



National Association for Public Defense Recommendations for the Biden Administration

Approved by the NAPD Steering Committee on October 15, 2020

Summary of Recommendations

I. Funding

- A. Pass Vice President Harris's Fair and Just Defense Act.
- B. Allocate 30% of Byrne-JAG funding to public defense.
- C. Ensure public service loan forgiveness for public defenders.

II. Data

- A. Create a BJS Division for Public Defense Statistics.
- B. Increase BJA funding for public defense projects to \$30m. annually.
- C. Standardize public defense data collection.

III. Policy

- A. Create the Office of the Defender General.
 - B. Establish and resource the National Council on Public Defense.
 - C. Restore the Office for Access to Justice.
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Introduction

In 1770, John Adams represented eight British soldiers following the Boston Massacre. Poor, unpopular, and previously uncounseled, the soldiers' lives hung on Adams's representation. President Adams later reflected, "It was . . . one of the most gallant, generous, manly and disinterested Actions of my whole Life, and one of the best Pieces of Service I ever rendered my Country."

Two centuries later, America is again led by a public defender. The Biden Administration understands the importance—and failings—of American public defense better than any administration since President Adams's:

"I was a public defender."
- President Joseph Biden

"During his time as a public defender, taking up the cause of those who could not afford to defend themselves, [President Biden] saw firsthand how those values cannot be taken for granted."
- Jamal Brown, National Press Secretary, Biden Campaign

"After spending my career around the criminal justice system, I've seen up close how it can fail to ensure that poor defendants receive a fair trial and due process, as guaranteed to all of us in our Constitution. . . . All too often, our public defenders are overworked and lack sufficient resources. This makes public defense unsustainable over the long haul. And the thing that suffers is the integrity of our system of justice, which is supposed to be based on fairness and equality. It's wrong, and it's the opposite of justice."
- Vice President Kamala Harris

The Biden Administration faces an unprecedented opportunity: to reform public defense so that its practice matches its promise. The National Association for Public Defense (NAPD) applauds the Biden Administration's commitment to justice reform. With over 22,000 members, NAPD is the voice of public defense in America. Its members represent Americans accused of crimes in all 50 states, all American territories, and federal court.

Here, NAPD outlines a plan for reforming American public defense. Many of these solutions could be housed within the Office of the Defender General. (See Recommendation 3.A.) NAPD stands ready to serve the President and Vice President as they undertake this worthy, impactful, and achievable endeavor.

1. Funding

Public defense is a federal mandate without federal funding. In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the United States Supreme Court held that, under the Sixth Amendment, states must provide an attorney in a criminal case if a defendant cannot afford one. But neither the Supreme Court nor Congress has said how public defense should be funded.

Although states have voiced support for the right to counsel—23 state attorneys general filed an amicus brief in *Gideon*'s favor—they've failed to pay for it. For over half a century, state, county, and local governments have cobbled together funding. (See ABA Ten Principles of a Public Defense Delivery System, Principle 8; NAPD Foundational Principles, Principles 4 and 11.) Low funding has led to lawyering divorced from standards, constitutional requirements, and the maxims on our marble monuments. In their place, excessive workloads, meet-and-pleads, uncounseled pleas, and wrongful convictions have crept in. Thousands of attorneys have jettisoned basic legal tasks—like investigation, legal research, client communication, and filing motions—in violation of their ethical and constitutional duties.

Today, half of Americans have seen a family member incarcerated, and 3 in 4 incarcerated Americans relied on public defense. Beyond incarceration, criminal conviction affects housing, education, healthcare, voting, and much more. Yet we have not reckoned with public defense's role in mass incarceration.

The Biden Administration has an opportunity to remedy decades of injustice. NAPD proposes three solutions to the public defense funding crisis. These solutions would not only promote fairness and justice, but also shrink the financial burden of housing inmates who pose no risk to public safety. The stakes—Americans' lives, livelihoods, and liberties—could not be higher.

A. Pass Vice President Harris's Fair and Just Defense Act.

Vice President Harris introduced the [Fair and Just Defense Act](#) (FJDA) in 2019. In part, FJDA would appropriate \$250 million annually for funding public defense through states, local governments, and public defender offices. Funding is conditioned on implementation of workload limits and data collection, so FJDA would not only ease state and local funding burdens, it would also go a long way toward closing the gap between constitutional guarantees and unconstitutional practices.

B. Allocate 30% of Byrne-JAG funding to public defense.

[The JAG program](#) is the leading source of federal justice funding to state and local jurisdictions. Federal law directs Byrne-JAG funding toward courts, police and prosecution, and public defenders. Yet state administering

agencies (SAAs) distribute less than 1% of Byrne-JAG funds to public defense. Ensuring fair distribution of JAG funds would help alleviate public defense underfunding and increase parity with other justice system actors.

C. Ensure public service loan forgiveness for public defenders.

The average law school debt now tops \$145,000. Aspiring Atticus Finches, now laden with debt, quickly flock to other areas of the law. [Public Service Loan Forgiveness](#) has been mired in controversy, yet holds great promise. The federal government should ensure that the program is properly funded, well staffed, and well executed, so that attorneys graduating with historically high law school debt are able to pursue public defense. The United States should provide additional financial incentives—including lower monthly payments and 7-year loan forgiveness—to public defenders, as well as loan forgiveness to public defense professionals, like social workers and investigators.

2. Data

There is a dearth of public defense data. Nearly 60 years after *Gideon v. Wainwright*, basic questions—How many Americans plead guilty without an attorney by their side? How many defense attorneys fail to visit their clients? How many Americans are represented by an attorney with an excessive workload?—remain unanswered. Public defense data collection, like public defense provision, is a patchwork. Without transparency, it is difficult to reform American public defense.

The Biden Administration has an opportunity to remedy the paucity of public defense data. NAPD proposes three solutions to our American public defense data deficiencies.

A. Create a BJS Division for Public Defense Statistics.

The Bureau of Justice Statistics (BJS) is the [United States' primary source for criminal justice statistics](#). The nation relies on BJS data to inform its citizens; make national, state, and local policy decisions; and allocate funding. BJS has devoted [statistical divisions](#) to Prosecution, Victims, Law Enforcement, and Corrections, but not public defense. A BJS statistical division devoted to public defense would help fix the lack of public defense data and help public defense achieve parity with the prosecution.

B. Increase BJA funding for public defense projects to \$30m.

[The Bureau of Justice Assistance](#) (BJA) works to improve America’s criminal justice systems through grants, training, and technical assistance. BJA currently provides than \$4 million in grants to improve public defense—only a fraction of the funds provided for policing, prosecution, or courts. Increased BJA public defense spending would help identify the most effective and efficient public defense practices and aid in replicating those practices across the country.

C. Standardize public defense data collection.

Although the right to counsel is federally mandated, public defense metrics vary widely from state-to-state, county-to-county, and courtroom-to-courtroom. Standard public defense metrics will aid state legislatures, criminal justice coordinating committees, and public defense oversight entities to improve national public defense data and advance evidence-based practices and policies.

3. Policy

With over 10,000 attorneys nationwide, the United States Department of Justice (DOJ) is the world’s largest law firm. The DOJ not only prosecutes federal crimes, it is also the epicenter for prosecution in America, leading through research, policy, funding, data collection, advocacy, and training.

There is no public defense counterpart to the DOJ. With less than one-third of the DOJ’s attorneys, 81 separate federal defender organizations defend approximately half of federal charges. But the federal defender lacks the research, policy, funding, data collection, advocacy, and training roles that the DOJ plays at the state level nationwide. Public defense has suffered as a result.

The Biden Administration has an opportunity to create, for the first time, federal public defense leadership. NAPD proposes three entities to lead public defense research, policy, funding, data collection, advocacy, and training.

A. Create the Office of the Defender General.

The Office of the Defender General could serve the research, policy, funding, data collection, advocacy, and training roles that the DOJ plays at the state level nationwide. It could oversee implementation of nearly all recommendations included in this document, obviating the need for various other entities, such as BJS, BJA, OAJ, or Byrne-JAG, to play those roles. Of the

recommendations here, creating the Office of the Defender General—an institutional home for public defense—should be among the highest priorities.

B. Establish the National Council on Public Defense.

Public defense funding, policies, and standards should be guided by a council of national public defense experts who can advise the Defender General. The Council should convene quarterly, focusing on creating and improving public defense systems, culture, and standards. In addition to advising the Defender General, the Council should be empowered to speak independently on public defense issues.

C. Restore the Office for Access to Justice.

Through legal filings, events, and national engagement with criminal justice stakeholders, the DOJ [Office for Access to Justice](#) (OAJ) was helpful in improving access to justice in both the civil and criminal arenas. In October 2018, the DOJ Office of Legal Policy assumed the OAJ's responsibilities, but has failed to further OAJ's mission. This administration should resurrect the DOJ Office for Access to Justice or include the OAJ's duties within the Office of the Defender General.

NAPD Supports Criminal Justice Reform

Public defense reform and criminal justice reform are inextricable. NAPD supports criminal justice reforms in the following areas and will proudly work with the Biden Administration in its reform efforts. Justice reform conversations should always include a public defense voice:

- Mass Incarceration
 - Underfunded public defense has been a driver of mass incarceration. (See NAPD Principle 11.)
- Racial Justice
 - Our criminal justice systems are one of the largest tools of racial oppression in America. (See NAPD Principle 12.)
- Policing
 - Discriminatory policing drives stigmatization of marginalized persons and justice system caseloads, leading to assembly-line justice. (See NAPD Principle 10.)
- Mental Health

- Our criminal justice systems have become the primary means of treating Americans with mental health problems. They were not designed for mental health treatment. (See NAPD Principle 13.)
 - Poverty
 - Three out of four persons in our justice systems rely on public defense. We too often criminalize poverty. (See NAPD Principle 10.)
 - Money Bail, Fines, and Fees
 - Although funding our justice system is a governmental obligation, too often the costs have been visited upon our clients. (See NAPD Principle 4.)
 - Juvenile Justice
 - While juvenile justice suffers from many of the same issues as public defense, there are several additional concerns, including parents, education, and adolescent development. (See NAPD Principles.)
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About NAPD

With over 22,000 members across all American states and territories, the National Association for Public Defense (NAPD) is the voice for public defense in America. NAPD was formed in 2013 by a small group of public defense leaders, who envisioned a new kind of association:

- Focusing exclusively on holistic public defense
- Including all defense team members: lawyers, investigators, social workers, paralegals
- Providing meaningful ways to participate in national public defense reform
- Leading with authenticity
- Comprising public defense experts

With this vision, NAPD has built a community focused on the issues most critical to delivering high-quality public defense. Through active committees—amicus, workloads, education, systems builders, cash bond, racial justice, technology, ethics, and communications—NAPD supports public defense providers and advances reform across the United States.

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