Written Testimony of
The Constitution Project
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Judicial Conference of the United States

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I. Introduction

The Constitution Project (TCP) submits this written testimony to the Ad Hoc Committee to Review the Criminal Justice Act Program (CJA Committee). We thank the Committee for holding these critical hearings and inviting TCP to testify. We commend the work of members of the Committee and those who have submitted comments and testified before it. Nationwide, we are seeing significant bipartisan support for reforming important pieces of our criminal justice system, including sentencing, corrections, and mental health treatment. At the same time, TCP believes that advocates, the public, and policymakers cannot overlook the urgent and necessary reforms needed for our indigent defense system.

TCP was founded in 1997 by Virginia Sloan—a former deputy federal public defender—as a nonpartisan organization that promotes and defends constitutional safeguards. We bring together legal and policy experts from across the political spectrum to promote consensus-based solutions to pressing constitutional issues. TCP undertakes original research; develops policy recommendations; issues reports, statements, and policy briefs; files amicus briefs; testifies before Congress; and holds regular briefings with legislative staff and policymakers. Our work includes reforming the nation’s broken criminal justice system, strengthening access to justice, protecting civil liberties, and ensuring government transparency and accountability.

TCP’s National Right to Counsel Committee (RTC Committee) has examined the state of indigent defense in our country for over a decade. It is determined to assist the federal and state governments in fulfilling the promise of Gideon v. Wainwright and its progeny: any person accused of a crime—regardless of his or her ability to afford a lawyer—has the right to effective legal representation under the Sixth Amendment. Our RTC Committee—for which former Vice President Walter Mondale and former FBI Director and former Chief Judge for the Western District of Texas William S. Sessions serve as honorary Co-Chairs—comprises individuals from across the political spectrum with experience in the criminal justice system. Our RTC Committee includes former prosecutors and defense attorneys and is chaired by former North Carolina Supreme Court Chief Justice Rhoda Billings; former President of the National District Attorneys Association and former Minnesota district attorney Robert M. A. Johnson; and former U.S. Court of Appeals for the Third Circuit Judge Timothy Lewis. Like the recommendations from all of TCP’s bipartisan, blue-ribbon committees, the recommendations set forth by the National Right to Counsel Committee are the product of consensus.

This testimony draws on the following RTC Committee reports and recommendations: 1) Justice Denied: America’s Continuing Neglect of Our Constitutional Right to Counsel (Justice Denied); 2) Don’t I Need a Lawyer?: Pretrial Justice and the Right to Counsel at First Judicial Bail Hearing (Don’t I Need a Lawyer?); and 3) Defending Gideon. This testimony also highlights the importance of funding for federal indigent defender services and highlights TCP’s efforts during budget sequestration in the 111th Congress.
As this Committee knows, the Criminal Justice Act (CJA) was enacted by Congress in 1964, following the Supreme Court’s decision in *Gideon*; it provides a system and funding stream to allow appointment and compensation of lawyers to represent defendants in federal criminal proceedings who are financially unable to hire a lawyer or other defense services on their own. The CJA created offices of federal defenders whose job it is to represent those charged with a federal crime who cannot afford a lawyer. It also created a system of “panel lawyers” to provide such representation when, for example, the federal defender has a conflict of interest.

Although it has been more than 50 years since *Gideon* was decided, the state of public defense is in desperate need of reform. Indigent defense services at state and local levels are widely described as woefully inadequate. In contrast, the federal public defense system is often touted as a “gold standard” due to its established structure and funding stream. However, TCP and its coalition partners – many of whom have previously testified before the CJA Committee – believe the federal system is also in need of critical reforms in order to fully comport with the Sixth Amendment.

Accordingly, TCP offers the following recommendations:

1. Create a National Center for Defense Services or similar independent, coordinating entity to ensure the independence of indigent defense services and the resources needed for these services.
2. Ensure parity in funding mechanisms between indigent defense services and prosecutors’ offices.
3. Establish and enforce work load limits for all indigent defense counsel.
4. Collect meaningful data about the state of indigent defense.

TCP believes that these recommendations are widely supported and attainable and we look forward to working with the Committee to improve access to counsel.

II. Create an Independent Entity for Coordinating Defense Services

Every defendant deserves representation that is both effective and free from conflicts of interest. In *Justice Denied*, the RTC Committee recommended creating an independent, adequately-funded National Center for Defense Services. ⁸ In the federal system, there are two aspects of the federal defender system that highlight this lack of independence: (1) inappropriate allocation of cases to defense counsel, and (2) pressure on defense counsel from their funding sources. Both erode the integrity of indigent defense and can even amount to a constructive denial of counsel.
a) Case Allocation

*Justice Denied* documents specific instances in Texas, Alabama, Nebraska, and North Carolina where lax appointment rules increased the likelihood of abuse and constrained the independence of defense counsel.\(^9\) Indeed, retired CJA Panel Attorney Rochelle A. Reback submitted testimony to this Committee:

> [I]f [panel attorneys] displease the judges for any reason, they are simply no longer given any CJA appointments. . . . There is no formal removal process, no due process nor any appeal, so there is no reasonable expectation of being rehabilitated or ever being returned to active CJA duty. A lawyer’s name will simply and quietly disappear from the panel list at the next annual renewal period at the request of any Judge [sic].\(^10\)

Assigned counsel systems without uniform rules and procedures governing the selection and assignment of counsel are ripe for abuse and conflicts of interest. Inappropriate allocation of cases erodes the independence of those defense attorneys beholden to that system for work.

b) Funding Concerns

Another great risk to the independence of the defense function is the pressure federal defenders receive from their funding sources.\(^11\) *Gideon* and its progeny, along with the reshuffling of funds during budget sequestration, have created an expensive unfunded mandate with which governments at every level have been struggling. Pressure from governments or court systems on judges to control costs creates a preference for certain attorneys known to resolve cases without litigation or with other characteristics having nothing to do with their expertise, and drives judges to use voucher procedures as a cost control mechanism.\(^12\) In contrast, federal prosecutors have no such system. United States Attorneys’ offices around the country represent the government without judicial interference; judges are not involved in the appointment or compensation of federal prosecutors.

The right to effective assistance of counsel extends beyond the appointment of attorneys and their compensation. To put forth an adequate defense, attorneys must also have access to experts, investigators, and translators. However, CJA panel attorneys often do not seek expert assistance, or they use experts who charge less but are also less experienced, because they fear not receiving future appointments. In several districts, defense lawyers must appear before judges in an ex parte hearing to justify their request for expert services. Often, legitimate requests for reimbursement for expert and other services are denied or dramatically reduced by the judges hearing the case, making effective assistance of counsel virtually impossible. Prosecutors, on the other hand, make such decisions on their own, without the need for judicial intervention or approval.

In TCP’s extensive work with former judges, there is a clear understanding of these inherent conflicts. Indeed, some judges have even testified before the CJA Committee to
expressly state that they would prefer to be eliminated from this process. They recognize that, because judges may be unfamiliar with salaries for good defense counsel and the associated fees related to litigation, the job of reviewing vouchers for experts and setting compensation becomes almost impossible. As a result, federal defense attorneys are systematically underpaid for their work. Equally as important, defendants are systematically denied access to the trial resources they need to mount an adequate defense against the prosecution, which does not face these same obstacles.

A National Center for Defense Services – or similar independent, central entity to coordinate federal defense programs – would strengthen the services of publicly funded defender programs nationwide. It would provide for the administration of grants, pilot projects, training, research, and critical data collection and analysis. Creation of such an entity would support the provision of competent counsel in the neediest jurisdictions, improve fundamental fairness and access to counsel by addressing crushing caseloads, increase training and support services for defense counsel, and give defenders the independence they need to do their job.

Indeed, a similar proposal has been offered by Representative Theodore Deutch (D-FL) in the National Center for the Right to Counsel Act, which would create a national nonprofit entity and smaller state-level advisory councils to: help fund public defender offices; coordinate training for public defenders; monitor, receive, and investigate complaints regarding the compliance of public defense systems; and, collect and share data regarding the delivery of public defense services in the state. TCP encourages the CJA Committee to publicly support such policy proposals for both the federal and state systems.

III. Ensure Parity in Funding Between Indigent Defense and Prosecution

To ensure justice, our adversarial system requires that both sides – prosecution and defense – be represented by lawyers who have a sufficient amount of independence, resources, training, and time to devote to the case. Moreover, to ensure a level playing field for poor people accused of crimes, financial support of prosecution and defense must be substantially equal. The Supreme Court has stated that, “While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.”

Yet year after year, funding for state and federal public defense services remains precarious. For example, in Fiscal Year 2017, the Office of Justice Programs has requested $4.2 billion; however, only 3.3 percent was reserved for indigent defense, which is aimed at state indigent defense services. At the federal level, the 2013 sequestration resulted in deep cuts to the federal public defenders’ budget and required significant layoffs, 15-20 day furloughs, and the complete elimination of defender training. That year, TCP and its partners quickly organized to prevent decimation of the federal defender system. The persistent, looming threat of budget cuts to indigent defense systems stand in stark contrast to the consistent allocation of resources and funding for the prosecution.
In *Justice Denied*, our RTC Committee highlighted its concerns with the dramatic funding disparity between prosecution and indigent defense. 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. 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. 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. In an effort to reduce overall judicial costs, legislators and administrators have favored efficiency over due process and effective assistance of counsel. Public defenders are laboring under such excessive caseloads that effective representation under the Sixth Amendment is simply not possible (let alone “quality” services as recommended in ABA standards and “competent” representation to their clients as required by rules of professional conduct).

Our RTC Committee urges that workload limits, which consider caseloads, be established and enforced for all attorneys furnishing indigent defense representation. 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.
V. Collect Meaningful Data About the State of Indigent Defense

A lack of data prevents the study of best practices, fiscal appropriation, quality of representation, and outcomes between represented and unrepresented defendants. Our RTC Committee recommends that all jurisdictions develop reporting systems for all criminal and juvenile delinquency cases, which would provide accurate data on the number of new appointments for counsel by case type, number, dispositions, and the number of pending cases. To make such data collection possible, the National Center for Defense Services should be created or the federal government should provide or retool grants to support data collection.

Studies regarding the implementation of the CJA program, as well as about state-level spending and case outcomes, would provide quantifiable statistics to go along with the sometimes-anecdotal statements made to this Committee. A pilot study in Baltimore, Maryland provided solid data showing that early representation resulted in a reduction of 6,000 beds/day in the City of Baltimore’s overcrowded pretrial justice system. Building upon pilot studies of this kind would improve the ability of public defender groups to seek funding and for policy experts to better understand the state of post-sequestration public defender systems.

Although we firmly believe that the creation of the National Center for Defense Services is necessary to effectuate the kind of change described, an existing infrastructure for collecting data may be built upon. The DOJ should use its grant and research capabilities to collect, analyze, and publish financial data and other information pertaining to indigent defense at every level of government. For example, the Office of Justice Programs’ Bureau of Justice Statistics provides timely and objective data about crime and the administration of justice at all levels of government. Additionally, the National Institute of Justice, the research and evaluation agency of DOJ, offers independent, evidence-based knowledge and tools designed to meet the challenges of criminal justice.

VI. Conclusion

It is our sincere hope that you will look to TCP, our reports, and our National Right to Counsel Committee members as resources as you hear from stakeholders on this important issue affecting the millions of Americans each year who are charged with federal criminal offenses and are unable to afford a lawyer. Your work is critical, and we urge you to provide federal defenders with the independence, resources, training, and workload levels that are vital to compliance with the demands of the Sixth Amendment and a fair and accurate justice system.
The system, a public highway safety, and drug enforcement programs).

Download the “Improving Juvenile Indigent Defense Program” 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”.


See id. at § 5(g)(5).

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”)

See Defending Gideon, supra note 6 (starting at 0:23:34)

24 Justice Denied, supra note 4, at 192.

25 Model Rules of Prof’l Conduct R. 1.1 (2016) (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).

26 Justice Denied, supra note 4, at 65–70.

27 See Don’t I Need A Lawyer?, supra note 5, at 41 (arguing that the lack of data itself hinders addressing the lack of access to counsel).

28 See Justice Denied, supra note 4, at 199–200.

29 TCP applauds the DOJ’s “Answering Gideon’s Call” initiative that empowers private non-profits to study and support state and local indigent defense services, and the $3 million requested for fiscal year 2017 for the National Institute of Justice to continue social science research into the state of indigent defense. We hope that initiatives grow and ask for them to be supported by nationwide standards and reporting requirements.

30 See Douglas L. Colbert, Ray Paternoster & Shawn Bushway, Do Attorneys Really Matter? The Empirical and Legal Case for Representation at Bail, 23 Cardozo L. Rev. 1719, 1720 (2002) (“Indeed, delaying representation until after the pretrial release determination was the single most important reason for lengthy pretrial incarceration of people charged with nonviolent crimes.”).

31 See Justice Denied, supra note 4, at 201.
