

Report from NACDL Working Group on the Role of the Federal Government in Public Defense

Members

- John Arrascada
- Steven Asin
- Anthony Benedetti
- Travis Finck
- Michael Heiskell
- Deborah Leff
- David Patton
- Sonya Pfeiffer
- Addy Schmitt
- NACDL Staff: Bonnie Hoffman

Process

In reaching its recommendations, the Working Group (WG) held 2 meetings and reviewed numerous resources. A list of some of those resources can be found in the Appendix to this Report.

The WG first met on July 26, 2021. At that time the group discussed the core concepts and models being proposed for the creation of a “Defender General” as well as examining some of the existing federal structures. The WG also identified areas to explore and learn more about to help inform its work.

The WG’s second meeting, on August 23rd, featured a discussion with [Melanca Clark](#). Currently the CEO of Hudson-Webber Foundation, Ms. Clark previously served a variety of roles within the Obama administration including with the Office for Access to Justice (ATJ). Ms. Clark provided the WG with background about DOJ’s structure, the work of ATJ, and some of the strengths and weaknesses of utilizing the federal government to address or influence state-level public defense.

Based on these meetings, a review of the relevant material, and the discussions of the group, the WG proposes a set of recommendations for NACDL. To understand the basis for these recommendations, the group provides the following information.

Background

Over the past several years there have been various calls for the creation of a federal entity to pursue issues of import to the defense function. The concept has taken several forms, including the call to create a narrow, specific defense counterpart to the U.S. Solicitor General; an organization to oversee federal public defense; and a broader, all-encompassing agency to countermand the role of the Attorney General and the Department of Justice¹.

¹ Other uses of the “Defender General” concept have included calls for an agency to “push back against faulty legal arguments by government attorneys that advance the president’s political interests”. See e.g. [“The Census Case Shows Why We Need a Defender General”](#) by Matthew R. Segal, *Slate*, June 27, 2019.

Supreme Court Advocate Model:

One concept for the Defender General is the creation of an analog to the US Solicitor General in an effort to “level the playing field” at the U.S. Supreme Court. [Over the past several years](#), some Supreme Court Justices have called attention to the lesser levels of Supreme Court experience of advocates for defendants in criminal cases. Both [Justice Kagan](#) and Justice Sotomayor have lamented the experience gap between criminal defense advocates and others who appear regularly before the U.S. Supreme Court. [Research on the issue](#) indicates that prior experience before the Supreme Court improves the advocate’s efficacy.²

This Defender General would represent “the interests of criminal defendants generally,” even when those interests diverge from the interests of the particular defendant in the case, as well as serving to represent individual defendants before the Supreme Court and filing amicus briefs. Most recently this model was highlighted in a 2020 law review article by Daniel Epps and William Ortman, [The Defender General](#)³. The concept received national press attention, including coverage by [The Atlantic](#) and [The New York Times](#). (“The problem, they say, is structural-prosecutors can choose which cases to appeal, with an eye towards shaping the law rather than preserving every conviction. Criminal lawyers, however skilled, must defend their individual clients.”)⁴

Federal legislation supporting the creation of a “Defender General” specifically to assist in advocacy before the U.S. Supreme Court was proposed by Senator Corey Booker in 2017. Senator Booker’s bill, the [Clarence Gideon Full Access to Justice Act](#), called for a federal corporation that would engage in advocacy before the US Supreme Court, and, if resources permitted, before state supreme courts, on behalf of defendants in criminal cases. The corporation would also file amicus briefs, serve as a consultant and resource for defenders with Supreme Court cases, and provide training for Supreme Court advocates.⁵ The Bill did not garner support and did not advance out of committee.

Federal Public Defender Model:

The need for a more independent federal public defense system has been a topic of discussion since the early days of the 1964 federal Criminal Justice Act, which established a program for the appointment and payment of private attorneys in federal criminal actions that is administered by an amalgam of Judicial Branch entities, including district courts, circuit courts of appeals, the Judicial Conference of the United States, and the Administrative Office of the United States Courts. In 1970 Congress

² *Human Capital in Court: The Role of Attorney Experience in U.S. Supreme Court Litigation*, Michael J. Nelson, Lee Epstein, Feb. 21, 2021. See also, “In ever-clubbier bar, eight men emerge as Supreme Court confidants,” [Reuters](#), Dec. 8, 2014.

³ *The Defender General*, Daniel Epps and William Ortman, 168 U. Penn. L. Rev. 1469 (2020)

⁴ [“A Proposal to Offset Prosecutors’ Power: The ‘Defender General’”](#) by Adam Liptak, [New York Times](#), January 27, 2020.

⁵ A House companion bill was introduced by Representative Sean Maloney (D-NY).

created the first federal and community defender offices, and while doing so, envisioned the eventual creation of an independent agency to oversee its operation.

The committee recognizes the desirability of eventual creation of a strong, independent office to administer the federal defender program. It considered as a possibility the immediate establishment of a new, independent official – a “**Defender General of the United States.**” It also considered establishing a special directorate for defender programs within the Administrative Office of the United States.⁶

Ultimately Congress elected not to create either a Defender General or some other independent agency. The federal defender program was placed under the existing CJA scheme of Judicial Branch authorities. Since 1970, there have been repeated studies of the federal public defense system, including NACDL’s work, [Federal Indigent Defense 2015: The Independence Imperative](#), and the 2017 Report of [the Ad Hoc Committee to Review the Criminal Justice Act Program](#), all of which come to similar conclusions—the need for an independent agency to oversee the federal public defense system.⁷

The [Ad Hoc] Committee unanimously recommends that Congress create an independent Federal Defender Commission within the judicial branch of government, but outside the oversight of the Judicial Conference. The Commission would have sole authority to set policy and practices related to the provisions of federal defense, a system that nearly 250,000 people each year depend upon for effective representation in federal court.

Overarching Defender General Model

Another model for the “Defender General” envisions the [creation of a single agency](#) that would serve as the umbrella for a large number of defense functions. In this model, the Defender General would be a legal system counterpart to both the criminal division of DOJ and the Solicitor General, while also litigating systemic constitutional violations and enforcing and monitoring consent decrees (as currently done by the Civil Rights Division of DOJ and the Access to Justice Office), administering grant funds and providing technical assistance (as currently done by the Bureau of Justice Assistance), serving as a clearinghouse for defense data (as currently done by the Bureau of Justice Statistics) and serving in role to create and promote defense policy.⁸

Relevant and Pending Federal Actions and Agencies That Impact Public Defense

Numerous federal actions and efforts are relevant to considering the underlying issues relating to local, state, and federal public defense and how that would affect any Defender General model.

⁶ Senate Report No. 91-790, 91st Cong. 2d sess. April 23, 1970. (Emphasis added).

⁷ See also, David E. Patton, [The Structure of Federal Public Defense: A Call for Independence](#), 102 Cornell L. Rev. 335 (2017).

⁸ See e.g. [Dean’s Desk: The United States needs a defender general](#), by Andrea Lyon, [The Indiana Lawyer](#), Oct. 18, 2016.

Current federal organizations that impact public defense

Judicial Conference of the United States (JCUS) and the Administrative Office of the U.S. Courts (AOUSC)

The current federal public defense system, designated by Congress as the Defender Services Program, is overseen by the JCUS, which sets policies governing all aspects of the program, advocates before Congress for program funding, establishes a budget and staffing level for each public defender organization, and controls resources available to federal defenders to advocate in Congress on behalf of the defense function. The JCUS operates on a committee system and, while various USJC committees have jurisdiction over significant aspects of the Defender Services program, the JCUS's Defender Services Committee (DSC) has primary authority for proposing and implementing Defender Services Program policies. In particular, the JCUS has authorized the DSC to approve annual funding amounts for each individual federal defender organizations based upon a JCUS established staffing formula.⁹

The AOUSC is the administrative agency for the federal judiciary and its Defender Services Office (DSO) is assigned responsibility for staffing the DSC, being the principal conduit of administrative support for federal defender organizations, implementing policies governing the federal defender and private appointed "panel" attorney program on a national basis, and providing training to all CJA service providers.

In their 2017 report, the Ad Hoc Committee recommended [35 interim recommendations](#) to be taken until there is a fully independent federal public defense system. Twenty-nine of those interim recommendations were [approved by the JCUS](#). In 2020, the JCUS denied a request from the DSC to commence a study of independent defense system models and instead commissioned a Federal Judicial Center study of the implementation and impact of these recommendations with a [report expected in 2023](#).

Office of Justice Programs

Located within the Department of Justice is the [Office of Justice Programs](#) (OJP). A primary role of OJP is to oversee grants, technical assistance, and the distribution of other resources in the criminal legal sphere. OJP operates 6 program offices including the [Bureau of Justice Statistics](#) (BJS) and the [Bureau of Justice Assistance](#) (BJA). A significant part of OJP's portfolio focuses on resources for law enforcement and victims of crime, but supporting public defense and core Sixth Amendment rights is a regular area of funding and support throughout all recent administrations.

BJS serves as the primary source for the collection and analysis of criminal legal system data for the federal government. BJS has undertaken a handful of national data [studies relating to public defense](#), but data on this issue is [not collected as regularly](#) as those relating to arrests, incarceration, and other court operations. BJS also provides

⁹ [Defender Services | United States Courts \(uscourts.gov\)](#)

funding and technical assistance to support state and local data collection efforts. Current grant funding from BJS is supporting the [development of a national survey](#) of public defense lawyers.

BJA has several priority areas, one of which is to oversee the provision of resources, technical assistance, and grants to state and local governments, community groups, and nonprofit organizations focusing on efforts to “promote a safe and fair criminal justice system.”¹⁰ Through their administration of the Byrne JAG program as well as a number of other competitive and other grant programs, BJA provides hundreds of millions of dollars to the field. NACDL and other defender organizations have frequently received BJA grants, including funding to support capital defender training, wrongful conviction units, pretrial and bail advocacy, and public defense, but the amount of funding provided to the defense function pales in comparison to the amounts awarded to law enforcement and court operations.

Bureau of Justice Assistance

The [Bureau of Justice Assistance](#) (BJA) is an agency within the U.S. Department of Justice, operating within the Office of Justice Programs. BJA’s primary focus relates to state, local and tribal jurisdictions. It serves a range of groups including law enforcement, courts, prosecution, and defense, but does not fund or focus its work in all of these segments equally. A primary focus of BJA’s work is dedicated to groups such as law enforcement, corrections, and victims of crime, and significant emphasis is placed on “reduction in violent crime, improvements in public safety, and support for public safety officers.”¹¹

BJA’s portfolio includes the administration of grant funds, including those under the Edward Byrne Memorial Justice Assistance Grant Program ([Byrne-JAG](#)), the leading source of federal funds for criminal legal system efforts for state and local jurisdictions. BJA is also a source of a variety of [competitive grants](#) for a range of criminal legal system efforts. Although the majority of these grants focus on policing, crime victims, and court programming (such as drug courts), there are a number of awards that are specifically focused on support of the public defense community. NACDL (as well as other defender organizations) have received a number of these grants and used such funding to support work addressing wrongful convictions, training capital defense teams, and to support public defense focused efforts.

Edward Byrne Memorial Justice Assistance Grant (Byrne JAG) Program

The [Byrne JAG program](#)¹² is administered by BJA and is a critical funding source for

¹⁰ Mission Statement of BJA, (“BJA’s mission is to provide leadership and services in grant administration and criminal justice policy development to support state, local, and tribal justice strategies to achieve safer communities. BJA works with communities, governments, and nonprofit organizations to reduce crime, recidivism, and unnecessary confinement, and promote a safe and fair criminal justice system”). <https://bja.ojp.gov/about>, last visited Jan. 29, 2022.

¹¹ See Bureau of Justice Assistance, About Us, Strategic Focus Areas, www.bja.ojp.gov/about.

¹² 34 U.S.C. 10151

state and local criminal legal systems. Byrne JAG funds can be used to assist a wide variety of system actors and support a range of programs.¹³ State Administering Agencies (SAAs) oversee the allocation of these funds and monitor and report on compliance.

Although public defense agencies are eligible for Byrne JAG funds, it is important to note that they are not expressly included as an agency or program in the enabling legislation. In many instances, the public defense function is considered part of the “court program” provision.

From amounts made available to carry out this part, the Attorney General may . . . make grants to States and units of local government, for use by the State or unit of local government to provide additional personnel, equipment, supplies, contractual support, training, technical assistance, and information systems for criminal justice, including for any one or more of the following programs:

- (A) Law enforcement programs.
- (B) Prosecution and court programs.
- (C) Prevention and education programs.
- (D) Corrections and community corrections programs.
- (E) Drug treatment and enforcement programs.
- (F) Planning, evaluation, and technology improvement programs.
- (G) Crime victim and witness programs (other than compensation).
- (H) Mental health programs and related law enforcement and corrections programs, including behavioral programs and crisis intervention teams.¹⁴

According to [data from the National Criminal Justice Association](#), in 2016, \$62.8 million, (representing more than 50% of all Byrne JAG funds), were distributed to law enforcement efforts; prosecution and court initiatives received \$17 million; and public defense received only \$1.8 million. A formula is used to determine the amount of funds to be provided to each state, but the decision on how to disperse the allocated funds is made at the local level.

Bureau of Justice Statistics

The [Bureau of Justice Statistics](#) (BJS) is a program within BJA. It is one of 13 statistical agencies within the Executive Branch and serves as the primary agency to collect, analyze and publish information relating to the criminal legal system. Indigent defense is identified as one of the areas (under the broader umbrella of courts) on which BJS collects and analyzes data. This data collection, as it relates to state and local public

¹³ [Navigating Byrne JAG and Other Federal Resources: Defender Programs Benefit from Proactive Engagement with SAAs Brief Survey Offers Insight into Federal Resources Access](#), by Marea Beeman, published by NLADA and CCI, Dec. 2020.

¹⁴ 34 U.S.C. 10151.

defense systems, is sporadic in comparison to data collection aimed at other areas such as policing.

The most recent work on public defense funded by BJS was a [survey of public defense lawyers](#) undertaken by the Urban Institute, with the assistance of the Indigent Defense Research Association and the National Association for Public Defense. It was released in 2021; BJS's last survey of public defense systems undertaken by BJA was published in 2013.

Office for Access to Justice

Initially conceived in 2010 under the Obama administration, the Office for Access to Justice (ATJ) operates within the Department of Justice. It works with state, local, and tribal system stakeholders to increase access to counsel and legal assistance, and otherwise improve the legal system for individuals unable to afford counsel. Addressing both civil and criminal legal system issues, in 2015 ATJ became a standalone office within DOJ. It remained in that role until shuttered by the Trump administration in 2018.

Seeing the restoration of ATJ under the Biden administration was a priority for many legal system reform organizations. On October 29, 2021, Attorney General Merrick Garland [announced the restoration of ATJ as a standalone agency within DOJ](#).

NACDL, along with other national organizations, have participated in several formal and informal conversations to identify priorities for ATJ. Although the Biden Administration tasked AG Garland with developing plans to restore the ATJ nearly a year ago, to date the ATJ Office operates with a skeleton staff and no direct leadership.

During its prior operation, ATJ's work included:

- Issuing "[Dear Colleague](#)" letters to state leaders on critical issues such as communicating to state court administrators and chief justices the importance of procedural protections in efforts to enforce payment of court fees and fines.
- Filing Statements of Interest and amicus briefs in ongoing systemic litigation relating to public defense systems or the clients they serve. Filings included
 - [Hurrell-Harring v. New York](#) (systemic underfunding of public defense)
 - [Kuren v. Luzerne County](#) (systemic underfunding creates constructive denial of counsel)
 - [NP v. Georgia](#) (right to counsel for juveniles)
 - [Tucker v. Idaho](#) (insufficient funding, training, and oversight of public defense)
 - [Varden v. City of Clayton](#) (bail practices)
 - [Wilbur v. City of Mount Vernon](#) (public defense workloads)

When operational, ATJ proved to be a powerful voice in systemic reform. In 3 of the 5 cases listed above, shortly after ATJ filed a Statement of Interest in support of reforms, such as the need for adequately staffed and funded public defense systems, the case resolved favorably for the efforts for systemic change. In the remaining 2 cases (*Wilbur*

and *Kuren*), litigation that followed the ATJ filing, resulted in outcomes calling for systemic change.

Federal legislation (most recently [HR 4501](#) in July 2021) has been introduced to codify the ATJ Office. Despite bipartisan sponsors, the bill has not advanced out of committee.

As with any government program, even with federal legislation establishing the ATJ Office, the program remains in danger of being rendered ineffective either through executive branch leadership appointments or through congressional decisions that limit funding.

Office of the Pardon Attorney

The President utilizes DOJ's [Office of the Pardon Attorney](#) to provide support for executive pardons, sentence commutations, and other Presidential clemency efforts. Any federal conviction for which a person is seeking executive clemency is directed to the Pardon Attorney's office for investigation, review and recommendation. Since May 2019, the position of Pardon Attorney has been vacant, with the Deputy Pardon Attorney, Rosalind Sargent Burns, serving as the Acting Pardon Attorney since designated for that role by then AG Barr on May 28, 2019.

Federal legislation relating to state and local public defense

EQUAL Defense Act

In 2019 then Sen. Kamala Harris and Rep. Ted Deutch (D-FL) introduced the [Ensuring Quality Access to Legal Defense](#) (EQUAL Defense) Act. The legislation called for federal grant funds to promote pay parity between public defense attorneys and their prosecution counterparts, address excessive workloads, and improve training. The Act proposed \$250M in funding. To put this into perspective, [according to BJS](#), a decade ago, *state* governments alone spent over \$2.3 billion for public defense¹⁵ and the \$250M proposed in the EQUAL Defense Act is smaller than the amount some individual states spend on public defense annually.

The Act was [introduced again](#) in 2021 by Rep. Deutch. In April 2021 it was referred to a subcommittee of the Judiciary Committee. No further action on the bill has occurred in the 9 months since.

National Center for the Right to Counsel

First introduced by Rep. Ted Deutch (D-FL) in 2013, the [National Center for the Right to Counsel](#) bill proposed a private, non-profit Center providing supplemental funds in the form of grants and contracts to help support state and local public defense systems. The Center would also provide training and technical assistance, engage in research and serve as an information clearinghouse. The bill also proposed the creation of

¹⁵ This figure likely significantly underestimates spending as it does not capture funds expended by counties and local governments and many public defense systems are substantially funded at the county or local level.

regional and state level units to provide more direct, localized support, and would be led by a Board appointed by the President and confirmed by the Senate. NACDL, as well as many other national organizations, [supported the legislation](#). This legislation was introduced in 2013, 2015, 2017 and most recently in 2019. It has never advanced out of the subcommittee to which it was referred.

Other Relevant Informational Resources

On November 20, 2020, the Justice Roundtable submitted its recommendations for the new administration and the 117th Congress in its report, [Transformative Justice](#). As a member of the Justice Roundtable, NACDL provided significant input on a number of recommendations, including several relating to public defense such as promoting BJA funding for public defense specific initiatives, promoting independence of federal public defense, support of the EQUAL Defense Act and expanded loan forgiveness funding, and protecting the right to counsel through the Access to Justice Office.¹⁶

On December 14, 2020, NACDL and 47 other justice reform organizations submitted a sign on letter to the Biden-Harris Transition Team calling for the re-establishment of the Office for Access to Justice.

Issues, Concerns, and Ideas on Federal Involvement with Defense Function.

Legal Services Corporation model: One concept proposed for an Office of the Defender General is to follow the [Legal Services Corporation](#) (LSC) model. LSC is a non-profit, independent agency [created by Congress](#) which oversees the disbursement of federal funds to eligible non-profit organizations providing civil legal aid. LSC receives most of its funding from a [congressional appropriation](#). Congressional oversight of LSC is conducted by on the House side by the Judiciary Subcommittee on Courts, Intellectual Property and the Internet and on the Senate side by the Committee on Health, Education, Labor and Pensions.

LSC uses a competitive process to oversee the distribution of more than 90% of its federal appropriation to 132 independent legal aid organizations.¹⁷ LSC's responsibilities include oversight of its grantees, ensuring appropriate financial management, providing training and technical assistance and conducting assessments on the quality of legal services provided by their grantees. LSC is led by an 11-member Board of Directors, appointed by the President and confirmed by the Senate. By law, the Board is bipartisan, with no more than 6 members of the Board from any one party.

While LSC is an independent federal agency, there are a [number of restrictions](#) on the services its providers can offer. These restrictions are often not limited to the ways in which the provider's federal funds are used, but also restrict the ways in which service providers can use private funds they raise. Current restrictions relate to representation

¹⁶ See Transformative Justice Report at pp. 24-25 and 29-31.

¹⁷ These 132 independent legal aid organizations oversee over 850 offices across the country who provide civil legal services to low-income individuals.

associated with abortions, class action lawsuits, demonstrations, desegregation, and the representation of non-citizens as well as engaging in lobbying activities.

Because it relies almost exclusively on federal funds, LSC can face efforts to end or drastically reduce its funding.¹⁸ While there is generally broad bipartisan support for LSC, on [multiple occasions](#) there have been [calls from federal leaders](#) to withdraw or severely cut federal funding to LSC, and leadership of LSC is subject to [some degree by partisan politics](#).

Federal Public Defense Independence

Federal Public Defense Oversight

NACDL has [long advocated](#) for the needs of the federal public defense system. Chief among those needs is independence.¹⁹

To the extent that any Defender General were to have oversight of the federal public defense system, such changes would need to comport with NACDL's existing policy recommendations from its September 2015 report, [Federal Indigent Defense 2015: The Independence Imperative](#) and its July 2013 [Resolution Concerning Restoration of Funding for Federal Indigent Defense](#).

Core among NACDL's focus for federal public defense are:

- Adequacy of funding, compensation, resources, and training for both institutional defenders and CJA attorneys.
- Insulation of the federal defense function from judicial interference at all levels.
- The creation of a federally funded, independent agency to oversee federal public defense that is free from political and judicial influence.

Risks and Concerns Regarding the Role of the Federal Government in State and Local Public Defense:

Impact on long-term financial health of defense function

Across the country state and local public defense agencies struggle with insufficient funding to meet the demands of their caseload, and to ensure equity with their prosecution counterparts. However, the amount of funding needed at the state and local levels to create a meaningful impact to redress these disparities is significant and may make it difficult to create sustained, annual federal funding.

In some jurisdictions there are concerns that any significant influx of federal funds may decrease state and local contributions to public defense, thereby serving only to alter the source of the funding, rather than the amount. If funding is reduced, those agencies

¹⁸ In 2017, 2018, 2019, 2020 President Trump's budget called for the elimination of all federal funds to LSC. <https://www.lsc.gov/press-release/lsc-submits-2021-budget-white-house-again-calls-defunding>.

¹⁹ In 2016, NACDL's Board of Directors passed a [resolution](#) that "calls for the creation of an agency to oversee federal public defense that is wholly independent of the judiciary."

may later struggle to restore state and local funds. As state and federal budget cycles may vary, shifts in funding may take years to be rectified.

Legislative provisions that prohibit reduction in state and local funding when receiving federal funds, such as was included in the National Center for the Right to Counsel could help alleviate such concerns, but enforcement may be challenging.

Even if there is no direct diminution in state and local funds, it can prove challenging for state and local governments to maintain the additional influx of funds if federal funds are later withdrawn or reduced. This can be especially a challenge if federal funds helped pay for salary supplements, funded additional positions, provided IT or data support, or funded programs.

Partisan politics: Regardless of how it is constituted, and the steps taken to attempt to insulate it from political influence, an agency created and funded by the federal government is subject to a degree of politics. The extent of that influence will be derived from the way in which the agency is created, how it is funded, under who's leadership it operates, and what role various agencies have in the hiring, oversight, and retention of agency leadership.

Changes in political party power and/or priorities, even when such change happens within a single administration can have major effect including the promotion of policies, practices and priorities inconsistent with defender and/or client interests. At their most extreme, partisan politics can directly lead to the dissolution of the organization through congressional action or executive order or indirectly see it destroyed by cutting funding and staffing to prevent it from meaningfully serve its role. The closure of the ATJ Office at DOJ, ongoing threats to funding faced by LSC, and the handling of the defenders within the administration of the AO (including limitations on work they are permitted to do, decisions during sequestration, and demotion of the DSO within the AO structure) are illustrative of these concerns.

Limitations on areas of engagement. A federally funded defender organization, like any federal agency can always have limitations imposed on the nature and type of work they can do or policies they can endorse by Congressional actions. Examples of this concern include the experiences of federal defenders being barred from working on clemency efforts by the AOUSC's interpretation of the CJA's scope and Congress's use of the appropriation process to limit the types of cases LSC funded offices can take and the types of advocacy it can pursue, despite LSC's status as an "independently" operated agency.

Expansive obligations but insufficient resources. Especially when it comes to the Overarching Defender General model, the scope of work proposed to be done would necessitate the creation and sustaining of an exceptionally large agency if it is to be effective. As has been seen by so many state-level public defense oversight agencies, inadequate funding and staffing coupled with outsized obligations can leave a substantial vacuum of leadership in a critical space.

The creation of an agency that is *expected* to be the voice of the defense community in a wide array of spaces; provide financial stewardship over significant grant funds, collect and analyze data; monitor, investigate, and litigate state and local public defense systems; support defense concerns before the Supreme Court; and address legislative, administrative, and other policy matters that impact the defense, but which is only staffed and funded to do fraction of that work can have disastrous effects. Similar to public defender office that has too few staff to meet their caseload, an inadequately staffed and resourced Defender General may, at best, serve only a small portion of community and at worst, can leave the defense community under resourced, underfunded, and ineffective.

Moreover, the more expansive the scope of work, and size of the personnel and budget of this Defender General agency, the greater likelihood that there will be significant oversight and involvement from political actors which could also render the agency ineffective.

Loss of DOJ support for defense issues. The creation of a free-standing, federal level defense agency may mean that DOJ will cease all of its efforts relating to the support and elevation of the defense function. Although DOJ does not always operate to support the defense function, it has proven a powerful ally when weighing in on public defense systemic litigation. While the defender agency could fill a similar role, it may not be to the same effect. Similarly, DOJ (through BJA) may no longer serve to provide grant funding for the defense community. While advocates can call for this same funding to be placed under the control of the federal defense agency, there is significant concern that less overall funding would be made available in such a process. Currently not all BJA funds that are awarded to defender groups are necessarily identified as defense only funding.

Limited need for Defender General to create national standards.

One of the roles identified for a Defender General agency is the creation of national models or standards of practice. There are several questions that arise regarding the creation of a federal agency to develop such standards.

Role of partisan politics: Overarching many concerns about the creation of a federal level defense agency is the role that partisan politics may play in shaping its agenda and policy. This is true when it comes to the development of any type of national models or standards of practice.

Existing national standards: Currently a number of national organizations already have criminal defense standards of practice, including the ABA ([Criminal Justice Standards for the Defense Function](#)), NLADA ([Performance Guidelines for Criminal Defense Representation](#)) and NJDC ([National Juvenile Defense Standards](#)). These practices have been developed and vetted by defense lawyers and defender organizations, with an emphasis on providing high quality representation to clients.

Additionally, many states have developed their own standards of practice for public defense representation. (See e.g. [Michigan](#), [Texas](#), [Virginia](#)) In other states, the requirement to have standards of practice is set by state law. (See e.g. [Nevada](#)) State-level standards allow for consideration of state laws and court rules of procedure, as well as for consideration of the unique culture, system values, and structure of the state's public defense system. Moreover, in some states there are rules that govern how changes to agency standards may be implemented (see e.g. [Idaho](#), [Michigan](#)), making the use of federal standards highly challenging.

The addition of a federal organization's standards, especially if that organization may be heavily influenced by or limited by its political infrastructure, will not further any critical needs. To the extent that such an agency may use its ability to tie funding to meeting various standards, that agency can draw from existing standards. Free from the complexities of the federal process, these state and national groups are more able to respond to new and emerging issues and changes in practice.

Impact on high functioning systems: Federal standards are likely to be below the standards set by high functioning, exemplary organizations and states and localities seeking to cut spending could utilize the lower standards to negatively impact these offices.

While standards from a federal agency can provide a model, given the variety of mechanisms in place at the state level to create, modify, and enforce standards of practice along with the existence of standards from national organizations dedicated to the defense function, there is minimal benefit to the creation of a federal government agency tasked with developing standards for representation.

Difficulty responding to evolving issues. Federal agencies, especially large ones, are not as nimble to change policies or positions, which can leave them out of step with evolving issues. Moreover, even in a bipartisan agency, the varying political climates may result in shifting policies and priorities that may not reflect the most pressing needs of the defender community.

Harming individual defendants and boundary pushing at the Supreme Court. The Solicitor General model can be especially harmful to individual defense interests, as well as potentially problematic to the very interest it proposes to serve. Currently only the United States may file an amicus without the consent of the parties or leave of the Court. The creation of a Defender General empowered to file, and possibly argue, a position contrary to that of the individual defendant whose case (and more often their freedom, future, and in some instances, very life) are before the court, could result in the sacrifice of that individual's success for the "greater good" of the defender community. This flies in the very face of the role of the defender, to be the voice and advocate for the single individual they are standing beside at that moment. This very issue, undertaking an effort that may be beneficial to one individual client but harmful to

other clients, is one defense attorneys frequently face; and one they are ethically bound to resolve in favor of the individual client.

There is also significant risk that the effort to have a moderating defender voice in an issue may stifle innovations and efforts to push boundaries at the Supreme Court in favor of more moderating efforts.

More fundamentally, it is unclear:

- Who would decide what is the “greater good” for the defense community?
- What measuring stick could be created to determine this?
- Whose interests would be considered?
- What influence will partisan politics play in such decisions?

Benefits and Opportunities with Federal Involvement in State and Local Public Defense:

Increase opportunities for defense voices to be centered in federal discussions.

The existence of a recognized, national voice for the defender community can facilitate the defense’s inclusion in relevant discussions and ensure the defense has a place in policy and decision-making agencies. Examples of where this could be beneficial include ensuring a defender voice on the US Sentencing Commission (where there are *ex officio* seats for the Attorney General and US Parole Commission, but none specifically designated for the defense)

Elevate voice of small and rural communities in the national conversation.

When there are opportunities for defender input into national issues, smaller jurisdictions can often find their voice is not reflected. A centralized defender organization could help better ensure all types of communities have their unique needs considered.

Elevate the practice of public defense.

Although national organizations such as the [ABA](#) and the [National Juvenile Defender Center](#) have well regarded standards of practice, state and local public defense systems who do not have their own, robust standards, may struggle to gain support for adherence to such standards. However, standards set by a federal agency may facilitate adoption by state and local governments and may have the ability to tie access to federal funds to compliance with such standards.

Increase federal financial support of defense function.

The presence of a strong advocate for the defense and/or the prioritization of the defense in funding can help secure much needed resources for defense infrastructure and the recruitment and retention of public defense lawyers. Practices that center the defense as a critical component of the legal community, including in the allocation of funds, can improve recruitment and retention of qualified lawyers as well as promote innovation and the development of new practices.

Centralize collection and create more uniform defense data.

One of the challenges for public defense systems is the collection of data. Lack of infrastructure as well as access to data analysts who understand the defense function severely hamper the defender community's ability to present a compelling narrative of their role and their needs.

Additionally, because there is no uniform, federal data collection for the defense, it can be difficult to identify national trends or even conduct comparisons between states. By contrast, the [Uniform Crime Report](#) (UCR), operated by the FBI allows federal, state, county, and local law enforcement agencies to report data in a common format. Drawing from the roughly 18,000 law enforcement agencies across the country, data regarding crimes reported, arrests, and even employment, can be collected, analyzed and compared.

Having meaningful, complete, comparable, and current data on a variety of defense related factors is critical. Accurate data provides compelling support for funding, staffing, and programmatic requests defenders make to federal, state, county, and local officials. It also helps identify innovations, assess the efficacies of different practices and strategies, and overall enables defenders to better utilize their resources in their efforts to provide impactful outcomes for their clients.

NACDL Policy Recommendations:

The Working Group has strong reservations about the creation of a “Defender General” as it is defined and described in the various contexts and proposals in which it is currently being used. As a result, the Working Group recommends that NACDL endorse a set of policies and practices related to the federal government’s role in public defense rather than supporting a particular title or agency to carry out such policies and practices.

1. Defense voices.

- a. The federal government must act to ensure defense voices are included in discussions and decision-making that:
 - i. Directly or indirectly impact defense lawyers, defender agencies, defense delivery systems, or the clients they serve.
 - ii. Relate to funding for defense lawyers, defender agencies, and defense delivery systems.
 - iii. Relate to federal grant funds for criminal legal system stakeholders.
 - iv. Relates to policies, procedures, and practices in the criminal legal system.
- b. The federal government must end practices that fail to include the defense as a stakeholder alongside their counterparts from the prosecution and judiciary. This includes adding a federal defender as an ex officio member of the US Sentencing Commission.

2. Federal Grants, Resources and Financial Support. The federal government must establish the defense function as a core priority area for federal funding relating to the criminal legal system including:

- a. Ensure that federal grant funding legislation, such as Byrne JAG, designates public defense as its own focus area.
- b. Ensuring that when federal funding, training, or other resources are provided to law enforcement and/or prosecutors, commensurate resources are also made available to public defense providers and systems.
- c. Providing training for public defense providers, SAAs, and other relevant personnel regarding defender eligibility for federal funds.
- d. Funding and supporting innovative, holistic, and constitutionally effective defense services.

3. Data Collection. The federal government must ensure the regular collection of data relating to public defense systems by:

- a. Working with the defender community to identify core data to collect.
- b. Providing resources to develop and support the infrastructure needed to collect and maintain such data.
- c. Ensuring those analyzing the data have experience with and knowledge of the defense function.
- d. Making the data available and accessible to defenders and the public.

4. **Support Improvements to State and Local Public Defense Systems.** The federal government, through agencies like DOJ and its Office for Access to Justice, can play a critical role in supporting the right to counsel. This includes:
 - a. Filing Statements of Interest and amicus briefs in support of litigation; conducting investigations; pursuing litigation; and obtaining and monitoring consent decrees that address systemic deficiencies in state and local public defense delivery systems.
 - b. Supporting efforts that promote adequate funding, compensation, staffing, and resources for public defense delivery systems.
 - c. Supporting efforts to ensure at all levels public defense systems are free from judicial interference.
 - d. Ensuring there is adequate staffing, funding, and resources to support these initiatives.
 - e. Supporting legislation that enables impacted individuals to raise systemic challenges and pattern and practice abuses, and otherwise seek redress for constitutionally deficient state and local public defense systems.
5. **Defense Impact.**
 - a. All federal legislation, spending bills, rule changes, policies and practices of federal agencies that impact the criminal legal system must include an assessment of their impact on public defense delivery systems, public defense lawyers, and the defense function generally. Such impact statements should consider impacts on staffing, resources, equipment, data/technology infrastructure, and caseloads.
 - b. All such assessments must be made by or in consultation with those who have specific experience working with the defense function.
6. **Prioritize Defender Initiatives and Staffing Within DOJ.** To fulfill part of its [stated mission](#) “to ensure fair and impartial administration of justice for all Americans,” the Department of Justice must have a robust, meaningful defender representation and ensure that relevant leadership positions impacting the defense function and the communities they serve are filled. To meet this mission DOJ must:
 - a. Ensure leadership roles in federal agencies critical to the defense function and the clients they served are promptly filled when vacancies arise. This includes leadership of the Office for Access to Justice and the Office of the Pardon Attorney.
 - b. Recruit and promote individuals with a defense background and experience to career staff positions within DOJ.
 - c. Promote initiatives and efforts that support and elevate the defense function and the provision of public defense services through the allocation of substantive funding, staffing, and resources.
7. **Supreme Court Advocacy.**

- a. Support the creation of federally funded opportunities to develop, train, and support criminal defense lawyers who are appearing before the United States Supreme Court.
 - b. Oppose policies or agencies that would undermine the Sixth Amendment including those which prevent or seek to interfere with the decisions of an individual defendant regarding:
 - i. Their choice of counsel
 - ii. Their choice of case theory, argument, or strategy.
8. **Federal Public Defense.** Consistent with NACDL’s previously approved [Seven Fundamentals of a Robust Federal Indigent Defense System](#) and its [2016 Resolution](#) calling for independence of the federal public defense system, it is crucial that action be taken to:
- a. Support and promote efforts that ensure adequate funding, compensation, staffing, and resources for federal defender offices and Criminal Justice Act attorneys.
 - b. Support and promote efforts to ensure at all levels the federal public defense system is free from judicial interference.
 - c. Create a federally funded, independent agency to oversee federal public defense that is free from political and judicial influence.
9. **Stable Operations, Funding, and Independence.** Any entity created at the federal level to support public defense, or the defense function generally must:
- a. Be free from political influence and partisan politics that would compromise its independence, policies, and decision-making.
 - b. Have adequate resources, and authority to
 - i. Be an effective and independent voice for public defense needs.
 - ii. Fulfill its identified role and mission.
 - c. Have stable, sustainable, and sufficient funding and funding sources for long-term operation.
 - d. Be insulated from ready dissolution, dismantling, defunding, demotion, or other practice that would diminish the independence or import of the entity by action by a single official or simple majority of legislators.
10. **Leadership:** A healthy and just legal system requires diverse backgrounds and experiences that reflect the whole of the legal system and the communities they are serving. To promote greater balance and legitimacy to federal leadership, it is critical to:
- a. Nominate and confirm to judicial positions at the trial, appellate, and Supreme Court levels, individuals with substantial experience as public defenders and criminal defense lawyers.
 - b. Ensure critical roles in the federal government that impact the criminal legal system have meaningful representation of individuals with criminal defense and public defense experience and expertise.

- c. Consistent with NACDL's [2018 Resolution on Public Defense Leadership](#), individuals placed in any leadership, oversight or management of the defense function should:
 - i. Be independent and insulated from control by actors whose interests may be directly or indirectly adverse to the defense function.
 - ii. Have a demonstrated commitment to and experience in
 - 1. Delivery of high quality, effective and zealous advocacy on behalf of those accused of criminal offenses.
 - 2. Confronting, addressing and working to eliminate racial disparity and bias in the criminal legal system.
 - 3. Advocating on behalf of the defense function's resources, structure and funding.

APPENDIX

Related Letters, Reports, and Position Papers

- Sign on Letter [Proposal to Reestablish the U.S. Department of Justice's Office for Access to Justice](#), Dec. 14, 2020 (NACDL among the 48 signatory organizations)
- [A Fair Fight: Achieving Indigent Defense Resource Parity](#), The Brennan Center, Nov. 9, 2019.

Defender General specific materials

- Defender General (website) <https://defendergeneralsoffice.com/>
- [A Proposal to Offset Prosecutors' Powers: The 'Defender General'](#)", by Adam Liptak, New York Times, Jan. 27, 2020.
- Epps and Ortman, [The Defender General](#), 168 Univ. of Pennsylvania Law Review 1469 (2020).
- ["One Change That Could Make American Criminal Justice Fairer"](#) , by Daniel Epps and William Ortman, The Atlantic, March 16, 2020.
- ["Proposed SCOTUS 'Defender General' Faces Hurdles, Lawyers Say"](#) , by Jordan Rubin, Bloomberg Law, Feb. 3, 2020.
- [The United States needs a defender general](#), by Andrea Lyon, Oct. 18, 2016.
- NAPD:
 - [Recommendations to the Biden Administration](#), Nov. 11, 2020
 - [Letter to President Biden, Vice President Harris and Attorney General Garland](#), Sept. 1, 2021

DOJ and Office of Access to Justice

- [DOJ Organizational Chart](#)
- Office of Access to Justice
 - Historical information
 - Archived Information: <https://www.justice.gov/archives/atj/about-office>
 - Accomplishments: <https://www.justice.gov/archives/atj/accomplishments>
 - Current Efforts
 - [Access To Justice Landing Page](#)
 - Memo on [Restoring the Department of Justice's Access to Justice Function](#), May 18, 2021.
 - [A Report to the President of the United States from the Attorney General of the United States](#), September 21, 2021.
 - [Restoration of Office of Access to Justice Press Release](#), October 29, 2021.

Federal Legislation

- National Center for Right to Counsel Act
 - [Summary of Legislation](#)
 - [2017 Bill Text](#)
- Office for Access to Justice Establishment Act
 - [Summary of Legislation](#)
 - [2021 Bill Text](#)
- EQUAL Defense Act
 - [Kamala Harris wants public defenders to get paid as much as prosecutors](#), by Li Zhou, [Vox](#), May 17, 2019.
 - [2021 Bill Text](#)

Federal Public Defense

- David Patton, *The Structure of Federal Public Defense: A Call for Independence*, 102 [Cornell L. Rev.](#) 335 (2017).
- Committee to Review the Criminal Justice Act
 - Website: <https://cjastudy.fd.org/>
 - [2017 Report](#)
 - [Interim Recommendations](#)
- NACDL
 - [Web page](#)
 - [Report](#)
 - [Board Resolution on Sequestration and Funding](#)

Justice Roundtable

The Justice Roundtable is a broad-based coalition of [over 100 organizations](#) working to reform federal criminal legal system laws and policies. NACDL is an active member of the Roundtable.

- [Transformative Justice: Justice Roundtable's Recommendations for The New Administration and the 117th Congress](#), Nov. 20, 2020 (pp. 29-31)