

THE **CONSTITUTION PROJECT**



*Safeguarding Liberty, Justice & the Rule of Law*

**Written Testimony of  
The Constitution Project**  
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**Submitted to**  
**The Ad Hoc Committee to Review the Criminal Justice Act**  
*Judicial Conference of the United States*

**In Advance of its Public Hearing on**  
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In *Justice Denied*, our RTC Committee highlighted its concerns with the dramatic funding disparity between prosecution and indigent defense.<sup>18</sup> As Congress creates new or duplicative federal crimes, the need for federal defenders increases, yet funding of indigent defense has failed both to keep pace with this increasing need for defense services, and to grow proportionally to prosecutorial and law enforcement appropriations and spending. Special funding—which incentivizes the use of innovative programming and state-of-the-art equipment—is almost entirely directed at state and local prosecutors’ offices and law enforcement agencies.<sup>19</sup> Similarly, Congress allocates funding for federal prosecutors and new programming and equipment without a similar and equal allocation for federal defenders.

Additionally, the prosecution has access to the resources of multiple law enforcement agencies, crime labs, and special investigators.<sup>20</sup> In contrast, federal public defenders – who have an ethical responsibility to investigate their cases independently – have limited funding to support additional investigative and expert resources, or, as noted, are often denied access to these resources by the court. The ultimate cost is passed onto indigent defendants, who either go without such vital resources, or who must rely on inexperienced and inadequate assistance. The risks of unfair or wrongful convictions and sentences are great in such circumstances, and defendants, victims, and society as a whole suffers.

#### **IV. Establish and Enforce Work Load Limits of Public Defenders**

Public defenders at all levels of government are managing crushing caseloads, limiting their ability to be effective advocates for their clients. TCP recommends establishing and enforcing workload limits, which take overwhelming caseloads into account, and reclassifying certain non-serious misdemeanors as civil infractions. The criminal justice system has been stretched thin by tough on crime policies, budget sequestration, over-criminalization, and over-federalization of what should be state, local, or administrative offenses.<sup>21</sup> In an effort to reduce overall judicial costs, legislators and administrators have favored efficiency over due process and effective assistance of counsel.<sup>22</sup> Public defenders are laboring under such excessive caseloads<sup>23</sup> that effective representation under the Sixth Amendment is simply not possible (let alone “quality” services as recommended in ABA standards<sup>24</sup> and “competent” representation to their clients as required by rules of professional conduct).<sup>25</sup>

Our RTC Committee urges that workload limits, which consider caseloads, be established and enforced for all attorneys furnishing indigent defense representation.<sup>26</sup> The most well-trained and highly qualified lawyers cannot provide “quality defense services” when they have too many clients to represent, i.e., when their caseloads are excessively high.

The goal should be to ensure that all attorneys who provide defense services have adequate time to devote to their cases and are thus able to meet established performance standards for each client’s case, including fulfilling basic responsibilities related to interviewing the client, conducting investigations, discovery and motions practice, trial preparation, sentencing, and post-conviction matters.



<sup>1</sup> For a full list of TCP policy and issue committees, visit <http://www.constitutionproject.org/about-us/policy-and-issue-committees/>.

<sup>2</sup> For a full list of TCP reports, visit <http://www.constitutionproject.org/documents/>.

<sup>3</sup> For detailed recommendations and examples of advocacy by TCP's National Right to Counsel Committee, visit <http://www.constitutionproject.org/issues/criminal-justice-reform/right-to-effective-counsel/>.

<sup>4</sup> THE CONSTITUTION PROJECT, NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 82–84 (2009), <http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf> [hereinafter JUSTICE DENIED].

<sup>5</sup> THE CONSTITUTION PROJECT, NAT'L RIGHT TO COUNSEL COMM., DON'T I NEED A LAWYER?: PRETRIAL JUSTICE AND THE RIGHT TO COUNSEL AT FIRST JUDICIAL BAIL HEARING 32 (2015), [http://www.constitutionproject.org/wp-content/uploads/2015/03/RTC-DINAL\\_3.18.15.pdf](http://www.constitutionproject.org/wp-content/uploads/2015/03/RTC-DINAL_3.18.15.pdf) [hereinafter DON'T I NEED A LAWYER?].

<sup>6</sup> DEFENDING GIDEON (The Constitution Project 2013), <http://www.constitutionproject.org/publications-resources/defending-gideon/> (A documentary marking the 50<sup>th</sup> anniversary of *Gideon v. Wainwright*).

<sup>7</sup> See, e.g., *Subcommittee Markup - FY 2011 Commerce, Justice, and Science Appropriations Bill Before the H. Subcomm. on Commerce, Justice, Science, and Related Agencies*, 111th Cong. (Apr. 14, 2010) (testimony of Virginia Sloan, President, The Constitution Project), <http://www.constitutionproject.org/wp-content/uploads/2012/10/389.pdf>.

<sup>8</sup> JUSTICE DENIED, *supra* note 4, at 201–02.

<sup>9</sup> *Id.* at 82–84.

<sup>10</sup> Rochelle A. Reback, Hearing Before the Ad Hoc Committee to Review the Criminal Justice Act Program (Jan. 11, 2016).

<sup>11</sup> See JUSTICE DENIED, *supra* note 4, at 61–64 (discussing outside fiduciary concerns, pay caps, salary averages, and number of investigators).

<sup>12</sup> See, e.g., Press Release, The Constitution Project, Budget Deal 'Stops the Bleeding' in Federal Defender Program, But More Funding Needed (Oct. 18, 2013), <http://www.constitutionproject.org/wp-content/uploads/2013/10/2013.10.18.pdf> (referring to, and accurately predicting, the “ripple effect” that could “clog judicial dockets, undermine the efficiency of a federal defender system and deny lower-income defendants their constitutional right to counsel”).

<sup>13</sup> National Center for the Right to Counsel Act, H.R. 2063, 114th Cong. (2015).

<sup>14</sup> *Id.* at § 5(g)(5).

<sup>15</sup> JUSTICE DENIED, *supra* note 4, at 202.

<sup>16</sup> *United States v. Cronin*, 466 U.S. 648, 657 (1984) (quoting *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir. 1975)).

<sup>17</sup> See OFFICE OF JUSTICE PROGRAMS, DOJ, FY 2017 BUDGET REQUEST AT A GLANCE, <https://www.justice.gov/jmd/file/822111/download> (showing that of the \$13.8 million set aside for indigent defense \$3 million is set aside for social science research through the National Institute of Justice, \$5.4 million is set aside for the “Answering Gideon’s Call” initiative to fund and encourage states to change the culture of state and local courts as it relates to their indigent defense services, and \$5.4 million is reserved for the “Improving Juvenile Indigent Defense Program”).

<sup>18</sup> JUSTICE DENIED, *supra* note 4, at 61–64.

<sup>19</sup> See *id.* at 61–62 (describing special funding as funding for particular programs such as domestic violence prosecution, highway safety, and drug enforcement programs).

<sup>20</sup> See *id.* at 61–62 (examining differences of in-kind resources of New Jersey, Texas, New York, Louisiana, Virginia, Missouri, Oklahoma, South Carolina, Tennessee, and Mississippi).

<sup>21</sup> See Letter from Virginia Sloan, President, The Constitution Project, to Loretta Lynch, U.S. Attorney General, U.S. Dept. of Justice (July 28, 2015), [http://www.constitutionproject.org/wp-content/uploads/2015/07/Letter-to-AG-Lynch-on-border-prosecutions-RTC\\_July-2015-final.pdf](http://www.constitutionproject.org/wp-content/uploads/2015/07/Letter-to-AG-Lynch-on-border-prosecutions-RTC_July-2015-final.pdf) (calling on Attorney General Loretta Lynch to end Operation Streamline, the “conveyor belt” system for prosecuting illegal entrants to the United States).

<sup>22</sup> See DEFENDING GIDEON, *supra* note 6 (starting at 0:23:34)

(When you in court, every day, facing pressures to process a lot of cases through the system, a public defender who is standing up saying, “slow things down, I need more time to investigate; I need more time to look into what is going on here,” rather than seeing that as a lawyer who is living up to their Constitutional obligation it is easy to see that person as an obstructionist. And so, I think the pressures in the system often drive players in the system to value efficiency and speed over justice, which actually can be time consuming.).

