g.,* US v. Cronic, 466 U.S. 648, 666-67 (1984), holding that ineffective assistance of counsel cannot be inferred by surrounding circumstances but rather must be demonstrated affirmatively "only by pointing to specific errors made by trial counsel."
[9] JUSTICE DENIED*, supra* note 2, at 39- 43.

defender organizations and community defender organizations.[10] In the first system, a federal defender is appointed to a four-year term by the court of appeals for the district in which he or she serves, and the staff in his or her office are federal employees. In a community defender system, non-profit entities incorporated under state law operate with grants from the federal judiciary and are supervised by a board of directors or a local legal services organization. Funding for federal indigent defense is authorized by the Criminal Justice Act of 1964.[11]

At the state level, indigent defense is usually provided in one of three ways.[12] First, many populous jurisdictions have a local office of the public defender staffed by government employees which handles almost all indigent defense in the jurisdiction. Second, some jurisdictions contract with private firms or individual attorneys to represent indigent defendants or a particular class of indigent defendants for a fixed fee. Third, many jurisdictions use an "assigned counsel" model in which the court assigns attorneys to indigent defendants on a case-by-case basis. Funding is provided by the state, the county, and, sometimes, by federal grant programs administered by the Bureau of Justice Assistance within the Department of Justice (DOJ).[13]

3. **The Executive and Indigent Defense**

The executive branch has a special responsibility to enforce the federal mandate announced in *Gideon v. Wainwright* and is uniquely situated to pursue indigent defense reform. Not only are federal defenders employees of the executive branch, but DOJ also directly assists state and local indigent defense systems with federal grant funding. Within DOJ, the Office of Justice Programs administers the Edward Byrne Memorial Justice Assistance Grant program (Byrne JAG). This program is the largest single federal grant program for funding of state law enforcement, court, prosecution, indigent defense, and related programs. While Byrne JAG grants can be used by states to fund indigent defense services, the formulation used for awarding grants has been criticized because it neither (i) conditions federal funding on the establishment of statewide public defense systems, nor (ii) requires any percentage of the federal grant go toward indigent defense programs.[14]

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[10] *See* United States Courts, The Defender Services Program, http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel.aspx (last visited Dec. 10, 2010).
[11] 18 U.S.C. § 3006A.
[12] JUSTICE DENIED*, supra* note 2, at 53-57**.**
[13] *Id.* at 53-60.
[14] *See* e.g., *Hearing before the Subcomm. on Commerce, Justice, Science and Related Agencies of the H. Comm. on Appropriations*, 111th Cong. (2010) (statement of Virginia E. Sloan, President, The Constitution Project), *available at* http://www.constitutionproject.org/pdf/389.pdf; National Legal Aid and Defender Association, *Make Our Justice System Fair and Our Communities Safer by Supporting Quality Public Defense Systems* (2008), *available at* http://www.nlada.org/DMS/Documents/1232143408.49/NLADA%20DOJ%20Transition%202-pager.pdf.

4. **Congress and Indigent Defense**

In 1964, Congress passed the Criminal Justice Act (CJA), "[t]o promote the cause of criminal justice by providing for the representation of defendants who are financially unable to obtain an adequate defense in the criminal cases in the courts of the United States."[15] The Act established a system, administered by the federal judiciary, for the appointment and compensation of counsel to represent indigent defendants charged with federal crimes. In 1970, the CJA was amended to authorize districts with large numbers of indigent defendants to establish federal defender organizations as counterparts to federal prosecutors in U.S. Attorneys' offices.[16]

The Innocence Protection Act (IPA) sponsored by Senator Patrick Leahy (D-VT) in the Senate, and Representatives Ray LaHood (R-IL) and Bill Delahunt (D-MA) in the House, and with support from Representative James Sensenbrenner (R-WI) and Senator Orrin Hatch (R-UT), was passed by Congress as part of the Justice for All Act of 2004 (JFAA).[17] The IPA was intended to help reduce the risk of wrongful convictions and executions in capital cases, and the JFAA was also intended to improve access to forensic evidence in criminal trials. The IPA includes a provision authorizing grants to states to improve their appointment of qualified defense counsel in capital cases, and conditions those grants on states adopting minimum standards for defense counsel and prosecutors in capital cases.[18] Grants for such a purpose must be matched by equal-sized grants to prosecutors to enhance their ability to effectively prosecute state capital cases and vice versa. In September 2010, Senator Leahy introduced a reauthorization of the JFAA that would also extend provisions of the IPA.[19] Though the legislation never came before the Judiciary Committee for markup, according to his staff, Senator Leahy intends to reintroduce the JFAA reauthorization in early 2011.

Finally, the John R. Justice Prosecutors and Defenders Incentive Act of 2008 (J.R. Justice Act) authorizes a program for student loan repayment for prosecutors and public defenders.[20] This piece of legislation, which passed both chambers with overwhelming bipartisan support, increases the incentive for the best and the brightest young lawyers to enter public services as public defenders and prosecutors.

5. **Resources Available to Indigent Defense Attorneys**

In our adversarial legal system, the truth is expected to emerge from the clash of two well-prepared, opposing sides, each of which has the ability to present its arguments, evidence, and witnesses with full knowledge of the rules of engagement. However, especially at the state and

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[15] 18 U.S.C. § 3006A.
[16] Pub. L. No. 91-447, Sec. 1(b), 84 Stat. 916 (1970) (codified in 18 U.S.C. § 3006A(g)).
[17] Innocence Protection Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (codified in scattered sections of 18, 42 U.S.C).
[18] 42 U.S.C. § 14163.
[19] S. 3842, 111th Cong. (2010).
[20] John R. Justice Prosecutors and Defenders Incentive Act of 2008, Pub. L. No. 110-315, §§ 951-52, 122 Stat. 3078 (codified as amended in scattered sections of U.S.C.).

local level, the resources available to the district attorney or prosecutor often far exceed those available to the defender, creating a favorable situation for government power and a dangerous situation for individual liberty. For example, defenders, who most often depend on the very government they are opposing in court for their salary, frequently lack the time or funding to pay for necessary expert witnesses.[21]

Additionally, inadequate funding leads to insufficient staffing of defenders' offices. As a result, many public defenders have caseloads so large that they risk violating the oaths they took as members of the bar to provide adequate attention to each client, and also violate, by a large margin, the American Bar Association's (ABA's) guidelines for attorney caseloads.[22] In fact, the Bureau of Justice Statistics reports that in 2007, 73% of county-based public defender offices exceeded the maximum caseload per attorney.[23] Similarly, state public defender offices had a median 67% of the attorneys necessary to comply with caseload limits.[24] The Cato Institute reported that "[i]n one highly publicized case, the Atlanta public defender demoted a staff attorney because she had filed a motion asking the local judges to appoint her to no more than six cases per *day*" (emphasis added).[25]

The federal government exacerbates already existing resource imbalances between the prosecution and defense by furnishing funding to the states for prosecution and law enforcement functions, as well as for training and technical assistance for prosecutors and law enforcement agencies, while providing almost no analogous support for state-based public defense services. The administration proposed $3.4 billion in federal funding for state, local, and tribal law enforcement assistance programs in fiscal year (FY) 2011, a $722.5 million increase from FY 2010.[26] Of that $3.4 billion in federal funding, a total of $1.3 million would be specifically directed to indigent defense programs.[27] An additional $2.5 million would fund the hiring of personnel for the Access to Justice Initiative, a DOJ program launched in March 2010 whose mission is to improve the availability and quality of indigent defense.[28] This means that under the President's FY 2011 budget, less than 0.1% of federal funding for state law enforcement programs would be specifically directed to indigent defense services.

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[21] JUSTICE DENIED, *supra* note 2, at 95-97.

[22] AMERICAN BAR ASSOCIATION, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE (2004), *available at* http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf.

[23] BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, CENSUS OF PUBLIC DEFENDER OFFICES, 2007: COUNTY-BASED AND LOCAL PUBLIC DEFENDER OFFICES 8 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/clpdo07.pdf.

[24] For FY2011, the Department of Justice requested $2.5 million and 10 positions for the Access to Justice Initiative. BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, CENSUS OF PUBLIC DEFENDER OFFICES, 2007: STATE PUBLIC DEFENDER PROGRAMS 13 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/spdp07.pdf.

[25] SCHULHOFER, *supra* note 3, at 8.

[26] U.S. DEPT. OF JUSTICE, FY 2011 BUDGET REQUEST: ASSIST STATE, LOCAL, AND TRIBAL LAW ENFORCEMENT (2010), *available at* http://www.justice.gov/jmd/2011factsheets/pdf/law-enforcement.pdf.

[27] *Id*. at 3.

[28] U.S. Dept. of Justice, FY 2011 BUDGET REQUEST: RESTORE CONFIDENCE IN OUR MARKETS, PROTECT THE FEDERAL FISC, AND DEFEND THE INTERESTS OF THE UNITED STATES 5 (2010), *available at* http://www.justice.gov/jmd/2011factsheets/pdf/defend-interests-unitedstates.pdf.

There are many examples of this imbalance. For instance, state prosecutors receive millions of dollars each year in direct federal funding through Byrne JAG, while public defense attorneys receive virtually no federal funding. Although indigent defense is currently a permitted expenditure of Byrne JAG funds, states may be unaware of this because it is not explicit in the statute.[29] States consistently spend either none or only a miniscule portion of the grant money for public defense programs, directing a vastly greater share to law enforcement and prosecutorial programs. In 2009, of the $1.2 billion in federal funding to states, only $3.2 million was spent on indigent defense, while prosecutors and courts received over $171 million and law enforcement received more than $521 million.[30] The disparity is staggering.

Likewise, prosecutors often have ready access to federally funded crime labs, while too often public defense attorneys are denied access or provided inadequate funding for essential testing. Similarly, state prosecutors have access to excellent training resources through the federally funded Ernest F. Hollings National Advocacy Center on the campus of the University of South Carolina,[31] while the federal government provides no funding for public defense professionals (and funding for state prosecutors in this training program has currently been removed for FY2011). These resource imbalances make it extremely difficult for publicly funded defense counsel to assess the reliability of the prosecution's evidence and to validate their own evidence. The end result is that juries and judges are deprived of critical information necessary to ensuring accurate verdicts and fair sentences.

6. **Transparency, Oversight and Accountability in Indigent Defense**

Transparency regarding government support of public defenders is necessary for the effective representation of indigent defendants. Without transparency in the manner in which federal, state, and local governments allocate funds and resources for indigent defense, it is nearly impossible to accurately assess the disparity in spending between indigent defense and prosecutors and law enforcement, fix deficiencies in systems, or hold anyone accountable for infringing upon the constitutional rights of indigent defendants. As Erica Hashimoto, associate professor of law at the University of Georgia Law observed, "we have no idea how many defendants are represented by the indigent defense systems in the country, how many misdemeanor defendants have a right to counsel, or how what percentage of defendants who are entitled to court-appointed representation go unrepresented."[32]

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[29] 42 U.S.C. § 3751.
[30] National Criminal Justice Association, Byrne JAG Funding: A Snapshot from the States, http://www.ncja.org/NCJA/Policies_and_Practices/Byrne_JAG_Data_Collection/NCJA/Navigation/PoliciesPractices/Byrne_JAG_Data_Collection.aspx?hkey=8bd3d63b-a641-4009-a9a1-bb977cc00e31 (last visited January 14, 2011).
[31] *See generally* Hollings National Advocacy Center, http://www.ndaa.org/nac.html (last visited January 14, 2011).
[32] Erica Hashimoto, *Assessing the Indigent Defense System*, AM. CONST. SOCIETY 9 (2010), *available at* http://www.acslaw.org/node/16836.

The current system does not provide the requisite transparency. The Bureau of Justice Statistics collects indigent defense data, but only for felony cases and only in very large jurisdictions. There is little data available for either misdemeanor representation or felony representation in smaller districts. Moreover, when the Bureau of Justice Assistance accepts grant applications from state and local criminal justice entities, it does not require reporting on indigent defense. Thus, the data necessary to evaluate indigent defense in a specific district simply does not exist.

Even if this data were available and violations of the constitutional right to counsel were detectable, it would be very difficult to hold state governments accountable should they abrogate the constitutional right to counsel. DOJ currently does not have the authority to hold state and local governments accountable for failing to meet their constitutional obligations, even if these jurisdictions use DOJ funding for their criminal justice systems. As a result, the responsibility for monitoring local governments and identifying constitutional violations falls to the defendants themselves—the very individuals who lack adequate legal counsel and access to knowledge of the law.

RECOMMENDATIONS

1. **Funding, Staffing and Training**

A. ***Public Defense Systems Lack Adequate Funding***

Inadequate funding, insufficient staffing, and unequal training opportunities are consistent challenges for public defense systems in all jurisdictions. Especially at the state and local level, the resources available to the district attorney or prosecutor often far exceed those available to the defender, creating a favorable situation for government power and a dangerous situation for individual liberty. With states facing budget shortfalls and the federal government under pressure to reduce the deficit, the already-underfunded indigent defense programs that protect the life, liberty, and property of Americans are particularly vulnerable.

B. *Congress and the Administration Should Ensure Adequate Funding, Staffing, and Training*

Legislative

i. *Provide Funding for John R. Justice Prosecutors and Defenders Act*

Congress should fully fund the John R. Justice Act, which authorizes student loan repayment assistance for prosecutors and public defenders.[33] This program improves public safety by assisting prosecutor and defender offices in their ability to hire and retain high-quality lawyers.[34] The law authorizes up to $10,000 per year in education debt assistance for prosecutors and defenders who agree to maintain that employment for three years.[35] Unfortunately, the current FY 2010 appropriation of $10 million, $5 million of which goes to prosecutors, limits the program's impact on indigent defense systems.

Congress could make it financially feasible for young attorneys to serve in indigent defense systems by supporting a national fellowship program to cultivate and train the next generation of defenders. The fellowship could combine loan forgiveness with federal funding for hiring entry-level attorneys. This program could be modeled on Public Defender Corps, a project of Equal Justice Works and the Southern Public Defender Training Center that is currently funded by a grant from the Bureau of Justice Assistance.[36] Public Defender Corps is a three-year fellowship program for bright young attorneys dedicated to providing excellent representation to indigent clients. The program matches these attorneys with public defender offices and sponsors their work for three years. Congress should support and provide resources to expand such efforts.

ii. *Dedicate Indigent Defense Funding in Federal Grant Programs*

Congress should provide sufficient financial support to states, local governments, and territories for the provision of indigent defense services comparable to federal support for prosecution. To this end, Congress should allow for exceptions to the required equal allocation between prosecutors and defenders for federal grants for capital case training. This would enable states to use the grants to create parity between prosecution and indigent defense resources.[37] Additionally, Congress should permit states to use grants under this program to hire counsel for capital defendants.

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[33] 42 U.S.C. § 3797cc-21. In 2007 the Congressional Budget Office estimated that the John R. Justice loan repayment assistance program, if fully funded, would cost $83 million over the 2008 – 2012 period. CONGRESSIONAL BUDGET OFFICE, H.R. 4127: HIGHER EDUCATION AMENDMENTS OF 2007, a*vailable at*: http://www.cbo.gov/ftpdocs/88xx/doc8899/hr4137.pdf.

[34] 42 U.S.C. § 3797cc-21.

[35] *Id.* at § 3797cc-21(d)(3).

[36] *See* Equal Justice Works, Public Defender Corps, http://www.equaljusticeworks.org/programs/public-defender-corps/general.

[37] *See* 42 U.S.C. § 14163 *et seq.*

Although indigent defense is currently a permitted expenditure of Byrne JAG funds, states may be unaware of this because it is not explicit in the statute.[38] Congress should amend the Byrne JAG authorizing legislation, adding indigent defense to the list of seven specific program categories identified in the statute. This will clarify for DOJ and state personnel that support for indigent defense services is one of the central purposes of the Byrne JAG programs.[39] Furthermore, either Congress, through legislation, or the DOJ, through its rulemaking authority,[40] can require that each state include at least one representative of the state's indigent defense systems as a member of its State Administering Agency (SAA), which distributes the funds. This will ensure, at a minimum, that the needs and interests of indigent defendants are considered during the SAA's deliberation process, and will highlight to the indigent defense community its right to seek Byrne JAG funding.

iii. ***Reduce Overcriminalization through Civil Infraction Reform***

To relieve the overwhelming caseloads of public defenders, states should re-classify certain non-violent crimes as civil infractions for which civil fines would be imposed rather than prison sentences. This would reduce the number of cases that public defenders must handle at a single time. To aid in states' civil infraction reform efforts, Congress should provide funding for states to establish criminal justice coordinating committees to consider reclassification of certain non-violent crimes to civil infractions, thereby alleviating some of the burden currently placed on indigent defense systems.[41]

iv. ***Create an Independent National Center for Public Defense Services***

Congress should adopt the recommendation of the ABA that the federal government establish and fund a National Center for Public Defense Services to serve as an independent, national oversight authority that would strengthen state public defense services by conducting and hosting public defense training programs, and administering federal funds for state public defense programs. For the past thirty years, the ABA has supported the establishment of an independent

[38] 42 U.S.C. § 3751.

[39] Violence Against Women and Department of Justice Reauthorization Act of 2005 §1111, Pub. L. 109-162, merged the Byrne Grant program with the Law Enforcement Block Grant program to create the Edward Byrne Memorial Justice Assistance Grant Program, 42 U.S.C. § 3751 *et. seq*. Previously, the authorizing legislation for these grant programs (Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C § 3711) listed indigent defense as an authorized use of grant funds. However, the streamlined language of the 2005 reauthorization did not explicitly list indigent defense and instead stated that a Byrne JAG grant "may be use for any purpose for which a grant was authorized to be used" in the previous legislation. 42 U.S.C. § 3751(a)(2). Thus, Byrne JAG funds are authorized for indigent defense expenditures, but this is not explicit in the DOJ grant solicitation given to states, which includes only the streamlined language from the 2005 reauthorization.

[40] The Department of Justice can amend 28 C.F.R. § 33.12(a) to achieve this result.

[41] For more information on the potential benefits of civil infraction reform, see COMMITTEE FOR PUBLIC COUNSEL SERVICES OF THE COMMONWEALTH OF MASSACHUSETTS, 2009 REPORT TO THE LEGISLATURE, *available at* http://www.publiccounsel.net/report_to_the_legislature.html.

federal Center for Defense Services to serve this function.[42] The concept was also endorsed in the 2009 report *Justice Denied* issued by the National Right to Counsel Committee. DOJ's Access to Justice Initiative, launched in March 2010, is an important first step. Under Professor Laurence Tribe's leadership it has brought needed attention to public defense reforms. However, as discussed above, it is critical that public defenders have the independence that a National Center for Public Defense Services would provide, especially given the potential for serious conflict of interest inherent in indigent defense work.

Executive

Each year, the Bureau of Justice Assistance within DOJ is allocated a certain amount of discretionary funds. In past administrations, a portion of these funds have been used to provide federal technical assistance and training for state, local, and territorial public defense systems, and the attorneys who participate in them.[43] The Bureau of Justice Assistance should use a portion of its discretionary funding for these functions, as it did under Attorney General Janet Reno.

2. Transparency, Oversight and Accountability in Indigent Defense

A. *The Current System Suffers from a Lack of Transparency, Oversight and Accountability*

Currently, there is no mechanism for the collection, analysis, and dissemination of nationwide indigent defense data. In addition, despite statutory and regulatory reporting requirements,[44] many states do not fully account for the manner in which they spend federal grant money for criminal justice initiatives.[45] Without such data, decision-makers are left to form policy based on anecdotal information, speculation, intuition, presumption, and even bias. Furthermore, the federal government lacks a sufficiently strong mechanism for holding state and local governments accountable for violations of the Sixth Amendment right to effective assistance of counsel.

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[42] AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, RECOMMENDATION FOR ESTABLISHMENT OF A CENTER FOR DEFENSE SERVICES (1979), *available at* http://www.abanet.org/legalservices/downloads/sclaid/121.pdf; AMERICAN BAR ASSOCIATION, *supra* note 22, at 41.

[43] *See*, Bureau of Justice Assistance, National Training and Technical Assistance Center, *available at* http://www.bjatraining.org (last visited Jan. 18, 2011).

[44] *See* 28 C.F.R. § 33.41(b) (requiring states receiving Byrne Justice Assistance Grant money to "designate which statutory purpose the program or project is intended to achieve, identify the state agency or unit of local government that will implement the program or project, and provide the estimated funding level for the program or project including the amount and source of cash matching funds."); *see also* 42 U.S.C. § 3752.

[45] The Constitution Project has requested information on state spending of Byrne Justice Assistance Grant money from both State Administering Agencies (SAAs) as well as the Department of Justice, but has never received the requested information. In a July 27, 2010 letter responding to a Freedom of Information Act (FOIA) request submitted by the Constitution Project, the Department of Justice FOIA office indicated that the Department does not keep separate account of the manner in which states spend grant money.

B. ***Transparency, Oversight, and Accountability will Protect Taxpayer Money and Individual Liberty***

Legislative

i. ***Increase Transparency in Expenditure of Taxpayer Money by the States***

Congress should reauthorize the Justice for All Act with the requirement that recipients of federal grant money for criminal justice indicate the recipient's intended indigent defense expenditures and report the recipient's actual indigent defense expenditures to the Bureau of Justice Assistance.

ii. ***Establish Accountability for Violations of Individual Liberty by State and Local Government***

Congress should provide DOJ with a cause of action to bring suit against those state or local governments that fail to protect the individual liberty of persons within their jurisdictions by providing inadequate counsel or no counsel to indigent defendants. DOJ's authority to sue is currently limited to cases demonstrating a "pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States."[46] By extending this authority beyond juvenile justice to include all criminal justice systems, Congress would empower DOJ to rectify states' systemic violations of the Sixth Amendment. Congress could also authorize DOJ to "deputize" private litigants to file federal suits on behalf of the United States, thereby ensuring that enforcement actions against non-compliant states could be sought without overburdening the Department.[47]

iii. ***Fund Research to Determine Whether Unequal Access to Counsel Contributes to Racial Disparities***

Congress should coordinate and fund a study to determine whether failure by states to provide constitutionally adequate public defense systems contributes to racial disparities within the criminal justice system. Because of the dearth of data on indigent defense, it is almost impossible to measure the impact of inadequate public defense systems on racial disparities in the criminal justice system. This study should be conducted by an entity that is independent of government, such as a university or impartial research foundation.

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[46] 42 U.S.C. § 14141.

[47] For discussion of a private litigation strategies see Eve Brensike Primus, *Litigation Strategies for Dealing with the Indigent Defense Crisis*, AM. CONST. SOCIETY 9 (2010), *available at* http://www.acslaw.org/files/Primus%20-%20Litigation%20Strategies.pdf.

Executive

i. ***Require Transparency in Federal Grants***

Because there is so little public data on indigent defense, it is extremely difficult to identify quantitatively measurable deficiencies in specific jurisdictions, and to hold accountable those responsible for violations of the right to counsel. The collection, analysis, and public presentation of this data would provide the transparency necessary for proper oversight. Therefore, DOJ should annually collect and publish data pertaining to: state-by-state indigent defense expenditures and funding sources; caseloads by provider and case types; methods of providing counsel; number of persons under the age of 18 tried in adult courts; indigency rates and criteria; race and ethnicity demographics of defendants and victims; and staffing of public defense agencies.

Additionally, DOJ should strengthen its regulations related to reporting requirements for state grant recipients and, if necessary, Congress should empower the DOJ to withhold a portion of a state's formula grant for failure to meet reporting requirements. Finally, if granted by Congress, the DOJ should use its authority to pursue causes of action against states violating the Sixth Amendment to engage those states in negotiations to help them improve their indigent defense systems, and, if necessary, hold accountable with litigation those jurisdictions that continue to deprive people of the right to counsel.

ii. ***Establish National Standards for Indigent Defense Services***

The ABA provides objective guidelines for the provision of indigent defense services. This document, titled *The Ten Principles of a Public Defense Delivery System*, should form the basis for national standards for adequate indigent defense promulgated by DOJ.[48] This document should also inform standards by which the federal government evaluates all state indigent defense systems, including standards for the awarding of grants and for state opt-in applications under Chapter 154 of Title 28.[49]

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[48] AMERICAN BAR ASSOCIATION, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf.

[49] As part of the 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA), Chapter 154 mandates greater restrictions on federal habeas corpus review of state capital cases if a state establishes a mechanism for appointing competent counsel to indigent capital defendants for state post-conviction review. A 2005 amendment to the statute moved the authority to certify that a state is eligible from the federal courts to the Attorney General of the United States, subject to review by the Court of Appeals for the District of Columbia Circuit. The Bush Administration issued a final rule that provided no standards for competent counsel; it was never implemented due to an injunction. The Department of Justice recently issued a notice removing this rule and is currently in the process of developing a new rule.

iii. ***File Amicus Briefs to Support Individual Liberty against State Governments***

DOJ should support current private litigation efforts by filing *amicus* briefs in support of cases that seek redress from states and localities that provide constitutionally inadequate indigent defense representation.[50] The Attorney General should also continue to speak to criminal justice stakeholders, through speeches, op-eds, and briefings, about the need for indigent defense reform, with special focus on prosecutors and law enforcement.

3. **Independence of Indigent Defense Attorneys**

A. ***Public Defenders Currently Lack Independence, Hampering Performance***

By design, public defense is necessarily provided by the same government that is accusing a defendant in a criminal case. As a result, conflicts of interest can easily arise in indigent defense systems. This is especially true in jurisdictions where politicians or judges appoint public defenders, pushing a defender's economic interest in a different—and sometimes opposite—direction from the interests of his or her client. Attorneys representing indigent defendants but beholden to the prosecuting party or the judiciary for funding or employment may focus not on their client's best interest, but rather on reducing backlogs of cases at the court, appearing "tough" on crime, or just keeping their jobs.[51]

B. ***Providing Independence for Public Defenders in both Funding and Decision-making will Reduce Central Government Control and Improve Representation***

Legislative

Congress should establish an independent, non-partisan federal agency for federal defense that possesses funding and oversight responsibilities. This will reduce the conflict of interest that arises when a public defender is beholden to the opposing party (the state) or to the judge for funding. When a defender's budget is dependent on the approval of judges, elected local boards, or others to whom she may be politically or professionally accountable, she will often come under pressure to shape defense strategies not according to the interests of her clients, but rather according to the political interests of those who control her budget.[52] Achieving systemic improvements may require an autonomous and permanent office with greater resources and authority at its disposal. For the past thirty years, the ABA has supported the establishment of an

[50] *See, e.g.*, Duncan v. State 784 N.W.2d 51(Mich., 2010). This case is currently before the Michigan Supreme Court, with the plaintiffs arguing that systemic deficiencies in Michigan's public defense system deprive indigent defendants of their Sixth Amendment rights to counsel.
[51] SCHULHOFER, *supra* note 3 at 2.
[52] For specific examples of the political pressure facing public defenders, see JUSTICE DENIED, *supra* note 2, at 80-84.

independent federal Center for Defense Services to serve this function. In addition, the concept was endorsed in the 2009 report issued by the National Right to Counsel Committee.[53]

Alternatively, Congress could make local federal defender organizations, or the Administrative Office of U.S. Courts (for those districts without federal defender organizations), responsible for the appointments and payment of private, appointed counsel to represent indigent defendants in federal criminal cases. If the judiciary remains responsible for appointing counsel, Congress should require federal courts to accept (absent good cause to the contrary) recommendations for counsel made by federal public defenders, federal defender community organizations, the Capital Habeas Unit, or the Administrative Office. These organizations, each of which has a role in providing federal indigent defense services, are better positioned to offer independent, expert recommendations for the appointment of counsel, as compared with judges, who are meant to be the impartial arbiters between prosecutors and defense attorneys.

Executive

The Access to Justice Initiative, which was established within DOJ in March 2010, represents a positive first step in the creation of an independent federal voice for indigent defense. It has already served as an important voice within DOJ by advocating reforms to federal policies related to indigent defense. The creation of the initiative marks an important first step in the federal government's acceptance of responsibility for addressing the national indigent defense crisis. In addition, the initiative's efforts have resulted in states taking notice and seeking to engage the Department regarding ways to improve indigent defense at the state level. The Access to Justice Initiative should be maintained and strengthened.

If Congress chooses not to pursue an independent federal defender agency (see legislative recommendation above), an alternative approach is to formalize the criminal defense functions of the Access to Justice Initiative as an Office of Public Counsel Services (OPCS) within DOJ.[54] The OPCS would be a congressionally created office headed by an assistant attorney general, who is appointed by the president, confirmed by the Senate, and reports directly to the Attorney General. The OPCS would develop objectives, priorities, and a long-term plan for federal support of state and local indigent defense systems. The office would have primary authority for the implementation of federal indigent defense policy and strategies necessary to carry out that policy.

[53] *Id.*, at 200.
[54] *See* ABA STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, *supra* note 42; AMERICAN BAR ASSOCIATION, *supra* note 22, at 41.

APPENDICES

Experts

Nicole Austin-Hillery, DC Office Director and Counsel, Brennan Center for Justice (http://www.brennancenter.org/people/austin-hillery_nicole)

Malia Brink, Counsel for Special Projects, National Association of Criminal Defense Lawyers (http://www.nacdl.org/public.nsf/staff+pages/Malia+Brink)

Edwin A. Burnette, Vice President of Defender Legal Services, National Legal Aid & Defender Association (http://www.nlada.net/library/people/burnette_ed)

Thomas Giovanni, Director of the Community Oriented Defender Network, Brennan Center for Justice (http://www.brennancenter.org/content/people/thomas_giovanni)

Christopher Durocher, Government Affairs Counsel, The Constitution Project (http://www.constitutionproject.org/staff/durocher.php)

Richard Goemann, Executive Director, DC Law Students in Court (http://www.dclawstudents.org/ourstaff.htm#goemann)

Norman Lefstein, Professor of Law and Dean Emeritus, Indiana University School of Law, Indianapolis (http://indylaw.indiana.edu/people/profile.cfm?Id=80)

Bruce Nicholson, Criminal Justice Section, American Bar Association (http://new.abanet.org/sections/criminaljustice/Pages/Contact.aspx)

Robert L. Spangenberg, Professor of Law, George Mason University (http://www.nlada.net/library/people/spangenberg_bob)

Johanna Steinberg, Assistant Counsel of Criminal Justice Practice, National Association for the Advancement of Colored People Legal Defense Fund (http://naacpldf.org/johanna-steinberg)

David Udell, National Center For Access to Justice (http://www.cardozo.yu.edu/MemberContentDisplay.aspx?ccmd=ContentDisplay&ucmd=UserDisplay&userid=246)

Georgia N. Vagenas, Standing Committee on Legal Aid & Indigent Defendants, American Bar Association (http://www.abanet.org/legalservices/sclaid/)

Jo-Ann Wallace, President, National Legal Aid and Defender Association (http://www.nlada.org/About/About_President).

Further Resources

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Primary Contact

Christopher Durocher
Government Affairs Counsel
The Constitution Project
1200 18th Street, NW
Suite 1000
Washington, DC 20036
(202) 580-6939
cdurocher@constitutionproject.org

CHAPTER 7 CONTRIBUTORS

American Bar Association (ABA)

Bruce Nicholson
740 15th Street, NW
Washington, DC 20005
(202) 662-1769
bruce.nicholson@americanbar.org

American Bar Association Standing Committee on Legal Aid & Indigent Defendants

Georgia N. Vagenas
321 North Clark Street
Chicago, IL 60654
(312) 988-5765
georgia.vagenas@americanbar.org

Brennan Center for Justice at New York University School of Law

Laura Abel
161 Avenue of the Americas
12th Floor
New York, NY 10013
(646) 292-8310
laura.abel@nyu.edu

Nicole Austin-Hillery
1730 M Street, NW, Suite 413
Washington, DC 20036
(202) 785-4747
nicole.austin-hillery@nyu.edu

Thomas Giovanni
161 Avenue of the America
12th Floor
New York, NY 10013
(646) 292-8310
thomas.giovanni@nyu.edu

Matthew Welch
1730 M Street, NW, Suite 413
Washington, DC 20036
(202) 785-4776
matthew.welch@nyu.edu

National Access to Justice Initiative

David Udell
55 5th Avenue
New York, NY 10003
(212) 790-0869
udell@yu.edu

Constitution Project (CP)

Adrienne Lee Benson
1200 18th Street, NW, Suite 1000
Washington, DC 20036
(202) 580-6920
abenson@constitutionproject.org

Christopher Durocher (Chapter Leader)
1200 18th Street, NW, Suite 1000
Washington, DC 20036
(202) 580-6920
cdurocher@constitutionproject.org

National Association for the Advancement of Colored People Legal Defense & Educational Fund, Inc.

Johanna Steinberg
99 Hudson Street, Suite 1600
New York, NY 10013
(212) 965-2200
jsteinberg@naacpldf.org

National Legal Aid & Defender Association (NLADA)

Edwin A. Burnette
1140 Connecticut Avenue, 9th Floor
Washington, DC 20036
(202) 452-0620, ext 221
e.burnette@nlada.org

Jo-Ann Wallace
1140 Connecticut Avenue, 9th Floor
Washington, DC 20036
(202) 452-0620, ext 212
j.wallace@nlada.org