**Dean’s Desk: The United States needs a defender general**

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At a time when nearly every political constituency agrees that we have over-incarcerated and over-criminalized our country, one question arises: Why did non-partisan recognition of this issue take so long?

It’s no secret that we incarcerate a higher number of people per capita than any other first-world nation. The numbers are staggering; we have the largest incarcerated population per capita and in absolute numbers in the world. That number is slightly north of two million, a bit less than 1 percent of the U.S. population. According to the Marshall Project, the average time lawyers spend on indigent defendants in misdemeanor cases in New Orleans is seven minutes; in Florida, the average indigent court appearance lasts as little as three minutes. Does this accomplish anything?

There has been no voice at the policy table for the accused, incarcerated and paroled. We have an attorney general of the United States. We have a solicitor general of the United States. The only lawyer that is enshrined in the United States Constitution is referenced in the Sixth Amendment: “In all criminal prosecutions, the accused shall enjoy the right to … the Assistance of Counsel for his defence.” Yet, the defense is not, and has not been a part of policy decisions regarding criminal justice matters. There is currently no office to represent criminal justice interests at the executive level the way that the attorney general does.

We have recently seen an acknowledgment of the use of fines to create essentially debtors prison in Ferguson, Missouri. This kind of inequity, which traces back historically to abuses of the criminal justice system to keep newly emancipated slaves indentured, exists all over the country. No one believed that there was a problem with how police speak to and stop African-Americans until there was video. If there was a defender general of the United States, that office could be a place where private and public defense attorneys, their communities and clients could go to ask for investigation into and action regarding these issues. The defender general could be the federal government’s national guide on indigent defense, standards of practice, establish training guidelines for local governments and help coordinate diversion programs. Would we not have preferred to see a uniform response to the improper use of fines and traffic stops occur before Michael Brown was shot and the simmering cauldron boiled over?

All over the United States indigent defense is in crisis. There are too many cases and insufficient resources to properly staff offices and prepare cases. Too often, the result is that we find out, sometimes decades after the fact, the wrong person was in prison, or perhaps executed. A defender general would know how the defense would be impacted by laws in ways that the prosecution and judiciary don’t anticipate. There could be real input for legislatures about the likely consequences of passing certain statutes, and to help prevent expensive and ineffectual decisions.

Here is one clear example. In 1996, President Bill Clinton signed into law the Antiterrorism and Effective Death Penalty Act. This, along with other crime bills from that era, has contributed to the mass incarceration we see today. I would like to speak to one part of that law, having to do with habeas corpus, a right enshrined in our Constitution that makes certain that no one is deprived of life or liberty without constitutionally mandated due process. It was succeeding far too often for some members of Congress in stopping executions. AEDPA was supposed to make it more difficult to get into court by erecting nearly impossible procedural hurdles, and to put a similarly near-impossible standard of proof needed by the petitioner.

The proponents thought this would lead to fewer petitioners, particularly from state courts, clearing those hurdles and getting into court, and would expedite the proceedings. AEDPA has done the first, ironically sometimes leaving intact a conviction despite DNA-exonerating evidence because it wasn’t presented properly. It has had the opposite effect on speed. Instead of making these petitions sail through the courts, what has happened is that years are now spent litigating whether the petitioner can litigate. At the time the president was considering signing the bill, a defender general could have been consulted on this policy decision and analyzed the potential outcomes of the bill. Those of us who do death penalty and habeas work did see the problems with this bill and predicted what was going to happen with this form-over-substance approach.

**Story Continues Below**



We have seen Secretary Hillary Clinton decry over-criminalization and mass incarceration and acknowledge her husband’s part in it. Had President Clinton been presented with a defender general’s analysis, he might have chosen a different path.

How would this work? As far as I know there is no similar office internationally. Israel has a chief public defender for the entire country, and that job is to run the defense attorney function for the indigent in that country. Vermont’s public defender system is called by that name. Some other states, such as Kentucky and Wisconsin, have statewide indigent defense systems. There is certainly recognition of the importance of representation of the accused in many countries, including our own.

What is not clear, though, is a national recognition of the need for a defense policy voice that is regularly included in the conversations that Congress and the executive branch have about these issues. Both branches can and do turn to the attorney general for her input on statutory and other concerns. The solicitor general also serves as an ongoing resource, but there isn’t an office that can represent the concerns of the defense, their families and their communities. Defendants and defense attorneys need a representative at the executive level who can collaborate on major policy issues, establish national and statewide standards, and coordinate training efforts within the criminal justice system. This is a crucial voice that should be a regular part of the executive discourse and an ongoing resource for indigent defense.

This defender general’s office should be created immediately. It should be appropriately staffed and liaisons created with each of the states and territories. The defender general should command the same respect and stature that the offices of the attorney general and solicitor general command, and the defender general would ensure that all of those interested in criminal justice have a seat at the table.•

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