

1 PROTECTING THE CONSTITUTIONAL RIGHT TO COUNSEL FOR
2 INDIGENTS CHARGED WITH MISDEMEANORS

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4 WEDNESDAY, MAY 13, 2015

5 United States Senate,
6 Committee on the Judiciary,
7 Washington, DC

8 The Committee met, pursuant to notice, at 10:03 a.m.,
9 Room 226, Dirksen Senate Office Building, Hon. Charles E.
10 Grassley, Chairman of the Committee, presiding.

11 Present: Senators Durbin, Klobuchar, Franken and
12 Coons.

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1 OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S.
2 SENATOR FROM THE STATE OF IOWA, CHAIRMAN, COMMITTEE ON
3 THE JUDICIARY
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5 Chairman Grassley. The Minority members are on
6 their way to the Committee meeting. So I think I will
7 start out with my opening statement. But before I give
8 my opening statement, my friend, Senator Leahy, cannot be
9 here today as Ranking Member of the full Committee and he
10 has a statement that I am going to put in the record,
11 that he has asked me to put in the record for himself.
12 So I have done that.

13 [The prepared statement of Senator Leahy follows:]
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1 Chairman Grassley. I want to say thank you to all
2 the people that are participating, as well as those in
3 the audience.

4 Today the Senate Judiciary Committee holds this
5 hearing on indigent misdemeanor representation.
6 According to the Sixth Amendment Center and certainly in
7 my memory, this is the first time the Senate Judiciary
8 Committee has ever held a hearing on this specific
9 subject.

10 The Sixth Amendment provides criminal defendants with
11 assistance of counsel. For more than 50 years following
12 the Gideon decision, it has been clear that it is
13 necessary to give low income people accused of crime the
14 right to a lawyer to help them navigate the system,
15 preserve their rights, and make sure innocent people do
16 not go to jail.

17 Clarence Gideon himself, when retried with a lawyer
18 representing him, was acquitted, and that landmark ruling
19 was extended in 1972 to misdemeanor defendants for good
20 reason. The overwhelming majority of people who face
21 criminal charges are prosecuted for misdemeanors.

22 In Iowa, for example, 80 percent of all criminal
23 prosecutions are for misdemeanors, among the highest rate
24 in the country. Some States have adhered to the
25 Constitution. In Iowa, our district courts do an

1 excellent job of providing counsel to misdemeanor
2 defendants.

3 I am pleased that our Chief Justice of the Iowa
4 Supreme Court is with us today. Last month his court
5 extended the right to counsel by not permitting un-
6 counseled convictions to be used as sentencing
7 enhancements in subsequent crimes.

8 Un-counseled convictions must exist in Iowa, however,
9 or the decision would not even be necessary. But many
10 States are not providing counsel as our Constitution
11 requires. I think it is quite a widespread problem.

12 In reality, the Supreme Court's Sixth Amendment
13 decisions regarding misdemeanor defendants are violated
14 thousands of times. No Supreme Court decision in our
15 history have been more violated so widely, so frequently,
16 and for so long.

17 Consider what is happening just in some of the States
18 represented on this Committee. Defenders are not present
19 at arraignment. A large number of misdemeanor defendants
20 plead guilty without lawyers. Defendants who have been
21 locked up pending their first appearance are told that
22 they can plead guilty and be sentenced to time served,
23 but if they choose to be represented by counsel, they
24 will wait in jail until one is appointed. And problems
25 exist on a smaller scale within our own Federal system,

1 as we will hear.

2 When misdemeanor defendants are not given counsel, no
3 one can challenge the legality of a traffic stop or to
4 make the prosecution prove every element of an offense
5 beyond a reasonable doubt. So innocent people may be
6 going to jail.

7 In locations where lawyers are provided at every
8 stage of the process, about 25 percent of all cases are
9 dismissed. There are members of the Senate who want to
10 reduce sentences for felons. At least those individuals
11 have been proven beyond a doubt to have, for instance,
12 sold large quantities of drugs that poison our children
13 or bring violence to our streets.

14 But to really address sentencing reform, we should
15 also be looking at the vast majority of crimes in the
16 country, meaning misdemeanors, and the un-counseled
17 prison sentences that punish them.

18 These constitutional violations cause serious
19 repercussions. People who are convicted of misdemeanors,
20 whether they receive legal representation or not, may
21 have problems obtaining a job for the rest of their
22 lives. That hurts those individuals, it hurts the
23 economy, it hurts all of us.

24 Misdemeanor convictions give rise to other collateral
25 consequences. Housing assistance and student loan

1 eligibility might be compromised. Some misdemeanor
2 convictions can lead to loss of gun ownership rights.
3 Some misdemeanors, when repeatedly violated, become
4 felonies.

5 Yet, prior un-counseled misdemeanors should not count
6 toward felonies and their consequences. Misdemeanor
7 convictions can also make defendants ineligible for a
8 Federal safety valve. That is a provision that allows
9 first-time low level drug offenders to avoid mandatory
10 minimum sentences. In many instances, misdemeanor
11 defendants are unaware of those consequences when they
12 enter their guilty pleas.

13 I do not think that the solution to the problem is
14 another Federal grant program. According to a 2012 GAO
15 report, there are already 13 such programs and of the
16 nine that can be used for indigent defense and for other
17 purposes, States have not used the grants for counsel.

18 Indigent representation is not a high priority. In
19 fact, barely half of all defender offices even knew that
20 these funds could be used for indigent defense.

21 Perhaps we need a better Federal effort in
22 coordinating and maybe even dispensing these funds,
23 combined with transparency and accountability for why
24 States are not spending available funds for indigent
25 defense.

1 One way to address the problem would be for States to
2 reclassify some misdemeanors as civil offenses or
3 eliminate prison sentences for various misdemeanors.
4 Perhaps civil fines would be just as effective without
5 making States pay for lawyers or causing collateral
6 consequences.

7 We will hear testimony today about divergent programs
8 that take some offenses out of the criminal justice
9 system. Again, there are Committee members who are
10 concerned about over-criminalization. This is a place to
11 begin.

12 States often make lawyers sit through CLE programs of
13 dubious value. Perhaps it would render a better public
14 service by requiring lawyers to provide assistance to
15 indigent misdemeanor defendants instead.

16 What is particularly troubling about these
17 constitutional violations is who is committing them. It
18 is our judicial system. The States and the State courts
19 must adhere to the Bill of Rights. Respect for our
20 courts, as well as the rule of law demands that.

21 Widespread, intractable violations of the Sixth
22 Amendment have existed for more than 40 years. Few
23 prospects exist that the States will soon remedy those
24 violations.

25 State systems need to be reformed. We need to know

1 what is happening. We pride ourselves on a legal system
2 that provides equal justice for all. For that to be
3 real, we must make sure that people without financial
4 means receive representation.

5 I would, at this point, ask unanimous consent to
6 include in the record a letter from Mark V. Holden,
7 Senior Vice President, General Counsel and Secretary,
8 Koch Industries, in support of today's hearing.

9 [The letter referred to follows:]

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1 Chairman Grassley. We also have 13 other letters to
2 place in the record that I will just categorize as
3 varying from across the political spectrum in support of
4 this hearing and doing something with it.

5 [The letters referred to follow:]

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1 Chairman Grassley. Now, I call on my friend from
2 Minnesota for any statement that you want to make, and
3 thank you for coming.

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1 OPENING STATEMENT OF HON. AL FRANKEN, A U.S. SENATOR FROM
2 THE STATE OF MINNESOTA

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4 Senator Franken. Thank you, Mr. Chairman, for
5 calling this hearing on the Sixth Amendment right to
6 counsel in misdemeanor cases.

7 This is a very important issue and a bipartisan
8 issue. Despite the fact that misdemeanors represent 70
9 percent to 80 percent of all criminal cases, misdemeanors
10 have not been a significant part of the conversation
11 surrounding criminal justice reform, and they should be.

12 So I am glad to see this issue come before the
13 Judiciary Committee and I appreciate the opportunity to
14 attend this hearing. It has been more than 50 years
15 since the United States Supreme Court unanimously ruled
16 in Gideon v. Wainwright, saying that defendants facing
17 criminal charges have a right to counsel regardless of
18 their ability to pay for legal representation.

19 In that decision, Justice Black wrote that any person
20 held in the court who is too poor to hire a lawyer cannot
21 be assured a fair trial unless counsel is provided for
22 him. He called that an, quote, "obvious truth."

23 Yet, in State and local courts across this country,
24 defendants in misdemeanor proceedings are still appearing
25 before judges without an attorney because they are unable

1 to afford one. States and localities staring down record
2 misdemeanor backlogs and shrinking budgets are not
3 providing those defendants with access to counsel despite
4 their constitutional obligation to do so.

5 As the Nation engages in difficult conversations
6 about the effects of mass incarceration and the state of
7 our criminal justice system, we are permitting scores of
8 defendants from our most vulnerable communities to appear
9 unrepresented in court.

10 The stakes are high. Misdemeanors or so-called
11 lesser offenses carry enormous and lasting consequences.
12 Individuals convicted of misdemeanors do not just face
13 crime and imprisonment. Long after they have served
14 their sentences, misdemeanor offenders are denied job
15 opportunities and career advancement. They are deemed
16 ineligible for student loans and even housing.

17 But despite the consequences and the costs those
18 consequences impose on our communities and on our
19 country, many of our citizens face these charges alone
20 without assistance and with little chance of success.

21 So I look forward to hearing more from our witnesses
22 about how we can confront this obvious truth and better
23 meet our constitutional obligation to ensure that
24 defendants receive a fair trial.

25 Thank you again, Mr. Chairman.

1 Chairman Grassley. Thank you, Senator Franken.

2 I am going to introduce everybody before you testify
3 and then we will move from Mr. Cady over to Ms.
4 Hashimoto, in that way.

5 I want to introduce a person that has testified
6 before our Committee before, the Chief Justice since
7 2010, but a member of the Supreme Court of Iowa since
8 1998. He earned both his undergraduate and law degrees
9 from Drake University. He has been a State judge since
10 1983.

11 In 2013, he was elected to the Conference of Chief
12 Justices' Board of Directors. Chief Justice Cady is also
13 an adjunct faculty member at Buena Vista University.

14 David Singleton is Executive Director, Ohio Justice
15 and Policy Center. OJPC provides free legal
16 representation to prisoners and ex-offenders. Mr.
17 Singleton is a graduate of Duke University and Harvard
18 Law School.

19 Next is Neil Fulton, United States Federal Public
20 Defender for the District of North and South Dakota since
21 2010. Mr. Fulton formerly was in private practice and
22 was also Chief of Staff to our new colleague, then
23 Governor Mike Rounds. Mr. Fulton graduated from Yale
24 University and the University of Minnesota Law School.

25 Robert Boruchowitz -- I may just call you Professor

1 Robert -- Professor of Practice and Director of the
2 Defender Initiative at Seattle University School of Law.
3 He was Director of the Defenders Association in Seattle
4 for many years and has published widely on misdemeanor
5 defense cases. He is a graduate of Kenyon College and
6 Northwestern University School of Law.

7 Erica Hashimoto is Associate Dean and a professor at
8 the University of Georgia School of Law. She is a former
9 Assistant Federal Defender. Much of Professor
10 Hashimoto's scholarship has been devoted to the right to
11 counsel in criminal cases. She graduated from Harvard
12 University and Georgetown Law Center.

13 Chief Justice Cady, will you start out, please?

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1 STATEMENT OF HON. MARK S. CADY, CHIEF JUSTICE, IOWA
2 SUPREME COURT, DES MOINES, IOWA
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4 Mr. Cady. Thank you very much, Mr. Chairman,
5 Ranking Member Franken.

6 I did have the honor to address this Committee 3
7 years ago on the issue of cameras in the courtroom and it
8 is again an honor to be before you this morning to talk
9 about this important issue of protecting the
10 constitutional right to counsel for indigents charged
11 with misdemeanors.

12 Before I begin my remarks, let me just briefly
13 describe the background of the organization of the
14 Council for Chief Justices, and I submit my testimony
15 this morning as a member of the Board of Directors of
16 that organization.

17 It was established in 1949 and its purpose was to
18 provide input and improve the administration of justice
19 throughout the country. As you know, State courts handle
20 97 percent of all judicial proceedings in this country.

21 The Conference of Chief Justices recognizes the Sixth
22 Amendment right to counsel and the parallel State
23 Constitution provisions that project the most important
24 -- some of the most important rights of people that are
25 brought into our courts on criminal offenses.

1 So it is indeed important this morning that we
2 remember the protection at the center of the issue that
3 we address provided by the United States Constitution.
4 It is a protection that, as the Chairman described, is
5 trumpeted by Clarence Gideon over 50 years ago and later
6 extended by the United States Supreme Court to all
7 criminal cases, including misdemeanors, where it could
8 lead to a sentence of incarceration or even a suspended
9 sentence.

10 It is a right that helps define our collective
11 understanding of justice.

12 Providing indigent defendants with representation,
13 however, is fiscally challenging for many States. In
14 2014, the Conference of Chief Justices adopted a
15 resolution entitled In Support of the Establishment of a
16 National Center for the Right to Counsel, identified as
17 H.R. 3407.

18 The resolution noted that State and local governments
19 continue to struggle to adequately fund legal
20 representation for indigent criminal defendants. And a
21 copy of this resolution is attached to the written
22 testimony.

23 At present, the mechanism used to deliver indigent
24 defense services nationally can best be described as a
25 patchwork of programs rather than a comprehensive system.

1 They are funded in different ways. They are structured
2 to operate in different ways and even the guidelines for
3 eligibility are different.

4 Attached to the testimony is a spreadsheet describing
5 the statutory provisions for indigent determination in
6 most States, but I think a review of that information
7 will demonstrate that courts have gone to considerable
8 lengths to ensure that everyone with a bonafide need for
9 representation can qualify for counsel.

10 Indigent defense delivery systems in every State are
11 underfunded; in many States, severely underfunded.
12 Courts handling misdemeanor cases almost always have
13 caseloads that are so high that they necessitate
14 processing cases in almost an assembly line fashion.

15 This leads to a high percentage of cases resulting in
16 guilty pleas without counsel to get the benefit of
17 receiving the fine and court costs as a sole sanction.
18 Although this may look attractive to criminal defendants
19 at the time and it may even induce them to waive
20 legitimate defenses, they are exposed to many, many
21 collateral consequences, as have already been identified.
22 These consequences can make the quality of representation
23 more and more essential.

24 The conviction itself and the permanent and easily
25 accessible record that it leaves can and does result in

1 significant hurdles to future employment, education,
2 housing and so many other opportunities to achieving a
3 productive life.

4 The States have made efforts to ensure that they are
5 in compliance with their requirements under the Sixth
6 Amendment to the Constitution to provide representation
7 to indigent defendants. Nevada and Pennsylvania, for
8 example, have recently established commissions to look
9 into the issue.

10 Other States have chosen to limit and redefine the
11 number of charges that can carry the possibility of
12 incarceration as a sanction in hopes of utilizing
13 existing resources more effectively. North Carolina is
14 an example.

15 Washington's Supreme Court recently adopted mandatory
16 misdemeanor caseload limits, as well as other
17 representation improvements. These standards have
18 brought attention to the misdemeanor issue for public
19 defense and have resulted in public defense upgrades in
20 hundreds of local courts there.

21 These efforts do mark progress, but much, much more
22 remains.

23 The Conference of Chief Justices believes that the
24 public would greatly benefit by the establishment of a
25 national center for the right to counsel to fund

1 innovations, support research on indigent defense
2 delivery systems, support training and technology
3 assistance programming, and to serve as a clearinghouse
4 of information. The center could help identify the best
5 practices currently employed nationally and, over time,
6 help bring uniformity to this issue. It would also help
7 improve the public confidence and trust in our criminal
8 justice system.

9 Thank you again for asking for our input on this very
10 important matter. The Conference of Chief Justices
11 stands ready to work collaboratively and cooperatively to
12 craft solutions to this important issue.

13 I will look forward and be happy to answer questions
14 later on. Thank you.

15 [The prepared statement of Mr. Cady appears in the
16 appendix.]

17 Chairman Grassley. Thank you, Mr. Chief Justice.

18 Now, Mr. Singleton?

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1 STATEMENT OF DAVID A. SINGLETON, EXECUTIVE DIRECTOR, OHIO
2 JUSTICE AND POLICY CENTER, CINCINNATI, OHIO
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4 Mr. Singleton. Good morning, Chairman Grassley,
5 Ranking Member Franken and Senator Durbin.

6 I am delighted to be here this morning to offer my
7 thoughts on this very important issue of protecting the
8 right to counsel in misdemeanor cases. I think we can
9 all agree that the problem is widespread and in my
10 written testimony I have some examples of Ohio, recent
11 examples where the courts of appeals had to reverse
12 convictions where the right to counsel was denied.

13 Rather than talk about those cases and rather than
14 getting into lots of statistics and numbers, I want to do
15 something different in my brief time this morning. I
16 want to try and put a human face on this problem and talk
17 about how misdemeanor convictions impact the lives of
18 folks who are just trying to do the best they can in
19 society and lead productive lives.

20 There are some people out there who would say
21 misdemeanors, what is the big deal; you do not go off to
22 prison for a long time if you get convicted of
23 misdemeanors. But misdemeanors matter. They matter
24 because they can have lifelong impacts on people's lives,
25 their ability to provide for themselves, and all sorts of

1 collateral sanctions that apply that make that difficult.

2 I want to tell you about Melinda. Melinda is a
3 former client of mine. She is a mother of three and she
4 has raised her children pretty much by herself. Back in
5 the 1990s, she got convicted of misdemeanor offenses that
6 stemmed from a seizure that she suffered. She has
7 suffered from seizures since she was 19 and had gone off
8 the medication because the doctors were trying to find a
9 new therapy for her.

10 Well, one afternoon while she was on the phone, she
11 suffered a seizure and, luckily, her friend on the phone
12 recognized it and called 911. The paramedics come. But
13 when the paramedics come, they find her three young
14 children, ages 3, 4 and 5, downstairs unattended and
15 there were cleaning supplies out and knives on the
16 counter in the kitchen.

17 And they walked upstairs and there were missing
18 screens in the windows, an electrical outlet not covered.
19 And they took her to the hospital. She got better. But
20 the paramedics reported what they found to the police.
21 And a couple of weeks later, Melinda got summoned to
22 court where she learned she was being charged with child
23 endangerment.

24 Now, a month after that, Melinda stood before the
25 judge without a lawyer and she was appointed a public

1 defender, but the public defender was not there. And
2 what the judge did was say, "Look, I am not sure why you
3 are here based on the facts of this case, but I will tell
4 you what I am going to do. If you plead no contest, I
5 will allow you to get non-reporting probation. You do
6 not have to show up and report to a probation officer.
7 And you can be on your way."

8 And that is what Melinda did. The problem was that
9 years later when she was struggling to earn a living to
10 support her three children, she found this great job in a
11 daycare center and she was good at it, she was very good
12 at it. The employer loved her, the kids loved her. But
13 then there was a change in the law that required a
14 mandatory background check.

15 And when the employer found that she had been
16 convicted of endangering children, they fired her, let
17 her go. And that was a job that Melinda loved and was
18 good at.

19 What would have happened had Melinda had a lawyer
20 standing by her side? Would she have pled no contest to
21 crimes for which she had a viable defense? That viable
22 defense was, number one, she was cleaning her house on
23 the day that this happened, cleaning her kitchen. That
24 is why the cleaning supplies were out. She tried to get
25 her landlord to fix the problems, but he told her it was

1 not his responsibility because he had just sold the
2 building to someone else.

3 Would she have been found guilty? Perhaps not. She
4 had a viable defense, but nobody told her that. And as a
5 result, she loses her income and her ability to support
6 her children.

7 Melinda is not alone. There are thousands of people
8 in Ohio and millions across this country who are impacted
9 by collateral sanctions.

10 In the State of Ohio, there are 700 laws on the books
11 that restrict people from working in certain industries;
12 20 percent of those apply to misdemeanor offenses. And
13 we know from the work that the ABA has done cataloging
14 collateral sanctions across this country that this
15 problem has huge dimensions. And it is not just jobs.
16 It is also the ability to get educational support,
17 housing and the like.

18 So the time has come for us to do something about
19 this problem, to make the promise of Gideon real. And I
20 urge you -- I am not going to go through a lot of
21 recommendations. I have read the recommendations from
22 Professors Boruchowitz and Hashimoto and I agree with
23 them and I agree with what the Chief Justice just said in
24 terms of the establishment of a center. But I urge this
25 body to recommend that change happen and change happen

1 soon.

2 Thank you.

3 [The prepared statement of Mr. Singleton appears in
4 the appendix.]

5 Chairman Grassley. Thank you, Mr. Singleton.

6 Now, Mr. Fulton?

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1 STATEMENT OF NEIL FULTON, FEDERAL PUBLIC DEFENDER,
2 DISTRICT OF SOUTH DAKOTA AND NORTH DAKOTA, PIERRE, SOUTH
3 DAKOTA

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5 Mr. Fulton. Thank you, Mr. Chairman, Ranking Member
6 Franken and Senator Durbin, for your interest in the
7 issue and the invitation.

8 In North and South Dakota, with 13 Indian
9 reservations and approximately two-thirds of our cases in
10 any given year arising from Indian country and the
11 concurrent Federal and Tribal jurisdiction over many
12 offenses, our interaction with Tribal courts in the
13 Federal defenders office is frequent and the issue of
14 misdemeanor representation in Tribal courts is critical
15 to our practice.

16 Many of the problems we encounter are similar to
17 those you will hear from from State practitioners, but
18 some are unique to the interplay of Federal law and
19 Tribal jurisdiction.

20 A first and critical unique aspect about Tribal
21 courts is that there is no Sixth Amendment right for
22 Native American offenders in Tribal courts. Sentences of
23 up to 1 year of incarceration can be imposed with no
24 right to appointed counsel in Tribal courts.

25 In instances where tribes allow counsel under their

1 laws, in many instances, counsel is provided by lay
2 advocates, not law trained individuals. That problem is
3 exacerbated by the rural nature of most reservation
4 areas. There simply are no lawyers.

5 In South Dakota, the Chief Justice has initiated a
6 program to draw more lawyers to rural areas because
7 regardless of whether you are in Tribal or State court,
8 there just is no lawyer available. But in Tribal court,
9 the problem is unique because there is no protection and
10 no guarantee of a lawyer.

11 As a result, guilty pleas without counsel are common,
12 I would say typical, in my experience in Tribal courts.
13 Why? It is the ultimate rational choice. You plead
14 today, you get out; you assert your right to counsel and
15 a defense, you will stay in jail.

16 Additionally, because of concurrent Federal
17 jurisdiction, many of our clients, unfortunately, believe
18 that a guilty plea will provide them with double jeopardy
19 protection against Federal charges down the road. That
20 belief is mistaken.

21 In fact, the concurrent Federal and Tribal
22 jurisdiction exacerbates that problem because in many
23 instances, Tribal misdemeanors are used as entry points
24 to a Federal prosecution. As an example, an individual
25 may be initially arrested for a simple assault or for a

1 public intoxication or a liquor violation for a more
2 serious assault charge or even a homicide.

3 That individual is detained. Statements are obtained
4 and the case is developed with that individual not
5 realizing that Federal charges are available, not
6 realizing the right to counsel and no guarantee thereof.

7 Admissions are made. No global plea agreements are
8 worked out. And in some instances, the appointment of
9 special attorney generals deputized in both Tribal and
10 Federal court, the prosecution is initiated and driven by
11 the person who will eventually pursue it in Federal court
12 and the individual has no counsel at any point while they
13 make critical admissions.

14 Collateral consequences are severe. You have heard
15 from other people about that and will hear more, but it
16 is particularly acute in Indian country. Six of the 10
17 lowest per capita income counties are in North and South
18 Dakota. They are all Indian country. Employment is
19 unavailable endemically. If you have disqualifying
20 misdemeanor convictions, it is even worse.

21 Student aid is unavailable to lift people out of
22 poverty and if you are ineligible for government
23 subsidized housing in Indian country, that is to say you
24 are ineligible for housing, period.

25 In many instances, heads of households will plead

1 guilty to misdemeanors, thus becoming ineligible to
2 retain their housing and displacing both them and their
3 family.

4 Additionally, a disturbing collateral consequence is
5 that un-counseled Tribal convictions can serve as
6 predicates for certain Federal offenses. As an example,
7 the Eighth Circuit Court of Appeals has affirmed the use
8 of un-counseled Tribal domestic assault convictions as
9 predicate offenses for habitual domestic offender
10 convictions under 18 USC 117.

11 The efforts by Congress to address these issues in
12 Tribal courts under the Indian Civil Rights Act, the
13 Tribal Law and Order Act and VAWA have not solved the
14 problem, at least not yet.

15 My compatriots in other places have described
16 instances where the Indian Civil Rights Act or the Tribal
17 Law and Order Act protections have been ignored, either
18 by mistake or bad faith; individuals receiving up to
19 2,500 days in detention post the enactment of TLOA,
20 individuals receiving almost 2.5 years after TLOA was
21 enacted, without counsel.

22 The problem is the remedies to address these issues
23 are very cumbersome. One has the right to pursue habeas
24 corpus in Federal court, but you have to first exhaust
25 your remedies in Tribal court. That is a cumbersome

1 process and you again face this rational choice of do I
2 assert my rights or do I get out of jail now, and most
3 people get out of jail now.

4 Additionally, the Violence Against Women Act
5 Reauthorization of 2013 expanded the number of people
6 subject to this problem by giving tribes the ability to
7 exercise jurisdiction over non-Indians in certain
8 instances and both TLOA and VAWA expand the available
9 sentencing resources and maximums that tribes can impose.

10 This problem is significant, it is systemic, and it
11 has a real impact on our clients on a daily basis. It
12 needs to be addressed.

13 I appreciate the Committee's interest in the topic
14 and the opportunity to be here today.

15 Thank you.

16 [The prepared statement of Mr. Fulton appears in the
17 appendix.]

18 Chairman Grassley. Thank you, Mr. Fulton.

19 Professor Boruchowitz? Is that pretty close?

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1 STATEMENT OF ROBERT C. BORUCHOWITZ, PROFESSOR FROM
2 PRACTICE, SEATTLE UNIVERSITY SCHOOL OF LAW, SEATTLE,
3 WASHINGTON
4

5 Mr. Boruchowitz. That is very close, Senator.
6 Thank you. And thank you, Ranking Member Franken and
7 Senator Durbin. Thank you for holding this hearing.

8 Misdemeanor public defense in much of the country is
9 broken and in many places it hardly exists. Thousands of
10 people go to jail every day without a lawyer. Other
11 thousands have lawyers who are overwhelmed with cases,
12 poorly trained, poorly paid, and operating without
13 investigation and expert witness resources.

14 As you have just heard, convictions result in heavy
15 consequences besides jail and fines. As Federal Judge
16 Lasnik said about two cities in Washington, "Actual
17 innocence could go unnoticed and unchampioned."

18 Capable lawyers can help avoid many of those
19 convictions and consequences. And in other cases, the
20 amount of jail and fines could be diminished and cases
21 against innocent people like David's client could be
22 dismissed.

23 Federal legislation and targeted funding could make a
24 difference.

25 Most people who go to court go to misdemeanor court.

1 There are approximately 10 million cases a year; in many
2 States at least one for every 30 residents. The cost is
3 staggering, as the full cost of a misdemeanor is
4 estimated to be about \$1,700.

5 This affects every American. Almost everyone knows
6 someone who has been charged with a misdemeanor, whether
7 a minor in possession of alcohol, shoplifting, driving
8 with a suspended license, or something more serious, such
9 as DUI or assault.

10 I have seen judges run through the advice of rights
11 so quickly that people do not understand what is being
12 said. Many courts send defendants to talk to a
13 prosecutor before they even have a chance to see a
14 defender.

15 I saw a judge in Arizona instructing defendants to
16 waive their right. He said, "I want you to waive your
17 right to an attorney. You have a right to have an
18 attorney, but I am not going to give you the public
19 defender. You would have to go and hire one and I do not
20 think you are going to do that. I think you and I are
21 going to talk about this right here, right now, right."

22 Many court proceedings take only a few minutes,
23 making justice impossible. I submitted a transcript of
24 one that took less than 90 seconds. There is no way in
25 that time that an accused person can understand and make

1 a meaningful decision about whether to exercise their
2 rights and how to present their perspective of the case
3 for the judge to consider, and there is no way for the
4 judge to know whether the person has made a knowing,
5 intelligent and voluntary waiver of their rights or is
6 making a valid guilty plea or to know anything about the
7 defendant or the case and what an appropriate sentence
8 should be.

9 I have seen defenders so overwhelmed that they
10 literally spend 5 minutes in a hallway talking to a
11 client before advising her to plead guilty. The lawyers
12 never asked her what happened in the case or what she
13 wanted to do with it.

14 The racial disproportionality in misdemeanors is
15 significant. A black person is 3.7 times more likely to
16 be arrested for marijuana possession than a white person,
17 even though blacks and whites use marijuana at similar
18 rates.

19 Historically, although Seattle's African-American
20 population is roughly 8 percent, more than 40 percent of
21 the suspended license charges have been against African-
22 Americans.

23 A recent Federal court decision highlights many of
24 the problems. The for-profit contract defenders in these
25 two cities were each handling about 1,000 cases a year

1 part-time. The judge found that public defense clients
2 were systematically deprived of the assistance of
3 counsel. There was almost no evidence that the defenders
4 did any investigation or legal analysis and adversarial
5 testing of the government's case was nonexistent. It was
6 basically a meet-and-plead system.

7 One way of responding to reducing the demand for
8 defenders is that hundreds of thousands of cases could be
9 reclassified or diverted, in my opinion, saving more than
10 \$1 billion a year. Each year, there are more than
11 700,000 arrests for drunkenness, disorderly conduct and
12 vagrancy. There are about 600,000 for possession of
13 marijuana.

14 If drunkenness were treated as a health problem and
15 not a crime, as Colorado does, for example, approximately
16 \$600 million a year would be available for treatment and
17 other uses. Savings easily could exceed \$1 billion if
18 disorderly conduct were included, not to mention
19 suspended driver's license, which the Spokane City
20 prosecutor, for example, has developed a diversion for,
21 not only reducing the defender caseload by one-third, but
22 also saving hundreds of thousands of dollars and by
23 combining with a relicensing program, yielded millions of
24 dollars in revenue as people paid their fines.

25 King County, Washington has law enforcement-assisted

1 diversion, diverting drug and prostitution suspects to a
2 social service program instead of jail and prosecution.
3 An evaluation found that participants in that program
4 were 58 percent less likely to be arrested.

5 I recommend the Senate take several steps. Some
6 existing Justice Department funding to the States could
7 be devoted to misdemeanor public defense, with funding
8 for pilot projects, training, research and development of
9 relicensing and diversion programs.

10 Some of the funding could be conditioned on a
11 certification by the State that they are providing
12 counsel for eligible defendants.

13 The Senate should adopt the Gideon's Promise Act
14 proposed by Senator Leahy, providing technical assistance
15 and authorizing the attorney general to bring civil
16 actions to remedy patterns or practices that deprive
17 persons of their right to counsel.

18 And the Senate should adopt the national center for
19 the right to counsel as proposed by Representative
20 Deutch.

21 It is a disgrace that 52 years after Gideon and 43
22 after Argersinger, thousands of accused persons face the
23 power of the State alone. It is not fair, it is
24 economically foolish and wasteful. The impact on
25 people's lives is dramatic.

1 The Congress can help remedy this situation.

2 Thank you very much.

3 [The prepared statement of Mr. Boruchowitz appears in
4 the appendix.]

5 Chairman Grassley. Thank you, Professor.

6 Now, Professor Hashimoto?

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1 STATEMENT OF ERICA J. HASHIMOTO, ALLEN POST PROFESSOR OF
2 LAW, UNIVERSITY OF GEORGIA LAW SCHOOL, ATHENS, GEORGIA

3

4 Ms. Hashimoto. Thank you. Thank you, Chairman
5 Grassley, Ranking Member Franken, and Senator Durbin.

6 Every year, thousands, if not millions, of defendants
7 charged with misdemeanor criminal offenses are not
8 represented by lawyers, even though our Constitution
9 guarantees them the right to counsel.

10 These widespread constitutional violations have
11 created a crisis in which defendants charged with
12 criminal misdemeanors are steamrolled by our criminal
13 justice system.

14 The Supreme Court has said that the processing of
15 millions of criminal misdemeanors each year resembles
16 assembly line justice. In one jurisdiction, it is known
17 as McJustice, because of the breathtaking speed with
18 which cases are resolved.

19 In Florida, for instance, the adjudication of
20 misdemeanor cases, including findings of guilt and
21 sentencing, took an average of 3 minutes per case. In 3
22 minutes, a person transforms from a full rights-bearing
23 citizen, presumed innocent, into a convicted criminal,
24 subject to the government's authority to intrude in every
25 part of her life.

1 The search in pursuit of justice that the
2 Constitution guarantees before States can deprive
3 citizens of their freedom simply cannot happen in 3
4 minutes.

5 Because of these concerns, the Supreme Court has held
6 that there is a constitutional right to counsel in most
7 misdemeanor cases. As the Court recognized, in a system
8 in which speed often is substituted for care, lawyers can
9 ensure that the constitutional rights of criminal
10 defendants remain protected.

11 But when the right to counsel is denied, violations
12 of fundamental constitutional rights, including the First
13 Amendment right to free speech, the Second Amendment
14 right to bear arms, the Fourth Amendment right to be free
15 from unconstitutional searches and seizures, and the
16 Fourteenth Amendment right to due process will occur.
17 And without lawyers, deprivations of the protections that
18 our founders enshrined in the Constitution become
19 invisible and go uncorrected.

20 In that sense, the Sixth Amendment right to counsel
21 serves as the gateway to protecting all of the other
22 constitutional rights of defendants.

23 Lawyers also can assure that facts about defendants
24 that may bear on guilt or sentencing and that may have
25 gotten lost in the haste of pushing the case to a

1 resolution are brought to the attention of the court.

2 Despite its importance, the constitutional right to
3 counsel has been ignored in many local and State
4 courtrooms across the country. And because many
5 jurisdictions do not keep data on misdemeanor
6 representation rates, authors of numerous reports have
7 had to go out to individual jurisdictions to watch what
8 is actually happening in those courts and every report
9 that has studied the issue of misdemeanor representation
10 in States from Florida to Michigan to Kentucky to
11 Washington and many States in between has found a
12 significant percentage of misdemeanor defendants who do
13 not have a lawyer and who have not waived the right to
14 counsel.

15 The failure to provide counsel has enormous costs
16 above and beyond the average \$30,000 a year the
17 government spends incarcerating that person, including
18 the loss of jobs that provide vital and often the only
19 means of support to low income people, the inability to
20 get jobs in the future, and the States' shuttling of
21 children into State custody because their parents have
22 been unconstitutionally incarcerated.

23 The cost to State and local jurisdictions, to the
24 defendants and their families, and to the community as a
25 whole are immeasurable.

1 There is a crisis in misdemeanor courts in
2 communities across the country. The question is what to
3 do about it. Federal legislation is vital in order to
4 provide States and localities both with incentives to
5 address the problem and assistance as they try to move
6 toward constitutional compliance.

7 Beginning with incentives, States and, in particular,
8 local courts have no incentive to comply with the Sixth
9 Amendment right to counsel because there is no cost to
10 the denial of that right. Federal legislation needs to
11 provide that incentive.

12 If there is clear evidence that a jurisdiction is
13 engaging in a pattern or practice of violating the
14 constitutional right to counsel, the Department of
15 Justice should have authorization to take action against
16 that jurisdiction by filing for injunctive or declaratory
17 relief.

18 In addition, funding from the Federal Government
19 should be conditioned, first, on providing data on
20 representation rates in misdemeanor cases and, second, on
21 having an indigent defense structure to ensure that
22 counsel are available to represent defendants.

23 Finally, as Justice Cady pointed out, a national
24 center for right to counsel would assist States as they
25 try to move toward constitutional compliance.

1 Such measures would bring us closer to the right to
2 counsel guaranteed by the Sixth Amendment.

3 Thank you for your attention to this issue.

4 [The prepared statement of Ms. Hashimoto appears in
5 the appendix.]

6 Chairman Grassley. Thank you, to all of you. I am
7 going to call on Senator Durbin, if he would go first,
8 please.

9 Senator Durbin. That is kind of you, Mr. Chairman.
10 Thank you very much.

11 As I listen to the testimony here, several things
12 come to mind. There is an answer, I think, that I
13 believe is helpful and I would like your reaction to it.

14 In 2008, we passed a bill here, which became the law,
15 called the John R. Justice Prosecutors and Defenders
16 Incentive Act and what we did with this was provide money
17 through the Department of Justice to young prosecutors
18 and public defenders who were willing to make a 3-year
19 commitment and if they would make that commitment, we
20 would help them pay back their student loans.

21 It turns out to be an extremely popular program
22 because many law school grads find it impossible to take
23 these jobs -- they do not pay as much as some other
24 opportunities -- and we are denied their services.

25 Well, it has been a good law, I think, despite the

1 fact that I sponsored it, and it has not been adequately
2 funded. We had it authorized at \$25 million. One year I
3 believe that there was \$10 million for the Nation put
4 into this student loan forgiveness, and now we are down
5 to about \$2 million.

6 We have helped thousands stay in these jobs and
7 commit themselves to these jobs.

8 Tell me what you think the impact of that would be in
9 terms of providing more professional prosecutors and more
10 public defenders, in your experience.

11 Mr. Boruchowitz. Senator, it is a great program.
12 It has made an enormous difference. The debt of many of
13 our graduates now is in excess of \$100,000 when they get
14 out. If they are lucky, they can make \$50,000 as a
15 public defender or a prosecutor starting out. And so if
16 they have an opportunity to go with a big firm making
17 double or triple that, it is hard to go into public
18 service.

19 It would be enormously helpful to fund that fully so
20 that defenders and prosecutors could be paid.

21 However, it assumes that those jobs exist and if you
22 are in a place like South Carolina, for instance, where
23 the magistrate courts and the municipal courts frequently
24 have no public defenders at all, first of all, you would
25 have to get the local government to agree to fund the

1 position and then hire the person who could pay their
2 loan back. But the jobs do not exist in a lot of these
3 courts.

4 So if the Congress could take some steps in that
5 direction, incentivizing, as Erica suggested, so that
6 they could get funding, just as the law graduates could
7 get funding, to enable the local governments to have the
8 public defender positions, incentivize them, or,
9 alternatively, authorize the Justice Department to bring
10 actions against them if they do not provide counsel, then
11 those are the kinds of incentives that would make a
12 difference.

13 As Senator Grassley pointed out, a lot of the States
14 are ignoring their obligation. But your program is --
15 when it passed, I had recently left public defense for
16 academia and I know that it was very, very popular among
17 defenders.

18 Senator Durbin. Well, I hope we can expand it. I
19 would say to the Chairman, we are talking about the John
20 R. Justice Act to help defer student loan payments for
21 those who will give a 3-year commitment to become
22 prosecutors and defenders, and I hope I can approach you
23 a little later and talk about how we can adequately fund
24 that.

25 Let me also say that one of the things we are trying

1 to do is to take a look at Federal sentencing, and the
2 object, of course, is to reduce incarceration of those
3 who are being held for an extraordinary period of time
4 for offenses which might not merit mandatory minimums,
5 for example, and money which is currently being diverted
6 into the Bureau of Prisons might then be diverted into
7 things that we have talked about here.

8 We are talking about prosecutors and defenders. We
9 are also talking about, I think, the prevalence -- and I
10 do not remember if I heard this -- it is your testimony
11 -- of many of these criminal defendants dealing with
12 substance abuse and mental illness, and diversion from
13 our penal system, corrections system into treatment is
14 certainly more valuable for the individual and, I think,
15 for society at large.

16 The last question I will ask in the minute or so
17 left, if anybody would like to respond. In my State,
18 there has been a suggestion that maybe we ought to change
19 the law school curriculum so that in the third year there
20 are more apprenticeships and more actual in-court
21 experience by some of these law students, so they might
22 then entertain possibilities of becoming prosecutors and
23 defenders more realistically.

24 Does anyone have a reaction?

25 Ms. Hashimoto. I would agree with that, Senator

1 Durbin. And I think the ABA has moved in that direction
2 and is really encouraging law schools across the country
3 to expand their clinical and experiential offerings so
4 that law students can serve the communities in which
5 their law schools are housed and provide assistance to
6 those folks and, when they graduate, be more capable of
7 taking these jobs and be more experienced when they start
8 those jobs.

9 Senator Durbin. Thanks. Thanks, Mr. Chairman.

10 Chairman Grassley. I am going to start out with
11 Chief Justice Cady. Tell me if I am wrong, but I kind of
12 believe that Iowa has a better record than a lot of
13 States in providing defense in misdemeanor cases for
14 indigents.

15 Are there any approaches that Iowa has taken to
16 address this problem that might help other States to
17 improve compliance with the Sixth Amendment for
18 misdemeanor defendants?

19 Mr. Cady. There is, Senator. But as a beginning to
20 answer that question, I think what we have tried to do is
21 educate our judges and our magistrates and, in turn, our
22 prosecutors to understand what the problem is that we
23 have all identified this morning, because to begin with,
24 the myth has to be eliminated from the process that a
25 disposition that results in a fine is a good outcome.

1 And I think a lot of the magistrates and the judges
2 and the prosecutors in small misdemeanor cases work in
3 that direction thinking that they are providing an
4 outcome that will work for the offender.

5 It does not. And so what we are trying to do is
6 educate the people involved in our process so that our
7 courts work in a way that it solves the problems of
8 people that come into its courtroom instead of piling on
9 to the problem.

10 So I think our focus has been for judicial education.

11 Chairman Grassley. I am going to go to Mr. Fulton,
12 please.

13 How does the expansion of Tribal courts'
14 jurisdiction, for instance, under the Violence Against
15 Women Act and particularly for non-Native Americans,
16 impact the problem of indigent representation for
17 misdemeanor defendants, especially as it affects Federal
18 proceedings?

19 Many of us had concerns regarding the expansion of
20 this jurisdiction when we reauthorized that legislation.
21 Are there particular remedies the Committee could
22 consider to address the right to counsel issues arising
23 from Tribal court proceedings?

24 Mr. Fulton. I think there are some things that
25 could be done, Mr. Chairman.

1 First, I think that in no circumstance should an un-
2 counseled conviction be an element, a sentencing
3 enhancement, or a predicate offense for a subsequent
4 offender statute under Federal law. It seems improper
5 for our Federal laws to capitalize on unrepresented
6 convictions, wherever they come from, Tribal or State
7 court.

8 The Violence Against Women Act and Tribal Law and
9 Order Act, whether through lack of information or
10 whatever basis, I have heard from people where tribes
11 have exercised that expanded jurisdiction, but the
12 protections under those statutes are not being provided
13 and individuals are receiving sentences that are greater
14 than they should receive.

15 The remedy to fix that is to go to Federal court and
16 pursue habeas corpus. I think that one thing the
17 Committee could look at there is to eliminate a
18 requirement to exhaust Tribal court remedies before
19 seeking habeas under TLOA or VAWA. That would expedite
20 that and make it a meaningful remedy so the individual
21 would not have to sit in jail and go there.

22 And lastly, I think going back and looking at whether
23 an expansion of Tribal court jurisdictions when resources
24 may not be available to non-Natives and sentencing
25 enhancements when there are existing Federal offenses

1 that can cover many of these is something the Committee
2 could do, as well.

3 Chairman Grassley. Now, I am going to go to
4 Professor Hashimoto.

5 Your written testimony describes how misdemeanors and
6 misdemeanor prosecutions have exploded. This seems to
7 reflect a mind set that every problem has a criminal
8 solution.

9 So if this trend, as I see it, is right -- and you
10 had it in your testimony, so I assume it is -- what can
11 be done to reverse the trend?

12 Ms. Hashimoto. Thank you, Chairman Grassley.

13 I think it is important for the education that
14 Justice Cady has talked about and, also, for States to
15 undertake looking comprehensively at their criminal codes
16 and identifying the offenses that are leading to the very
17 high volume of criminal cases.

18 Bob mentioned a couple of those, including driving on
19 suspended licenses, disorderly conduct cases. All of
20 these kinds of cases, particularly the ones that do not
21 constitute threats to public safety, could easily be
22 rediverted, reclassified either as non-criminal cases or
23 depenalized so that the collateral consequences do not
24 attach to those.

25 I think studying that problem in every State is very

1 important because I think in every State, the types of
2 offenses are slightly different and the offenses that are
3 prosecuted at the highest rates are also slightly
4 different.

5 So I do think that the States need some assistance
6 looking at their criminal codes and determining ways to
7 decriminalize some of those offenses.

8 Chairman Grassley. Thank you.

9 Now, Senator Franken and then after Senator Franken,
10 Senator Klobuchar.

11 Senator Franken. Thank you, Mr. Chairman, for this
12 very important hearing.

13 Just to the Chairman's question on court jurisdiction
14 and VAWA on Tribal courts, those cases tend to be not
15 misdemeanor cases. Am I right?

16 Mr. Fulton. The underlying predicates frequently
17 are misdemeanor cases, Senator Franken.

18 Senator Franken. They are.

19 Mr. Fulton. Yes. I will give you an example. An
20 individual is called to a house. There is a report of a
21 disturbance. There is a public intoxication charge.
22 There is a liquor violation charge. There is a simple
23 assault charge. Those can then give rise down the road
24 to the predicate offenses. Also, then the tribes will
25 exercise what I would call misdemeanor analogs, simple

1 assault for what is actually an aggravated assault.

2 So frequently they are misdemeanors.

3 Senator Franken. Thank you. In your testimony, you
4 reference reports from colleagues suggesting that Tribal
5 courts are failing to appoint effective counsel or
6 failing to appoint counsel all together. But, clearly,
7 this is not unique to Tribal courts, as the testimony of
8 all the witnesses testifies.

9 You mentioned severe backlogs and a general lack of
10 available lawyers in sparsely populated areas. You do
11 the Dakotas or just South Dakota?

12 Mr. Fulton. North and South Dakota, Senator.

13 Senator Franken. Well, I imagine you see that
14 throughout the Dakotas.

15 Mr. Fulton. Absolutely, and it is a problem not
16 only in Tribal courts in the Dakotas, but also in State
17 courts. I mentioned Chief Justice Gilbertson in South
18 Dakota has started a program to try and incentivize
19 lawyers to come back to underserved rural communities.
20 It is just a problem of rural areas generally.

21 Senator Franken. What, in your opinion, and there
22 has been some testimony to this effect, what can we do to
23 incentivize attorneys, when they are starting their
24 careers, to consider serving the communities, these rural
25 communities?

1 Mr. Fulton. I think John R. Justice is great,
2 Senator Franken. I have lawyers in my office that are
3 beneficiaries of that. State programs like South Dakota
4 has initiated that is similar to John R. Justice
5 incentivizing people with student loan forgiveness or
6 repayment to bring them back to underserved communities
7 is a great idea.

8 I have to be candid. There is a ceiling at some
9 level. I love South Dakota. Not everyone chooses to
10 live there. That is just fine, but it is a reality. But
11 those programs do work and they do give people an
12 opportunity. And I think the discussion of law school
13 education and apprenticeship programs are great.

14 The University of Minnesota, my alma mater, has an
15 excellent misdemeanor defense clinic and it, frankly,
16 when I was there, incentivized a lot of people to go into
17 indigent defense. And those are great models to follow.

18 Senator Franken. University of Minnesota.

19 Professor Boruchowitz, it seems to me that one of the
20 major obstacles to solving the crisis is cost and you
21 bring out in your testimony that this really is cost to
22 not providing counsel.

23 Some of the witnesses here today have suggested that
24 there is a role for Congress to play in supporting an
25 increase in funding for the type of programs that provide

1 indigent defendants, but some of my colleagues might balk
2 at the price tag associated with funding those programs.

3 But you have written the staggering -- you just
4 testified about the staggering cost of misdemeanor cases.

5 Is it not true that a significant part of that cost
6 is not just prosecuting the misdemeanors, but
7 incarcerating misdemeanor offenders who may not have
8 faced jail time at all had they been effectively
9 represented by counsel?

10 So tell us about this, the real cost here. Would it
11 be less expensive if we were providing counsel?

12 Mr. Boruchowitz. Well, I think there are several
13 different ways of answering that. First, there is what
14 you could call the demand side, which is all the cases
15 that need lawyers, and Spokane is a good example, I
16 think, in answering all of your question.

17 First of all, the prosecutor realized that with the
18 caseload limits, which Chief Justice Cady mentioned, we
19 now have in Washington, they were going to need lots more
20 defenders if they did not get rid of some of the cases
21 they had. Plus, she also did not have enough lawyers to
22 do what she needed to do focusing on DUI and domestic
23 violence.

24 So she initiated a diversion program to work with
25 relicensing on suspended driver licenses. It took a

1 third of the cases out of the system and as a result,
2 they only had to add two lawyers to the defender office
3 instead of many more.

4 Secondly, they reduced the cost for her office, as
5 the prosecutor, as well as the jail and the defender and
6 they started collecting more revenue for the underlying
7 fines that people with suspended licenses had because
8 they helped them get their licenses back so they could
9 work, drive their kids to school and so forth. And so
10 they have brought in, over the past several years, \$4
11 million in additional revenue that they probably would
12 not have gotten otherwise.

13 The cost of jailing somebody is significant. As
14 Erica said, it is in the \$30,000 a year range. So for
15 every person that you are not locking up, you are saving
16 that money.

17 On top of that, there is all the cost to the economy
18 of somebody losing their job, their housing, all of the
19 consequences that come from that.

20 And then finally, I would say that there is some
21 research to indicate, and my own experience confirms
22 this, that when you have a lawyer at the first hearing,
23 very often the lawyer can persuade the judge, "My client
24 is going to be safe to be in the community, you can let
25 them out pending the next hearing," and you save jail

1 costs there.

2 And so for a relatively small investment in having
3 the lawyer there, you can yield a much greater savings in
4 the jail costs later on.

5 Senator Franken. Thank you very much. Thank you,
6 Mr. Chairman.

7 Chairman Grassley. Senator Klobuchar?

8 Senator Klobuchar. Thank you, Mr. Chairman. And
9 thank you to Senator Franken for also being part of this
10 hearing. It is a really important topic.

11 I was once a prosecutor, ran an office of 400 people,
12 and I remember you, Judge Cady, because I had you testify
13 on the cameras in the courtroom issue, and you are back,
14 when we had that hearing. So thank you for that.

15 Also, this is near and dear to our heart in
16 Minnesota, because Gideon v. Wainwright, when Walter
17 Mondale was the Attorney General, he actually led -- the
18 Attorney General sent a letter supporting the right to
19 counsel in that case. And I know there are many issues
20 that come out of it and have not been resolved, including
21 this one. So thank you.

22 I will start with you, Chief Justice. When an
23 individual pleads guilty or no contest to a misdemeanor
24 crime, there are consequences of that action that extend
25 beyond the immediate fine or jail sentence.

1 What other effect do you think these convictions can
2 have that people do not think about immediately? And
3 maybe you would like to answer that, as well, Mr.
4 Singleton.

5 Thank you.

6 Mr. Cady. Well, the consequences are many and they
7 come down the line where they are not even considered at
8 the time. But that is largely because our constitutional
9 standard is premised on the protection of someone's
10 liberty from incarceration.

11 But the consequences that follow, whether they are
12 employment, education, military service, whatever it
13 might be, are not part of the constitutional standard
14 that is sought to be protected.

15 And so we have to uncouple our analysis of the issue
16 at that point and understand that this involves the right
17 to counsel, but it also involves making our justice
18 system more fair and more just, because when we do become
19 better in doing our work, we do avoid so many costs and
20 so many heartaches later on down the line.

21 And so I think it is imperative to understand that
22 these collateral consequences oftentimes have much more
23 impact than a jail sentence.

24 Senator Klobuchar. Right. Mr. Singleton, do you
25 want to elaborate on that a little bit?

1 Mr. Singleton. Well, I wanted to add -- thank you
2 for the question, Senator. One of the things I wanted to
3 add that we have not talked about yet is these collateral
4 sanctions or consequences can also lead to increased
5 crime.

6 One of the things that we do at the Ohio Justice and
7 Policy Center is we have legal clinics in the community
8 where we meet with folks who are impacted in terms of
9 getting work, primarily getting work, but also other
10 impacts, housing and the like, but who come to us because
11 they want to be law-abiding, productive members of the
12 community and they are shut out of work because of their
13 criminal convictions.

14 I had one client --

15 Senator Klobuchar. We just did a letter on this, a
16 group of Senators, for job application purposes, not
17 having that be the first question.

18 Mr. Singleton. And that is terrific. But I had a
19 client a while back say, "Listen, what am I supposed to
20 do to support my family if I cannot get a job? I am
21 going to have to do something," and too often that
22 something is something that is illegal.

23 So I think that -- I mean, this is indirect, but I
24 think that if someone has a good lawyer, they can prevent
25 the conviction, they can prevent the spiral of having

1 collateral consequences that shut you out of work, I
2 think that ultimately pays off in public safety for all
3 of us because we are keeping people more stable and able
4 to support themselves through legitimate work rather than
5 resorting to crime.

6 Senator Klobuchar. Very good. Thank you.

7 Professor Hashimoto, you talked about the need for
8 better data about indigent representation. How do you
9 collect that data? And just based on some of the
10 research you have done, I guess you could also answer
11 that, Professor Boruchowitz. But just what you see as a
12 model that works in States. So go ahead.

13 Ms. Hashimoto. The Bureau of Justice Statistics has
14 been very good in felony cases about requiring
15 jurisdictions to keep pretty good data on who is being
16 represented in felony cases and by whom, so whether it is
17 public defenders, court-appointed counsel, or private
18 attorneys. And in felony cases, the data indicates that
19 it is about a 99 percent representation rate.

20 In misdemeanor cases, by contrast, there is just
21 simply no nationwide data at all. I think the Bureau of
22 Justice Statistics could be really helpful in helping to
23 get some data systems up.

24 My sense is that many, many, many misdemeanor courts
25 already keep some data, they have got court records on

1 these cases, and so all that would need to be added is a
2 box that says "Was the defendant represented by a lawyer;
3 if yes, what kind of a lawyer."

4 And I think collecting that data and then compiling
5 it so that we have got some record of exactly what is
6 happening on a nationwide basis is very important.

7 Senator Klobuchar. Professor, just quickly. I was
8 asking about models in other States that work the best.

9 Mr. Boruchowitz. Right. Part of the problem is
10 that a lot of these courts have their own systems that do
11 not talk to other systems. And so having some incentive
12 for the States to coordinate the data collection.

13 Some States are very good about keeping track of how
14 many cases individual lawyers have or at least what
15 courts they are operating in, but other States do not do
16 that. So being able to incentivize the States to
17 coordinate the data and get their local -- I mean, some
18 States literally have hundreds of courts and so -- and
19 very often these are city courts with very little
20 resources. And having their computer systems talk to the
21 State system is not always to do, but being able to get
22 all of them to report that data, as Erica suggested,
23 incentivize them to do that perhaps with some Federal
24 assistance to coordinate it.

25 Senator Klobuchar. Thank you. Well, I am out of

1 time here, but I also wanted to thank you, Mr. Fulton,
2 for your work. I know your counterpart in Minnesota and
3 I know how hard that work can be.

4 And I do want you to know when I was a prosecutor, I
5 testified at the legislature several times for full
6 funding for public defenders. I actually argued that it
7 was our best way to get good results if you have lawyers
8 that are matched on both sides.

9 So thank you.

10 Chairman Grassley. Senator Coons, you arrived just
11 at the right time.

12 Senator Coons. Thank you, Chairman Grassley. And I
13 would like to thank you and Ranking Member Leahy and
14 Senator Franken for calling this hearing.

15 This is an important issue. As we all know, the
16 right to counsel is one of the foundational rights of our
17 constitutional order. And in misdemeanor prosecutions,
18 as I know you have explored in great depth, which are the
19 majority of all cases and prosecutions in the country,
20 there is an uneven collection of data, uneven access to
21 counsel, uneven representation both in terms of quality
22 and timeliness and its impact on outcome.

23 So I am grateful for the chance for us to talk about
24 this vital piece of criminal justice reform.

25 In the last Congress, I was pleased to be able to

1 join with Senator Sessions in holding a hearing about the
2 Federal Public Defender Service and then working on the
3 appropriation side to try and reduce some of the harmful
4 impact of sequester on our judiciary as a whole, but, in
5 particular, on the Public Defender Service.

6 So I just wanted to ask a few questions, if I might,
7 since I suspect I am the very last thing between you and
8 concluding the hearing.

9 If I could, Mr. Singleton, there has been testimony
10 about misdemeanor sentencing and the significant racial
11 disparities which mirror some of the very disturbing
12 racial disparities in the criminal justice system as a
13 whole.

14 One example cited earlier is that it is 3.7 times
15 more likely that an African-American will be charged with
16 marijuana possession than a white person despite
17 identical rates of use.

18 How does the lack of representation in misdemeanor
19 cases contribute to or exacerbate the racial disparities
20 in our criminal justice system?

21 Mr. Singleton. Well, I can speak certainly in terms
22 of the experience in Cincinnati and what we find there is
23 that if you are a person of color, you are more likely to
24 be targeted for police enforcement. And as a result of
25 that, not having good representation just magnifies the

1 problem that you face.

2 You are more likely to wind up with a conviction.

3 Actually, let me just say this. In Cincinnati, we have -
4 - our public defender in Hamilton County is getting
5 better. It had some problems before, but it is getting
6 better now. But when I first came to the Cincinnati area
7 in 2001, it was a disaster and because you had
8 predominantly low income people of color in our municipal
9 court, which is where misdemeanors are prosecuted, they
10 were not getting adequate representation.

11 And so you had so many more of them winding up locked
12 up in jail when maybe they should not have been, but also
13 accumulating these collateral consequences, which make it
14 hard to get work, which drives the cycle of going in and
15 out of the system.

16 Senator Coons. Collateral consequences in terms of
17 employment, access to housing, access to skills or
18 training programs, lots of other things that once you
19 have a criminal record continue to accumulate and in the
20 absence of advice of counsel on a three strikes law, for
21 example, what began as relatively minor misdemeanor
22 offenses can end up having really significant
23 consequences long term.

24 Mr. Singleton. That is exactly right.

25 Senator Coons. Are there other members of the panel

1 who wanted to comment on this particular aspect of the
2 impact of lack of counsel for misdemeanor charges?

3 Mr. Boruchowitz. Senator, thank you for the
4 question. I think that David Singleton has pointed out
5 that it is a spiral. And one of the things that can
6 effective lawyer can do is when you identify racial
7 disproportionality happening, you can sometimes make a
8 difference.

9 I had a case myself in our juvenile clinic. The
10 client was African-American. He was charged with
11 trespass for literally walking into a shopping mall. He
12 had been there 11 month earlier wearing a hood and in
13 this particular shopping center, you are not allowed to
14 wear a hood.

15 Well, guess who they enforced that against? They
16 enforced it against African-American teenagers. And so
17 they told him you cannot come back for 1 year. He came
18 back 11 months later and they arrested him just for
19 showing up.

20 I had been at a session at the University of
21 Washington Law School a week or so earlier and I heard
22 the prosecutor talking about we cannot have racial
23 disparity. Well, I know him and I could call him up.
24 Not every lawyer can do that. And he looked into the
25 case and the next thing I know, the day before trial, the

1 prosecutor dismissed the case, which they should have
2 done. It made no sense to prosecute a young man just for
3 showing up, particularly, in the first place, when all he
4 did was wear a hood to get thrown out.

5 If that young man did not have an effective lawyer,
6 he could very easily have been convicted and the spiral
7 would have continued.

8 Senator Coons. If I could, Chief Justice Cady, we
9 have heard testimony today that suggests as much as \$1
10 billion in government resources could be saved by
11 decriminalizing some offenses that would really be better
12 treated as civil infractions, and that figure is in
13 addition to the immeasurable benefit to our citizens who
14 might have to pay a fine, but would not have to suffer
15 diminished job prospects, loss of liberty, other things
16 we have been talking about.

17 In my home State of Delaware, there are some who have
18 an interest in undertaking this task moving toward civil
19 citation, but the process can be difficult both
20 procedurally and politically.

21 What advice would you have for States that want to
22 rewrite portions of their criminal codes in ways that
23 would make them more just, but also that would achieve
24 the buy-in of the community, law enforcement,
25 prosecutors, judges, and elected leaders?

1 Mr. Cady. Well, that is something that certainly
2 needs to be explored and has been explored, but we also
3 have to ensure that we are solving the larger problem by
4 doing it, because sometimes switching into the civil
5 enforcement concept does not shed the problems that can
6 follow later on because there is still a record of that
7 and the like.

8 So I just think it is important that we continue to
9 be thoughtful about this. And it is interesting, when I
10 did testify before this body 3 years ago, the testimony
11 was divergent. People had sides. And I do not sense
12 that at all this morning and I sense that this is an
13 issue that is profound. It impacts people in such
14 significant ways, and we are all pointing to the same
15 thing.

16 And I think it just illustrates that when we sit in a
17 contemplative way and think about ways to make our
18 process work in a just way, it solves so many problems,
19 whether it is the cost avoidance later on or whether it
20 is the racial disparity, the problem that has now
21 surfaced in our criminal justice system that we are all
22 aware of.

23 And so I think this is a unique opportunity for us to
24 come together on this issue and see how it can solve so
25 many other things.

1 Senator Coons. Thank you, Mr. Chief Justice. That
2 is a great concluding comment and I appreciate both the
3 testimony of the witnesses and your calling this hearing
4 today. Thank you, Mr. Chairman.

5 Chairman Grassley. I would like to have the last 5
6 minutes. But before I do that, do any of you have
7 follow-ups you want to ask?

8 [No response]

9 Chairman Grassley. Then I will conclude this with a
10 couple questions.

11 Kind of a philosophical approach here, but it also
12 has practical, and I would like to have you all listen
13 and any or all of you that want to address it.

14 Some of the testimony today makes me wonder what is
15 really behind many misdemeanor prosecutions. States and
16 localities are fining defendants who cannot pay fines.
17 Rather than prioritizing serious misdemeanors that may
18 pose a real threat to the community, I have concerns that
19 what might be driving many of these cases is money and
20 the people who are paying the real costs are people who
21 cannot afford it.

22 No one is really seeking jail time. Fines are being
23 imposed and fees for monitoring are paid to private
24 companies and when people cannot pay those fines, they go
25 to jail for not paying the fines that were imposed for

1 minor offenses.

2 So two questions. What is driving States and
3 localities to establish a system and do you think that
4 the current system looks uncomfortably like a modern
5 debtors' prison? Any of you.

6 Ms. Hashimoto. Thank you, Chairman Grassley. Yes.
7 I think that is exactly what is happening. And what we
8 are seeing in States across the country is local courts
9 that, particularly after the recession hit, did not have
10 money to keep their courts afloat and so began funding
11 their local courts through the fines assessed to usually
12 poor people. And the only way to get those fees out of
13 poor people was by threatening them with incarceration,
14 at which point people would beg for money from their
15 families.

16 There are stories of this from across the country.
17 We have private probation companies threatening to revoke
18 probation and incarcerate people if they cannot pay;
19 unconstitutional under Bearden v. Georgia, but it is
20 happening across the country. And because there are no
21 lawyers in those courtrooms, there is nobody to say this
22 is unconstitutional, you cannot do this.

23 Mr. Boruchowitz. I think you are right, Senator.
24 It is consistent with the Justice Department finding
25 about the town in Missouri. And often it is really

1 counterproductive because it costs so much money to lock
2 people up. It costs more money to lock them up than it
3 does to get the money from them to pay the fines for
4 which you are locking them up.

5 But there are many, many courts that have what they
6 pay or stay, pay your fine or go to jail, without any
7 consideration of the ability to pay and if they cannot
8 pay, they cannot be locked up. And if they did not have
9 a lawyer in the first place, they cannot be locked up for
10 violating the condition of the probation.

11 There is no question that money is driving a lot of
12 this and you can see it when you go into some of these
13 lower level courts and the focus of everybody from the
14 clerk to the judge to the bailiff, the sheriff, is how do
15 we get money from this person and how do we get a fine.
16 And there are standard fines that are imposed often in
17 hundreds of dollars or more without any consideration of
18 whether the person can pay.

19 Chairman Grassley. Anybody else?

20 Mr. Fulton. If I could, Mr. Chairman. One thing
21 that I think is true in Tribal courts is that and also a
22 unique factor is it becomes a proxy for enforcement of
23 addiction issues, dealing with addiction issues.

24 Singlehandedly, the most common misdemeanor offenses
25 we see in people's background are tribal liquor offenses

1 or public intoxication. So it becomes a proxy for
2 dealing with problems of addiction and homelessness a lot
3 of times in tribal communities.

4 Mr. Singleton. I just wanted to add one thought. I
5 agree that money drives a lot of this, but I think we
6 also have a cultural issue here and the cultural issue is
7 I think we over-prosecute in this country.

8 I think we tend to bring into court and charge
9 criminally people we are mad at and we lock up people we
10 are mad at rather than people who are a true danger to
11 the community. So I think that that is also behind the
12 explosion of misdemeanor cases, as well as felony cases,
13 in our criminal justice system.

14 Yes, we should prosecute people who break the law and
15 pose -- and lock up people who pose a serious danger to
16 the community, but most of the cases in municipal court
17 in Hamilton County, Ohio are not very serious at all, yet
18 they can have huge repercussions if there is a criminal
19 conviction.

20 Chairman Grassley. Mr. Chief Justice, do you have
21 anything to add to the other four?

22 Mr. Cady. Mr. Chairman, I would just add that the
23 explosion of misdemeanor filings and convictions across
24 the country and in our State of Iowa, too, certainly has
25 been looked at as a revenue opportunity and that has

1 exacerbated the issue that brings us here this morning.

2 And I would just tell you that in our State, we try
3 to collect the fine for a short period of time and if
4 not, we refer it to the prosecutor, who gets an
5 opportunity to try to collect the fine. About half of
6 our counties have a process where the prosecutor does
7 that. And after that, after a year, it is shipped out to
8 a private company and they go after it like any other
9 debt collection.

10 Chairman Grassley. I am going to end with this
11 question then for Professor Robert.

12 Washington State has adopted approaches to take
13 driving with suspended license misdemeanor cases out of
14 criminal justice. That is a way to avoid triggering the
15 constitutional right to counsel and its accompanying
16 State expense. It is my understanding that this has
17 taken a fair proportion of misdemeanor cases out of the
18 criminal justice system in that State.

19 However, it is also my understanding that additional
20 misdemeanor cases are being filed that add to the
21 criminal justice system and negate all the driving cases
22 that have been moved out.

23 Is that your understanding of Washington's experience
24 and if it is, what is causing new misdemeanor cases to
25 take the place of the old and what can be done about it?

1 Am I right?

2 Mr. Boruchowitz. You are partially right, Senator.

3 Chairman Grassley. Go ahead.

4 Mr. Boruchowitz. We have reduced dramatically the
5 number of driving while license suspended third degree
6 cases. There used to be probably 100,000 a year in
7 Washington and I think those have been reduced by at
8 least half, maybe more than half.

9 The two largest cities, Seattle and Spokane, hardly
10 file any anymore because they divert them or they put
11 them in relicensing programs.

12 There has been some increase in filings, but nothing
13 close to the amount that has gone away. One of your
14 staff asked me to look into that in Spokane and I did
15 check with the prosecutor and the prosecutor said, yes,
16 there has been some increase since the recession, but
17 nothing close to the volume of what we are taking out
18 with suspended driver license.

19 And really there are three different things
20 happening. One is diversion accompanied with relicensing
21 programs and local prosecutors can do that without any
22 State action.

23 Secondly, the legislature narrowed the type of
24 offense that could lead to suspended driver license, and
25 then the department of licensing passed a regulation that

1 narrowed the group. So there are fewer cases that are
2 eligible for it and then within that, the prosecutors are
3 filing fewer.

4 And, of course, when you do not get your license
5 suspended, you cannot get arrested for driving with
6 license suspended, with saves a lot of money all around.

7 But in general, the volume of misdemeanor cases has
8 declined in Washington very dramatically. We used to
9 have over 300,000 a year, now there is something like
10 220,000 or 210,000, and a big part of that drop has been
11 getting rid of the DWS-3 cases.

12 Chairman Grassley. Well, thank you very much, and
13 all my colleagues who have come. I appreciate very much
14 your testimony and the participation of everybody.

15 I will adjourn the hearing. By the way, the record
16 will be open for 1 week. You may get questions from any
17 of us on the Committee. Please answer in writing.

18 [Whereupon, at 11:28 a.m., the hearing was
19 concluded.]

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C O N T E N T S

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STATEMENT OF:

THE HONORABLE CHARLES E. GRASSLEY
A United States Senator
from the State of Iowa

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THE HONORABLE AL FRANKEN
A United States Senator
from the State of Minnesota

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