Independence

Recommendation 2—States should establish a statewide, independent, non-partisan agency headed by a Board or Commission responsible for all components of indigent defense services. The members of the Board or Commission of the agency should be appointed by leaders of the executive, judicial, and legislative branches of government, as well as by officials of bar associations, and Board or Commission members should bear no obligations to the persons, department of government, or bar associations responsible for their appointments. All members of the Board or Commission should be committed to the delivery of quality indigent defense services, and a majority of the members should have had prior experience in providing indigent defense representation.

Recommendation 3—The Board or Commission should hire the agency’s Executive Director or State Public Defender, who should then be responsible for hiring the staff of the agency. The agency should act as an advocate on behalf of improvements in indigent criminal and juvenile defense representation and have the authority to represent the interests of the agency before the legislature pertaining to all such matters. Substantial funding for the agency should be provided by the state from general fund revenues.

Qualifications, Performance, and Supervision of Counsel

Recommendation 5—The Board or Commission should establish and enforce qualification and performance standards for defense attorneys in criminal and juvenile cases who represent persons unable to afford counsel. The Board or Commission should ensure that all attorneys who provide defense representation are effectively supervised and remove those defense attorneys who fail to provide quality services.
Workload

Recommendation 6—The Board or Commission should establish and enforce workload limits for defense attorneys, which take into account their other responsibilities in addition to client representation, in order to ensure that quality defense services are provided and ethical obligations are not violated.

Compensation

Recommendation 7—Fair compensation should be provided, as well as reasonable fees and overhead expenses, to all publicly funded defenders and for attorneys who provide representation pursuant to contracts and on a case-by-case basis. Public defenders should be employed full time whenever practicable and salary parity should be provided for defenders with equivalent prosecution attorneys when prosecutors are fairly compensated. Law student loan forgiveness programs should be established for both prosecutors and public defenders.

Adequate Support and Resources

Recommendation 8—Sufficient support services and resources should be provided to enable all defense attorneys to deliver quality indigent defense representation, including access to independent experts, investigators, social workers, paralegals, secretaries, technology, research capabilities, and training.

Executive Summary of the Report

Introduction

More than 45 years ago, the United States Supreme Court rendered one of its best known and most important decisions—Gideon v. Wainwright. In memorable language, the Court explained that “[i]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.” Observing that “lawyers in criminal courts are necessities, not luxuries,” the Court concluded that governments have an obligation under the United States Constitution to provide lawyers for people charged with a felony who cannot afford to hire their own.

Soon afterwards, the Court extended Gideon, applying the right to a lawyer to juvenile delinquency cases and to misdemeanor cases where imprisonment results. The right to counsel is now accepted as a fundamental precept of American justice. It helps to define who we are as a free people and distinguishes this country from totalitarian regimes, where lawyers are not always independent of the state and individuals
can be imprisoned by an all powerful and repressive state.

Yet, today, in criminal and juvenile proceedings in state courts, sometimes counsel is not provided at all, and it often is supplied in ways that make a mockery of the great promise of the Gideon decision and the Supreme Court’s soaring rhetoric. Throughout the United States, indigent defense systems are struggling. Due to funding shortfalls, excessive caseloads, and a host of other problems, many are truly failing. Not only does this failure deny justice to the poor, it adds costs to the entire justice system. State and local governments are faced with increased jail expenses, retrials of cases, lawsuits, and a lack of public confidence in our justice systems. In the country’s current fiscal crisis, indigent defense funding may be further curtailed, and the risk of convicting innocent persons will be greater than ever. Although troubles in indigent defense have long existed, the call for reform has never been more urgent.

The National Right to Counsel Committee

For the first time since the Gideon decision, an independent, diverse group, whose members include the relevant constituencies of the justice system, has examined the nation’s ways of providing defense services for the poor and is sounding the alarm about the grave problems that exist today nationwide. The National Right to Counsel Committee was established to address the full dimension of the difficulties in indigent defense from a national perspective. The Committee’s members include persons with judicial, law enforcement, prosecution, and defense experience, as well as policymakers, victim advocates, and scholars. The membership also includes a person who was convicted of a crime that he did not commit, sent to prison, and later exonerated due to DNA evidence. (A list of Committee members and brief biographies of our Reporters precede this Executive Summary.)

Mission and Scope

The Committee’s two-fold mission was to examine, across the country, whether criminal defendants and juveniles charged with delinquency who are unable to retain their own lawyers receive adequate legal representation, consistent with decisions of the Supreme Court and rules of the legal profession, and to develop consensus recommendations for achieving lasting reforms.

In approaching these subjects, the Committee was mindful that there have been numerous studies that have cataloged the problems with indigent defense, but these reports have not had significant impact in bringing about improvements. For this reason, the Committee was determined that its Report focus not simply on all that ails indigent defense—although Chapter 2 of this Report clearly does that—but that it also present detailed information on successful strategies for change. Chapter 3, therefore, is an in-depth, first-of-its-kind analysis of indigent defense litigation instituted to achieve reforms, including approaches that have been successful; Chapter 4 describes the various statewide structures used in the delivery of indigent defense services and suggests the kinds of oversight bodies most likely to succeed in promoting
Making a case for needed reform in the United States is not especially difficult because the subject has often been examined and the difficulties in delivering defense services are constantly in the news. In conducting its work, the Committee, through its Reporters, had access to literally hundreds of national, state, and local reports of indigent defense, as well as several thousand newspaper articles spanning even beyond the past decade. This Report cites many of the most recent studies conducted in state and local jurisdictions, a national report of the American Bar Association published in 2004, and numerous newspaper articles. In addition, some site visits were conducted by independent researchers (other than our Reporters), retained on behalf of the Committee, and the reports of these persons are referenced in Chapter 2. Because the Committee desired a study that would withstand the scrutiny of any persons who would doubt its findings, the statements in the five chapters of this Report are fully supported, with numerous sources contained in more than 900 footnotes.

The Committee's focus purposely has not included the myriad of problems involved in providing defense representation in death penalty cases. The Committee was aware that The Constitution Project had issued several reports related to the death penalty. See Mandatory Justice: Eighteen Reforms to the Death Penalty (2001); and Mandatory Justice: The Death Penalty Revisited (2006), both of which are available on The Constitution Project’s website (http://www.constitutionproject.org/). There also are the 2003 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (available at http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/deathpenaltyguidelines2003.pdf). Moreover, by excluding death penalty prosecutions, the Committee believed that it could better concentrate its attention on defense representation in non-capital cases.

Also, while juvenile delinquency proceedings are discussed in this Report, the Committee recognizes that its primary focus has been on defense services in criminal cases. For further specific information about juvenile defense representation, the Committee commends the materials available on the website of the National Juvenile Defender Center (http://www.njdc.info/index.php), some of which also are cited in chapter 2.

Before summarizing each of the chapters in this Report, we want to emphasize that our overriding focus has been on the many current difficulties throughout the country in providing indigent defense representation. Obviously, there has been considerable progress since Gideon was decided in 1963. The sums spent by state governments and local jurisdictions in defending accused persons have increased significantly during the past four decades, and there are some places in which defense services are being delivered by talented professionals who have the time, training, and resources to do first-rate legal work for their clients. However, even in these places the progress that has been made is at considerable risk given the fiscal problems that now afflict state and local governments. Just as this Report was being completed, on December 10, 2008, the Center on Budget and Policy Priorities, a non-partisan research and policy
organization, reported that “[a]t least 43 states faced or are facing shortfalls in their budgets for this and/or next year.”

Moreover, the evidence is overwhelming that jurisdictions that have done reasonably well in the indigent defense area are in a distinct minority. In most of the country, notwithstanding the dedication of lawyers and other committed staff, quality defense work is simply impossible because of inadequate funding, excessive caseloads, a lack of genuine independence, and insufficient availability of other essential resources. In addition, as our summary below of Chapter 2 points out, these are by no means the only problems.

Chapter Summaries

Chapter 1—The Right to Counsel: What is the Legal Foundation, What Is Required of Counsel, and Why Does It Matter?

Our first chapter provides a primer on the right to counsel in America, which derives from the Sixth Amendment to the United States Constitution and is applicable to the states. We explain the kinds of cases to which the right applies, which are the vast majority of criminal cases at trial and on appeal as well as juvenile delinquency proceedings at trial and on appeal. Moreover, the Supreme Court of the United States has continued to extend and to elaborate upon the right to counsel. In 2002, the Court declared that a defendant who receives a suspended sentence in a misdemeanor case may not later be imprisoned for a probation violation unless counsel was afforded when the defendant was initially prosecuted. And, in 2008, the Court held that the right to counsel attaches at initial court appearances at which defendants learn of the charges brought by the state.

But an accused is entitled to more than just a lawyer. The right to counsel also encompasses the right to experts and transcripts to assist in a person’s defense, and, like counsel, those must be paid for by governments. While the Court has not held that defendants must be represented by lawyers, it has declared that lawyers must be provided unless defendants knowingly, voluntarily, and intelligently decide to forego the assistance of counsel. On the other hand, the Court has said virtually nothing about how governments are to provide lawyers and, even more importantly, who must pay for the experts, transcripts, and thousands of attorneys across the country who must be provided to assist accused persons in criminal and juvenile cases. What we do know is that these expenses entail substantial costs, and the financial burden, as a result of the Court’s decisions designed to fulfill a requirement of the federal Constitution, has fallen exclusively on state and local governments, who are called upon to translate the right to counsel into meaningful indigent defense programs. As we observe in Chapter 1, the Court’s decisions “are a significant high-cost, unfunded mandate imposed upon state and/or local governments.”

One of the reasons that the right to counsel is expensive is because the lawyers providing the representation must be trained and have offices, computers, and the
assistance of investigators and other paralegals. If they are private attorneys, they must receive adequate compensation for their services. If they are employed as public defenders, they must have reasonable salaries and benefits. In addition, the rules of the legal profession require that all attorneys who represent clients, including indigent clients, must be “competent” and “diligent” in doing so. Consequently, they cannot be allowed to have an unreasonable number of clients, lest they violate their duties as members of the bar and deprive their clients of the kind of representation that a private lawyer could be expected to provide. In addition, all states require that legal representation be made available in situations where the right to counsel is not constitutionally required, thus further straining the resources of public defense programs.

Chapter 1 also addresses why the right to counsel matters. The most compelling answer is that, in our adversary system of justice, fairness is served if both sides are represented by lawyers who are evenly matched in areas such as available time to devote to the case, training, experience, and resources. When the defense does not measure up to the prosecution, there is a heightened risk of the adversary system of justice making egregious mistakes. We have learned all too well during the past decade, with the advent of DNA evidence, that an unknowable number of genuinely innocent persons in the United States have been wrongfully convicted and sent to prisons. Usually this has happened due to police and prosecution errors or because of mistaken eyewitness identifications, though on occasion it has been due to clear abuses of law enforcement powers. Wrongful convictions also have occurred as a result of inadequate representation by defense lawyers. Whatever the reasons, for innocent persons to lose their liberty is a travesty. Equally troubling, it means that the guilty are free to roam without restraint, victimizing others, while the state pays to incarcerate those who have not transgressed against society. Well-trained lawyers and adequately funded systems of defense are essential to prevent this from happening.

Finally, effective programs of public defense are crucial to the public's trust in the legitimacy of its justice systems and confidence in its results. While politicians frequently fail to support adequate funding of indigent defense, fearing a lack of public support for such action, the evidence suggests that the public understands the issue better than the politicians may appreciate. Several years ago, a national, independent public opinion research organization polled 1,500 Americans and requested their views respecting indigent criminal defense. The results revealed overwhelming support for appointing and paying for lawyers on behalf of persons who could not afford one. The survey results are available at http://www.nlada.org/Defender/Defender_Awareness/Defender_Awareness_Indigent.

Chapter 2—Indigent Defense Today: A Dire Need for Reform

Over a period of many years, there have been numerous national reports that have exposed the countless problems in indigent defense and urged reforms, but the problems have persisted. Although the funding of indigent defense among state and local governments has increased considerably since the 1960's, inadequate financial
support continues to be the single greatest obstacle to delivering “competent” and “diligent” defense representation, as required by the rules of the legal profession, and “effective assistance,” as required by the Sixth Amendment. Moreover, the country’s current fiscal crisis, which afflicts state and local governments everywhere, is having severe adverse consequences for the funding of indigent defense services, which already receives substantially less financial support compared to prosecution and law enforcement.

Undoubtedly, the most visible sign of inadequate funding is attorneys attempting to provide defense services while carrying astonishingly large caseloads. Frequently, public defenders are asked to represent far too many clients. Sometimes the defenders have well over 100 clients at a time, with many clients charged with serious offenses, and their cases moving quickly through the court system. As a consequence, defense lawyers are constantly forced to violate their oaths as attorneys because their caseloads make it impossible for them to practice law as they are required to do according to the profession’s rules. They cannot interview their clients properly, effectively seek their pretrial release, file appropriate motions, conduct necessary fact investigations, negotiate responsibly with the prosecutor, adequately prepare for hearings, and perform countless other tasks that normally would be undertaken by a lawyer with sufficient time and resources. Yes, the clients have lawyers, but lawyers with crushing caseloads who, through no fault of their own, provide second-rate legal services, simply because it is not humanly possible for them to do otherwise. Finally, to complete the picture, we discuss in Chapter 2 a variety of factors that exacerbate caseload problems for indigent defense systems, such as “tough on crime” policies translated by legislatures into additional criminal laws, the need for defendants to be aware of the collateral consequences of conviction, the criminalization of minor offenses, the ever-increasing complexity of the law with which defense attorneys must be familiar, a lack of open file discovery practices by prosecutors, and specialty courts that impose additional time demands on defense attorneys.

Beyond excessive caseloads, there are other impediments to having successful indigent defense programs. Too often the problems stem from a lack of independence from the authorities that provide funding for the defense program. We tell stories in Chapter 2 of county officials, responsible for providing funds for indigent defense, subjecting chief public defenders to political pressures because their lawyers challenged the prosecution and did exactly what they were required to do in representing their clients. We also point out that a lack of independence from the judiciary sometimes impacts the selection, appointment, and payment of counsel. Lawyers deemed to be too aggressive may be excluded from appointments, or favoritism may be shown to certain lawyers, who are appointed to a disproportionate share of the cases.

Other difficulties encountered in efforts to provide effective defense services include a lack of experts, investigators, and interpreters; insufficient client contact; and inadequate access to technology and data. Usually, there are no enforceable standards governing the performance of defense counsel, little or no training of defense lawyers, and a lack of meaningful supervision and oversight of their performance. Another
problem is that defense lawyers are not always appointed to clients’ cases in a timely manner, causing defendants to remain in custody far longer than they would otherwise and counties to incur jail costs that could have been avoided had counsel been appointed earlier in the process.

So far, we have focused on situations when lawyers are provided for the accused, although sometimes later than they should be. But there is another dimension to the problem, namely, the total absence of counsel because defendants either are not advised or not adequately advised of their right to counsel. When a defendant is not adequately advised of the right to counsel, the waiver almost certainly would not withstand scrutiny as a valid waiver of the right to legal representation. The invalidity of the waiver, however, typically fails to come to light, as the waiver process is of low visibility and defects rarely surface in the appellate courts. There are still some lower courts, moreover, that do not maintain a record of proceedings, so there is no way to be sure exactly how counsel was offered to the accused and if the waiver of legal representation was valid. There also is considerable evidence that, in many parts of the country, prosecutors play a role in negotiating plea arrangements with accused persons who are not represented by counsel and who have not validly waived their right to counsel. Not only are such practices of doubtful ethical propriety, but they also undermine defendants’ right to counsel.

Many of the Committee’s findings reported in Chapter 2 are virtually identical to a recently completed study of indigent defense services in misdemeanor cases in the United States conducted by the National Association of Criminal Defense Lawyers (NACDL). Publication of this study is expected to be released early in 2009. Among the problems identified in the forthcoming NACDL report are the following: (1) defendants unrepresented in misdemeanor courts because they have not properly waived the right to counsel; (2) excessive caseloads of public defenders and assigned counsel that undermine effective representation and lead lawyers to violate their ethical obligations; (3) defendants pleading guilty to misdemeanor offenses without an understanding of the applicable and potentially severe collateral consequences; (4) a lack of investigators, experts, and mental health professionals; and (5) the over-criminalization and prosecution of minor infractions and offenses, which drains resources that would otherwise be available for more serious offenses.

Chapter 3—How to Achieve Reform:
The Use of Litigation to Promote Systemic Change in Indigent Defense

There is no better evidence of the problems in implementing the Supreme Court’s right to counsel decisions than the enormous number of lawsuits that have been brought over a period of many years and the litigation currently pending, in which indigent defense representation has been challenged in the courts. Many times, as reflected in Chapter 3 (and in other chapters), these challenges have been successful and have led to improvements.

The lawsuits that we discuss were brought in federal and state courts in the following

In addition, as this Report was completed, litigation respecting indigent defense was pending in at least seven states, five of which are reviewed in Chapter 3. In Michigan and New York, lawsuits have been brought challenging entire systems for the delivery of indigent defense services. In Florida, Kentucky, and Tennessee, litigation is pending in which defense lawyers have challenged the actions of trial courts in seeking to require public defense programs to handle caseloads alleged to be excessive.

In concluding Chapter 3, we sum up lessons learned in seeking indigent defense reforms through litigation. We suggest that actions should be instituted pretrial on behalf of all, or a large class of indigent defendants, in order to secure a favorable remedy with broad impact. We also stress the importance of involving pro bono counsel from large law firms or the involvement of lawyers from public interest legal organizations, since systemic reform litigation is time consuming and requires an expertise not typically possessed by public defense practitioners. We also stress the importance of strong factual support on behalf of the claims asserted and discuss the role of the media and public support in fostering a climate likely to lead to a successful outcome.

Chapter 4—How to Achieve Reform: The Use of Legislation and Commissions to Produce Meaningful Change

In this chapter, we set forth the organizational structures for delivering indigent defense services in the 50 states and devote particular attention to developments since the year 2000. We note that 11 states have enacted legislative changes during the past eight years and describe the kinds of changes that have occurred. In addition, we review the impetus for legislative reforms and the obstacles to achieving change.

Currently, there are 27 states that have organized their defense services either entirely or substantially on a statewide basis. Of these, there are 19 states that have a state commission with supervisory authority over the state’s defense program headed by either a state public defender or state director; in the other eight states, there is a state public defender but not a state commission to provide oversight. In the remaining 23 states, there is either a state commission with partial authority over indigent defense (nine states); a state appellate commission or agency (six states); or no state commission of any kind (eight states).

Based upon our study of defense programs, we offer a number of suggestions about what is necessary in order to have a successful statewide oversight body. We urge that the state’s commission be an independent agency of state government and that its
placement within any branch of government be for administrative purposes only. We also suggest that the members of the commission be appointed by a diverse group of persons so that the members are not responsible to just one or two appointing authorities to whom they feel a sense of obligation. A range of other specific matters are explored as well, including the duties that should be given to commissions so that they will be able to improve the quality of representation in the state. Finally, we consider the role of study commissions in achieving indigent defense reforms, pointing out the contributions that they have made in the past and noting the several current commissions that are focused on indigent defense reforms.

Chapter 5—Recommendations and Commentary

This chapter contains the Committee’s 22 Recommendations. Each of the recommendations is accompanied by Commentary with cross-references to other parts of the Report that explain and support our positions.

One of our most important recommendations is that indigent defense should be independent, non-partisan, organized at the state level, adequately funded by the state from general revenues, and overseen by a board or commission. See Recommendation 2.

Of equal significance is our recommendation that the federal government assist the states in the delivery of indigent defense services. For more than 45 years, the states and/or counties have struggled—and continue to struggle—to implement the Gideon decision and its progeny. The right to counsel is a federal guarantee based upon the Sixth Amendment to the United States Constitution, and it is entirely fitting that the federal government assist in its implementation. See Recommendations 12 and 13.

Finally, we emphasize that, in order to achieve reform at the state level, it is vital that a coalition of partners be engaged as part of a comprehensive strategy. The judiciary, bar officials, community leaders, public interest organizations, national associations of lawyers, and others need to be enlisted as partners to persuade the legislature of the importance of an adequate statewide program of indigent defense. To succeed, empirical documentation of the problems, as well as favorable media coverage, will be needed in order to generate a positive climate of public support.

All of these efforts are essential investments in America’s future because, as Judge Learned Hand said many years ago: If we are to keep democracy, there must be a commandment: Thou shalt not ration justice.