CONSCRIPTION OF PRIVATE ATTORNEYS TO REPRESENT INDIGENT CRIMINAL DEFENDANTS IN STATES AND TERRITORIES

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This year marked the sixtieth anniversary of *Gideon v. Wainwright*,[1] the seminal case in which the Supreme Court of the United States held that the Sixth and Fourteenth Amendments to the Constitution guarantee a right to court-appointed counsel to indigent criminal defendants charged with serious offenses. Very few would argue with that basic proposition today. Instead, the contemporary debate is whether to recognize a "civil *Gideon*," i.e. a right to court-appointed counsel for indigent civil litigants.[2]

But the right to court-appointed counsel differs in a critical way from other federal constitutional rights, such as the right to freedom of speech, the right to bear arms, or the right to be free from unreasonable searches and seizures. While the latter rights are essentially rights to be left alone, the right to court-appointed counsel literally codifies an entitlement to someone else's labor. At first glance this distinction may seem like an academic curiosity or a philosophical question with no practical import. After all, there are more than a million active lawyers in the United States. Surely there are more than enough lawyers willing to undertake such representation to render this inquiry purely academic.

Unfortunately, no. While the obligation to implement *Gideon* ultimately lies with the government, funding for indigent criminal defense is rarely a priority in any jurisdiction. Not only are lawyers expensive, but so are the resources lawyers need to do their jobs effectively, including but not limited to paralegals, investigators, secretaries, electronic legal research, and—of course—an office. And unlike pretty much every other activity funded by the government, elected officials may not necessarily *want* a robust indigent criminal defense system.

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1. 372 U.S. 335 (1963).

2. *Compare* Sarah L. Harrison, *Civil* Gideon: *A Right Whose Time Has Come?*, 6 SAVANNAH L. REV. 108 (2019), *with* Benjamin H. Barton, *Against Civil* Gideon *(And For Pro Se Court Reform)*, 62 FLA. L. REV. 1227 (2010).

Moreover, to implement *Gideon*, it is not enough to create and fund a single public defender's office. The United States Supreme Court has held that the right to effective counsel under the Sixth Amendment includes "a correlative right to representation that is free from conflicts of interest."[3] As such, when the government charges multiple indigent codefendants with participating in a criminal activity with each other, each defendant is generally entitled to separate court-appointed counsel because the codefendants may develop divergent interests during the course of the proceeding.[4]

The ultimate responsibility to implement *Gideon* unquestionably falls with the legislative branch of each state and territory.[5] Nevertheless, in several jurisdictions, the legislature has abdicated this responsibility and shifted it onto the judicial branch—which, in some jurisdictions, shifted it further onto individual attorneys. Until 2015, the Superior Court of the Virgin Islands systematically conscripted members of the Virgin Islands Bar to represent indigent criminal defendants in all cases where the public defender had been permitted to withdraw as counsel[6] at rates as low as forty-five dollars per hour.[7] Similar involuntary appointments of attorneys to represent indigent defendants against their will have also occurred in states such as Alaska, Arkansas, Kansas, and Oklahoma.[8]

The involuntary appointment of private attorneys to represent indigent criminal defendants—especially when done so without regard to the attorneys' level of experience—raises numerous constitutional concerns. Due to its involuntary nature, it unquestionably constitutes a taking under the Fifth Amendment of the United States Constitution and may even implicate the Thirteenth Amendment's prohibition on involuntary servitude. It raises the specter that indigent defendants may receive ineffective assistance of counsel when attorneys who do not wish to represent them, and may lack criminal defense experience, are required to do so against their will for virtually no meaningful compensation. And since such involuntary appointment systems are often sanctioned by legislatures or lower courts, their continued existence draws the exclusive authority of state and territorial courts of last resort to regulate the practice of law into question within those jurisdictions.

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3. *Wood v. Georgia*, 450 U.S. 261, 271 (1981) (collecting cases).

4. *See Holloway v. Arkansas*, 435 U.S. 475 (1978).

5. *See, e.g.*, State *ex rel.* Partain v. Oakley, 227 S.E.2d 314, 323 (W.Va. 1976); *State v. Rush*, 217 A.2d 441, 449 (N.J. 1966); *In re* Office of Dist. Pub. Def. for First Jud. Dist., 373 N.W.2d 772, 775 (Minn. 1985).

6. *See In re Holcombe*, 63 V.I. 800 (V.I. 2015).

7. *See In re Morton*, 56 V.I. 313, 322 n.2 (V.I. 2012).

8. *See DeLisio v. Alaska Superior Ct.*, 740 P.2d 437, 442–43 (Alaska 1987); *Arnold v. Kemp*, 813 S.W.2d 770, 774–75 (Ark.1991); State *ex rel.* Stephen v. Smith, 747 P.2d 816, 842 (Kan. 1987); *State v. Lynch*, 796 P.2d 1150, 1158 (Okla. 1990).

While such involuntary appointment systems are thankfully not widespread, the fact they have remained in place for so long *anywhere* in the United States raises serious questions as to what may happen if "civil *Gideon*" was adopted nationwide.