

Right to Counsel National Consortium Holds Second Annual Meeting



National, State, and Local Policymakers

Discuss Ways to Protect Sixth Amendment Rights

On October 25, 2016 The Right to Counsel (R2C) National Consortium, coordinated by the Justice Programs Office, a center at American University's School of Public Affairs, held its second annual meeting in the Great Hall of the U.S. Department of Justice. The meeting brought together a group of criminal justice stakeholders, policymakers and advocates to show their continued commitment to protecting citizens' Sixth Amendment right to effective counsel.

The day began with opening remarks by **Lisa Foster**, former **Director of the Office of Access to Justice**, who acted as master of ceremonies throughout the day. Former **U.S. Deputy Attorney General Sally Q. Yates** followed with an invigorating speech that set the tone for the day. Yates emphasized that, "the promise of Gideon remains unfilled for too many individuals in our nation," and advocated for continued work to achieve effective counsel for all, regardless of race, class, or gender. Yates placed special importance on the need to ensure access to counsel for defendants at initial appearance. Yates concluded by thanking those present for their efforts to promote what she called a "shared goal." Indeed, the message of collaboration and cross-discipline coordination rang loud throughout the day as a requisite means for reforming public defense systems and safeguarding the constitutional right to counsel. Yates concluded by stating, "I've talked with correctional officers, inmates, law enforcement officers, public defense advocates, elected officials and community leaders, and despite their differing roles, the common message is clear: the status quo needs to change."

Denise O'Donnell, former **Director of the Bureau of Justice Assistance (BJA) at the U.S. Department of Justice**, also spoke to the importance of the right to

counsel, reminding everyone that right to counsel is not just a policy we should strive to implement but a *constitutional right* that must be upheld. O'Donnell also spoke about procedural fairness and its tie to the right to counsel. Intrinsically linked, she explained that the right to counsel improves perceptions of procedural fairness by ensuring that those accused of criminal offenses understand the legal process, have a chance to be heard, and see the decision-making process as unbiased. As a result, O'Donnell said, defendants whose cases have benefited from effective assistance of counsel are more likely to accept the court's outcome and see it as fair.



U.S. Deputy Attorney General Sally G. Yates

Session 1: Where have we been?

Preeti P. Menon, **Associate Director of Strategic Partnerships at the Justice Programs Office at American University**, took the stage to report on the Right to Counsel National Consortium's highlights throughout the previous year, including webinars and conference presentations. Among others, Menon applauded the National Association of Criminal Defense Lawyers, the National Association of Counties, the National Association of Public Defenders, the National Legal Aid & Defender Association, the Pretrial Justice Institute, the Sixth Amendment

"I've talked with correctional officers, inmates, law enforcement officers, public defense advocates, elected officials and community leaders, and despite their differing roles, the common message is clear: the status quo needs to change."

**Former U.S. Deputy Attorney General,
Sally Q. Yates**

Center, and the Constitution Project for their coordinated efforts to promote the constitutional right to counsel. She encouraged everyone to continue the momentum of advancing right to counsel and the conversations within all the criminal justice stakeholders and policymakers. Menon concluded by stating that “this past year for R2C demonstrates the importance of public defense across the continuum of the criminal justice system” and that she looked forward to continuing to work with everyone on ensuring that the constitutional right to counsel is meaningfully carried out throughout the nation.



Panel 1, moderated by David Carroll and Colette Tvedt, featuring panelists Derek Pullan, Eileen Farley, Rep. Christina Perry, and Corey Stoughton.

Session 2: Where are we now?

The first panel of the morning addressed the current state of the right to counsel across the United States and highlighted activities from five states: New York, Mississippi, Missouri, Utah, and Washington. **Judge Derek Pullan, District Court Judge from the Fourth Judicial District in Utah**, explained his role in ensuring the right to counsel as a judge and spoke about the reform efforts that have taken place recently in Utah. Judge Pullan identified seven principles that Utah uses to assess the strength of public defense systems and that others can adopt; representation must:

- Be independent
- Without conflicts of interest
- Without interference
- Exist at all critical stages

- Ensure meaningful adversarial testing of the state’s evidence
- Fair compensation for public defenders
- Systemic quality control.

Judge Pullan added that Utah has recently created a statewide indigent defense fund, the first of its kind nationwide, to help implement and oversee representation in Utah. **David Carroll, Executive Director of the Sixth Amendment Center**, added that the seven principles described by Judge Pullan were not only adopted by the state of Utah but also helped build a new coalition around public defense reform and evaluation in other states. Eventually, Mississippi adopted Utah’s seven principles to assess their own public defense systems.

The panel also engaged in a discussion about public defense reform in Washington State. **Colette Tvedt, Director of Public Defense Training and Reform at the National Association of Criminal Defense Lawyers**, and **Corey Stoughton, Senior Counsel in the Civil Rights Division of the U.S. Department of Justice**, spoke about statements of interest that DOJ filed in a Washington State federal case, *Wilbur v. City of Mount Vernon*.ⁱⁱ In filing statements of interest, DOJ recognized not only a need for effective individual representation but also a need for effective delivery systems capable of fulfilling the promise of *Gideon v. Wainwright*.ⁱⁱⁱ Stoughton added that DOJ continues to look for more ways to “ensure that the Sixth Amendment has real-life meaning.” The case sided with the plaintiffs, requiring Washington to examine and change the way public defense was provided.

Echoing the implications of the *Wilbur* decision, **Eileen Farley, Director of the Northwest Defenders Division of the King County Department of Public Defense in Washington**, spoke about overseeing its implementation. To improve Washington’s public defense system, all Washington cities had to report public defenders’ investigation hours, jail visits, and calls to jail monthly to track progress. Collecting this data allowed the court to analyze the system. Farley emphasized the importance of usable statistics – ensuring that reported data is comprehensible and applicable – to address problems as they arise.

Next, David Carroll turned the conversation to Idaho, a state that is now farther along in reform than either Utah or Washington, and one that used a different strategy—outside of the courts and through the legislature—to create change. **Representative Christy Perry of Idaho’s 11th District**, as a champion of public defense reform in the legislature, spoke about the legislative changes that led to reform; Representative Perry described the division of responsibility for funding public defense systems between the state and individual counties. She explained that in Idaho, the state may provide funding but ultimately individual counties are responsible for funding their public defense systems, creating a potential barrier to reform. Because of this tension, Idaho took a strategic, collaborative approach to align both county and state priorities. In 2016, Idaho passed legislation with the sole purpose of improving public defense delivery systems by providing funding to counties and creating defense delivery standards.

Returning to the courtroom, Stoughton spoke about her experience with state reforms, providing a summary of her work as a former attorney for the New York Civil Liberties Union. At the New York Civil Liberties Union, Stoughton served as lead counsel on a class action suit, arguing constructive denial of counsel and challenging New York’s indigent defense systems in five separate counties: Onondaga County, Ontario County, Schuyler County, Suffolk County, and Washington County. In 2010, the New York State Court of Appeals decided the lawsuit, *Hurrell-Harring et al. v. State of New York*, valuing the integrity of the Sixth Amendment right to counsel.^{iv} The state of New York and Governor Cuomo eventually reached a settlement with the plaintiffs that reforms the public defense services offered in the five counties listed in the suit. The settlement guaranteed counsel beginning at arraignment, instituted caseload limits, and required the presence and participation of the New York Office

of Indigent Legal Services to ensure the quality of indigent defense.

Speaking on the panel next to Stoughton was **William Leahy, Director of the New York Office of Indigent Legal Services**. He explained how the *Hurrell-Harring* settlement helped his office obtain more authority and funding. “We were able to reduce caseloads from wildly excessive to simply excessive,” Leahy stating, highlighting that even though there has been progress, there is still far more to do in the state of New York and across the nation. Leahy also touched on no counsel courts, stating that not having access to counsel is “un-American and unacceptable.”

Michael Barrett, Director of the Missouri State Public Defender (MSPD), recounted his unique response to the funding problems faced by MSPD earlier in 2016. After Governor Jay Nixon cut \$4.5 million from MSPD’s budget, Barrett used a little-known Missouri statute giving the director of the public defense system

Inadequate counsel is “un-American and unacceptable.”

**William Leahy,
Director of the New York Office of
Indigent Services**

authority to appoint any lawyer in the state to represent an indigent client, assigning Governor Nixon a case. Garnering national media attention, this move shed light on the systemic problems associated with public defense in Missouri. Barrett used this platform to illuminate these problems and sought to demonstrate to the legislators that investing dollars up front in public defense saves money on the back end, decreasing costs in other areas of the criminal justice system including those associated with jails and prisons. Barrett is committed to changing the perceptions of public defense and closed stating, “no one ever got elected advocating for public defenders,” but it is important to continue to push the legislature to spur change.

Sharing another example of successful reform from the audience, Doug Colbert of the University of Maryland School of Law echoed the panelists, detailing his struggles with an underfunded public

defense system. Maryland's system did not provide counsel to indigent defendants at arraignment, so Colbert reached out to the largest law firm in Maryland to file a class action suit. Thanks to the work of Colbert and the lawyers he recruited, the Maryland Supreme Court found in favor of Colbert, reinforcing Maryland's commitment to recognizing that counsel at first appearance is a constitutional right.

Session 3: Where are we going?



Angela Kiper, David Porter, and Judge Bernice Donald

The next speakers participated in the lighting round: 10-minute presentations by five criminal justice experts across disciplines and party lines, highlighting the importance of an effective public defense system. **Jo-Ann Wallace, President and CEO of the National Legal Aid and Defender Association (NLADA)** started the lighting round with optimism about the future, emphasizing the power and the need to take advantage of technology to improve data collection. Wallace recognized the power that research has, helping leaders make decisions based on accurate information. Specifically, Wallace mentioned, data can help underscore the racial disparities in the system, as well as demonstrate the financial benefits of high-quality public defense. Touching on a theme that recurred throughout the day, Wallace reminded those in attendance that collaboration across agencies and organizations is key to achieving effective public defense reform. With collaboration, Wallace said, "I am confident and optimistic that we will complete the journey to justice for all."

Marc Levin, Policy Director for Right on Crime, reported on public defense challenges in the state of Texas. Levin cited jail-able misdemeanors as a major concern because individuals charged with such offenses do not receive appointed counsel if they cannot afford to hire a lawyer. Levin said this leads to a high rate of misdemeanor conviction statewide, and the resulting jail time is very expensive for the government. Levin also pointed to excessive caseloads statewide as a detriment to effective representation. However, Levin also highlighted some positive changes in Texas, including a program in San Antonio, which allows indigent defendants to choose their own attorney from a list throughout the county. Levin closed with optimism about progress across the country, emphasizing the need to reach across disciplines and partisan lines, and restated his commitment to public defense, stating we should not rest until everyone has quality representation.

Judge Bernice Donald of the Sixth Circuit United States Appellate Court discussed the uphill battle faced by advocates of public defense reform when it comes to public perception. Judge Donald conveyed the most common perception is that people who cannot afford counsel are not deserving of it. Judge Donald attributed this perception in part to popular culture, where television shows and movies frequently illustrate the role police officers and prosecutors play in the interest of the public, but rarely portray public defenders in the same light. We must engage in a culture shift to correct this misperception. She emphasized the importance of taking action saying, "we have wonderful laws, but we have to remember that laws are not self-executing." Judge Donald called for a wide range of government agencies to get involved in reform, including the federal government, state policymakers, state supreme courts, bar associations, and law school clinics.

John Wetzel, Secretary of Corrections for the State of Pennsylvania, reinforced Levin's and Judge Donald's message of aligning unlikely allies. Wetzel explained that he did not see a connection between his work in corrections and the right to counsel at first, until he realized that one solution to the injustices in corrections (particularly overrepresentation of

minorities, individuals with mental health problems, and the poor) was more effective public defense services. “We all want the same thing,” Wetzelsaid, pointing out that public defense reform is an issue on which a variety of agencies with different goals can unite.

Ivan Dominguez, Director of Public Affairs and Communications at the National Association of Criminal Defense Lawyers (NACDL) called on everyone present to increase the public profile of this important issue through social media and other media outlets. Dominguez asked advocates of public defense reform to post interesting stories and important reports online and to send resources to others in the community. He stressed the importance of using social media, including hashtags, to spread the word and educate the public. Social media can be a powerful tool in advancing reform and in shifting the culture surrounding public defense.

Lunchtime Speakers

Assistant Attorney General Karol Mason provided information on the work the Department of Justice is doing to ensure procedural justice for defendants nationwide, including programs like Smart Defense and the Answering Gideon’s Call Initiative. Mason also reminded those in attendance that right to counsel is just as much of an issue in the juvenile justice system, where more than half of juveniles in detention facilities say they did not have representation of counsel. Mason cited a Rand Corporation study that found that better public defense leads to lower rates of conviction and shorter sentences for the accused.^v She also encouraged continuing diversion programs, treatment courts, and other creative resolutions that have been shown to yield positive results for people involved in the criminal justice system.

Principal Deputy Assistant Attorney General Vanita Gupta spoke about the need to ensure meaningful right to counsel in order to restore trust in public institutions. Gupta stressed that the breakdown in community/police trust has broad implications across the criminal justice system. To prevent that breakdown, Gupta said, we must ensure that the

system functions equally for all, including poor people and people of color. As communities of color and lower socioeconomic status are over-represented in the criminal justice system, ensuring the meaningful implementation of the right to counsel can help increase trust in the overall criminal justice system. Further emphasizing the need to decriminalize poverty, Gupta stated “being convicted for being poor is against the Constitution.”^{vi} That means stopping the cycle of debt and incarceration that can occur from excessive court fees, and preventing poor children in the criminal justice system from falling into a pipeline to prison.

Linking the importance of a strong public defense system, **Laurie Garduque, Director of Justice Reform for the MacArthur Foundation**, presented the MacArthur Foundation’s vision to change the way

the United States thinks about and uses jails. There are 12 million jail admissions annually, said Garduque, and three out of five people in jail are legally presumed innocent (meaning they have not yet been convicted of anything). She



Laurie Garduque, Director of Justice Reform, MacArthur Foundation

emphasized that local criminal justice systems are at the heart of the issue of over incarceration, and described the MacArthur Foundation’s work with twenty jurisdictions. With the help of her foundation, those jurisdictions were able to reduce jailing rates and racial disparities. Public defenders were an important part of that change.

Breakout Sessions

The day concluded with invigorating breakout sessions where attendees had the opportunity to engage with others across disciplines and party lines and brainstorm local, state, and federal policies that ensure the right to counsel. They also discussed



Breakout Sessions in Progress

concrete ways to be involved in the R2C National Campaign and what they would do upon returning to

their respective day jobs to promote the effective implementation of the Sixth Amendment Right to Counsel and the fair administration of justice.

The day closed reemphasizing the shared commitment to ensuring the constitutional right to counsel and the Department of Justice's reassurance of continued support.

The R2C National Consortium has been finalizing the federal, state, and local recommendations for doing so and will release them this spring. Please visit the Right to Counsel National Campaign website at www.rtcnationalcampaign.org to see the final documents. *Coming Spring 2017.*

Follow the Right to Counsel Campaign on social media:
<https://www.facebook.com/righttocounselnationalcampaign>
<https://twitter.com/right2counsel>

For more information, please contact:
Genevieve Citrin Ray, Project Director
citrin@american.edu, 202-885-2875

i Yates, Sally Q. Right to Counsel National Consortium Second Annual Meeting, 25 Oct 2016. United States Department of Justice, Washington, D.C. Full remarks: <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-right-counsel-national-consortium>

ii Wilbur, et al. v. City of Mount Vernon, et al. No. 2:11-cv-01100-RSL. (W.D. Wash. 2012) http://www.opd.wa.gov/documents/0181-2013_WilburDecision.pdf

iii Gideon v. Wainwright, 372 US 335 (1963). <https://www.law.cornell.edu/supremecourt/text/372/335>

iv Kimberly Hurrell-Harring, et al. v. State of New York, et al. 75 AD3d 667 (2010).
http://www.nycourts.gov/reporter/3dseries/2010/2010_03798.htm

v Anderson, James M. and Paul Heaton. *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*. Rand Corporation, Dec 2011.
https://www.rand.org/content/dam/rand/pubs/working_papers/2011/RAND_WR870.pdf

vi Gupta, Vanita. Right to Counsel National Consortium Second Annual Meeting, 25 Oct 2016. United States Department of Justice, Washington, D.C. Full remarks: <https://www.justice.gov/opa/speech/head-civil-rights-division-vanita-gupta-delivers-remarks-right-counsel-national>

This project was supported by Grant Number 2013-DB-BX-K003 awarded by the Bureau of Justice Assistance, Office of Justice Programs to American University. The opinions, findings, and conclusions or recommendations expressed are those of the author and do not necessarily reflect the views of the U.S. Department of Justice.