COMMITTEE TO REVIEW
THE CRIMINAL JUSTICE ACT PROGRAM

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On the Undue Judicial Interference in the
Delivery of Right to Counsel Services

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***Introduction*:** The fear of government unduly taking a person's liberty led the United States Supreme Court in 1963 to unanimously declared it to be an "obvious truth"[1] that the indigent accused cannot receive a fair trial against the "machinery"[2] of law enforcement unless a lawyer is provided to him at no cost. "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries," the Court announced in *Gideon v. Wainwright*, "but it is in ours."[3] Accordingly, *Gideon* made it incumbent upon states through the Fourteenth Amendment to provide Sixth Amendment right to counsel services to any person of limited means facing a possible loss of liberty at the hands of the criminal justice system.[4]

Fifty years later, the U.S. Department of Justice (DOJ) has determined that right to counsel services in America "exist in a state of crisis."[5] The method through

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[1] *Gideon v. Wainwright*, 372 U.S. 355 (1963).

[2] *Ibid*.

[3] *Ibid*.

[4] *Gideon* established the right to counsel in felony proceedings. In the intervening 50 years, the Supreme Court has extended the promise of *Gideon* to any criminal case in which a defendant may potentially lose their liberty. The *Gideon* mandate now extends to: direct appeals [*Douglas v. California*, 372 U.S. 353 (1963)]; juvenile delinquency proceedings [*In re Gault*, 387 U.S. 1 (1967)]; misdemeanors [*Argersinger v. Hamlin*, 407 U.S. 25 (1972)]; misdemeanors with suspended sentences [*Shelton v. Alabama*, 505 U.S. 654 (2002)]; and, appeals challenging a sentence as a result of a guilty plea [*Halbert v. Michigan,* 545 U.S. 605 (2005)].

[5] *Attorney General Eric Holder Delivers Remarks at the Annual Meeting of the American Bar Association's House of Delegates,* San Francisco ~ August 12, 2013 ("America's indigent defense systems continue to exist in a state of crisis, and the promise of Gideon is not being met."); *Attorney General Eric Holder Speaks at the American Film Institute's Screening of Gideon's Army* ~ June 21, 2013 ("America's indigent defense systems continue to exist in a state of crisis."); *Acting Senior Counselor for the Access to Justice Initiative Deborah Leff Speaks at the American Constitution Society for Law and Policy Convening, "Considering Gideon at 50: the History and*

which the indigent accused is provided the constitutional right to an attorney is described alternatively in DOJ speeches as, "inadequate,"[6] "broken,"[7] and "unjust,"[8] with "devastating"[9] consequences to both the defendant and to society as a whole.[10] The situation is "unacceptable,"[11] "unconscionable"[12] "morally

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Future of Indigent Defense," Washington, D.C. ~ March 21, 2013 ("At the Justice Department, my boss, Attorney General Eric Holder, has repeatedly spoken of this country's indigent-defense crisis, noting that the basic rights guaranteed under *Gideon* have yet to be fully realized."); *Attorney General Eric Holder Speaks at the Justice Department's 50th Anniversary Celebration of the U.S. Supreme Court Decision in Gideon v. Wainwright,* Washington, D.C. ~ March 15, 2013 ("In short, America's indigent defense systems exist in a state of crisis."); Eric Holder's "Question & Answer" session with National Public Radio host Nina Totenberg after a speech he gave on voting rights at the John F. Kennedy Presidential Library & Museum, Boston ~ December 11, 2012. ["(Indigent defense) is in crisis."); *Attorney General Eric Holder Speaks at the American Bar Association's National Summit on Indigent Defense,* New Orleans ~ February 4, 2012 ("… the Department is moving to develop and implement a series of concrete steps to help us better understand and address the indigent defense crisis."); *Laurence Tribe, Senior Counselor for Access to Justice, Speaks at the Bronx Defenders Annual Gala Dinner*, New York, New York ~ October 20, 2010 ("A key priority of the Access to Justice Initiative is to address the crisis in indigent defense.")

[6] *Attorney General Eric Holder Speaks at the Justice Department's 50th Anniversary Celebration of the U.S. Supreme Court Decision in Gideon v. Wainwright,* Washington, D.C. ~ March 15, 2013 ("As a judge on the District of Columbia Superior Court – and, later, as United States Attorney for the District of Columbia – I frequently witnessed the devastating consequences of inadequate representation.").

[7] *Attorney General Eric Holder Delivers Remarks at the Annual Meeting of the American Bar Association's House of Delegates,* San Francisco ~ August 12, 2013 ("While I have the utmost faith in – and dedication to – America's legal system, we must face the reality that, as it stands, our system is in too many respects broken.")

[8] *Supra*, note 6. ("I saw that wrongful convictions and unjust sentences carry a moral cost that's impossible to measure.")

[9] *Ibid*.

[10] *Ibid*. ["(W)rongful convictions … undermine the strength, integrity, and public trust in our legal system. I also recognize that, in purely economic terms, they drain precious taxpayer resources – and constitute an outrageous waste of court funds on new filings, retrials, and appeals just because the system failed to get it right the first time."]

[11] *Ibid.* ("Today – together – it's time to declare, once again, that this is unacceptable.")

[12] *Attorney General Eric Holder Speaks at the Legal Aid Society of Cleveland Annual Luncheon*, Cleveland ~ September 28, 2012 ("Unfortunately, the day has not yet arrived when all of our citizens can access legal help without having to wait, to sacrifice, or to worry. This is unconscionable.")

untenable,"[13] "economically unsustainable,"[14] and "unworthy of a legal system that stands as an example to all the world."[15]

The DOJ's words are justified. America's deficient state-level indigent defense services produce a myriad of seemingly disconnected problems throughout the greater criminal justice system. For example, why is America one of the few countries in the world that still relies on bail? The answer is that few state and local courts allow defense counsel at bail hearings to fight for change on behalf of the poor. Without an impetus for change, the bail system continues to work to the disadvantage of those who cannot afford to pay for their own representation.[16] Why do convicted persons have difficult times re-entering society upon release from prison? They do so, in part, because their public advocates are prevented from continuing to fight on their behalf for better conditions of confinement, and treatment and re-entry programs after they are incarcerated.

Point to almost any criminal justice issue – wrongful convictions, over-incarceration, non-violent offenders serving life sentences, etc. – and at root the problem will be one of a lack of true advocacy on the part of people of insufficient

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[13] *Supra*, note 6. ("But problems in our criminal defense system aren't just morally untenable. They're also economically unsustainable.")

[14] *Ibid.*

[15] *Ibid*. ("Today – together – it's time to declare, once again, that this is unacceptable – and unworthy of a legal system that stands as an example for all the world. It's time to reclaim Gideon's petition – and resolve to confront the obstacles facing indigent defense providers. Most of all, it's time to speak out – with one voice – to rally our peers and partners at every level of government and the private sector to this important cause.")

[16] According to the U.S. DOJ, Bureau of Justice Statistics, about 6 in 10 of those held in local jails across the nation at mid-year 2012 were unconvicted and awaiting court action, and this rate has held true since 2005. [See: Todd Minton, Bureau of Justice Statistics, Jail Inmates at Midyear, 2012 – Statistical Tables (NCJ 241264), at 1 (May 2013)]. With an average daily population of 735,983, this means that taxpayers are paying daily for over 440,000 people to sit unproductively in jail. The daily cost to taxpayers of housing a person pretrial varies from jail to jail. Just to get an idea, the U.S. Department of Justice explains that, in fiscal year 2011, more than half of its pretrial detainees were housed "in more than 774 different facilities located throughout the United States" and "owned and operated by state and local governments." According to the DOJ, "[on] average, the highest per diem rate was paid for facilities located in the Northeast," at $100.05 per detainee per day, "and the lowest for facilities located in the Southeast," at $58.61 per detainee per day. [See: The United States Department of Justice Archives, Statistics, available at www.justice.gove/archive/ofdt/statistics.htm, last checked September 29, 2013.] Yet magistrates can only make pre-trial release determinations on the basis of the evidence put before them. And, where no attorney is present to represent the indigent defendant, there is no one who can present evidence to the magistrate to demonstrate that the defendant is not a threat to public safety and should be released pending trial, or that the defendant has ties to the community such that he will most assuredly appear at all court proceedings, or that the defendant does not have any resources with which to pay bail money.

means charged with crime. Just as a doctor treating only the visible symptoms of an underlying ailment may fail the patient, the focus of any number of well-meaning advocacy groups to address the myriad of issues plaguing criminal justice *without concurrently reforming indigent defense services* yields lop-sided results, which continue to fail most who are embroiled in the justice system – the indigent.

Thus, when former Attorney General Holder, in August 2013, challenged criminal justice stakeholders, policymakers and the general public at a meeting of the American Bar Association House of Delegates to "break free of a tired status quo" and "challenge that which is unjust,"[17] in America's criminal justice systems, at heart he was asking for transformational change in how we provide the poor with constitutionally required defender services.

The State-Level Indigent Defense Crisis, in Brief: Right to counsel services at the state-level in America exist on a broad continuum where substandard practice is prevalent. Public defender offices that meet national standards for the defense function (or, have evolved beyond them to develop innovative best-practices focusing on such things as a client's broader life issues and/or civil legal needs) make up only a very small portion of the spectrum. Instead, the most prevalent manner for delivering indigent defense services in the United States is for a private attorney to handle an unlimited number of cases for a single flat fee under contract to the judge presiding over the lawyer's cases. These systems lack accountability and proper supervision. The quality delivered differs significantly from one courtroom to the next. They are not truly "systems" – without any clear structure, they are better described as "non-systems."

Such contractual arrangements are rife with financial incentives for lawyers to do as little work on cases as possible. Generally, all trial expenses (experts, investigators, etc.) must be paid out of the same flat fee meaning that a lawyer's take home pay is negatively impacted the more outside assistance he seeks. Often, lawyers in these "non-systems" take into account what they must do to satisfy a judge in order to get the next contract rather than advocating effectively on a defendant's behalf. When lawyers triage the duty they owe each and every client, it is not uncommon for such attorneys to end up juggling several hundred cases all at the same time.

The scope of the problem is massive. There are 3,033 organized county or county-equivalent governments in the United States. Yet, the Department of Justice's Bureau of Justice Statistics reports that there are only 957 public defender offices in the country. Even accounting for the few contract systems that do meet national standards, it is simply a fact that fully 64% of counties (over

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[17] *Attorney General Eric Holder Delivers Remarks at the Annual Meeting of the American Bar Association's House of Delegates*, San Francisco ~ August 12, 2013.

1,900 counties) operate “non-systems” when it comes to the constitutional right to counsel.[18]

However, the nation’s indigent defense crisis extends far beyond the prevalence of “non-systems.” Even those jurisdictions with staff public defender offices generally assign so many clients at the same time to the system that the lawyers have, on average, only a few hours to open a case, meet with the client, investigate the charges, search for witnesses, negotiate with prosecutors, and if necessary conduct a trial or otherwise dispose of the case. Such time constraints often result in fundamental legal tasks being short-changed, such as the filing of motions, legal research, or coming to an understanding of a defendant’s mental health or life experiences that could mitigate or explain some of his actions to a jury. Simply put, no attorney can be effective when assigned a new felony case every day – weekends and holidays included. Yet, a caseload of 356 felony cases per attorney per year or more is the norm in too many jurisdictions in this country.[19]

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[18] There are two methods for providing Sixth Amendment right to counsel services in our country: a) The “public defender” model in which all attorneys and support staff are government employees and work out of a single agency; and, b) The “private defender” method, in which a city, county, or state retains the services of a single attorney, group of attorneys, or private law firm (for-profit or non-profit) to provide indigent defense services in the jurisdiction in return for a set rate or fee, or paid on a case-by-case basis or paid an hourly fee for their services.

The American Heritage Dictionary defines a “system” as an “organized and coordinated method.” Even though there is a great disparity when measuring the effectiveness of public defender offices throughout our nation (e.g., some offices abide by stringent workload standards while others operate under excessive caseloads) all public defender models are rightfully classified as “systems” since attorney and non-attorney staff will generally work collaboratively while operating under a single administration, and often out of a single office.

However, the private defender model can be divided into two broad sub-categorizations: coordinated and non-coordinated. Coordinated assigned counsel and contract models are characterized as having independent administrators who are not unduly influenced by politics or the judiciary, monitor and enforce performance standards, keep workload manageable, and provide training, among other systemic safeguards. However, very few of these “systems” exist in America. They are the exceptions, not the rule.

So, even when one acknowledges and accounts for the counties in those states that provide services primarily through coordinated assigned counsel plans (e.g., Massachusetts – 5 counties) or coordinated contract systems (e.g., Oregon – 36 counties) and those individual counties that have coordinated non-public defender systems (e.g., San Mateo, California), it remains true that the majority of jurisdictions in the U.S. operate “non-systems” for delivering constitutionally mandated indigent defense services. Even under the most generous definition of “system,” a full 64% of counties do not have organized “systems” (or, over 1,900 counties).

[19] Many experts have commented on the problems with excessive caseloads, most notably: a) American Bar Association. *Gideon's Broken Promise: America's Continuing Quest For Equal Justice a Report on the American Bar Association's Hearings on the Right to Counsel in Criminal Proceedings.* December 2004; and, b) The National Right to Counsel Committee. *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*. The Constitution Project. April 2009.

Excessive caseloads in indigent defense systems and non-systems alike lead to one of two results. Either the court experiences inordinate delays, with defendants waiting months in jail at taxpayers' expense, or our courts become assembly-lines to process poor people into jail or prison without adequately sorting the guilty from the innocent. Neither is acceptable. When an innocent person sits behind bars on a pretrial basis or is wrongfully incarcerated because his or her attorney did not have the time, ability or resources to do the job right, the real perpetrator remains on the streets to continue endangering public safety.

The Constitutional Imperative for Defender Independence: The root cause of America's indigent defense crisis is a lack of independence of the defense function. Judicially controlled indigent defense systems often follow or adjust to the needs of each judge in each court, rather than focusing on providing constitutionally effective services for each and every defendant. Fearing the loss of income by not pleasing the judge overseeing their compensation, defenders often take on more cases than they can ethically handle, will delay working on a case, and will triage their hours available in favor of some clients but to the detriment of others, thereby failing to meet the parameters of ethical representation owed to all clients.

And so, it does not take a judge to say overtly, for example: "Do not file motions in my courtroom." Defense attorneys will bring into their calculations what they think they need to do to garner favor with a judge thereby not advocating solely in the interests of a client, as is their ethical duty.

Such practices stand in contrast with Sixth Amendment case law. In, *Ferri v. Ackerman*, the Court states that "independence" of appointed counsel to act as an adversary is an "indispensible element" of "effective representation."[20] Two years later, the Court determined in *Polk County v. Dodson*, that states have a "constitutional obligation to respect the professional independence of the public defenders whom it engages."[21] Observing that "a defense lawyer best serves the public not by acting on the State's behalf or in concert with it, but rather by advancing the undivided interests of the client," the Court concluded in *Polk County* that a "public defender is not amenable to administrative direction in the same sense as other state employees."[22]

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[20] *Ferri v. Ackerman,* 44 U.S. 193 (1979).

[21] *Polk County v. Dodson,* 454 U.S. 312 (1981).

[22] Justice Burger underscored this point in his concurrence: "I join the Court's opinion, but it is important to emphasize that, in providing counsel for an accused, the governmental participation is very limited. Under *Gideon v. Wainwright,* 372 U. S. 335 (1963), and *Argersinger v. Hamlin,* 407 U. S. 25 (1972), the government undertakes only to provide a professionally qualified

This is confirmed in *Strickland v. Washington*. In that case, the Court states that "independence of counsel" is "constitutionally protected," and that "[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense."[23]

More importantly, *Strickland* must be read in conjunction with another case heard and decided on the same day: *United States v. Cronic*.[24] *Cronic* sets out the systemic deficiencies that may result in a constructive denial of counsel – e.g., the inability of a defender system to subject the state's case to the "crucible of adversarial testing"[25] even when a lawyer is present to represent the indigent accused. When constructive denial of counsel occurs, courts must presume that ineffective representation will occur.

The overarching principle in *Cronic* is that the process must be a "fair fight."[26] *Cronic* notes that the "fair fight" standard does not necessitate one-for-one parity between the prosecution and the defense. Ensuring that both functions have the resources they need, at a level their respective roles demand, is all the adversarial process requires. As the *Cronic* Court notes: "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."[27]

In *Cronic*, the Court points to the deficient representation received by the so-called "Scottsboro Boys" and detailed in the U.S. Supreme Court case, *Powell v. Alabama*,[28] as demonstrative of constructive denial of counsel. The trial judge overseeing the Scottsboro Boys' case appointed a real estate lawyer from Chattanooga, who was not licensed in Alabama and was admittedly unfamiliar with the state's rules of criminal procedure. The *Powell* Court concluded that defendants require the "guiding hand"[29] of counsel – i.e., attorneys must be

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advocate wholly independent of the government. It is the independence from governmental control as to how the assigned task is to be performed that is crucial."

[23] *Strickland v. Washington*, 466 U.S. 668 (1984).

[24] *United States v. Cronic,* 466 U.S. 648 (1984).

[25] *Ibid*.

[26] *Ibid.*

[27] *Ibid.*

[28] *Powell v. Alabama*, 287 U.S. 45 (1932).

[29] *Ibid*.

qualified and trained to help the defendants advocate for their stated interests.

Having been assigned unqualified counsel, the Scottsboro Boys' trials proceeded immediately that same day. *Powell* notes that the lack of "sufficient time" to consult with counsel and to prepare an adequate defense was one of the primary reasons for finding that the Scottsboro Boys were constructively denied counsel, commenting that impeding counsel's time "is not to proceed promptly in the calm spirit of regulated justice, but to go forward with the haste of the mob."[30] Insufficiency of time is, therefore, a hallmark of constructive denial of counsel, and the inadequate time may itself be caused by any number of things, including but not limited to excessive workload or contractual arrangements that produce negative fiscal incentives to lawyers to dispose of cases quickly.

But perhaps the most noted critique of the Scottsboro Boys' defense was that it lacked independence from governmental interference, specifically from the judge presiding over the case. In specific relation to judicial interference, the *Powell* Court stated:

> "[H]ow can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that, in the proceedings before the court, the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional."[31]

In other words, it is *never* possible for a judge presiding over a case to properly assess the quality of a defense lawyer's representation, because the judge can never, for example, read the case file, question the defendant as to his stated interest, follow the attorney to the crime scene, or sit in on witness interviews. That is not to say a judge cannot provide sound feedback on an attorney's in-court performance – the appropriate defender supervisors indeed should actively seek to learn a judge's opinion on attorney performance. It is just that the judge's in-court observations of a defense attorney cannot comprise the totality of supervision.

***Conclusion: Judicial Interference and the CJA Act*:** Though there are certainly more structural protections at the federal level than the state level, having the federal judiciary in charge of the indigent defense budget and approving individual defense requests for investigators or experts offers the same conflicts of interests as bemoaned in *Cronic* and *Powell*. In short, someone other than the judiciary needs to provide quality and fiduciary supervision.

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[30] *Ibid*.

[31] *Ibid*.

In 2002, the American Bar Association (ABA) promulgated *Ten Principles of a Public Defense Delivery System* – a set of ten standards that, in the words of the ABA, "constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney."[32] Our nation's former top law enforcement officer, Attorney General Eric Holder, states that the ABA "quite literally set the standard"[33] for indigent defense systems with the *Ten Principles*, calling them the "basic building blocks of a well-functioning public defense system."[34]

The first of the ABA *Ten Principles* explicitly states that the "public defense function, including the selection, funding, and payment of the defense counsel, is independent."[35] In the commentary to this standard, the ABA notes that the public defense function "should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel" noting specifically that "[r]emoving oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense."[36]

Footnotes to ABA *Principle 1* refer to National Study Commission on Defense Services' (NSC) *Guidelines for Legal Defense Systems in the United States (1976).*[37] The *Guidelines* were created in consultation with the United States Department of Justice (DOJ) under a DOJ Law Enforcement Assistance Administration (LEAA) grant. NSC *Guideline 2.10 (The Defender Commission)* states in part:

> A special Defender Commission should be established for every defender system,

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[32] American Bar Association. *Ten Principles of a Public Defense Delivery System. February 2002*. Available at: *http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf*.

[33] United States Attorney General Eric Holder. *Attorney General Eric Holder Speaks at the American Bar Association's National Summit on Indigent Defense.* New Orleans ~ Saturday, February 4, 2012. Available at: http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-120204.html.

[34] United States Attorney General Eric Holder. *Address to the Department of Justice's National Symposium on Indigent Defense: Looking Back, Looking Forward, 2000-2010.* Washington, D.C., February 18, 2010. Available at: http://www.justice.gov/ag/speeches/2010/ag-speech-100218.html.

[35] *Supra*, note 32.

[36] *Ibid.*

[37] Available at: http://nlada.net/sites/default/files/nsc_guidelinesforlegaldefensesystems_1976.pdf.

> whether public or private. The Commission should consist of from nine to thirteen members, depending upon the size of the community, the number of identifiable factions or components of the client population, and judgments as to which non-cli-ent groups should be represented. Commission members should be selected under the following criteria: The primary consideration in establishing the composition of the Commission should be ensuring the independence of the Defender Director. (a) The members of the Commission should represent a diversity of factions in order to ensure insulation from partisan politics. (b) No single branch of government should have a majority of votes on the Commission.[38]

Twenty-one states now have statewide commissions that oversee all aspects of indigent defense services.[39] This task force should recommend a similar federal commission to oversee all aspects of the delivery of right to counsel services at the federal level.

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[38] *Ibid*.

[39] Arkansas, Colorado, Connecticut, Kentucky, Hawaii, Idaho, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Hampshire, New Mexico, North Dakota, Oregon, Utah, Virginia, and, Wisconsin. For ease of explanation, we include in this group both Colorado and Michigan. Each of those states has two statewide commissions. Colorado has one commission over the primary system and a second overseeing conflict representation, while Michigan has one commission overseeing appellate services and a second overseeing trial level representation. However, only 14 of those 21 states statutorily require diverse appointing authorities to name public defense commission members. Of the remaining seven states, five cede all appointing authority to the governor and two give all appointments to the judiciary.