

SMART ON CRIME: RECOMMENDATIONS FOR THE NEXT ADMINISTRATION AND CONGRESS

More than twenty organizations and individuals collaborated to create “Smart on Crime: Recommendations for the Next Administration and Congress.” The Constitution Project coordinated the production of the report, which was released in November 2008.

“Smart on Crime” identifies 43 criminal justice priorities in 15 issue areas, makes recommendations for congressional and executive action, and provides in-depth background information on a broad array of subjects. It also includes lists of issue-based resources and experts. The report includes the following chapters:

- Overcriminalization of Conduct, Overfederalization of Criminal Law, and the Exercise of Enforcement Discretion
- Federal Law Enforcement Reform — Improve Investigative Techniques, Including Eyewitness Identification, Incentives to Testify, and Interrogation
- Forensic Science Reform — Federal Oversight and Standards
- Federal Grand Jury Reform
- Federal Sentencing Reform
- Asset Forfeiture Reform
- Innocence Issues
- Prison Reform
- Pardon Power/Executive Clemency— Breathe New Life into the Pardon Power
- Re-entry—Ensure Successful Reintegration After Incarceration
- Public Defense Reforms—Make our Communities Safer by Supporting Quality Public Defense System
- Death Penalty/Habeas Corpus Reform
- Juvenile Justice Reforms
- Fixing *Medellin*: Compliance with International Law and Protecting Consular Access
- Victim Issues and Restorative Justice

The full report is available online at <http://2009transition.org/criminaljustice/>, at www.constitutionproject.org, and on the websites of many members of the coalition.

Please note that organizations and individuals identified as “potential allies” have indicated that they support the general principles expressed in the policy proposals described in that chapter. The allies listed do not necessarily endorse the specific language in every proposal in that chapter, but they do agree that the proposals reflect the general principles that should govern policy in that area. A potential ally signing on to one chapter is only signing on to that chapter and does not necessarily support the principles expressed in other chapters. Furthermore, the decision of a group not to sign on as a potential ally does not necessarily indicate an opposition to the policies proposed.

For policy questions, please contact the individuals or organizations identified in the catalogue as experts. Please direct general questions to Daniel Schuman, Director of Communications and Counsel, the Constitution Project, at 202-580-6922.

CHAPTER ELEVEN

PUBLIC DEFENSE REFORMS

Make Our Communities Safer by Supporting Quality Public Defense Systems

The Constitution of the United States of America affords people charged with crimes the presumption of innocence and equal access to a fair day in court. These core values define the beliefs we as Americans hold in common—whether we are conservative or liberal, white or black, rich or poor, from a Blue state or Red state.

Celebrated in the closing refrain of our Pledge of Allegiance, this guiding notion of “justice for all” is the cornerstone of the American social contract and our democratic system. We entrust our government with the administration of a judicial system that guarantees equal justice before the law—assuring victims, the accused, and the general public that resulting verdicts are fair, correct, swift and final. To the Court, the fact that “[g]overnments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime” makes it an “obvious truth” that “lawyers in criminal courts are necessities, not luxuries.” Justice Black’s words are from the case of *Gideon v. Wainwright* in which the United States Supreme Court ruled that states have a constitutional obligation under the Sixth and Fourteenth Amendments to provide counsel to indigent defendants in felony cases. The right to counsel has been consistently extended to any case that may result in a person’s potential loss of liberty.¹

Despite the desire of the American people to preserve our core values and ensure a meaningful level of justice for people of insufficient means, there is ample and growing evidence that many states have simply failed to deliver on the promise of *Gideon*. More than forty years after the U.S. Supreme Court proclaimed the right to appointed counsel as the law of the land, many states have inadequately structured indigent defense systems that fail to protect our basic right to equal access to justice. A cursory review of reports, speeches, and media since the start of the 21st Century reflects the existence of a serious need to rethink our system of justice.

Well-respected organizations have declared a state of emergency with regard to justice for all in America. Throughout 2003, the American Bar Association (ABA) held hearings across the United States to honor *Gideon*’s fortieth anniversary. The resulting report, *Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice*, concluded that “indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction.”²

The systems that appoint counsel to indigent defendants are plagued by myriad problems that often result in defendants receiving wholly inadequate representation. These systems defy both the letter and the spirit of the right to counsel guaranteed by the Constitution. Without question, the core of this fundamental constitutional right is not fulfilled by providing a warm

body in a chair, but that appointed counsel would provide ethical, competent, and zealous representation on behalf of the indigent accused.

The new administration and Congress have an opportunity to correct many of the problems that have plagued criminal justice systems around the country that totally fail to provide adequate representation for the poor. These problems range from the appointment of ineffective and ill-prepared counsel to a failure of governing bodies to provide the public defense resources necessary for competent defense services and to ensure reliable and fair criminal justice systems, thus imperiling public safety.

There are several solutions that are available to improve public defense systems. These solutions range from increasing the funding support to state and local governments to adopting recommendations made by well-respected national organizations that study public defense systems and ways to improve these vital criminal justice agencies that help to ensure justice in our communities. In some instances, the solutions are as simple as providing appropriate training and technical assistance and creating parity between defense and prosecution resources. What is key is securing the support of the administration so that the proposals that have been studied and formulated by experts in the field can become a reality.

This administration has the opportunity to secure an effective and viable system of justice that ensures individuals who cannot afford representation in criminal matters of the same protections as those who can ably pay for counsel. This effort should begin with a focus on the following top three priorities:

1. Funding for John R. Justice Prosecutors and Defenders Act of 2008
2. Congressional authorization for and funding of National Center for Public Defense Services
3. Congressional authorization for a study to determine whether failures by states to provide constitutionally adequate public defense systems contribute to racial disparities within the criminal justice systems.

This memorandum should serve as the foundation for continued strengthening of our country's state public defense systems and for a more cohesive partnership between the administration and the advocates who work daily to secure an effective and viable system of justice for those in our communities who are accused of committing crimes and who cannot afford to hire counsel.

Summary of the Problem: The nation has failed to honor the guarantee of *Gideon v. Wainwright*. Although the Supreme Court ruled that the U.S. Constitution requires the appointment of counsel for people facing criminal charges who are unable to afford private counsel, in practice the lawyers made available by states and counties commonly lack the experience, training, time, and resources necessary to provide an effective defense, and some

states and localities fail to provide counsel at all to many who are constitutionally required to receive it.

The crisis in federally mandated public defense services has been repeatedly and vividly documented, including, most recently, in the ABA's comprehensive study, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*.³ The failure to provide adequate counsel for the criminally accused who cannot afford to hire an attorney calls into question the integrity of the criminal justice system as it undermines the legitimacy of criminal convictions—innocent people go to jail, wrongdoers escape responsibility, money is wasted, people are harmed and existing racial disparities present in the system are exacerbated.⁴ Nonetheless, today, the federal government is neither monitoring nor encouraging or enforcing compliance with *Gideon's* requirement.

In fact, 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. Thus, for example, state prosecutors receive millions of dollars each year in direct federal funding through the Justice Assistance Grants program, while defense attorneys, who represent accused persons, many of whom are innocent of the charges alleged, receive virtually no federal funding. Likewise, prosecutors often have ready access to federally funded crime labs, while too often defense attorneys are denied access or provided inadequate or no 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 Carolina⁵ while the federal government provides no funding for public defense professionals. 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.

The next administration should work to ensure that *Gideon's* federal mandates are implemented by state and local⁶ criminal justice systems and that these systems operate fairly and accurately. The federal government should monitor state and local compliance with *Gideon* and ensure that publicly funded defense counsel receive the resources, training, and other assistance needed to appropriately assess and challenge prosecution cases.

Proposed Solutions:

Legislative Changes:

- Congress should fund the John R. Justice Prosecutors and Defenders Incentive Act of 2008, which authorizes student loan repayment assistance for prosecutors and public defenders in order to improve public safety by assisting prosecutor and defender offices in their ability to hire and retain high-quality lawyers. P.L. 110-315, Title IX, Part E, Sections 951, 952.

- Congress should provide sufficient financial support as applicable to the states, local government, and territories for the provision of public defense services in state criminal and juvenile delinquency proceedings comparable to the federal government’s support for the prosecution function.⁷
- Congress should provide federal technical assistance and training for state, local, and territorial public defense systems, and the attorneys who participate in them, comparable to the federal government’s support for the prosecution function.
 - The Bureau of Justice Assistance of the U.S. Department of Justice should use some of its discretionary funding for these functions, as it did under the administration of Attorney General Reno.
 - Congress should adopt the recommendation of the American Bar Association that it 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 by administering federal funds for state public defense programs.⁸
- In order to ensure that state criminal justice systems meet constitutional requirements, each should be required, as a condition of receiving federal criminal justice funding, to (1) promulgate and adhere to public defense standards that are consistent with the ABA’s *Ten Principles of a Public Defense Delivery System*; the National Juvenile Defender Center/National Legal Aid & Defender Association’s *Ten Core Principles for Providing Quality Delinquency Representation through Public Defense Delivery Systems*; and NLADA’s *Performance Guidelines for Criminal Defense Representation*; and (2) include public defense systems in state and local justice planning.
- 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 criminal justice systems. This study should be conducted by an entity that is independent of government, such as a university or impartial research foundation.

Jurisdiction:

Executive Branch: DOJ Office of Justice Programs (Bureau of Justice Assistance, Bureau of Justice Statistics)

Legislative Branch: House and Senate Judiciary and Appropriations Committees

Judicial Branch: Federal Judicial Conference, Administrative Office of the United States Courts

Background:

Executive Branch: The Executive Branch has a special responsibility to enforce the federal mandate announced in *Gideon v. Wainwright*, and is uniquely situated to support public defense reform. In 1997 then-Attorney General Janet Reno and officials from the U.S. Department of Justice's Office of Justice Programs and the Bureau of Justice Assistance convened a group of criminal defense leaders from around the country. The group identified areas in which the Department of Justice could play an effective role, including publicizing the poor quality of our nation's public defense services, promoting independence in public defense structures, overseeing a more equitable allocation of funds among public defense and other criminal justice system components, and promoting standards for public defense. Attorney General Janet Reno convened national symposiums that brought together members of our nation's criminal justice communities to further explore these topics in 1999 and 2000.⁹

The Bureau of Justice Assistance, in partnership with Harvard University's Program in Criminal Justice Policy and Management, the Harvard Law School, the Vera Institute of Justice, and the Spangenberg Group convened "The Executive Session on Public Defense." From 1991 to 2001, session members—including state public defense leaders, assigned counsel managers, a prosecutor, a legislator, a social worker, a journalist, and criminal justice experts—worked to identify the challenges facing the field of public defense, and explored new ways of serving clients and society.¹⁰

The Compendium of Standards for Indigent Defense Systems is a Bureau of Justice Assistance publication that contains national, state, and local standards and guidelines relating to five functions of public defense: Standards for Administration of Defense Services (Volume I), Attorney performance (Volume II), Capital case representation (Volume III), Appellate representation (Volume IV), and Juvenile justice defense (Volume V).¹¹

In 1999, the Bureau of Justice Statistics within the Department of Justice sponsored a data collection effort that gathered information on public defense services among the nation's 100 largest counties based on population. The survey examined the methods by which public defense is delivered, as well as operating expenditures, staffing, and case loads of the different types of public defense services.¹² In an effort to update its 1999 work, the Bureau of Justice Statistics is currently funding the 2007 Census of Public Defender Offices. The survey is collecting data on publicly funded defender offices (approximately 1,400 offices nation wide). The survey's purpose, as described by the Bureau of Justice Statistics, is to "identify the most pressing challenges confronting the justice system and to provide state-of-the-art knowledge and information in support of innovative strategies and approaches for dealing with these challenges."¹³

The Office of Justice Programs administers the Justice Assistance Grant program (JAG). This program is the largest single federal grant program allowing for funding of state law enforcement, court, prosecution, and related programs. While JAG grants can be used by states to fund public 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 public defense programs.¹⁴ Historically, states have allocated either none of their JAG funding or only a

miniscule portion to public defense programs, directing a vastly greater share to law enforcement and prosecutorial programs. For example, in FY99, of the almost \$500 million in formula grants awarded to states under the Byrne Grant program, the JAG program's predecessor, only 1.4 percent of the funds were granted to defender 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 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 In FY08 Congress cut JAG funding to \$170 million from the \$520 million available in FY07.¹⁷

Legislative Branch: 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.” 18 U.S.C. § 3006A. 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.¹⁸

The Innocence Protection Act sponsored by Senator Patrick Leahy in the Senate, and Representatives Bill Delahunt and Ray LaHood in the House, and with key support from Representative James Sensenbrenner and Senator Orrin Hatch, was passed by Congress in 2004.¹⁹ The Act was intended to help reduce the risk of wrongful convictions and executions in capital cases. The Act 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.²⁰ 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.²¹ The Innocence Protection Act is scheduled to be reauthorized in 2009.

The John R. Justice Prosecutors and Defenders Incentive Act of 2008 authorizes a program for student loan repayment for prosecutors and public defenders. P.L. 110-315, Title IX, Part E, Sections 951,952. To date, the act has not been funded.

Judicial Branch: Federal defenders and Criminal Justice Act panel attorneys are compensated and overseen by the Administrative Office of the United States Courts and each jurisdiction’s respective appellate circuit court. The Administrative Office organizes and supports training for the federal defenders and CJA panel attorneys, and recently produced a training video for federal judges focusing on issues related to the court’s responsibility in managing expenditures in high-cost criminal cases where the defendant is represented by a CJA panel attorney.

Potential Allies, Potential Opposition, and Public Opinion:

Potential Allies: American Bar Association, American Civil Liberties Union, American Council of Chief Defenders, Brennan Center for Justice, Constitution Project, National Legal Aid and Defender Association, National Association of Criminal Defense Lawyers, NAACP

Legal Defense and Educational Fund, National Alliance on Mental Illness, National Council of State Churches, National Juvenile Defender Center, National Juvenile Justice Network, U.S. Conference of Catholic Bishops, Center for Community Alternatives, Justice Policy Institute, Prison Legal News, International CURE, Virginia CURE

Potential Congressional Allies:²²

House – Rep. Michael A. Arcuri, Rep. Spencer Bachus, Rep. Tammy Baldwin, Rep. Xavier Becerra, Rep. Howard L. Berman, Rep. Sanford D. Bishop, Jr., Rep. Dan Boren, Rep. Bruce L. Braley, Rep. G. K. Butterfield, Rep. Michael E. Capuano, Rep. Ben Chandler, Rep. Steve Cohen, Rep. John Conyers, Jr., Rep. Jim Cooper, Rep. Elijah E. Cummings, Rep. Artur Davis, Rep. Danny K. Davis, Rep. Lincoln Davis, Rep. Nathan Deal, Rep. Diana DeGette, Rep. William D. Delahunt, Rep. Rosa L. DeLauro, Rep. Lincoln Diaz-Balart, Rep. Keith Ellison, Rep. Rahm Emanuel, Rep. Bob Etheridge, Rep. Chaka Fattah, Rep. Mike Ferguson, Rep. Bob Filner, Rep. Elton Gallegly, Rep. Bart Gordon, Rep. Raul M. Grijalva, Rep. Luis V. Gutierrez, Rep. Mazie Hirono, Rep. Kenny C. Hulshof, Rep. Steve Israel, Rep. Sheila Jackson-Lee, Rep. Patrick J. Kennedy, Rep. Ron Kind, Rep. Dennis J. Kucinich, Rep. Tom Lantos, Rep. Barbara Lee, Rep. John Lewis, Rep. Nita M. Lowey, Rep. Stephen F. Lynch, Rep. Edward J. Markey, Rep. Thaddeus G. McCotter, Rep. Kendrick B. Meek, Rep. Michael H. Michaud, Rep. Dennis Moore, Rep. Jerrold Nadler, Rep. Donald M. Payne, Rep. Ted Poe, Rep. Charles B. Rangel, Rep. Steven R. Rothman, Rep. Linda T. Sanchez, Rep. Janice D. Schakowsky, Rep. Adam B. Schiff, Rep. Robert C. "Bobby" Scott, Rep. Hilda L. Solis, Rep. Mark Udall, Rep. Zach Wamp, Rep. Debbie Wasserman Schultz, Rep. Melvin L. Watt, Rep. Lynn C. Woolsey, and Rep. C.W. "Bill" Young

Senate – Sen. Daniel K. Akaka, Sen. Max Baucus, Sen. Joseph R. Biden, Jr., Sen. Barbara Boxer, Sen. Sherrod Brown, Sen. Maria Cantwell, Sen. Robert P. Casey, Jr., Sen. Hillary Rodham Clinton, Sen. Thad Cochran, Sen. Norm Coleman, Sen. Susan M. Collins, Sen. Pete V. Domenici, Sen. Russell D. Feingold, Sen. Dianne Feinstein, Sen. Tom Harkin, Sen. Daniel K. Inouye, Sen. Tim Johnson, Sen. Edward M. Kennedy, Sen. John F. Kerry, Sen. Herb Kohl, Sen. Mary L. Landrieu, Sen. Frank R. Lautenberg, Sen. Patrick J. Leahy, Sen. Carl Levin, Sen. Joseph I. Lieberman, Sen. Mel Martinez, Sen. Claire McCaskill, Sen. Robert Menendez, Sen. Patty Murray, Sen. Bill Nelson, Sen. Barack Obama, Sen. Mark L. Pryor, Sen. Ken Salazar, Sen. Bernard Sanders, Sen. Charles E. Schumer, Sen. Gordon H. Smith, Sen. Olympia J. Snowe, Sen. Arlen Specter, Sen. Sheldon Whitehouse, and Sen. Ron Wyden

Public Opinion: In 2002 the National Legal Aid and Defender Association published a first-of-its-kind report on public opinion about due process and the role of lawyers who represent indigent criminal defendants available at http://www.nlada.org/Defender/Defender_Awareness/Defender_Awareness_Indigent.

The report's main findings are that a majority of Americans support a strong system of public defense and believe that competent representation should be provided to people who need and cannot afford it.

For Further Information:

See DOJ Compendium of Standards for Indigent Defense Systems; ABA Standards for Criminal Justice; NLADA Performance Guidelines for Criminal Defense Representation, ABA Ten Principles of a Public Defense Delivery System, NLADA Five Problems Facing Public Defense on the 40th Anniversary of Gideon v. Wainwright.

Overall Indigent Defense Contacts:

Co-chairs

Nicole Austin-Hillery
Director and Counsel, DC Office
Brennan Center for Justice
1730 M Street, NW, Suite 413
Washington, DC 20036
(202) 785-4773 (direct)
nicole.austin-hillery@nyu.edu

Richard C. Goemann
Director, Defender Legal Services
National Legal Aid & Defender Association
1140 Connecticut Avenue, NW, Suite 900
Washington, DC 20036
804-647-7110 (Direct)
202-452-0620 x 212 (Office)
r.goemann@nlada.org

For Individual Recommendation

John R. Justice Funding:

Kenneth J. Goldsmith
Legislative Counsel
American Bar Association
Governmental Affairs Office
740 15th Street, NW, 11th Floor
Washington, DC 20005
(202) 662-1789
(301) 233-3010 cell
(202) 662-1762 fax
goldsmithk@staff.abanet.org

Richard C. Goemann
Director, Defender Legal Services
National Legal Aid & Defender Association
1140 Connecticut Avenue, NW, Suite 900
Washington, DC 20036

804-647-7110 (Direct)
202-452-0620 x 212 (Office)
r.goemann@nlada.org

Kyle O. Dowd
Policy Director
National Association of Criminal Defense Lawyers
1660 L St., NW 12th Floor
Washington, DC 20036
Phone: (202) 872-8600 ext 226
kyle@nacdl.org

Financial Support Parity

Richard C. Goemann
Director, Defender Legal Services
National Legal Aid & Defender Association
1140 Connecticut Avenue, NW, Suite 900
Washington, DC 20036
804-647-7110 (Direct)
202-452-0620 x 212 (Office)
r.goemann@nlada.org

Maureen Dimino
Indigent Defense Counsel
National Association of Criminal Defense Lawyers
1660 L St., NW 12th Floor
Washington, DC 20036
Phone: (202) 872-8600 ext 247
maureen@nacdl.org

Federal T/A and Training, including National Defender Center

Richard C. Goemann
Director, Defender Legal Services
National Legal Aid & Defender Association
1140 Connecticut Avenue, NW, Suite 900
Washington, DC 20036
804-647-7110 (Direct)
202-452-0620 x 212 (Office)
r.goemann@nlada.org

Professor Norman Lefstein
Lawrence W. Inlow Hall
Indiana University School of Law at Indianapolis
530 West New York Street
Indianapolis, IN 46202

Telephone: 317-274-8241
(Advisor to ABA Standing Committee on Legal Aid & Indigent Defendants)

Melanca Clark
Counsel, Justice Programs
Brennan Center for Justice
161 Avenue of the Americas, 12th Floor
New York, NY 10013
(212) 992-8639
melanca.clark@nyu.edu

Maureen Dimino
Indigent Defense Counsel
National Association of Criminal Defense Lawyers
1660 L St., NW 12th Floor
Washington, DC 20036
Phone: (202) 872-8600 ext 247
maureen@nacdl.org

Meeting Standards as a Condition of Federal Funding

Richard C. Goemann
Director, Defender Legal Services
National Legal Aid & Defender Association
1140 Connecticut Avenue, NW, Suite 900
Washington, DC 20036
804-647-7110 (Direct)
202-452-0620 x 212 (Office)
r.goemann@nlada.org

Maureen Dimino
Indigent Defense Counsel
National Association of Criminal Defense Lawyers
1660 L St., NW 12th Floor
Washington, DC 20036
Phone: (202) 872-8600 ext 247
maureen@nacdl.org

Study of Racial Disparities

Melanca Clark
Counsel, Justice Program
Brennan Center for Justice

161 Avenue of the Americas, 12th Floor
New York, NY 10013
(212) 992-8639
melanca.clark@nyu.edu

Richard C. Goemann
Director, Defender Legal Services
National Legal Aid & Defender Association
1140 Connecticut Avenue, NW, Suite 900
Washington, DC 20036
804-647-7110 (Direct)
202-452-0620 x 212 (Office)
r.goemann@nlada.org

Malia Brink
Counsel for Special Projects
National Association of Criminal Defense Lawyers
1660 L St., NW 12th Floor
Washington, DC 20036
Phone: (202) 872-8600 ext 224
malia@nacdl.org

¹ *Gideon* established the right to counsel for felony trials. Subsequent cases extend that right to direct appeals—*Douglas v. California*, 372 U.S. 353 (1963); custodial interrogation—*Miranda v. Arizona*, 384 U.S. 436 (1966); juvenile proceedings resulting in confinement - *In Re Gault*, 387 U.S. 1 (1967); critical stages of preliminary hearings—*Coleman v. Alabama*, 399 U.S. 1 (1970); misdemeanors involving possible imprisonment—*Argersinger v. Hamlin*, 407 U.S. 25 (1972); and misdemeanors involving a suspended sentence—*Shelton v. Alabama*, 535 U.S. 654 (2002).

² *Criminal Justice in Crisis*, American Bar Association (1988). The Criminal Justice Section’s Special Committee on Criminal Justice in a Free Society prepared this report, which was based upon public hearings conducted in locations throughout the U.S. It observed that “defense representation is too often inadequate” because “we, as a society, [are] depriving the system of the funds necessary to ensure adequate defense services;” Professor Norman Lefstein, *Criminal Defense Services for the Poor: Methods and Programs for Providing Legal Representation and the Need for Adequate Financing*, American Bar Association (1982). This report, on behalf of the ABA Standing Committee on Legal Aid and Indigent Defendants, was based upon site visits and a review of empirical evaluations of nearly 40 jurisdictions in which state and local indigent defense programs had been studied. The report contains this assessment: “Overall, there is abundant evidence in this report that defense services for the poor are inadequately funded. As a result, millions of persons who have a constitutional right to counsel...are denied effective legal representation;” *Gideon Undone: The Crisis in Indigent Defense Funding*, American Bar Association (1982), a report based upon a hearing conducted by the ABA Standing Committee on Legal Aid and Indigent Defendants—held in cooperation with the National Legal Aid and Defender Association and the General Practice Section of the ABA. Among problems cited by witnesses were public defenders with too many cases; lack of adequate support staff; insufficient compensation

for assigned counsel; defendants often not advised of their right to counsel in misdemeanor cases; and waivers of counsel that failed to meet constitutional standards.

³ This 2004 report, based on a series of hearings held around the country, is available online at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf>.

⁴ See e.g., *Assembly Line Justice: Mississippi Indigent Defense Crisis*, NAACP Legal Defense Fund and Educational Fund, Inc. (2003), available at http://www.naacpldf.org/content/pdf/indigent/Assembly_Line_Justice.pdf.

⁵ For a description of the Hollings National Advocacy Center see http://www.ndaa.org/education/nac_index.html.

⁶ Although *Gideon*'s mandate is directed at the states, in practice, many states delegate the delivery of public defense services to localities.

⁷ See ABA, Report with Recommendation to the ABA House of Delegates 107 (Aug. 2005) (urging, among other things, substantial federal funding for public defense), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/res107.pdf>.

⁸ The ABA, the largest organization of lawyers in America, has twice endorsed the creation of a National Center for Defense Services, first in 1979 and then again in 2005 in its report, *Gideon's Broken Promise* at 41-43. See also American Bar Association Report with Recommendation to the ABA House of Delegates 121 (Feb. 1979) (urging the creation of a federal Center for Defense Services), available at <http://www.abanet.org/legalservices/downloads/sclaid/121.pdf>.

⁹ See *Improving Criminal Justice Systems Through Expanded Strategies and Innovative Collaborations: Report of the National Symposium on Indigent Defense* (1999), and *National Symposium on Indigent Defense 2000: Redefining Leadership for Equal Justice* (2000).

¹⁰ For a list of publications arising out of the Executive Session see http://www.hks.harvard.edu/criminaljustice/executive_sessions/esp.html.

¹¹ Compendium available at http://www.nlada.org/Defender/Defender_Standards/Defender_Standards_Comp.

¹² See *Indigent Defense Services in Large Counties*, 1999, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/idslc99.pdf>.

¹³ See <http://www.ojp.usdoj.gov/bjs/pub/html/cpdo07sol.html>.

¹⁴ See e.g., ABA, 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>.

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

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

¹⁷ See CRS Report to Congress, "Department of Justice (DOJ) Appropriations for FY 2008 and 2009" (June 10, 2008), available for download at <http://www.fas.org/sgp/crs/misc/RL34530.pdf>.

¹⁸ See *An Analysis of the Performance of Federal Indigent Defense Counsel*, Radha Iyengar, National Bureau of Economic Research (2007) (comparing performance of salaried federal defenders and panel attorneys), available at http://people.rwj.harvard.edu/~riyengar/indigent_defense.pdf.

¹⁹ Justice for All Act of 2004, Pub. L. No. 108-405, (codified in scattered sections of 18, 28 and 42 U.S.C.), Title IV—Innocence Protect Act of 2004.

²⁰ "Capital Representation Improvement Grants," 42 U.S.C. § 14163 (2004).

²¹ "Authorization of Appropriations" 42 U.S.C. § 14163e (2004), restricts the use of funds to ensure equal allocation between "Capital Representation Improvement Grants" and "Capital Prosecution Improvement Grants." Notably, other than the Innocence Protection Act provision, no equivalent parity requirement exists with respect to the distribution of federal funds. Thus, the substantial funding provided for state prosecution and

law enforcement purposes through JAG and other federal grant programs are not matched by funds for state public defense systems.

²² Sponsors of the John R. Justice Act.