

**Representation of Indigent Defendants in Criminal Cases:
A Constitutional Crisis in Michigan and Other States?**

Testimony of

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Chairman Scott, Ranking Member Gohmert, and Members of the Committee and Subcommittee, thank you for the opportunity to speak today on the subject of the representation of indigent defendants in criminal cases. My name is Erik Luna, and I am a law professor at Washington and Lee University School of Law and an adjunct scholar with the Cato Institute.¹ I specialize in criminal law, criminal procedure, and allied areas of law and public policy. In my allotted time, I will briefly discuss some concerns about the possibility of federal involvement in the criminal defense function in state criminal justice systems.

1. THE CONDITION OF INDIGENT DEFENSE REPRESENTATION

To begin, however, it is important to express my agreement with much of the critical commentary in this area, including the opinions of my fellow panelists. There are American jurisdictions where the accused receives the facade of legal representation, which at best meets the letter of *Gideon*² but certainly not its spirit, and at worst fails to maintain even the pretense of constitutional compliance.

The report that inspired today's hearing paints a somber picture of indigent defense in Michigan.³ Some of the problems are directly attributable to parsimonious decision-making, including inadequate attorney compensation and the lack of resources for investigators, expert witnesses, and support staff. Other problems are derivative of deficient funding, such as excessive caseloads for defense lawyers and the absence of meaningful training programs. Still other problems may have some loose causal connection to insufficient funding but are more properly ascribed to individual behavior and structural choices – grossly incompetent and unethical lawyering, for instance, or undue judicial involvement and interference with the defense function.

Michigan is not alone, however, as chronicled in a series of reports commissioned or written by the American Bar Association and its Standing Committee on Legal Aid and Indigent Defendants (ABA Standing Committee).⁴ The accounts are disconcerting to those who care about criminal justice, describing in detail the state failures to meet the basic principles of public defense delivery systems enumerated by the ABA and analogous state bodies.⁵ Although one might quibble with some of the assertions made by the authors, by and large the reports and principles are unobjectionable, as are most of the proposed solutions to the problems of indigent defense.

¹ All opinions expressed and any errors herein are my own.

² *Gideon v. Wainwright*, 372 U.S. 335 (1963).

³ NATIONAL LEGAL AID & DEFENDER ASSOCIATION, TRIAL-LEVEL INDIGENT DEFENSE SYSTEMS IN MICHIGAN, A RACE TO THE BOTTOM – SPEED & SAVINGS OVER DUE PROCESS: A CONSTITUTIONAL CRISIS (June 2008).

⁴ See ABA STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, 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 (Dec. 2004). See also "State and Local Indigent Defense Studies & Reports," ABA Standing Committee on Legal Aid and Indigent Defendants, available at www.abanet.org/legalservices/sclaid/defender/reports.html#sta.

⁵ See, e.g., ABA STANDING COMMITTEE ON LEGAL AID & INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (Feb. 2002); STATE BAR OF MICHIGAN, ELEVEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (Apr. 2002).

2. REPORT RECOMMENDATIONS

The ABA Standing Committee has recommended that state governments increase their funding for indigent representation and provide resource parity between prosecutors and defense attorneys.⁶ Likewise, the Michigan report calls upon state government to fulfill its financial responsibility for indigent representation rather than passing on the bill to the individual counties.⁷ Other recommendations are not explicitly fiscal in nature, although their dictates may involve funding of some sort: the creation of state organizations to provide oversight of indigent defense, the obligation of defense counsel to refuse excessive caseloads, the elimination of judicial interference or even vindictiveness against defense counsel, and the active involvement of state and local bar associations in evaluating, monitoring, and reforming indigent defense systems.⁸

In general, the recommendations mirror the problems detailed in the reports. They also place the onus to act upon the entities most liable for the current status quo. For instance, state bar associations often are responsible for licensing attorneys and ensuring their continued education and compliance with ethical and legal standards. In such cases, bar associations must accept at least part of the blame for system-wide failures of professional responsibility in indigent representation – and in the end, they may be in the best position to remedy such failures.⁹

The most culpable entities, however, are the elected and appointed officials of the relevant states. They are the ones who fail to provide sufficient funds for indigent representation and enact the sometimes dubious criminal laws and punishments that fill state penal codes. Likewise, state and local officials make the choices that overload the system with arrests and prosecutions. These officials also have the power to provide the necessary resources for defense counsel, to pare back their bloated penal codes and reduce lengthy sentences, and to be more prudent in the enforcement of criminal laws on the streets and in courthouses.

Within constitutional constraints, state officials ought to be encouraged to meet their obligations, whether by increasing funding of indigent representation or by reducing the number of criminal cases and thus the need for defense counsel. If they refuse to do so, these officials should be held to answer in the appropriate tribunal pursuant to a simple but essential ideal: A jurisdiction may not deprive individuals of their liberty through a process that denies basic rights, including the Sixth Amendment right to counsel.

Along these lines, today's hearing may serve a laudable agenda: investigating the problem of indigent representation in state criminal justice, placing the spotlight on those states with deficient systems and encouraging them to comply with their constitutional obligations, and even providing fodder for judicial decision-making. I would like to raise some concerns, however, if the objectives of the hearing prove far broader. Specifically, the ABA Standing Committee has recommended that the federal government provide substantial financial support for indigent

⁶ GIDEON'S BROKEN PROMISE, *supra*, at 41.

⁷ See RACE TO THE BOTTOM, *supra*, at 1-13.

⁸ See GIDEON'S BROKEN PROMISE, *supra*, at 42-45.

⁹ Admittedly, law schools bear some blame and should also be called upon to provide solutions.

representation in state criminal justice systems, including the creation of what looks to be a rather large entity to administer these funds.¹⁰

3. SIXTH AMENDMENT BAILOUT

On its face, federal funding might appear to be a sound public policy to address the dilemma of indigent representation in various places around the nation. But it may be motivated by a widely held and erroneous assumption, namely, that a crisis in America necessarily requires congressional action. Indeed, there are circumstances where federal involvement might not only fail to improve a particular problem but may also exacerbate a larger structural infirmity. To help conceptualize the issue, let's consider congressional funding of indigent defense in a given jurisdiction as a sort of *bailout*. This may be a loaded term in the current state of affairs, but such action would meet the basic definition: one entity (the federal government) rescuing another entity (a state) from its financial distress.

The institutional beneficiaries of a Sixth Amendment bailout, state lawmakers, are not viewed with the jaundiced eye currently focused on corporate America. Nonetheless, a bailout of those states that fail to meet their constitutional duties has a distinctly troubling aspect, given that they could meet their obligations by: [1] fully financing indigent representation through increased taxes or the diversion of funds allocated for other items; or [2] reducing the number of defendants and thus the need for indigent representation by means of decriminalization, diversion, lower sentences, and tempered enforcement. The states have chosen neither option, however, doubtlessly because such actions are viewed as bad politics.

There is a real question of fairness if the federal government were to bail out states that have failed to hold up their constitutional responsibilities: *Why should citizens in a state that meets its Sixth Amendment-based financial obligations have to pay for a state that does not?* Under most circumstances, it would be curious (if not perverse) for the federal government to provide funding to a state precisely because it violates the Constitution. Imagine, for instance, a county sheriff's department that has the ability to provide jail inmates adequate food, clothing, shelter, and so on, but refuses to do so for political reasons. Or imagine a police department that systematically violates the Fourth Amendment rights of pedestrians and motorists. The appropriate response would not be to provide these entities federal funds to, respectively, maintain humane conditions of confinement and refrain from conducting illegal searches and seizures. Instead, they should be given an ultimatum: Meet the constitutional requirements or face, among other things, civil rights litigation.

In its title, the Michigan report uses the phrase "race to the bottom," presumably in reference to the tendency of counties to use the least expensive and most efficient means of providing indigent representation. However, a different set of incentives might arise from congressional funding of state indigent representation. If a given state does not bear the full costs of its criminal justice decisions and instead is able to externalize a politically disagreeable expense on another entity – in this case, passing along the funding of state indigent defense to the federal government – state officials may have little incentive to temper their politically self-serving decisions that extend the criminal justice system. In a worst-case scenario, those states

¹⁰ GIDEON'S BROKEN PROMISE, *supra*, at 41-42.

that have met the constitutional requirements may be tempted to skimp on their own budgeting for indigent representation with an eye toward receiving federal support.

To be sure, these are only broad and somewhat abstract public policy considerations, stated in the absence of a concrete budget proposal, not the inexorable results of federal funding for state indigent defense. Opposing arguments may point to hopelessly dysfunctional political processes at the state level, for instance, or various legislative techniques that might avoid perverse incentives for funding recipients. My mind remains open on this issue, and, of course, the devil of any legislation would be in its details. Nonetheless, Congress should consider the unintended consequences and inter-jurisdictional equity of absorbing the costs owed by a given state, resulting from the political choices and neglect of its officials, when that state can and, in all good conscience, should pay the bill.

4. FEDERALISM

Another concern involves the constitutional principle of federalism. Grounded in the text and context of the nation's charter, federalism limits the powers of national government and prevents federal interference with the core internal affairs of the individual states. As James Madison famously wrote in *The Federalist No. 45*, the powers delegated to the federal government would be “few and defined,”

exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.¹¹

Federalism was enshrined in the U.S. Constitution by specifically enumerating the powers of the federal government¹² and declaring that all other powers were “reserved to the States respectively, or to the people.”¹³ Since the founding, the Supreme Court has stated on a number of occasions that the federal government does not have a general police power.¹⁴

Among the areas that the Framers sought to reserve to the states was “the ordinary administration of criminal and civil justice.”¹⁵ The Constitution mentioned only a handful of crimes in its text, all of which were consistent with the design and limits of federalism.¹⁶ In fact, it was unthinkable to the Framers that the federal government would adopt a full-scale penal code, let alone displace or otherwise interfere with the state criminal justice systems.¹⁷ As Chief Justice John Marshall would later opine, Congress “has no general right to punish murder committed within any of the State,” and “it is clear that Congress cannot punish felonies

¹¹ THE FEDERALIST No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961).

¹² See U.S. CONST. art. 1, §8.

¹³ U.S. CONST. amend X.

¹⁴ See, e.g., *Brown v. Maryland*, 25 U.S. 419, 443 (1827); *United States v. Lopez*, 514 U.S. 549, 566 (1995).

¹⁵ THE FEDERALIST No. 17, at 120 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

¹⁶ See U.S. CONST. art. 1, §8, cl. 6 (counterfeiting); U.S. CONST. art. 1, §8, cl. 10 (piracy, felonies on the high seas, offenses against the law of nations); U.S. CONST. art. 3, §3 (treason).

¹⁷ See, e.g., RUSSELL CHAPIN, UNIFORM RULES OF CRIMINAL PROCEDURE FOR ALL COURTS 2 (1983).

generally.”¹⁸ In more recent times, the Supreme Court has reiterated these limitations on federal involvement in local criminal justice matters, given that the “[s]tates possess primary authority for defining and enforcing the criminal law.” As such, constitutional concerns are raised whenever Congress effects “a significant change in the sensitive relation between federal and state criminal jurisdiction.”¹⁹

There are numerous arguments in favor of federalism in this area. In a pluralistic society like ours, citizens in different jurisdictions are likely to have distinct views on the substance and process of criminal justice. State and local decision-makers are more likely to be attuned to such preferences, given their closeness to constituents and the greater opportunity of citizens to be involved in state and local government, including the legal system. Unencumbered by national dictates, states may even become laboratories of experimentation in criminal justice. In the oft-repeated words of Justice Louis Brandeis, “It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”²⁰ Should individuals find unbearable the local or state approach to crime and punishment, federalism allows them to vote with their feet, so to speak, by moving to another county or state.

These benefits may be impeded by federal interference with state criminal justice systems, which inevitably implicate norms and values that vary by jurisdiction. Most importantly, it may jeopardize “the principal benefit of the federalist system,”²¹ the protection of individual liberties. Federalism and its allied doctrine, the separation of powers, create multiple layers of government, all duty-bound to the people rather than to each other. This provides a structural check on every level of government, preventing the concentration of power and the ensuing danger of oppression. “Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”²²

All of this may be cold comfort for indigent defendants and their counsel in financially delinquent states. But to be clear, federalism in no way relieves a jurisdiction of its obligations to comply with other constitutional principles, such as the right to counsel. So let me reiterate: The states can and must ensure that criminal defendants receive the type of representation demanded by the Sixth Amendment. What federalism restricts is the involvement of Congress in the internal affairs of the states, allowing each jurisdiction to make independent decisions that comport with citizen preferences, including those with regard to crime and punishment. Above all, it checks tyranny by preventing the accumulation of too much power in too few hands, a problem that may not seem relevant here but all too often manifests itself in criminal justice systems.

¹⁸ *Cohens v. Virginia*, 18 U.S. 264, 426, 428 (1821).

¹⁹ *Lopez*, 514 U.S. at 561 n.3 (internal citations omitted).

²⁰ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

²¹ *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

²² *Id.* See also *Lopez*, 514 U.S. at 553.

5. CONCLUDING THOUGHT

I would like to conclude today with a recommendation of my own: The federal government should drastically downscale its criminal justice portfolio, including the funding it provides state and local law enforcement. Federalism is not a law-and-order, anti-defendant political gimmick. It is a fundamental principle, grounded in the Constitution, that restricts federal involvement in state affairs, whether Congress wants to incentivize and even command local police and prosecutors to pursue particular crimes or instead seeks to fund indigent representation in state courts.

In turn, I would encourage Congress to reexamine the federal criminal justice system. According to a recent estimate, there are at least 4,450 federal crimes in the U.S. Code,²³ a number that would be outrageous in a jurisdiction with a general police power. Particularly troubling are those crimes that duplicate state laws or dispense with traditional constraints on culpability, such as a *mens rea* requirement.²⁴ Moreover, the federal sentencing is in dire need of a make-over to replace the virtually incomprehensible U.S. Sentencing Guidelines scheme as well as the inflexible and often draconian mandatory minimum sentences.²⁵

By reforming the federal criminal justice system, Congress would be providing a valuable and perfectly constitutional service to the states – the federal government as role model, not dictator or underwriter.

Again, thank you for the opportunity to speak today, and I look forward to answering any questions you may have.

²³ John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, HERITAGE FOUNDATION LEGAL MEMORANDUM No. 26, June 16, 2008, available at www.heritage.org/Research/LegalIssues/upload/lm_26.pdf. See also ABA TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, *THE FEDERALIZATION OF CRIMINAL LAW* (1998).

²⁴ See, e.g., Erik Luna, *The Overcriminalization Phenomenon*, 54 AMERICAN UNIVERSITY LAW REVIEW 704 (2005).

²⁵ See, e.g., Erik Luna, *Gridland: An Allegorical Critique of Federal Sentencing*, 96 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 25 (2005).