



**STATEMENT OF VIRGINIA SLOAN
PRESIDENT, THE CONSTITUTION PROJECT**

**SUBMITTED TO
THE SUBCOMMITTEE ON COMMERCE,
JUSTICE, SCIENCE AND RELATED AGENCIES
COMMITTEE ON APPROPRIATIONS
UNITED STATES HOUSE OF REPRESENTATIVES**

APRIL 14, 2010

Introduction

Mr. Chairman, Representative Wolf, and Members of the Subcommittee, thank you for providing this opportunity to share with the Subcommittee the Constitution Project's perspective on the fiscal year 2011 (FY 2011) budget, particularly as it relates to the Department of Justice and federal funding for indigent defense services across the United States.

The Constitution Project is a nonprofit organization in Washington, DC, that promotes and defends constitutional safeguards through constructive dialogue across ideological and partisan lines, and through scholarship, activism, and public education efforts. It brings together political leaders from across ideological spectrums, policy experts, and legal scholars who share a common concern about preserving civil liberties. The National Right to Counsel Committee, one of the Constitution Project's seven bipartisan committees, seeks to address inadequacies in the current delivery of indigent defense services in state criminal justice systems and offers policy and program recommendations to protect the Sixth Amendment right to counsel for all Americans.

Right to Counsel and State Budget Realities

Our country and its citizens value the rule of law. The 1963 landmark U.S. Supreme Court ruling in *Gideon v. Wainwright*, along with its progeny, upheld this value by guaranteeing the right to counsel for indigent defendants charged with crimes that carry a sentence of imprisonment.¹ The Court's ruling has, over the years, been expanded to cover other individuals charged with a crime who cannot afford lawyers. While funding for indigent defense has increased over the past five decades, it remains woefully inadequate and has suffered steep cuts during the historic economic turmoil that currently confronts the nation.

In much of the country, insufficient funding of indigent defense programs has resulted in unacceptable levels of staffing, salaries, training, and supervision. State indigent defense programs face enormous budget and resource constraints. For example, in Kentucky, the Department of Public Advocacy handles an average of 147,000 cases annually, with a budget in

¹ 372 U.S. 335 (1963).

FY 2010 of \$44.7 million.² That represents an expenditure of roughly \$208 for each case. Yet, despite the overwhelming caseload and insufficient funding, Kentucky Governor Steve Beshear has proposed reducing the budget for the agency in both FY 2011 and FY 2012.³

This problem existed long before the financial crisis that emerged in late 2008. For years, numerous states have underfunded indigent defense programs. In fact, between 2002 and 2005, when adjusted for inflation, states including Connecticut, Hawaii, Missouri, New Mexico, Oregon, and Wisconsin had already decreased their funding for public defender programs.⁴

The problem is only growing worse. As the resources of average Americans dwindle, so too do the budgets of states across the country. In Montana, the Office of Public Defender will suffer a five percent budget cut, slashing nearly \$1 million from a budget already confronting an \$800,000 deficit.⁵ For the Oklahoma Indigent Defense System, a \$1.8 million shortfall is forcing the agency to lay off eight employees and has already resulted in its eviction from its offices.⁶ As its Executive Director Joe Robertson explained, “Compared to other agencies, we really don’t have any other funding source besides the state legislature.”⁷ These are but a few examples of what is happening across the country, as defendants’ constitutional right to counsel is being threatened by the vagaries of state budgeting.

Tightening budgets across the country mean that every day, the caseload for public defenders increases. Facing such constraints, even the best-intentioned defense attorney cannot render competent and effective defense services to all of his or her clients. When there are too many cases, lawyers are forced to choose among their clients. In some cases, public defender programs are so constrained and stretched thin that they may be forced to turn away indigent defendants.

Not all states have public defender offices, even though they are the most cost-effective way of providing these kinds of legal services. In those states that rely on private attorneys, the situation may be even worse. Private lawyers assigned to cases for fees receive compensation insufficient to cover their overhead, discouraging their participation. In systems that have no public defenders, a dearth of private lawyers volunteering to represent indigent defendants threatens the efficient operation of the criminal justice system. Moreover, the appointment system is too often not independent, and the quality of lawyers is accordingly diminished.

² Ronnie Ellis, *Public Defenders, KSP Plead for State Funding*, McCreary County Record, February 3, 2010, available at http://www.mccrearyrecord.com/statenews/local_story_034151953.html.

³ Id.

⁴ See The Spangenberg Group, *State and County Expenditures for Indigent Defense Services in Fiscal Year 2002* at 35-36 (2003); The Spangenberg Group, *State and County Expenditures for Indigent Defense Services in Fiscal Year 2005* at 35-37 (2006).

⁵ Jennifer McKee, *State Public Defenders Face Cut on Top of Budget Shortfall*, Billings Gazette, February 2, 2010, available at http://billingsgazette.com/news/state-and-regional/montana/article_213b85be-105f-11df-94fb-001cc4c03286.html.

⁶ Meghan McCormick, *OIDs Reduced Workforce*, The Norman Transcript, January 15, 2010, available at http://www.normantranscript.com/localnews/local_story_015032006.

⁷ Id.

Finally, some states have simply been unable to appoint *any* lawyers at all, meaning that individuals are incarcerated without any legal representation for extended periods of time, in clear violation of the Constitution.

Even when attorneys represent indigent defendants, severe resource constraints mean that otherwise diligent attorneys can neglect essential tasks such as conducting client interviews, performing legal research, drafting motions, requesting investigative or expert services, or otherwise preparing for pretrial, trial or sentencing hearings. As Ed Monahan, director of Kentucky's Department of Public Advocacy, observes, many public defenders do not meet their clients until the day of their first hearing, and, "[s]ometimes there's not enough time to even talk to the client."⁸ As a result, defendants throughout the country, especially in the lower criminal courts, are convicted and imprisoned each year because they are "represented" by lawyers who have hundreds of other cases and lack sufficient support staff, including persons who can investigate their clients' cases. In reality, too often the representation is perfunctory and so deficient as not to amount to representation at all.

Not only does this situation violate the Sixth Amendment; it immeasurably increases the risk of wrongful incarcerations and convictions, as well as the risk that the real perpetrator remains free to continue to prey on society.

The Federal Role in Indigent Defense

The Constitution Project recognizes that the budgets of states and the federal government – like those of families - must operate within the constraints of our current economic environment. While deficit spending is not popular, most states do not even have that luxury; they must balance their budgets every year, and as a result, indigent defense programs are on the chopping block across the country, despite the dire need to *increase* indigent defense spending rather than reduce it.

When states have to make deep cuts in their indigent defense programs, the federal government must step in to ensure defendants' federal constitutional right to effective counsel. Today, states across the country cannot afford to provide citizens accused of crimes constitutionally adequate legal representation; therefore, it is time for the federal government to help fill the void.

In its FY 2011 Budget Request, the Department of Justice (DOJ) seeks \$1.3 million for a Bureau of Justice Statistics' (BJS) study of indigent defense by contract and pro-bono attorneys.⁹ DOJ will also allocate a portion of the \$5 million requested for the Ensuring Fairness and Justice Program to provide indigent defense training.¹⁰ Additionally, the agency requests \$2.5 million for Access to Justice and Rule of Law personnel, who, among several other responsibilities,

⁸ Ellis, *supra* note 2.

⁹ U.S. Dept. of Justice, *FY 2011 Budget Request: Assist State, Local, and Tribal Law Enforcement* 3 (2010), available at <http://www.justice.gov/jmd/2011factsheets/pdf/law-enforcement.pdf>.

¹⁰ *Id.*

would “ensur[e] indigent defense.”¹¹ Neither of these budget requests identifies further spending specifically earmarked for indigent defense funding for the states.

The Constitution Project appreciates the Administration’s commitment to exploring the need for and protecting access to indigent defense. Funding for research and oversight of state indigent defense programs is vital. As I have recounted in my testimony, however, the need for additional resources for indigent defense has been well established, and further study and DOJ oversight are not enough to address this issue. The federal government must ensure its citizens’ Sixth Amendment rights by providing sufficient financial support for state indigent defense systems.

A potential source for additional federal funding can be found in the Byrne Justice Assistance Grant program (JAG), which the DOJ’s Office of Justice Programs administers. This program is the largest single federal grant program for funding state law enforcement, court, prosecution, and related programs. States *can* use JAG money to fund public defense services. Unfortunately, the formulation for awarding grants neither conditions federal funding on the establishment of statewide public defense systems nor requires any percentage of the federal grant go toward public defense programs.¹²

Inquiries to both the DOJ and various state governments have failed to determine the exact percentage, if any, of JAG grants utilized for indigent defense in particular states and localities over the past few years. According to data the National Criminal Justice Association (NCJA) has compiled for FY 2009, of the \$1.1 billion in state JAG spending accounted for nationally, states spent less than \$3 million on public defense.¹³ JAG funding for public defense funding is dwarfed by the over \$400 million spent on law enforcement and nearly \$160 million spent on prosecution and court programs.¹⁴

The funding imbalance in FY 2009 is consistent with what we know about how states have historically allocated JAG funding. 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. For example, in FY 1999, of the almost \$500 million in formula grants awarded to states under the Byrne Grant program, JAG’s predecessor, only 1.4 percent was granted to public defense programs.¹⁵ In 32 states, public defense programs received no such funding at all. A 2006 study that examined allocations of JAG funds in five states found that only one state awarded any money to public defense programs in the most recent year

¹¹ 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>.

¹² See e.g., American Bar Association, *Report with Recommendation to the ABA House of Delegates* 103 (Feb. 1991) (urging inclusion of public defense programs in federal grant funding), available at <http://www.abanet.org/legalservices/downloads/sclaid/103.pdf>.

¹³ National Criminal Justice Association “Byrne JAG Funding by Project Type by Purpose Area- National” available at www.ncja.org.

¹⁴ *Id.*

¹⁵ See National Legal Aid & Defender Association report, *Federal Assistance to State and Local Indigent Defense Programs, FY 1998 and 1999*, available at <http://www.nlada.org/DMS/Documents/1013119600.02/Federal%20Assistance%20Report%20FY98-99.pdf>.

studied. That state awarded less than 4 percent of its JAG grant money to public defense programs, and nearly 80 percent for prosecution and law enforcement purposes.¹⁶

The President's budget proposes \$519 million for JAG in FY 2011. As currently designed and utilized, the program exacerbates already existing resource imbalances between prosecutors and indigent defenders 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, without requiring analogous support for state-based indigent defense services.¹⁷ These resource imbalances make it 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. It is inconceivable that justice can be served when most, if not all JAG money is provided for prosecutor and law enforcement resources and indigent defense is left with little or no federal funding. Moreover, while we do not question the need for resources for prosecution and law enforcement functions, without comparable federal resources for indigent defense systems, defenders are unable to effectively represent the additional clients and perform the functions that are essential to our adversarial system of justice.

The Constitution Project seeks a renewed commitment to indigent defense and the promise of *Gideon*. The Project is aware that the Executive Branch cannot make these critically needed changes by itself. Congress must take the lead by changing the law. Thus, in its FY 2011 appropriations, Congress should set aside a sufficient percentage of JAG funding for the support of indigent defense within the states, whether through public defender agencies or the services of private attorneys who function in systems designed to ensure quality and independence.¹⁸ Requiring each state to use a minimum of its JAG formula allocation to fund indigent defense programs is the first step to equalizing the vast imbalance between the resources states provide to prosecute defendants and the resources public defense programs have to zealously represent those defendants. In our adversarial criminal justice system, only through a balance of such resources can we hope that justice is truly served.

Conclusion

Thank you for the opportunity to submit this statement for the record. The Constitution Project looks forward to working with you to secure federal funding for indigent defense programs and pass FY 2011 appropriations legislation that ensures the fair and efficient operation of the criminal justice system.

¹⁶ See Covington & Burling memo for The Constitution Project regarding JAG Program Funding Disparities (August 1, 2006).

¹⁷ The 2009 Criminal Justice Transition Coalition, *Smart on Crime: Recommendations for the Next Administration and Congress* 141 (2008), available at <http://www.constitutionproject.org/manage/file/62.pdf>.

¹⁸ See American Bar Association, *Ten Principles of a Public Defense Delivery System* (2002), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf>; see also, The Constitution Project, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* 201-202 (2009).