



NO EXCEPTIONS

A CAMPAIGN TO GUARANTEE A FAIR JUSTICE SYSTEM FOR ALL

Volume 3: The Need for Independent Public Defense Systems



GIDEON VS. WAINWRIGHT

Forty years ago, the U.S. Supreme Court ruled in the landmark case of *Gideon v. Wainwright* that the Constitution guarantees access to legal representation for all Americans facing criminal charges. If someone cannot afford to hire an attorney, the court is required to appoint one. The Court later declared that the “constitutionally protected independence of counsel” is a critical component of effective representation (*Strickland v. Washington*, 1984).

Unfortunately, public defense systems do not always operate in an independent manner. Judges and politicians should have no more control over lawyers with poor clients than those with paying ones. But in many states across the country, they do. When public defenders are under direct judicial or political supervision, they are subject to influence that may prevent them from providing the best defense for their client.

To cut costs, speed up cases or simply appear tough on crime, judges and politicians may exert pressure or control over public defense attorneys and deter them from vigorously investigating and preparing a defense. Retained attorneys – for people who can afford them – do not face these same kinds of political influence and judicial supervision.


THE PROBLEM:

Without Independent Systems, the Promise of *Gideon* Is Compromised.

Without a system that guarantees defense attorneys are able to operate free of judicial or political influence, the promise of *Gideon* cannot be met.

Which attorney gets a case, how much the attorney is paid, whether funds will be approved for an expert or an investigator and whether a chief public defender will be hired or fired are all decisions that can be influenced by judges or other elected officials. An independent system diminishes this influence by limiting political or judicial oversight.

The opportunities for judicial or political influence vary based on the type of public defense system. In an *assigned counsel system*, for example, the judge may pick attorneys to handle individual cases and often enjoys free reign over who to pick and how much money can be spent for the defense. Some judges base these decisions on the attorney’s reputation for moving cases along quickly and cheaply instead of an attorney’s legal qualifications.



“Independence is critically important.... the indigent defense function must be independent from both the political and judicial branches.... defender independence furthers both the goal of judicial impartiality and the client’s right to the effective assistance of conflict-free counsel.”

U.S. Department of Justice, “Redefining Leadership for Equal Justice: Report of the National Symposium on Indigent Defense 2000”

The practice of using *contract public defenders* often leads to a similar compromise. Under this system, a county commissioner or a judge might determine which attorney will get the business based on the lowest bid – not qualifications or experience. This process can encourage attorneys to constantly placate the “decision-makers” by processing cases quickly and avoiding motions, trials or requests for experts or investigators – practices that can be a vital part of the defense, but also take extra time and money.

In a system that employs a full-time *public defender agency*, the defense attorney’s approach may also be influenced – especially if the chief public defender is a political appointee of an elected official, such as a governor or a county chief commissioner. In this instance, public defenders who fight hard for their clients may risk offending their political patron. Some public defenders have paid for their zeal with their jobs, leaving a chilling effect on their peers.

In each case, the public defense system is undercut by political influence and judicial supervision in a way that would never be tolerated for clients with enough money to hire a private lawyer. Clearly, *Gideon’s* promise of equal justice for all is not being met.

THE CAMPAIGN:

No Exceptions

The public defense crisis in America is a serious nationwide problem – there is not one state that fully delivers on the promise of the *Gideon* ruling. Many states fall woefully short.

The American Bar Association (ABA) has identified 10 principles that, if implemented by states, would strengthen public defense in America. The *No Exceptions* campaign is based on these principles and aims to remind each state of its responsibility to fulfill *Gideon’s* promise.

The first of the ABA’s *Ten Principles* states that the public defense system must be independent. Public defense attorneys should be free to mount the best possible defense for their clients without undue influence. **There should be no exceptions to this rule.**

Without the guarantee of qualified counsel, free from outside pressures, the American justice system is unfair. It is that simple.

To learn more about the campaign and the issue, visit www.NoExceptions.org.

WHAT SHOULD HAPPEN

Independent Systems

For a public defense system to be independent, oversight cannot be conducted by a judicial, legislative or executive agency, but must instead fall under an independent board or commission made up of individuals appointed by many different officials and political parties. Control of the public defense system must not be left to a single official.

WHAT REALLY HAPPENS

Political and Judicial Influence

The ruling in *Gideon v. Wainwright* applies to every state. Yet, in states across the country, public defense attorneys are subjected to a variety of political and judicial pressures that hinder their ability to adequately represent their clients.

To document how widespread this problem is, the following are public defense systems that suffer from a lack of independence.

CALIFORNIA

Elected county supervisors have complete discretion over the selection of a chief public defender, the firing of the public defender, the elimination of the office and the choice of the contract lawyer or law firm who bids to do the work most cheaply. One contract lawyer expressed pride in a court deposition saying that he pleads up to 70% of his clients guilty at the first court appearance after spending 30 seconds explaining the prosecutor's "offer" to the client.

Deposition of Jack Suter, Shasta County Contract Defender, in Fitzmaurice-Kendrick v. Suter, March 1999.

FEDERAL SYSTEM

Chief federal public defenders serve at the pleasure of the judges in their circuit. One of the best public defenders, in Maryland – famed for training public defenders from all over the country – was terminated after judges took offense at a leaked copy of an internal office memo exhorting his staff lawyers to represent clients aggressively. A 1991 review committee appointed by U.S. Chief Justice Rehnquist had urged that the appointment power be switched to an independent national commission to prevent possible "abuse" by judges, but the recommendation went nowhere.

"Too Independent," The American Lawyer, Jan/Feb 1993

GEORGIA

In many counties, judges retain authority over the appointment of public defense attorneys and the selection and renewal of lawyers' contracts for public defense services. A recent study found that, "two of the biggest problems facing indigent defense in Georgia and efforts to improve it are its lack of independence from the judiciary, and a steadfast unwillingness on the part of some judges in the state to support a system that grants this independence."

"Status of Indigent Defense in Georgia: A Study for the Chief Justice's Commission on Indigent Defense," The Spangenberg Group, December 12, 2002. New legislation in May 2003 established an independent state board with power to hire and fire public defenders, and to write and enforce standards.

LOUISIANA

In Caddo Parish, judges are required to appoint members of the local indigent defender board from a list provided by the local bar association. However, during a recent budget crunch, the judges dismissed three of the local bar association's nominees and chose three of their own people to fill those slots.

"State Must Fund Justice for Its Poor," Shreveport Times, May 1, 2003.

Examples of systems in which the public defense function is not independent, including the selection, funding, and payment of defense counsel: The federal system and states such as: AL, AK, AR, CA, DE, IA, LA, ME, MS, NM, NV, OH, PA, TX, VA, VT, WY

stories and statistics about

MISSISSIPPI

Judges and county administrators control the public defense attorneys. In one Mississippi county, a circuit judge not only assigns contracts to attorneys, but also decides when to give raises and how much to give each attorney.

"Assembly Line Justice: Mississippi's Indigent Defense Crisis." NAACP Legal Defense and Education Fund, Inc. Feb. 2003

"Lawyers for the poor cannot be vigorous advocates for their clients when their continued employment depends upon staying in a judge's good graces."

"Assembly Line Justice: Mississippi's Indigent Defense Crisis." NAACP Legal Defense and Education Fund, Inc. Feb. 2003

PENNSYLVANIA

County commissioners appoint chief public defenders in almost every county and control the public defenders' budgets. Judges have no formal standards for selecting and assigning contract attorneys, leaving them free to appoint friends and associates instead of the most qualified attorneys for the job.

"Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System," March 2003.

States where judges have total discretion over the appointment and compensation of private lawyers appointed to represent low-income defendants: **AL, AR, ME, OH, VA**

TEXAS

According to a 2000 study, four in ten judges who appoint lawyers in criminal cases admitted to favoring personal friends. Roughly one-third admitted to favoring attorneys who politically supported or contributed money to their latest reelection campaign, and almost half admitted to appointing attorneys based on their reputation for moving cases quickly, regardless of the quality of the defense.

Survey conducted for State Bar of Texas, analyzed in "Muting Gideon's Trumpet: The Crisis in Indigent Defense in Texas," 9/22/00. Legislation was passed to limit judges' power over appointments in 2001.

VERMONT

The state's defender general was summarily terminated by the governor in 2001. The defender general was doing a top-quality job. However, his advocacy for more staff to meet rising caseloads produced "a perennial tension" with the governor, who has absolute statutory power to fill the position with his own person.

"Dean Names Rutland lawyer next defender general," Barre-Montpelier Times Argus, August 2001.

States where the governor alone appoints the state chief public defender:
AR, DE, IA, NV, NM, VT, WY

The Solution:

AN INDEPENDENT

For a public defense system to be truly independent, oversight must be provided by an independent board or commission – not judges or other appointed or elected officials.

Where there is a public defense agency – whether a governmental agency or a nonprofit organization operating under a contract with a county – the board or commission serves as a buffer between the agency and the political or judicial authorities. Such a board is usually made up of attorneys and community representatives, but never judges, prosecutors or police. The members are appointed by different leaders of the criminal justice and political branches of both political parties – no single person has unchecked control.

Where individual lawyers are appointed one case at a time, there must be a professional administrator of the system whose job is to set standards of experience and training; sort available attorneys into lists according to their skill level; provide fair compensation for attorney time and expenses; and make sure that ongoing training is available. The judge's job is only to select the next attorney on the list.

An independent oversight body:

- * **Enables judges to provide neutral arbitration over cases and remain detached from the parties who appear before them.**
- * **Makes it clear to political figures that the job of a public defender is constitutionally mandated with no room for political maneuvering based on headlines or polls.**
- * **Ensures that people who may face public defenders in court, such as prosecutors and members of law enforcement, are not involved in public defense services.**
- * **Levels the playing field between people facing criminal charges who have money and those who do not.**

OVERSIGHT BODY

“...the primary means of ensuring defender independence is to provide for oversight by an independent board or commission, rather than directly by judicial, legislative, or executive agencies or officials.”

U.S. Department of Justice, March 2000 report on indigent defense (“Improving Criminal Justice Systems Through Expanded Strategies and Innovative Collaborations”)

According to the ABA’s ten principles, the selection, funding, and payment of public defense counsel should be independent....a nonpartisan board should oversee defender, assigned counsel, or contract systems...the selection of the chief defender and staff should be made on the basis of merit....

DOES YOUR STATE DELIVER ON THE PROMISE OF COUNSEL TO ALL ITS CITIZENS?

Find out how the public defense system in your state delivers on its responsibility to provide an independent system for assigning public defense attorneys. Start by asking the following questions:

- 1.** Did a single elected official appoint the chief defender in your area?
- 2.** Do judges have complete freedom to pick appointed attorneys in your area and decide how much they get paid?
- 3.** Do judges have the power to increase or decrease attorneys' payment vouchers?
- 4.** Who do your public defense providers "work for?"

FOR MORE INFORMATION

If you would like to schedule an interview or to speak to a state-based contact for indigent defense issues, please contact the Gideon Desk at 202-293-6200, ext. 205 or info@noexceptions.org.

For more information on the issue, visit:

American Bar Association,
www.abalegalservices.org/sclaid
www.abanet.org

National Association of Criminal Defense Lawyers
www.nacdl.org

National Legal Aid & Defender Association
www.nlada.org