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*Leading Articles***THE CRIMINAL JUSTICE ACT OF 1964**

Robert J. Kutak*

*The right of one charged with crime to
counsel may not be deemed fundamental and
essential to fair trials in some countries,
but it is in ours.¹*

A busy reader, scanning the pages of the *Washington Post*, might well have missed the story. The dateline was Panama City, Florida, August 5, 1963. The lead paragraph read: "Clarence Earl Gideon, whose hand-penned appeal from prison resulted in a United States Supreme Court landmark decision which gave Florida its public defender law—and won him a new trial—was acquitted today of a 1961 breaking-and-entering charge."

Those unfamiliar with the Supreme Court decision would not have caught the significance of the story until the last paragraph: "At the opening of his new trial today, ordered by the Supreme Court ruling, Gideon was represented by prominent Panama City criminal lawyer W. Fred Turner, who was appointed by the Court at Gideon's request." At his second trial, unlike his first, Clarence Gideon had a lawyer. As a result, he was not only acquitted, he was vindicated. Gideon demonstrated what the ruling case law, up to then, had in effect denied—that a lawyer does make a difference. It is doubtful whether more proof would be needed to show that the mandate of the sixth amendment providing the right to the assistance of counsel must apply in all forums, state and federal.²

Whether the wire service story caught the eye of the Senate leadership on the way to the floor the morning of August 6, 1963, is a detail that will escape history. But a bill to cure many of the deficiencies regarding the right to representation in the federal court system had been on the calendar since July 10, 1963, awaiting Senate action. This was the Criminal Justice Act of 1963.³

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¹ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

² See LEWIS, *GIDEON'S TRUMPET* (1964) for an account of the Gideon trial and a discussion of the Supreme Court decision.

³ Title was changed to the Criminal Justice Act of 1964, following final passage that year.

That afternoon, however, the bill was called up and passed. The brief Senate debate made no reference to the Gideon acquittal the previous day. Rather, to quote Victor Hugo as was so frequently done in the debate on another bill pending in the Congress, it was evident that the Senate was simply responding to "an idea whose time has come."

What idea is this? That a poor man should not be denied an opportunity to defend himself against a criminal charge because he lacks the means. He is entitled to enjoy the same protection in criminal proceedings as those having wealth. Equal protection of the law requires that such factors as the financial resources of an accused become irrelevant. Justice shall not be rationed on the basis that "them that has, gets." Simply stated—there shall be equal justice for the accused, and the government has the obligation to provide it, private means lacking, if it chooses to prosecute.

The Criminal Justice Act of 1964⁴ goes a long way towards making that idea a reality in our federal court system. By its impact on the administration of criminal justice, it is quite possible that the act will become recognized and rank as one of the major legislative achievements in a decade spanning both the New Frontier and the Great Society and crowded with congressional actions. The Criminal Justice Act of 1964 is quite short. Behind it, however, lies a lengthy history which must be appreciated if its potential is to be widely known and its provisions are to be fully used. With the means now at hand to furnish "representation of defendants who are financially unable to obtain an adequate defense in criminal cases in the courts of the United States,"⁵ the bar has both a challenge and a responsibility. Will the quality of representation in court appointed cases now improve? In the process of providing the desired representation, can abuse of the provisions of the act be avoided? The purpose of this article is to suggest ways and means for doing both.

I. THE PRESENT SITUATION

In the federal system at the present time an accused person who lacks counsel, and requests one, generally is furnished a lawyer at the time of his arraignment.⁶ At the proceedings before

⁴ 18 U.S.C.A. § 3006A (Supp. 1964).

⁵ Pub. L. No. 455, 88th Cong., 2d Sess. § 1 (Aug. 20, 1964).

⁶ FED. R. CRIM. P. 44. Compare proposed revision of the Rule, Advisory Committee on Criminal Rules, Second Preliminary Draft of Proposed Amendments 47-49 (March 1964).

the Commissioner—presuming they are not waived—he is informed of his right to retain counsel, but it is questionable how helpful this information is when the accused is poor.⁷ Counsel are appointed in a number of ways.⁸ In most districts the customary procedure is to assign lawyers engaged in private practice on an individual case basis. It has been observed that: “The assignment methods vary in their success in spreading the workload throughout the bar and in picking a suitable lawyer for a particular case.”⁹ In districts where the criminal docket is light, a selection can be made on the basis of personal contact with the members of the bar, assuring the judge that adequate representation is afforded the accused without the practice becoming individually too burdensome. However, in districts covering large metropolitan areas, the likelihood of individualized appointments is practically nil. The selections may come from lists of volunteers where they can be obtained—and this, too, is rapidly affected by the frequency of the call—or by a routine selection of lawyers admitted to practice in the federal district court. In a few districts, representation is furnished in whole or in part by privately financed legal aid societies or voluntary defender organizations. The District of Columbia has a mixed system. The Legal Aid Agency for the District of Columbia operates with appropriations from the Congress on the basis of a public defender office, but members of the bar are still individually called upon to furnish representation in a great number of cases.

The magnitude of the problem of furnishing representation throughout the federal court system cannot be underestimated. A total of 29,944 criminal cases were filed in the district courts during fiscal year 1964.¹⁰ Approximately 30 per cent of the defendants in those cases had counsel assigned to them.¹¹ The per-

⁷ FED. R. CRIM. P. 5(b). Compare proposed revision of the Rule, Advisory Committee on Criminal Rules, Second Preliminary Draft of Proposed Amendments 2 (March 1964).

⁸ See Note, *The Representation of Indigent Criminal Defendants In The Federal District Courts*, 76 HARV. L. REV. 579, 581-96 (1963).

⁹ *Id.* at 581.

¹⁰ See ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U. S. COURTS 147 (1964).

¹¹ See Judicial Conference of the United States, *Report of the Ad Hoc Committee*, H.R. Doc. No. 62, 89th Cong., 1st Sess. 91 (1965) [hereinafter cited as *Judicial Conference Report*]: “These figures and percentages [citing comparable statistical information] are not considered by the Committee to be a reliable estimate for the future. First of all, they do not take into consideration the entirely new provision in the act requiring the assignment of counsel at the level of the U.S.

centage of assignments in each judicial district, however, varies considerably. Some districts reported that more than 50 per cent of the defendants were furnished counsel. A substantial number of districts had over one-third of the defendants so represented. In the district of Nebraska during fiscal year 1963, of the 142 defendants whose cases were terminated by convictions or acquittals 77 of them—or 54.2 per cent—had assigned counsel.¹² This does not mean, of course, that counsel were retained in the remaining cases. The defendant frequently waived his right to counsel. The figures point out the extent to which legal services, although needed, cannot be provided by the accused in our federal court system.

Pressure on court appointed counsel may account for the number of guilty pleas. Of the 33,381 defendants who appeared in the district courts in fiscal year 1964, 29,170 were convicted and sentenced. Of this number, 26,273 defendants were convicted by pleas of guilty or *nolo contendere*.¹³ The *Allen Committee Report* observes that while:

a higher percentage of pleas of guilty among cases in which defendants are represented by assigned counsel may reveal more about the character of the crime committed than the quality of the representation. . . . [t]he facts indicate that in all districts studied, pleas of guilty are entered much more frequently by defendants with assigned counsel than those represented by private counsel.¹⁴

There is such a person as a guilty defendant who comes to terms with his predicament and does not choose to prolong the day of judgment. A frank and early recognition of the desirability of this course of action may be the best advice his counsel, whether retained or appointed, can give. For this reason the Allen Committee's admonition not to draw too hasty a conclusion about the higher percentage of pleas of guilty among cases in which the

Commissioner. Nor do they take into account the likelihood that in the future and in order to protect the record, courts and commissioners will be less inclined to accept waivers of counsel by defendants who appear before them."

¹² Statistics for the previous fiscal years for District of Nebraska:

Fiscal year	Defendants cases terminated	Assigned counsel	Per cent
1962	112	57	50.9
1961	134	78	58.2
1960	140	54	38.6

¹³ See ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS 256 (1964).

¹⁴ See REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 28-29 (1963) [hereinafter cited as ALLEN COMMITTEE REPORT].

defendants were represented by assigned counsel is well taken. The question is where the line is drawn. "Present practices sometimes induce a plea of guilty because appointed counsel recognize the futility of electing a contest in the absence of resources to litigate effectively."¹⁵ When the plea is entered on the basis of poverty, not proof, a problem of adequate representation arises. The need for counsel, moreover, would not wane at the time of plea. Obviously, without the help of a lawyer throughout the subsequent stages of the proceedings, the interests of a defendant may be severely prejudiced. The consequence of the disparity in the quality of those services or their deprivation altogether is not lost on the guilty.¹⁶

It is unnecessary here to retrace in detail the struggle to secure the right to counsel which is now enjoyed. This has been done expertly in a previous article in the *Nebraska Law Review* and elsewhere.¹⁷ As Justice Douglas stated: "The sixth amendment's provision that in all criminal prosecutions the accused shall enjoy the right 'to have the Assistance of Counsel for his defense' is the beginning of our problem."¹⁸ For a long period in our history this provision in the Constitution stood only for the right to retain counsel and left those who did not have the means defenseless.¹⁹ A notion that poverty was somehow a personal fault contributed to the early thinking on the subject and the case law lingered long after the attitude was rejected.²⁰

¹⁵ *Id.* at 29.

¹⁶ See S. REP. NO. 346, 88th Cong., 1st Sess. 6 (1963). Statement of Attorney General Kennedy: "The [Department of Justice] study showed that pleas of guilty are entered much more frequently—in some areas three times as often—by defendants with assigned counsel than those represented by paid private counsel who have both the facilities and the incentive to make independent investigations. Defendants with appointed counsel, the study also showed, had less chance to get charges against them dismissed, less chance of acquittal when they went to trial, and greater chance, if convicted, of being sent to jail instead of being placed on probation."

¹⁷ See Fellman, *The Constitutional Right to Counsel in Federal Courts*, 30 NEB. L. REV. 559 (1951). See also BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* (1955); Morris, *Poverty and Criminal Justice*, 38 WASH. L. REV. 667 (1963).

¹⁸ See Douglas, *Foreword to The Right to Counsel: A Symposium*, 45 MINN. L. REV. 693 (1961).

¹⁹ See EQUAL JUSTICE FOR THE ACCUSED, REPORT OF A SPECIAL COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND THE NATIONAL LEGAL AID ASSOCIATION 41-43 (1959).

²⁰ See Hoadley, *Is the Right Against Poverty Another Constitutional Right?*, 49 A.B.A.J. 1192 (1963).

The first major breakthrough occurred in *Powell v. Alabama*,²¹ the celebrated Scottsboro case. By a seven to two vote the Supreme Court held:

that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.²²

Justice Sutherland's language in *Powell v. Alabama* is among the classics in the literature on the right of representation. It is deservedly cited often:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable generally of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he may not be guilty, he faces the danger of conviction because he does not know how to establish his innocence.²³

However, the facts of the case rather than the force of the argument controlled. It was established that, so far as the state courts were concerned, the fourteenth amendment only required the appointment of counsel in capital cases. The states were otherwise left to settle for themselves whether, under the particular facts and circumstances of each case, due process required the appointment of counsel.²⁴

This rule was destined for reversal. It came in *Gideon v. Wainwright*.²⁵ Speaking in a concurring opinion, Justice Clark observed: "The Court's decision today, then, does no more than erase a distinction which has no basis in logic and an increasingly eroded basis in authority."²⁶ Justice Black rendered the opinion

²¹ 287 U.S. 45 (1932).

²² *Id.* at 71.

²³ *Id.* at 68-69.

²⁴ *Betts v. Brady*, 316 U.S. 455 (1942).

²⁵ 372 U.S. 335 (1963).

²⁶ *Id.* at 348.

for a unanimous Court. The drama of the hour was relished by those who lived for this decision. He stated the case in language that will be remembered as long as there is liberty and justice for all:

[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.²⁷

A quarter of a century before, the Supreme Court had established the governing rule in the federal court system. In *Johnson v. Zerbst*,²⁸ the Court interpreted the sixth amendment to entitle the accused to counsel in all federal criminal cases. If an accused appears without counsel, and he does not knowingly waive his right to counsel, the court will lose jurisdiction to proceed. If a conviction is secured under these circumstances, the judgment is void. The sixth amendment's provision that the accused shall enjoy the right "to have the Assistance of Counsel for his defence" was held to mean that counsel must be appointed to represent a defendant who cannot afford to hire a lawyer and who does not waive his right to representation. *Gideon* brought the state practice alongside the federal practice and current with the times.

II. THE SEARCH FOR AN ADEQUATE REMEDY

Faced with the necessity of furnishing counsel, the federal courts began the program of court appointments which thrust the burden of providing representation entirely on the practicing bar. With only minor exceptions,²⁹ no provision existed to reimburse

²⁷ *Id.* at 344.

²⁸ 304 U.S. 458 (1938).

²⁹ See 28 U.S.C. § 753(f) (1958)—transcript to be furnished persons permitted to appeal in forma pauperis to be paid by the government; FED. R. CRIM. P. 15(c)—lawyer's travel and subsistence to take a deposition to be at government expense; FED. R. CRIM. P. 17(b)—subpoena and witness fees incurred for the defense to be at government expense.

counsel for his out-of-pocket expenses. Nor could he be compensated for the time involved in the preparation and presentation of the case. While the ruling in *Johnson v. Zerbst* clearly called for more than a ritualistic performance by counsel, the means to provide it other than out of the lawyer's own resources were totally lacking. An open invitation to find a method was presented.

Quite recently two "test cases" in district court have arisen. In *United States v. Germany*,³⁰ Judge Frank M. Johnson of the middle district of Alabama dismissed an indictment because the government failed to pay the expenses of the defendant's court appointed attorney to interview witnesses and view the scene of the alleged crime. He reasoned that implicit in the assistance of counsel doctrine is the opportunity for the lawyer to prepare his case. Whether counsel was afforded that opportunity in this case turned on the availability of government funds to pay the expenses required. The failure to provide the necessary funds prevented counsel from furnishing the assistance to which the accused was entitled under the sixth amendment. The reasoning was difficult for the government to deny, grave as the consequences would be.³¹

Judge William G. East of the district of Oregon, in *Dillon v. United States*,³² tried another route. In a hearing on a motion to vacate sentence under 28 U.S.C. § 2255 (1958), where it was previously ruled an error not to appoint an attorney, Judge East designated a lawyer and at the conclusion of the case suggested that he apply for compensation for his services on an eminent domain theory. Holding that the appointment of counsel to represent a defendant was in fulfillment of the government's obligation to furnish a lawyer to an indigent person and the legal services provided constituted a taking of compensable property under the fifth amendment, he entered a judgment against the United States for the lawyer's time and expenses.³³

³⁰ 32 F.R.D. 421, enforcing 32 F.R.D. 343 (1963).

³¹ See Testimony of Attorney General Kennedy, *Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary*, 88th Cong., 1st Sess., ser. 3 at 45 (1963) [hereinafter cited as 1963 *House Hearings*]: "There are going to be cases thrown out all over the country if this [decision] is followed and it makes a good deal of sense, I must admit."

³² 230 F. Supp. 487 (1964), *rev'd on appeal*, — F.2d —, 33 L.W. 2673 (9th Cir. 1965).

³³ See Comment, 78 HARV. L. REV. 1654 (1965), wherein the ramifications of the *Dillon* theory, if valid, would suggest that the limits on compensation provided in the act may likewise be unconstitutional. It is

Before further cases appeared in the reports, the Criminal Justice Act of 1964 became public law. While these decisions came too late in the day to have a substantial effect on the course of congressional action, they did serve the purpose of focusing attention on the consequences of continued neglect of the problem. So much of the substance of the Criminal Justice Act of 1964 has its origin in earlier legislative proposals and so much of the logic for the act can be found in this history that to adequately comprehend the statutory provisions it is necessary to examine those proceedings.

The first traces are found in a resolution adopted by the Judicial Conference of the United States at its September, 1937, meeting.³⁴ It urged the enactment of a public defender system in those districts where the volume of criminal cases justified an appointment. The Judicial Conference recommended that elsewhere counsel be appointed on an individually assigned basis with compensation for services involving substantial time and effort. This proposal, which anticipated the ruling in *Johnson v. Zerbst*, was renewed by the Judicial Conference with little basic change through the years. The resolution attracted negligible opposition, but neither did it arouse appreciable interest. The resolution was adopted at the suggestion of Attorney General Homer Cummings. Each of his successors, through Nicholas deB. Katzenbach, has favored similar action. Indeed, the proposal was associated with many criminal law reform efforts.³⁵

In March, 1949, the Senate reported a bill without the public defender provision. It authorized the court to compensate counsel who was appointed, at the request of the defendant, to the extent

important to re-emphasize, however, that the situation confronting the court in *Dillon* is not covered by the Criminal Justice Act of 1964. 18 U.S.C.A. § 3006A(a) (1964). For another reaction, see N.Y. Times, March 27, 1965, p. 24, col. 1, reporting citation of contempt of a Patterson, New Jersey, lawyer by a county judge for refusing to take an assignment as counsel to a defendant in a criminal case. The lawyer maintained "he was seeking to prove that lawyers were entitled to receive compensation even as assigned counsel."

³⁴ See Report of the Judicial Conference of the United States, 8-9 (Sept. Sess. 1937).

³⁵ See Bennett, *Of Prisons and Justice, To Secure the Rights to Counsel*, S. Doc. No. 70, 88th Cong., 2d Sess. 123 (1964). From the inception Mr. James V. Bennett was indefatigable in his efforts to secure remedial legislation in this field and for many years worked almost single-handedly to develop a public awareness of the gravity of the right to counsel problem. In large part the eventual passage of the act can be attributed to his persuasive pleas.

of fifteen dollars for services devoted to preparation for trial or a plea and in an amount not to exceed twenty dollars per day for the days actually required in court for trial. Fellman concluded his article, "The Constitutional Right to Counsel in Federal Courts," on a note that the bill was languishing on the calendar, and wondered "why such a modest bill of such obvious merit should take such a long time getting through Congress."³⁶ As it happened, the struggle would involve another thirteen years.

In succeeding Congresses the quest for legislation primarily focused on a provision for a public defender system. The first measure to be passed by the Senate occurred in the second session of the 85th Congress. The action came too late in the session to receive House consideration. The bill, S. 3275, was patterned after legislation which had been introduced but never acted upon in earlier Congresses. It authorized each United States district court to appoint a public defender. He could be a full or part-time defender, depending upon the need. Provision was also made for assistant defenders as required. The court would assign the cases to the public defender, and he would be responsible for all phases of the proceedings, including appeal. If the needs of the district were considered adequately and economically covered by an individual assignment of counsel, however, the court could continue to follow this practice. In determining which system to adopt, the principal factor was to be whether the district had a city of 500,000 population. The salary of the public defender was set at 10,000 dollars a year; assigned counsel would receive up to thirty-five dollars a day for services. The cost of the program was estimated to be approximately one million dollars.

In contrast with its attitude in 1949, the Senate this time had no difficulty in accepting the public defender system. The recommendations of the Judicial Conference and the Department of Justice in the intervening years had had a substantial effect. The argument that the current system of assigned counsel without compensation was working an undue hardship on attorneys with experience, as well as putting the defendants at a severe disadvantage, could not be ignored. Related bills provided larger amounts of compensation and made grants to legal aid societies and similar groups furnishing legal services, but the Senate was not ready to accept these ideas.

On April 28, 1959, an identical bill—S. 895—was favorably reported by the Senate Judiciary Committee. At the time the bill

³⁶ Fellman, *supra* note 17, at 599.

was on the floor, it was observed that the measure "may not, in this form, fulfill all the ambitions or realize all the desires of a public defender system. . . . But to the end that it safeguards and promotes the rights established under the sixth amendment to the Constitution, this bill deserves the unanimous support of the Senate."³⁷ But notwithstanding the growing congressional interest in such legislation, the measure died in the House.

The House Judiciary Committee held hearings in May, 1959, on four bills reflecting different approaches to the representation problem. Despite the sponsorship of the House counterpart of S. 895 (H.R. 4185) by the chairman of the Judiciary Committee, opposition to any system providing for the appointment of a public defender was strong. As an alternative, a bill limited to affording compensation to assigned counsel was favored by a majority of the committee. The bill had no ceiling on the rate of compensation to be provided, although the author of the bill indicated he would accept one rather than report no bill at all. Instead of taking action, however, further study of the problem of the right to representation was ordered by the committee—presumably for the sponsors of H.R. 4185 to gather enough empirical evidence and muster enough public support to report the bill.³⁸ Finding that the study changed few minds in the committee, the chairman decided to forego any action at that time.

While the House Judiciary Committee could not be persuaded as to the wisdom of public defender legislation, the 86th Congress did pass the District of Columbia Legal Aid Act.³⁹ Designed as a mixed public and private system of representation and styled—with foresight—as a legal aid agency, the legislation authorized in fact a public defender program for the District of Columbia. The district presents unique problems in the federal court system. The jurisdiction of the courts is much broader and, consequently, the criminal case load is much heavier. Still, the concept which seemed to be an anathema to a majority of the members of the House Judiciary Committee was accepted by the House Committee on the District of Columbia without difficulty.⁴⁰

³⁷ 105 CONG. REC. 8573 (1959) (Remarks of Senator Hruska).

³⁸ See *Hearings Before Subcommittee No. 2 of the House Committee on the Judiciary*, 86th Cong., 2d Sess., ser. 13 (1960).

³⁹ 74 Stat. 229, 43 U.S.C. § 620(d) (1960).

⁴⁰ To the extent even that the provision for salary of the Director of the Legal Aid Agency was substantially more liberal than either body was willing to allow in the public defender legislation—\$16,000. The figure placed the official on a level comparable with the local U.S. Attorney.

Provision was also made for a complete staff. No compensation, however, was allowed lawyers who were assigned cases on an individual basis. The bill was passed by the Congress with scant debate. The program in the District of Columbia has since been widely acclaimed and considered in many respects a model for later legislation. Unfortunately, however, the experience of the agency left little impression on key members of the Judiciary Committee.

On March 29, 1961, Senator Cotton of New Hampshire, Senator Keating of New York and later Senator Ervin of North Carolina joined Senator Hruska in the introduction of S. 1484, a revised version of the measure that had passed the Senate in the previous Congress. The revision reflected numerous recommendations contained in the House Report, "Representation for Indigent Defendants in Federal Criminal Cases." This bill was the first substantial departure from the form of legislation previously introduced in the Congress. It was versatile and comprehensive. The test adopted for the availability of legal services was whether a person was "financially unable to employ counsel," although the term "indigent" was still used throughout the bill. The public defender was required to appear at every stage of the proceedings, including the preliminary hearing. His salary was to be comparable to the salary paid to the United States Attorney in the same district. Similarly, the term of office was set at four years in an effort to place these officers on as equal a footing as possible. Reimbursement for expenses included the costs of technical experts required in a defense which are "reasonably incurred." Appointments, when made on an individually assigned basis, were to be from among lawyers having five or more years of experience. Their compensation was increased to a sum not in excess of fifty dollars a day with a provision for reimbursement of expenses that included the costs of hiring experts. The test for providing representation on appeal, previously stringent, was broadened to a "not plainly frivolous" rule.

The Committee on the Administration of the Criminal Law of the Judicial Conference of the United States met in January, 1962, to discuss S. 1484 and related legislation which had been introduced in the Congress. The bills were analyzed and out of the discussions emerged specific recommendations for amendments. Shortly afterwards Senator Hruska (again joined by Senators Cotton, Keating and Ervin) introduced a new bill, S. 2900. It was to apply, for the first time, to defendants who were financially able to retain counsel but could not hire a lawyer on account of the unpopularity of their cause. In addition, the bill eliminated a test for representation on appeal. The per diem com-

persation for court-appointed counsel was increased to one hundred dollars. The purposes of the latter amendments were to assure continuing representation and to encourage the appointment of qualified counsel.

Further changes were made in committee before reporting the bill. The appointment of the public defender was to be confirmed by the Senate.⁴¹ Provision was made for court-appointed counsel to be reimbursed for investigators as well as experts used in the preparation of a defense. The public defender was also furnished this service. The bill also provided that the public defender or the court-appointed counsel should not accept payment for services from the defendant without obtaining court approval. This last amendment had the effect of broadening the coverage of the bill to include others besides the indigent. The bill was passed by the Senate on October 4, 1962, but by that time the sponsors could do no more than make a record for consideration of the measure in the next Congress.

By tradition, bills are not introduced in a new Congress until the President has delivered his State of the Union address. President Kennedy addressed a joint session of the Congress on January 14, 1963. It was his last State of the Union message. Among his recommendations, he urged that "[t]he right to competent counsel must be assured to every man accused of crime in Federal court, regardless of his means."⁴² The same afternoon, Senator Hruska, again joined by his three colleagues, Senators Cotton, Keating and Ervin, reintroduced his bill to provide representation for defendants who were unable to retain counsel. It was, in virtually all respects, the same measure as passed the Senate the previous October. The number assigned to it had been reserved by the sponsors — S. 63.

The formal call for action from the President was the turning point in the history of this legislation. The optimism was apparent in Senator Hruska's remarks when reintroducing his bill:

⁴¹ The confirmation procedure was an effort on the part of the sponsors of the public defender system to allay fears that the appointment would be a "step towards the police state" or that the public defender would come under the domination of the court to the detriment of the defendant. The assumption was that Senate confirmation would signify and secure independent standing for the official. However, later events showed that such efforts to satisfy objections to the system produced no change of attitude on the part of those opposing the concept.

⁴² 109 CONG. REC. 172 (1963).

To those of us who have urged passage of this bill, and have worked to that end for several years, the remarks of the President in his State of the Union message this afternoon were understandably gratifying. The expressed declaration of administration support of this effort, coupled with that of the American Bar Association and the Federal judiciary will, I am confident, increase the prospects for passage by both Houses in the current session.⁴³

The American Bar Association made the passage of the public defender bill its primary legislative project for the year. At its midwinter meeting in New Orleans, Louisiana, the House of Delegates voted unanimously to support such legislation and to participate actively to secure its passage. It is apparent from the widespread attention given the problem of adequate representation in the sessions and publications of the American Bar Association in subsequent months that its work was instrumental in maintaining the momentum which would prevent the bill from faltering as it had in the past.

Another decisive factor in developing a new attitude towards the problem of representing the poor was the report and recommendations of the Allen Committee. Early in the Kennedy Administration, Attorney General Robert Kennedy appointed a special committee to study the problems plaguing indigent defendants prosecuted in federal courts. Its report, "Poverty and the Administration of Federal Criminal Justice," proposed far-reaching reforms in many areas of concern to the Department of Justice. One of the specific proposals—and perhaps the major concern of the Allen Committee—was for more adequate representation of the poor. Its recommendations for a proper defense of the poor, which were put in the form of draft legislation, became the framework for the Criminal Justice Act of 1964.

The Allen Committee's appraisal of the need for immediate legislative action was cogent and concise:

Although *Johnson v. Zerbst* did not resolve all issues relating to the constitutional rights of counsel in the federal courts, the fundamental obligation of the federal government was clearly and unmistakably indicated. It is a matter for legitimate concern therefore, to discover that, except for legislation restricted in its application to the District of Columbia, Congress has as yet done little to implement the constitutional commands by placing the defense of financially disadvantaged persons on a systematic and satisfactory basis and that the federal statutes leave us little closer to the solution of these basic problems today than was true a quarter-century ago when *Johnson v. Zerbst* was decided.⁴⁴

⁴³ *Id.* at 244.

⁴⁴ ALLEN COMMITTEE REPORT, 14.

III. EFFORTS TOWARDS ENACTMENT

The Allen Committee drafted the most flexible and comprehensive plan yet considered. It came to the Congress with the highest endorsements—a cover letter from Attorney General Kennedy to President Kennedy, dated March 6, 1963, and a message from the President to the Vice President and the Speaker, dated March 8, 1963. The Attorney General reminded the President of his call for action in his State of the Union message, recited the long struggle to round out the rights of the accused who were too poor to protect their own interests, pointed to the decisions requiring such representation, mentioned the committee which had developed a draft bill, reviewed the defects in the present criminal practice, and described the main features of the proposed legislation.⁴⁵ The President transmitted the legislation to the Congress and recommended its prompt consideration, saying: "Its passage will be a giant stride forward in removing the factor of financial resources from the balance of justice."⁴⁶

While the Allen Committee draft contained many features that were found in earlier bills, it had several important innovations. First, retaining the principle of flexibility regarding the methods for providing counsel, the number of "local options" was increased. Besides the previously designated systems of private attorneys and public defenders, bar associations, legal aid societies, and local defender organizations were included as additional alternatives and provision was made for a combination of any of these programs. Second, the standards for an adequate defense embraced more than simply providing a lawyer and permitting him to hire investigators or experts as needed. The resources were expanded to include "investigative, expert and other services necessary to [prepare and present] an adequate defense." Third, representation was to be provided at every stage of the proceeding, commencing with the initial appearance before the United States Commissioner and continuing through the final appeal to assure early and continuous assistance of counsel. Fourth, the concept of indigency associated with previous bills was avoided. The test, as it was uniformly stated in the bill, became "persons financially unable to obtain an adequate defense." The bill recognized that some defendants were completely destitute; others become so during the proceedings; and still others could pay some, but not all, of the expenses incurred in their defense. The bill thus became

⁴⁵ See S. REP. NO. 346, 88th CONG., 1st Sess. 10-13 (1963).

⁴⁶ *Id.* at 10.

operative to whatever degree was appropriate to assure that, in light of the circumstances, an adequate defense was afforded.

The legislation was introduced in the Senate on March 11, 1963, by Senators Eastland and Hruska and was numbered S. 1057. The same proposal was introduced in the House by the chairman of the Judiciary Committee, Congressman Celler, on March 13, 1963, and was numbered H.R. 4816. Both committees promptly held hearings.⁴⁷ In the Senate there was never much doubt that the bill, substantially in the form that it was introduced, would be approved. Except for the provision affording counsel for the defendant with an unpopular cause, S. 63 was displaced by the new bill. Only one witness in the hearings urged the inclusion of the "unpopular cause" provision in whatever bill was to be reported.⁴⁸ It was not incorporated in S. 1057, as reported, however, because of the lack of evidence indicating its need.

The purpose of the Senate hearings was primarily to pinpoint the meaning of the new provisions in S. 1057, rather than to persuade the committee members to accept such legislation. One witness voiced concern about the public defender provision.⁴⁹ His contentions, however, were challenged by succeeding witnesses.⁵⁰ The concept of a public defender system was sympha-

⁴⁷ See *Hearings on S. 63 & S. 1057 Before the Senate Committee on the Judiciary*, 88th Cong., 1st Sess. (1963) [hereinafter cited as *1963 Senate Hearings*]. *1963 House Hearings* were held on May 22, 1963.

⁴⁸ See Testimony of Monrad Paulsen, Columbia University School of Law, *1963 Senate Hearings* 116.

⁴⁹ See Testimony of Hon. Edward J. Dimock, Senior U.S. Dist. Judge for the Southern District of New York, *id.* at 33.

⁵⁰ See Testimony of Whitney North Seymour, Director of the New York Legal Aid Society and Chairman, Special Committee on Defense of Indigent Persons Accused of Crime, *id.* at 74: "I would comment on Senator Hruska's question that I don't think there is any real basis for concern that a public defender, selected as these bills contemplate, would be subservient to the prosecutors. I am sure that the public defenders do a fine job for their clients. The concern that has been expressed about that by my friend Judge Dimock and others is largely, I think, theoretical and not based upon any actual experience. Because in actual experience, the public defenders work very well." See also Testimony of Hon. William F. Smith, Judge, Third Circuit, U.S. Court of Appeals, *id.* at 171: "Senator, I read Judge Dimock's remarks and I do not agree. True, the public defender is going to be paid by the same government as the U.S. attorney is paid. His income will come from the same source. But my income comes from the same source when I sit as judge. But if I let this in any way influence my judgment in a particular case then I do not deserve to be a judge in the first place. I think that would be also true of a

thetically viewed by the committee. It became a matter only of devising a program so narrowly applicable as to overcome the anticipated House objection.

The testimony of Judge Smith pointed out the direction the committee followed in this regard. Stressing that the burden of administration of the act would largely fall upon the judiciary, Judge Smith suggested that no appointment of a full or part-time public defender be designated without express authorization by the Judicial Conference. This is the procedure followed in the designation of referees in bankruptcy, with their number set strictly by the needs of the district.⁵¹ The original proposal of relating the appointment of a public defender to the population in a district was not viewed as effective as a case load criterion. A figure of one hundred criminal cases was suggested as a workable basis, under which about thirty-two districts would qualify to select a public defender program—assuming they would prefer this system.⁵²

The hearings on the other side of Capitol Hill developed strenuous opposition to the public defender system.⁵³ Moreover, while it was accepted that counsel should be compensated,⁵⁴ the notions as to the costs of the bill to provide “adequate representa-

public defender. If it reaches the stage where they become collaborating colleagues, then it is time that that public defender should be removed. And there is the power of removal in the statute as proposed by the Attorney General, and yours could be amended by making the same provision.”

⁵¹ See Testimony of Judge Smith, *id.* at 159; see also supplemental statement, *id.* at 178.

⁵² The figure is based on the number of assigned counsel in fiscal year 1962, the last available data when the Committee was conducting its hearings.

⁵³ For the range of views see generally *1963 House Hearings*. Testimony of Gene A. Picotte, President of the Montana Bar Association, *id.* at 23; Hon. Basil Whitener, Congressman from North Carolina, *id.* at 63; Hon. Richard H. Poff, Congressman from Virginia, *id.* at 66; Hon. Arch A. Moore, Congressman from West Virginia, *id.* at 88; Examination of Mr. Seymour by Congressman McCulloch, *id.* at 97; and Testimony of Judge Dimock, *id.* at 103. The question was discussed with practically all of the witnesses who appeared at the hearing.

⁵⁴ See Statement of Congressman McCulloch, *id.* at 143: “I think the entire subcommittee and all of the committee have long since made up their minds that an attorney assigned by a court to defend a defendant who has not the money to pay for that defense should be compensated and compensated reasonably well. In view of the lack of time and commitments that all of us have later this evening, I would admit that without further proof.”

tion" and the time it would take to afford "adequate representation" sharply differed.⁵⁵ In view of the range of criticism levelled at the public defender program in the House hearings, it became apparent that—at least in the form in which it was introduced—the provision was headed for trouble.

The Senate Judiciary Committee began to mark up the bill almost at once. The sponsors did not want to be disadvantaged by delayed action, particularly if the bill was headed for conference over the public defender provision. The later the conference, the less the chance to break a deadlock. Working closely with representatives from the Deputy Attorney General's office,⁵⁶ Senator Hruska redrafted S. 1057 in large part. Three major amendments were incorporated. First, in an effort to preserve the option of a public defender plan, the choice was restricted to those districts having a case load of 150 or more appointments (18 in number) which could show that no other system of representation was more efficient and economical. Second, the provision for services other than counsel was broadened to authorize the court to ratify such defense services when circumstances did not permit prior approval. Third, in recognition of the diversified character of the judicial districts, the commissioners were given the authority, not only to appoint counsel, but to approve defense services when the power is specifically delegated by the court.

Because of the innumerable "perfecting" amendments which came up, it was decided to offer an amendment in the nature of a substitute bill. A large majority of the committee joined in co-sponsorship. S. 1057 was reported unanimously on July 10, 1963, and was passed less than a month later. As stated by the manager of the bill during the Senate debate,

S. 1057, as reported with an amendment in the nature of a substitute, is the product not only of past experience with public defend-

⁵⁵ See Statement of Congressman Poff, *id.* at 69: "Now, if we assume that each attorney would spend 1 hour in his office and 1 hour on each of these cases, the \$25 fee would amount to \$250,000 a year. Of course, in a complicated felony case, the time expended and the cost involved might be substantially greater than the average, especially if appeals are involved. However, it is equally true that in many cases, if not most cases, less than an hour of courtroom practice and less than \$15 in fees may be involved."

⁵⁶ Messrs. Daniel J. Freed and Herbert Hoffman were in continuous contact with both the House and Senate sponsors of the legislation and furnished invaluable advice and assistance at each phase of its development. Without their labor and understanding of the legislative mystique, the ultimate product undoubtedly would have been far less comprehensive than it now is.

er legislation introduced in this body but of extended hearings before the Judiciary Committee and consultation with my colleagues on both sides of the aisle and in both Chambers of the Congress. It is carefully drawn to avoid abuse while seeking to remedy a chronic problem of serious proportions in our Federal courts. . . . We have been impressed with the conscientious attitude the Federal courts have demonstrated towards establishing prudent systems within their respective districts. We are mindful, on the other hand, that the assumption of this responsibility will not be without costs. But these costs . . . are rightfully to be borne if the realization—not merely the aspiration—of equal treatment for every litigant is to be achieved.⁵⁷

The Chairman of the House Judiciary Committee sensed from the beginning that it would be impossible to report a bill containing any provision for a public defender plan.⁵⁸ A new bill was introduced by Congressman Arch Moore in mid-summer. Reflecting the views expressed by a number of Committee members during the hearings, the bill substantially reduced the scale of operations as originally proposed by the Criminal Justice Act. The Moore bill, with amendments, was reported by the committee. The public defender option was deleted altogether. The rate of compensation was designated as ten dollars per hour for time spent out of court and fifteen dollars per hour for time in court, with an overall limitation to be paid an attorney of 500 dollars in a felony case and 300 dollars in a misdemeanor case. The defense services were made available only to counsel assigned by the court. The bill was reported on October 24, 1963. A rule was granted on December 4, 1963, but no further effort was made to proceed with the measure that year.

The debate on H.R. 7457, as the House bill was numbered, took place on January 15, 1964. Two amendments were accepted from the floor. The first limited the payment of fees for defense services to the same amounts allowed lawyers in the case; the second prohibited the appointment of a member of Congress from serving in any case covered by the act. The debate itself reflected a range of views from outright cynicism⁵⁹ to a practical recognition that the measure probably was the best that could be obtained.⁶⁰ The forceful position of the committee minority report

⁵⁷ 109 CONG. REC. 14222-24 (1963) (Remarks of Senator Hruska).

⁵⁸ See 1963 *House Hearings* 84.

⁵⁹ 110 CONG. REC. 477 (1964) (Remarks of Mrs. Griffiths) "I am not opposed to every defendant having counsel, but in my judgment the bill will not produce any better counsel for \$500 than any Federal judge could provide for nothing [T]his is likely to become a racket."

⁶⁰ *Id.* at 454 (Remarks of Mr. Corman) "I would just like to say, I support this legislation. I have always felt that half a loaf was better

was not pursued on the floor.⁶¹ The merits of a public defender system were extensively debated, but no one offered to amend the bill to incorporate the program worked out in the Senate bill. Similarly, the restriction placed on the defense services was not altered. It is particularly surprising inasmuch as the committee amended the bill to permit counsel to be appointed who originally had been retained, recognizing the problem of changed financial circumstances. The ceilings placed on the overall payments to counsel remained without change. The author of the legislation stated in the debate, furthermore, that the limitation applied to each case, although the language of the measure read "to the attorney."⁶²

The bill was sent to conference for resolution of the differences.⁶³ No action was taken, however, until August of 1964, nearly seven months later. The civil rights debate had shifted early in 1964 from the House to the Senate, which contributed to the delay. The conferees used the available time, however, to find a solution for the major points of difference between the two

than none, but this is the first time I have had to make a choice between a thin slice and none at all."

⁶¹ See H.R. REP. NO. 864, 88th Cong., 1st Sess. 10-12 (1963).

⁶² 110 CONG. REC. 447 (1964) (Remarks of Mr. Moore answering a question whether the limitation placed in the bill is to be \$500 for each case or each lawyer) "In order that the record might be clear, and as the bill is written, it is \$500 per case." Compare the statement of Mr. Poff, *id.* at 457, in offering his amendment limiting the compensation to be paid for defense services: "Immediately above the language proposed, on the same page the committee saw fit to place a limitation upon the total compensation which the assigned or appointed counsel could obtain. In the case of a felony the maximum is to be \$500 and in the case of a misdemeanor the maximum is to be \$300." It is clear that there may be multiple defense services provided—with each person so rendering the service entitled to receive compensation not to exceed \$300—and it is also clear that multiple lawyers may be furnished an accused with each attorney entitled to be compensated at a rate not to exceed the maximum provided. The language of H.R. 7457 read: "The court shall, in each instance, fix the compensation and reimbursement to be paid to the attorney provided, however, that the total compensation to be paid to the attorney for such representation shall not exceed \$500 in case of a felony and \$300 in case of a misdemeanor." See also 18 U.S.C.A. § 3006A(c) (1964). The assumption throughout the debate was that ordinarily not more than one attorney would be appointed in each case. Provision is made, however, for the appointment of more than one attorney. See 18 U.S.C.A. § 3006A(a)-(b) (1964).

⁶³ Senate conferees were Senators Eastland, Ervin, Hart, Hruska and Keating. House conferees were Congressmen Celler, Rodino, Rogers, McCulloch and Moore.

bills. Over the spring and summer months they informally reached an agreement on all the issues except the matter of a public defender program.⁶⁴

The Senate conferees spared no effort to find a middle ground for the public defender program. Their final proposal would have placed the public defender program on an experimental basis to afford an opportunity to determine whether it had in actual practice the advantages claimed or the dangers charged. So the Congress would not lose control of the program in the process, a trial period of five years was set, with the program automatically expiring unless affirmatively renewed at that time. The program was also limited to a maximum of five districts. For a district to qualify, it had to make at least 150 court appointments annually. Further, its selection of the plan had to be approved by the Judicial Conference of the United States. Moreover, the program was to be supplemented by an assigned counsel system to avoid preempting the services available by the bar. But no plan proved acceptable to key members of the House conference. The most that was managed was the inclusion of language in the Conference report, inviting the Department of Justice to continue its study of

⁶⁴ There were thirteen points of difference. The Senate agreed to the House version as follows: hourly rate of compensation reduced to \$15 per hour in court, \$10 per hour out of court; limitation on services other than counsel reduced to \$300 in all cases; all appointments of counsel made from a panel of attorneys established by the court; deletion of reference to "other local defender organizations" and substitution of the generic term "legal aid agency"; and express provision for appointment of counsel if defendant with retained counsel exhausts his funds during the course of proceedings. The House agreed to the Senate version as follows: the availability of defense services to all defendants who cannot afford them regardless of whether they have appointed or retained counsel; no restriction on participation by members of Congress; coverage extended to felonies and misdemeanors, but not petty offenses; provision for supervision of representation by judicial councils of the circuits and for Judicial Conference approval of plans with power to issue rules and regulations; and representation provision to be effective within not more than one year. The Senate version had required, moreover, that all claims would be supported by written statements; the House version, by affidavits. It was agreed to have attorneys submit statements but claims for defense services would be supported by affidavits. The Senate version had no limitation on the maximum counsel fees available; the House provided \$500 for a lawyer in a felony case and \$300 for a lawyer in a misdemeanor case. The House version was accepted with a proviso that additional compensation would be afforded in extraordinary circumstances if approved by the Chief Judge of the circuit; and a fee not in excess of the same limits was provided for appellate services without a provision for additional fees under any circumstances.

the need for the system in light of the program authorized by the act and to cooperate with the Judicial Conference of the United States to determine whether a public defender program continued to have validity and value.⁶⁵

Hence a twenty-seven year struggle to secure some kind of a public defender system in the federal district courts was put over until another day. It is understandable why the interest in a public defender program overshadowed the deliberations on the other provisions of the bill. Despite sincere differences of opinion as to the merits of the respective approaches taken by the House and the Senate, and the adequacy of the language ultimately worked out, such provisions emerged in a form capable of realizing the desired objectives. More than that, in the form adopted, they satisfy the overall purpose of removing the penalty which poverty imposes upon a defendant in a criminal case. On the other hand, by delaying the day when a public defender plan is available to certain districts, the Congress passed up an opportunity for the courts to cope directly, effectively, and economically with their expanding criminal caseloads. The provision permitting the designation of bar associations and legal aid agencies will, on the other hand, allow some degree of needed flexibility and, together with the provision for compensation of attorneys, will afford a greater capability than now available to overcome the glaring defects in the present system.⁶⁶

The Conference report was submitted on August 6, 1964, one year to the day after the Senate passed the bill. No time was lost in taking up the report. The House moved first, quickly accepting the report but not before Congressman Moore commented on its tenor.⁶⁷ The Senate acted the same afternoon.

⁶⁵ See H.R. REP. NO. 1709, 88th Cong., 2d Sess. 5-6 (1964).

⁶⁶ The deletion of the public defender option from the Criminal Justice Act of 1964 would not necessarily preclude a district court from utilizing such services. The selection of a plan whereby representation is furnished through a bar association or a legal aid agency could accomplish the same purpose if the bar association or agency would organize or operate a defender-type program. This procedure is anticipated in the plan adopted by the United States District Court for the District of Columbia, which now is served by the Legal Aid Agency for the District of Columbia—a public defender office in all but name—supplemented as the needs require by representation furnished by private attorneys. The main regret regarding the Conference action is that what can be done by degree was not able to be done directly.

⁶⁷ 110 CONG. REC. 18558 (1964) (Remarks of Congressman Moore) "I am proud that I had a significant hand in guiding this legislation and that it was my bill, H.R. 7457, that the Judiciary Committee reported

The spirit with which the finishing touches were added to the legislative history of the bill was in the best Senate tradition:

The case for this legislation is easy to state: we are a nation dedicated to the precept of equal justice for all. Experience has abundantly demonstrated that, if this rule of law will hold out more than an illusion of justice for the indigent, we must have the means to insure adequate representation that the bill before us provides. I am grateful to those who have labored so long and so well to draft a statute which recognizes the complexities and demands of modern criminal trials. By their devotion to the highest traditions of the law and their determination to relate them to the urgent needs in the administration of criminal justice, the principle of a fair trial, so fundamental to our society, is more nearly secured.⁶⁸

Cleared for the President's signature, the bill was signed by President Johnson on August 20, 1964. By its terms, the Criminal Justice Act of 1964 will become operative one year after that date.⁶⁹

IV. PROBLEMS IN IMPLEMENTATION

Senator Javits of New York recognized that the burden had now shifted:

This bill is a beginning. We hope that all the bar associations and legal aid societies who provide these services will measure up to what is expected of them, because what will happen in connection with this law, and how well the law will be administered will in a large measure be up to the organized bar, at whose door it is laid. We hope they will take this mandate from Congress and treat it as a sacred trust and see to it that every dollar that is spent will produce the devotion that is contemplated. Thousands of families will be grateful to them.⁷⁰

to the House; that the House subsequently passed; and is contained in its original form in this conference report. . . . I am amazed, then, to read the conference report and discover that primary accentuation was placed upon the Senate bill and the appearance created that the conferees, in essence, were only amending the Senate bill."

⁶⁸ 110 CONG. REC. 18521-22 (1964) (Remarks of Senator Hruska).

⁶⁹ Pub. L. No. 455, 88th Cong., 2d Sess. § 3 (Aug. 20, 1964).

⁷⁰ 110 CONG. REC. 18522 (1964). See also 111 CONG. REC. 11480 (daily ed. May 27, 1965) (insert by Senator Metcalf of Address by Chief Justice Warren to the American Law Institute, May 18, 1965) "This Act poses a real challenge to our profession because we have had no similar experience. It cannot be the problem of the courts alone. The local bar associations must participate both in the making and administration of the plans. The members of those associations must each accept a measure of responsibility, and it should not be delegated to those in our profession who are willing to accept the partial compensation because they find difficulty in making a living otherwise. To permit

Even before the President had affixed his signature to the bill, apprehension was expressed about its administration. An article in the *Wall Street Journal* described the pitfalls which may lie ahead: "President Johnson soon will sign into law a measure that could someday serve the admirable goal of giving dollarless defendants a better break in Federal court trials. But even its best friends fear this lofty aim may remain unreached while, as one supporter says, 'Federal money goes sailing down a rat hole'."⁷¹ Citing the increased demand for funds attributable to the rising crime rate and expanding federal criminal jurisdiction and pointing to the measure's "generous provisions" for factfinding services, as well as its "failure to define closely those persons eligible for help" the article predicted the bill will prove costly. The article stated that it was likely qualified lawyers would not be secured: "Officials in the Executive and Judicial branches freely disclose their uneasiness that the plentiful funds will be snapped up by second-rate lawyers tempted by hundreds of dollars per case in fees."⁷²

While the impression created by this article might be distorted, the concern was nonetheless valid. It is imperative to those responsible for implementing the Criminal Justice Act of 1964 that it be properly supervised. Its provisions were not loosely or thoughtlessly drafted. The purpose in keeping the provisions flexible and broad was to afford maximum latitude in their operation. This presupposes an involvement by the courts in each aspect of the operation so that necessary control is not lost. The courts, in the first instance, must diligently perform this task. The Congress, briefed on the operation of the act by the annual reports of the Administrative Office of the United States Courts and by the annual requests for appropriations, will necessarily look to the courts for an accounting. Any unanticipated rise in expenditures which can be traced to loose supervision will quickly draw criticism and develop pressures to curb such authority. Apart from this, the courts cannot afford to be drawn into a situation where questions may be raised regarding their capacity and competence to approve claims for payment. Direct and tight control over the operation of the act in its every particular by the courts is the surest method for providing the kind and

this would convert the objective of affording legal assistance to indigents to that of affording assistance to indigent lawyers."

⁷¹ The *Wall Street Journal*, Aug. 18, 1964, p. 10, col. 4-5.

⁷² *Ibid.*

quality of representation called for by the Criminal Justice Act of 1964.

The courts, therefore, must not only carefully look into each claim for service, but continually look to the lawyers for conduct of a fiduciary character. Public funds are involved. While it is essential for counsel to be encouraged to use the means and facilities provided by the Criminal Justice Act of 1964, this would suggest no license or leeway to spend money because it is available. Indifference, carelessness or any other behavior which does not comport with the highest professional standards must be guarded against by counsel and, if found, must be censored by the court. Only by devoting what time is needed, incurring what expenses are necessary and requesting what services are required will counsel faithfully discharge his duty to his client and the court. By making certain that such standards are observed the courts will discharge their obligation under the act.

The Criminal Justice Act of 1964 recognizes the wide variety of conditions and requirements existing among the federal district courts. For this reason the act requires that each district court devise a plan for representation incorporating one of the "options" provided in it.⁷³ Each district court plan is to be designed in accordance with the rules and regulations provided by the Judicial Conference of the United States.⁷⁴ The plan implementing the Criminal Justice Act of 1964 in the district had to be submitted to the judicial council of the circuit within six months from the date of enactment.⁷⁵ The judicial council was required to review and approve each plan within its circuit, supplement it with a plan for representation of defendants on appeal, and forward the plans to the Administrative Office of the United States Courts within the following three months.⁷⁶

Following the midwinter meeting of the Judicial Conference in March of 1964, the Ad Hoc Committee to Develop Rules, Procedures and Guidelines for an Assigned Counsel System was appointed.⁷⁷ Anticipating the passage of the Criminal Justice Act of 1964, the Ad Hoc Committee began collecting data regarding court assignment practices in representative circuits and considered problems that immediately might arise out of the administration

⁷³ 18 U.S.C.A. § 3006A(a) (Supp. 1964).

⁷⁴ Pub. L. No. 455, 88th Cong., 2d Sess. § 3 (Aug. 20, 1964).

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ See *Judicial Conference Report* 89.

of the act. The Ad Hoc Committee's report was submitted to the Judicial Conference the following fall.⁷⁸

In its study, the Ad Hoc Committee found no one system that could serve as a model for all other districts in developing and maintaining a panel of lawyers for appointment, in assuring the availability of counsel, and in coordinating the assignments with state court needs. What concerned the Ad Hoc Committee most—and added a new note of urgency to its work—was the discovery, from the responses received to its inquiries, that many district courts assumed that the requirements of the Criminal Justice Act of 1964 could be satisfied by superimposing its provisions on now existing methods of operation.⁷⁹

Focusing on this attitude, the Ad Hoc Committee report stated:

In the deliberations of the Committee there were many problems raised which apparently were not fully anticipated or realized at the time the legislation was considered. It is apparent that if the legislation is administered in the manner intended, it will bring about a significant advancement in the administration of Federal criminal justice. It is equally apparent that if the legislation is poorly administered, it could bring adverse criticism upon the courts.⁸⁰

Several recommendations were made by the Ad Hoc Committee for the general administration of the act, including the use of a central disbursement system for funds provided by the Criminal Justice Act of 1964, with the submission of vouchers containing a justification for payment, and the supervision of the act in each circuit through a board of advisors patterned after the board of trustees of the Legal Aid Agency of the District of Columbia. The Ad Hoc Committee also recommended that it be succeeded by a committee which included district judges, and that it carry forward the work of guiding the implementation of the Criminal Justice Act of 1964.⁸¹

The Judicial Conference of the United States met in the fall of 1964 and approved these recommendations. A new committee was selected. The Committee to Implement the Criminal Justice Act of 1964 held its first meeting on October 17, 1964. The Committee incorporated its ideas in a number of model plans which the district courts could consider in drafting their own plans.

⁷⁸ *Id.* at 87.

⁷⁹ *Id.* at 90.

⁸⁰ *Ibid.*

⁸¹ *Id.* at 96.

The model plans were to take into consideration specific problems discussed by the Committee. Throughout the remainder of the fall the Committee worked on the form of the model plans to prepare them for circulation throughout the court system early in 1965.⁸²

The Ad Hoc Committee had recommended that a special meeting of the Judicial Conference of the United States be held early in 1965 to discuss the problems that will occur in the implementation of the Criminal Justice Act of 1964. In its report the Committee took the position that it was neither possible nor desirable to prescribe any specific plan or plans for adoption by a district court.⁸³ Assuming that the suggested model district court plans would reflect sufficient guidelines, the Committee also proposed that the Judicial Conference not issue any rules and regulations until the need was indicated by the operation of the plans.⁸⁴ A number of required provisions for each plan were proposed. Moreover, the committee recommended the adoption of uniform standards and procedures to determine financial inability and assure continuity of representation. The board of advisors program for each circuit was endorsed. No plan for representation on appeal was proposed at that time. It was also recommended that proposals for administrative organization be deferred until the district plans were placed in operation and the requirements arose.

The Judicial Conference of the United States adopted the report and directed that the actions be followed.⁸⁵ With these reports, recommendations and model plans before them, district courts were prepared to devise a plan that would be consistent with the expressed policy of the Judicial Conference and appropriate to their particular needs. The Eighth Circuit was in a particularly advantageous position to respond. The Chief Judge, Harvey M. Johnsen, had been intensely active in each phase of the post-passage study of the Criminal Justice Act of 1964.⁸⁶ Promptly acting upon the recommendation of the Ad Hoc Committee that the Chief Judge of each circuit call a meeting "as soon as practical of the chief judges of the district courts in his

⁸² See minutes of the meeting of October 17, 1964. *Id.* at 79-85.

⁸³ *Id.* at 5.

⁸⁴ *Id.* at 6-9. Six model district court plans were attached to the report (pages 31-74) as well as vouchers and other forms required to be used in each plan devised by the courts (pages 12-30).

⁸⁵ *Id.* at 2.

⁸⁶ *Id.* at 2, 11, 79, 97.

circuit to consider the implementation of the Criminal Justice Act,"⁸⁷ Judge Johnsen held a meeting in Kansas City, Missouri, on October 23, 1964, to discuss

the problems of administration under the act, the urgency of developing practical and acceptable plans in each district, ways and means stimulating the interest and securing the support and cooperation of the bar in every district in the implementation of the act, and to make plans for the appointment from the bar of an appropriate board of advisors to the judicial council.⁸⁸

Early in November, Chief Judge Richard E. Robinson of the United States District Court for the District of Nebraska requested the President of the Nebraska State Bar Association to appoint an *ad hoc* committee to draft a plan implementing the Criminal Justice Act of 1964 in this district. A committee of nine lawyers was selected.⁸⁹ Following a preliminary meeting to outline the requirements for a Nebraska plan, drafts were prepared and circulated among the members for study during the months of January and February. A plan was submitted in February which was formally adopted by the federal district court on February 19, 1965. It was approved by the judicial council of the Eighth Circuit on May 8, 1965. The plan will take effect on August 20, 1965, the effective date of the Criminal Justice Act of 1964.

V. PROVISIONS OF THE PLAN

The format of Nebraska's plan is similar to several model plans to the extent that it has incorporated many of the provisions contained in them. Yet the plan is individualistic and is patterned after the needs of the district. As the plan is designed to be a guide for lawyers given court appointments under the Criminal Justice Act of 1964, it would be well to discuss the provisions of the plan against the background of some of the problems with which they will be concerned.⁹⁰ In this way the potential, as well as the purpose, of the plan may become apparent.

⁸⁷ *Id.* at 87.

⁸⁸ *Id.* at 3.

⁸⁹ The members were Robert H. Berkshire, George B. Boland and Warren S. Zweibach (of Omaha); John C. Gourley and C. M. Pierson (of Lincoln); Donald W. Pederson (of North Platte); Gerald E. Matzke (of Sidney); Francis L. Winner (of Scottsbluff) and the author.

⁹⁰ See Timbers, *Representation of Indigent Defendants in Federal Criminal Cases*, 38 CONN. B. J. 395 (1964) for a detailed discussion of the procedural steps (and check-list) counsel should follow in handling a court assignment. The article was prepared prior to the implementation of the Criminal Justice Act of 1964 in the district of Connecticut.

The plan ought to be viewed from the broad and necessarily general declarations of the Criminal Justice Act of 1964. If no specific standard is suggested for deciding whether its provisions can be utilized—or how far they can be applied—the answer must turn, in the last analysis, on whether an adequate defense would be furnished an accused.⁹¹ If this test allows considerable latitude and provides a stimulus which otherwise would be lacking, it is intended to. The time has passed when the poor are deprived of their rights in a criminal proceeding because they cannot afford protection. The help which is provided to overcome this handicap is not a matter of generosity to be offered or denied by the government as it sees fit. As the *Allen Committee Report* states, what we are concerned with now is “a broad commitment by government to rid its processes of all influences that tend to defeat the ends a system of justice is intended to serve.” Only in this way will the ideal of equal justice convey any meaning in the courtroom. What is now considered as effective assistance of

⁹¹ The author had the opportunity to read Professor Lake's article in galley and is prompted to make one specific comment with regard to the question posed by him in his text accompanying footnote 42: To what extent is the Criminal Justice Act of 1964 applicable to the Supreme Court? Certainly it would seem incongruous if the court which rendered *Gideon* would not extend the same right of representation to its litigants as that ruling requires of nearly every other court in the land. It is obvious, however, that the framework of the act reflects a design for the district courts and the courts of appeal. No specific reference is made to the Supreme Court or to review by certiorari. Yet the purpose of the act is to provide representation “in the courts of the United States”; provision is made for representation “at every stage of the proceedings from [the defendant's] initial appearance before the U.S. commissioner or court through appeal”; the plans lay emphasis on a continuity of representation until or unless the lawyers are relieved by the next higher level of the judiciary; and with regard to claims for compensation specific reference is made “to each appellate court before which the attorney represented the defendant”. Beyond this, the Allen Committee Report refers to representation in “any appellate proceedings”; several witnesses in the Senate hearings spoke about assuring legal counsel “in all federal courts”; the Senate report specifies that adequate representation will be furnished “until the termination of appellate review”; the Senate manager of the bill likewise stated at the time of passage that the legislation would apply “until the termination of appellate review”; the House report also states that the purpose is to provide legal assistance “in the courts of the United States”; the House debate refers to representation “all the way to the Supreme Court” and “through final appeal”; and, finally, the Conference report uses the phrase “in each appellate court” and “at any stage of the proceedings, i.e., before the commissioner, the district court, the court of appeals, or the Supreme Court”. Considering the foregoing it is reasonable to say that, al-

counsel bears little resemblance to the practice of the past.⁹² The days of the "enthusiasm-experience dilemma"⁹³ have departed. With the passage of the Criminal Justice Act of 1964, more must be expected from counsel in assuming the defense of the poor, just as more can be expected by him in the preparation and presentation of the case.

(1) Coverage.—The plan⁹⁴ covers "defendants charged with felonies or misdemeanors, other than petty offenses as defined in 18 U.S.C. § 1, who are financially unable to obtain an adequate defense." This does not mean that defendants charged with petty offenses are not entitled to representation. However, the nature of such offenses would not require the facilities of the Criminal Justice Act of 1964 to afford adequate protection. By definition, collateral proceedings civil in character are not covered by the plan. Attorneys appointed to furnish representation in those cases must rely on their own resources as they do now.⁹⁵ The court took pains to express in the plan that the public service aspects of representation still exist. The plan states that the lawyer's participation in the plan, which provides compensation, in no way diminishes that responsibility. Despite the effort to distribute part of the burden which it is proper to share with the public, the necessity on the part of the lawyers to accept these appointments and to perform in the best tradition of the bar is not changed by the passage of the Criminal Justice Act of 1964.

The district court chose to adopt the most flexible system for appointment of counsel provided by the act. The practice now

though the act is not altogether explicit on the issue, the legislative intent was not to stop short of the Supreme Court insofar as federal criminal cases are concerned. By all logic, moreover, if the act does apply to the Supreme Court, it should make no difference at this point whether the case is federal or state in character. The methods for providing such representation, however, must remain for the Court to work out. One circuit has already ruled that it is not a denial of due process for a state court to refuse to appoint counsel for a defendant who seeks an appeal of his conviction from a state supreme court to the United States Supreme Court. *Peters v. Cox*, 341 F.2d 575 (10th Cir. 1965).

⁹² See Note, *The Effective Assistance of Counsel*, 78 HARV. L. REV. 1434 (1965).

⁹³ See Note, *The Representation of Indigent Criminal Defendants In The Federal District Courts*, 76 HARV. L. REV. 579, 596-600 (1963).

⁹⁴ See text of plan attached as an Appendix to this article.

⁹⁵ This is probably the next development of the act and should receive thorough consideration by the Congress as experience is gained with the present provisions.

followed is to assign lawyers in the general practice on an individual case basis. This procedure for securing counsel will continue for some time. However, the court recognized there are two legal aid agencies in Nebraska which potentially could be called upon to furnish representation.⁹⁶ In anticipation of the time when either agency is equipped to render this service, the court designated a plan containing a combination of the two systems.

(2) Qualifications for service.—The *sine qua non* of the Criminal Justice Act of 1964 is participation by competent counsel. If the plan is properly administered, this should not be a problem in Nebraska. The criminal docket in this district is not heavy.⁹⁷ On the other hand, a problem of securing counsel may arise in the future by reason of the greater number of appointments anticipated in federal court, the greater requirements associated with representation, and the expanding needs of the state courts.⁹⁸ However, a system for a fair allocation of appointments among qualified members of the bar should result from the program set up by this plan.

The practice of selecting a lawyer known or recommended to the judge whose only indicia of competence is admission to the bar is foreclosed. Counsel appointed under the plan must be selected from a panel of attorneys designated by the district court.⁹⁹ To develop a panel, local bar associations and other sources were contacted by the district court and invited to submit lists of lawyers who, in their opinion, had demonstrated ability and interest and were deemed qualified to furnish adequate representation. Members of the bar are always invited to present names. Undoubtedly the standard formulated is as broad as it is long. It was intended to mean more than a submission of a list of every practicing lawyer in the state, but how much more? While this question is not settled, the court decided that the leaders of the bar and the local trial judges would be in the best position to propose the initial lists of names for consideration. To avoid causing anyone to certify the competency of the lawyers recommended, the actual selection for the panel will be made by the court.

⁹⁶ The Legal Aid Society of Omaha, Nebraska, and the Lincoln Legal Aid Bureau.

⁹⁷ See note 12, *supra*.

⁹⁸ See L.B. 839, 75th Neb. Leg. Sess. (May 3, 1965) (providing for the appointment of counsel in the Nebraska state courts).

⁹⁹ 18 U.S.C.A. § 3006A(b) (Supp. 1964).

What constitutes "competence" in a particular case must be applied with reason. A lawyer who may have "demonstrated ability and interest" to handle a Dyer Act violation, for example, may not possess the skills and experience required to handle a narcotics offense. Necessarily, the panel needs a range of talents. The essential virtue of the panel, however, is that every member should possess a sufficiently recognized degree of competence to cope adequately with the case to which he might be assigned. This presupposes the exercise of sound judgment at the time of the designation to the panel and a careful exercise of judgment in making an appointment in a particular case.

If at any time it becomes apparent the appointment was ill-advised, the error should not be perpetuated at the defendant's expense. A substitute appointment can and should be made. In the interest of justice, which accords the broadest discretion, the judge may appoint as counsel any attorney admitted to the bar who is not on the panel, whose name then automatically is included. The panel will be supplemented and revised from time to time. The plan specifies that the selection of counsel from the panel is the responsibility of the judge or the Commissioner.

(3) Duration of service.—Once a lawyer is appointed to represent an accused, he will normally continue to serve throughout the remainder of the proceedings. In fact, the plan provides that counsel will continue to represent the defendant at each succeeding stage until further order of the court. If counsel is appointed by the Commissioner, the judge may reappoint him when the matter reaches the court level or he may substitute counsel; but in the meantime there is an obligation to continue to provide representation unless relieved by the court. The same procedure is followed on appeal. Counsel appointed by the judge must advise the defendant of his right to counsel on appeal and continue to represent him unless he is relieved by the Court of Appeals. In those cases where the defendant does not wish to appeal, the plan provides that a statement to that effect must be filed. A suggested form is provided. Should the defendant refuse to acknowledge his decision not to appeal in writing, counsel must certify that the advice was given. Of course, if it is convenient to do so, a record can be made in open court.

The geographical distances between the location of the Commissioners and the places where court is held in Nebraska are, in some instances, substantial. This factor is to be taken into consideration in determining whether counsel appointed by the Commissioner should continue to serve in subsequent stages. The

greatest degree of flexibility is contemplated by the plan for determining the duration of service or the advisability of substituting counsel. Counsel must be provided as required, but the arrangements for representation need not be continued when found to be inappropriate. The court may, and when the facts are called to its attention will, reexamine the need for counsel at any time. If the defendant is financially able to obtain counsel, or to make partial payment for his representation, the judge may terminate the appointment or direct that payment be made. If the judge finds that a defendant who has initially retained counsel cannot pay for his services, he may appoint the same counsel or substitute other counsel for his defense.

(4) Need for services.—The Criminal Justice Act of 1964 and the district court plan systematically avoid the use of the word “indigency.” It is not an adequate standard. The test employed in the act and the plan is “financial inability to obtain counsel.” In other words, a defendant need not be destitute to apply for assistance under this plan.¹⁰⁰ Rather, the criterion is “a lack of financial resources adequate to permit the accused to hire his own lawyer.”¹⁰¹ As the *Allen Committee Report* states, this is a “relative concept with the consequence that the poverty of [the] accused must be measured in each case by reference to the particular need or service under consideration.”¹⁰² Clearly the intention of the Criminal Justice Act of 1964 is that the concept should have a liberal interpretation.

(5) Time for appointment.—Each defendant charged with a felony or a misdemeanor who appears without counsel must be advised at his initial appearance before the judge or the Commissioner, or at such time as he first appears without counsel, of his right to counsel.¹⁰³ The *Allen Committee Report* points out the purpose of this provision: “It is clear that a system for adequate representation requires more than an appointment of counsel. One of the essentials of such a system is that counsel be appointed early enough in the criminal proceedings to insure protection of the defendant’s legitimate interests.”¹⁰⁴ This provision

¹⁰⁰ See Carter & Hansen, *The Criminal Justice Act of 1964*, 36 F.R.D. 67 (1964). See also *Judicial Conference Report* 6.

¹⁰¹ ALLEN COMMITTEE REPORT 7.

¹⁰² *Ibid.*

¹⁰³ 18 U.S.C.A. § 3006A(c) (Supp. 1964). See also *Judicial Conference Report* 84, for discussion of phrase “from his initial appearance”—interpreted as meaning “at his initial appearance.”

¹⁰⁴ ALLEN COMMITTEE REPORT 37.

will have a substantial impact on the character of the proceedings before the Commissioner and will certainly make the preliminary hearing more meaningful to the accused. It also imposes a greater duty upon the Commissioner which, although it could be anticipated by the proposed revision of the Rules of Criminal Procedure, is not now performed.¹⁰⁵ The selection of the lawyer by the Commissioner must be from the panel designated by the court. Although the court will still retain control through the designation of the panel and by review of appointments as they reach the trial stage, nonetheless it can be expected that the Commissioner's influence upon the entire proceedings through his initial selection of counsel will substantially increase under the plan, causing his role and responsibility to assume new importance. The language of the plan makes it plain that if the accused is first brought before the judge, rather than the Commissioner, the judge should promptly appoint counsel.

(6) Procedure for appointment.—When the defendant appears without counsel, the plan specifies that the defendant shall be asked whether he desires counsel and whether he is financially able to obtain counsel for himself. Upon the indication that he wishes to have counsel, he is unable to obtain a lawyer, and he wants to apply for one, it is then incumbent upon the judge or the Commissioner to make appropriate inquiry. However, it does require that whatever statements are made by the defendant in support of his application will be under oath in open court or by affidavit. The extent of the inquiry would vary in each case, and what might warrant extensive investigation in one instance may not be required in another. The practice should follow the same lines now employed in court. The purpose of the inquiry is not to discourage the appointment of counsel, but only its abuse. While there will be greater demands for counsel, current experience indicates that few, if any, defendants are now refused counsel when requested. Liberality in granting such requests is indicated by the provision allowing the defendant to make partial payment for representation. Forms are included in the plan for making the

¹⁰⁵ See note 7 *supra*. See also 111 CONG. REC. 11480 (daily ed. May 27, 1965) (insert by Senator Metcalf of Address by Chief Justice Warren to the American Law Institute, May 18, 1965) "Undoubtedly, the passage of the Criminal Justice Act will bring to light many inadequacies in our commissioner system. I believe our experience may well demonstrate the need for a throughgoing study of the system not only to assure the effective administration of the Act at the commissioner level but also to assure that the position of the U.S. Commissioner is a meaningful one viewed in the light of current needs."

affidavit and inquiry. The nature of the inquiry at the Commissioner level would be less extensive than at the court level.

While the plan is drafted in terms of the accused making application for the appointment of counsel, the purpose of the act is to discourage waiver of counsel. The formalities regarding an application for counsel should be minimized. Short of foisting counsel on the accused, the policy is to have counsel present¹⁰⁶ The act provides that if a defendant appears without counsel, one will be appointed unless the right is waived.¹⁰⁷ It may be desirable to appoint counsel, where a waiver is indicated, to advise the defendant as to the value of such services at the time of plea and sentence apart from informing him about the consequences and risks of waiver. To discourage the practice of waiver, the plan requires that the waiver be formally executed so that the defendant's "eyes will be open." A suggested form is provided. The plan also permits his revoking the waiver and applying for an appointment of counsel at any stage of the proceedings.

The plan makes provision for the appointment of more than one attorney in the case when the requirements of an adequate defense so indicate. Care must be exercised to avoid abuse. The provision does not contemplate multiple appointments merely to circumvent the dollar limitation on fees or to serve the convenience of counsel previously appointed. Separate counsel are also to be appointed in those cases where the defendants have such conflicting interests that they cannot be properly represented by the same attorney. This, too, is not a matter of lessening the burden or following the preference of counsel.

(7) Services other than counsel.—The *Allen Committee Report* states that the absence of a provision for defense services is "a fundamental deficiency of the present system," which reaches "serious proportions."¹⁰⁸ The plan provides that counsel, whether appointed for or retained by a defendant who is financially unable to obtain the services other than counsel necessary to an adequate defense, may request them in an ex parte application to the court. The ex parte nature of the application will insure that the defendant will not have to disclose his defense prematurely. Al-

¹⁰⁶ See *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942). For the danger of insisting on counsel appointment see *Time*, March 19, 1965, p. 57, for discussion of ruling by federal district court granting a writ of habeas corpus in case where counsel was not desired, but appointed in a state trial.

¹⁰⁷ 18 U.S.C.A. § 3006A(b) (Supp. 1964).

¹⁰⁸ ALLEN COMMITTEE REPORT 26.

though the legislative history is replete with references to these services, no exhaustive description of them has been found. The *Allen Committee Report* refers to counsel having at his disposal the "tools essential to conduct a proper defense,"¹⁰⁹ and later specifically mentions "investigatory services, the assistance of experts, transcripts of proceedings and the like."¹¹⁰ Sound judgment in the matter is required, although on a showing of reasonable need, a court should not hesitate to afford counsel the fullest opportunity to prepare his case. To indicate the liberality of the rule, as well as provide guidance to counsel in utilizing the provision, the plan gives this interpretation:

The fact finding services contemplated by the plan are similar to, but are not necessarily the same as, the services utilized in careful police work or required by a diligent United States Attorney. In passing on an application for such fact finding services, the Judge need only be satisfied that they reasonably appear to be necessary to assist counsel in his preparation and trial of his case and that the defendant is unable to pay for them.¹¹¹

On granting the application, the judge can establish a limit as to the amount which will be approved for such service but, in any event, cannot authorize payment or award compensation to any one person for the service, or to any organization for such service rendered by an employee, in excess of 300 dollars, exclusive of expenses. When it is appropriate and not prejudicial to the defendant's case, the court may determine whether stipulations can be entered into to avoid the expense. The plan contains a provision for the court to ratify the employment of such services after they have been obtained when counsel shows that timely procurement of the services could not await prior authorization. This authorization should be used sparingly. It is not intended to rescue a negligent lawyer. Some plans include a caveat that "ratification is not looked upon with favor." Nebraska's plan indicates that the services contemplated as being needed immediately would be those services necessary to preserve evidence which may be lost by delay. Other appropriate criteria will develop with experience. Statements supporting the request for these services, unless made by the defendant's attorney, are required to be in the form of affidavits or under oath in open court and to be endorsed by counsel. Forms are included in the plan. The plan specifies that the Commissioner cannot authorize these defense services.

¹⁰⁹ *Id.* at 39.

¹¹⁰ *Ibid.*

¹¹¹ See Appendix, *infra*.

(8) Payment.—Attorneys appointed under the plan will submit a claim at the conclusion of their services, or any segment as deemed appropriate, which is supported by a written statement specifying the time expended, services rendered and the expenses incurred while the case was handled. Any compensation or reimbursement received in the case must also be indicated. The procedure for presenting these claims would be similar to the showing made for other court disbursement of funds. A strict accounting is expected. The modest limitations for hourly reimbursement do not justify excessive charges for time. Expenses are limited to out-of-pocket expenses actually incurred in defense work, and would not include either unreasonable personal living expenses or non-allocable office costs. A form specified in the plan is to be used.

The court is authorized to set the compensation to be paid an attorney at the rate not to exceed fifteen dollars an hour for court time and ten dollars an hour for office time, exclusive of expenses. However, an overall limitation is specified for each attorney appointed of 500 dollars for a case involving a felony and 300 dollars for a case involving only a misdemeanor. In extraordinary circumstances—and the term implies nothing less—payments in excess of these limits are authorized if the district court certifies that the payment is necessary to provide fair compensation for protracted representation and the sum is approved by the Chief Judge of the circuit. For representation on appeal, the compensation for each attorney appointed is limited to 500 dollars for a felony case and 300 dollars for a misdemeanor case. The plan requires the claims to be submitted within forty-five days after the service is rendered unless reason for delay is given.

The court will also determine the compensation for service other than counsel and direct payment to the person or organization which rendered it. Such claims must be supported by an affidavit specifying the time expended, the service rendered and expenses incurred on behalf of the defendant, as well as the compensation received in the case or for the same service from any other source. The standard of strict accounting equally applies to these claims. The compensation can not be in excess of the amount authorized, which in no event would exceed the sum of 300 dollars for each person rendering such service, exclusive of expenses. Forms are provided in the plan for making application.

To emphasize the tight control the courts will exercise over the payment of fees and expenses, notification of all appointments

and authorizations are to be given the Administrative Office of the United States Courts as they are made. The director of the Administrative Office will disburse the funds through a central accounting system. He is also authorized to secure reports from the courts and judicial councils on the operation of the plans, as needed, and will prepare standard forms for appointments and submission of claims.

The plan prohibits any attorney or person rendering a defense service from requesting or accepting payment from any other source without court approval. Information coming to the attention of counsel that the defendant is in a position to make payment in whole or in part is to be reported to the court.

VI. CONCLUSION

The members of the Nebraska Bar will have further guidance in working with the plan. Patterned after the Board of Trustees of the District of Columbia Legal Aid Agency, an advisory committee composed initially of the lawyers who drafted the plan has been designated to serve as an intermediary between the bar and the court to resolve any questions that might arise in the day-by-day operation of the plan.¹¹² The assignment should prove to be one of the most challenging undertaken by the bar. Hard problems lie ahead. It is relatively simple to state that effective assistance of counsel is required in all cases. It is something else again to provide it. It is rather popular to talk about equal justice for the accused, but to see that it is done involves a great deal more. However, a growing awareness of the vast disparities and inequities in the criminal law practice is producing new attitudes and prompting more effective action. Lawyers are thinking about the constitutional aspects of their case. Not long ago to raise a constitutional objection would practically imply that there was no substance to the defense. Today police practices and prosecutors' proof are scrutinized immediately in the light of constitutional requirements. And new precedent to this end is rapidly developing.

This new direction in the law quite naturally has aroused anxieties in the public mind. The crime rate increases—even faster than our population growth. Cities fall prey to gangs that roam

¹¹² Special Committee on the Federal Criminal Justice Act, created June 18, 1965. For membership see note 89, *supra*. An illustration of the kind of problem the Committee might face is found in Professor Lake's article in the text accompanying footnote 56.

its streets at will. Citizens are terrorized by hoodlums who do not hesitate to strike in broad daylight. The police everywhere confess to a general breakdown of law and order. Little wonder that news of an appellate court reversal of a conviction is greeted with public dismay.¹¹³ As the front pages of newspapers had once carried the details of the crime, now the editorial columns decry apparent judicial indifference as to the consequences of these decisions. Even in the comic strips—seemingly our last escape from the problems of the world—criminals suffering swift and sure justice are heard to mumble that “someone is violating their constitutional rights.”

To be sure, there is also a lively and articulate press which regularly rakes judges over the civil libertarian coals for allowing a policeman's testimony to be admitted in a court of law or for sending a defendant to prison who has led such an exemplary life while out on bail. The need for understanding of our task was clearly stated by Professor Vorenberg in a recent address:

[M]any parts of today's dialogue are not merely uncreative, they are destructive. 'Hanging judge', 'soft-headed court', 'police brutality', and 'hard-nosed reactionary' are phrases which have become part of the jargon in this field. We read these epithets in our newspapers every day, and all too many people accept them as accurate reflections of the questions posed by the criminal process. Distinctions are drawn which suggests that one must make a simple, all-purpose choice between protecting the individual and protecting society; between coddling the criminal and promoting effective law enforcement; between the rights of the accused and the rights of the public. In my view, these are false conflicts which obscure and obstruct rather than aid analysis of the issues in this field. This 'which side are you on' approach not only impedes communication among those who are working in the criminal field; far worse, it so distorts the public's understanding of how hard and important are our tasks that it seriously impairs our ability to enlist needed support for work [on the right to counsel].¹¹⁴

To the extent that it has clarified our national policy and purpose on the question of the right to counsel, the passage of the Criminal Justice Act of 1964 is profoundly important. To the degree that it will be utilized by lawyers to overcome, in the defense of the poor, the disadvantages traced to poverty, it will be a success. This nation is committed to the eradication of pov-

¹¹³ See *Time*, April 23, 1965, p. 46, for contrasting report, "*Winner Take Nothing*".

¹¹⁴ See Address by James Vorenberg, Director, Office of Criminal Justice, The Office of Criminal Justice—Its Role and Relationship To State And Federal Reform, Governor's Conference on Bail and The Right To Counsel, Louisville, Ky., Jan. 23, 1965.

erty in its midst. It is appropriate that one of the earliest pieces of legislation should consider the impact of poverty on the administration of criminal justice. There is, perhaps, no greater test of our commitment than by adequately providing for the defense of the poor who are accused of crime. The bar has an opportunity to demonstrate that the rights of every member of our society, regardless of his circumstances, shall be decently respected. It has, just as well, the responsibility to see that they are fully protected. In faithfully pursuing the declared purposes of the Criminal Justice Act of 1964, the bar will perform its truest function and preserve its greatest tradition. While, therefore, this legislation is just a beginning of a better pursuit of social justice, it is an auspicious start.

APPENDIX

PLAN FOR IMPLEMENTING THE CRIMINAL JUSTICE ACT OF 1964 IN THE DISTRICT OF NEBRASKA

The Judges of the United States District Court for the District of Nebraska have adopted the following plan in accordance with the provisions of the Criminal Justice Act of 1964 (P.L. 88-455, 78 Stat. 552, 18 U.S.C. § 3006A) to furnish representation for defendants charged with felonies or misdemeanors, other than petty offenses as defined in 18 U.S.C. § 1, who are financially unable to obtain an adequate defense. Representation under this plan includes the services of counsel and investigative, expert and other services necessary to an adequate defense.

This plan combines representation by private attorneys and representation by attorneys furnished by a legal aid agency. Each legal aid society within this district, including the Legal Aid Society of Omaha, Inc. and the Lincoln Legal Aid Bureau, is designated as a legal aid agency under this plan, provided that the names of attorneys furnished by the legal aid agency shall be approved by the Court before being included in the panel of attorneys available for such representation.

The members of the Bar of this Court traditionally have represented defendants who are financially unable to obtain counsel without compensation for services or reimbursement for expenses. This public service is recognized as a part of the professional responsibility of attorneys and their participation in this plan, which makes provision for compensation, in no way diminishes that responsibility.

Attorneys appointed to furnish representation in habeas corpus cases, in proceedings to vacate sentence brought under 28 U.S.C. § 2255 or in any other proceeding of a similar character, which is collateral to the original criminal case, are not covered by this plan. The representation furnished by attorneys in such proceedings is in fulfillment of their professional responsibility as officers of the Court.

PANEL OF ATTORNEYS

The bar associations and legal aid agencies within this district are invited to prepare and submit to the Chief Judge not later than May 1, 1965, a list of attorneys who are admitted to practice in this Court and who, in the opinion of the bar association or of the legal aid agency, have demonstrated ability and interest and

are deemed qualified to furnish adequate representation to defendants financially unable to obtain counsel. Each name on a list so submitted shall be accompanied by the address and telephone number of the attorney and the date of his admission to the bar.

The members of the bar of this Court are individually invited to submit their names, or the names of any other attorneys who are admitted to practice in this Court and who in their opinion have demonstrated ability and interest and are deemed qualified to furnish adequate representation to defendants financially unable to obtain counsel, to any of the Judges of the Court for consideration in designating the panel. Each name so submitted shall be accompanied by the address and telephone number of the attorney and the date of his admission to the bar.

After considering the names of attorneys submitted to the bar associations and legal aid agencies and the names of attorneys proposed separately to the Judges of this Court, and upon making such other inquiries as may be deemed appropriate, the Court shall establish a panel of attorneys on or before June 15, 1965. The panel of attorneys shall list each attorney, his address and telephone number and date of his admission to the bar and shall signify the attorneys who will be furnished by a legal aid agency. Additions to and deletions from the panel may be made by the Court from time to time. The bar associations and legal aid agencies are encouraged to supplement the lists submitted by them to the Chief Judge whenever they deem it appropriate.

The Clerk of the Court shall furnish each Judge and United States Commissioner in the District copies of the panel of attorneys and revisions thereof as made by the Court. The selection of counsel shall be the responsibility of the Judge or the United States Commissioner, as the case may be. The selection shall be from the panel designated and approved by the Court. In the interest of justice, the Judge may appoint as counsel any attorney admitted to practice in this Court, who will be placed on the panel of attorneys if not previously so designated.

APPOINTMENT OF COUNSEL

Each defendant charged with a felony or misdemeanor, other than a petty offense, who appears without counsel shall be advised at his initial appearance before the Judge or the United States Commissioner or at such time when he first appears without counsel of his right to counsel and shall be asked whether he desires counsel and is financially able to obtain counsel in his defense. Whenever the defendant states that he desires counsel and that he

is financially unable to obtain counsel and applies for the appointment of counsel, it shall be the duty of the Judge or the United States Commissioner, as the case may be, to make appropriate inquiry to determine whether the defendant is financially able to obtain counsel. If, on the basis of such inquiry, the Judge or the United States Commissioner finds that such defendant is financially unable to obtain counsel, he shall appoint counsel for the defendant.

The term "financial inability," as considered for the purposes of this plan, does not mean indigency. The defendant does not have to be destitute to be eligible for an appointment of counsel. The Judge or the United States Commissioner need only be satisfied that the representation essential to an adequate defense is beyond the means of the defendant.

All statements made by a defendant in the inquiry shall be either under oath in open court or by affidavits. The Judge shall make his own finding of the need to appoint counsel for a defendant, but he may base his finding upon the record made by the defendant before the United States Commissioner. The standard forms of the Administrative Office of the United States Courts shall be used by the Judge and the United States Commissioner in the inquiry and for the order appointing counsel. (See Appendix 1: CJA Forms 1 through 3a and instructions.)*

Where counsel is waived by the defendant, either before the Judge or the United States Commissioner, the waiver shall be in writing, signed by the defendant. At any stage of the proceeding the defendant may revoke his waiver and apply for the appointment of counsel. (See Appendix 2: Suggested Forms for Waiver, Certification of Refusal to Sign Waiver and Certification of Admission of Financial Ability to Obtain Counsel.)*

Separate attorneys shall be appointed for defendants who have such conflicting interests that they cannot properly be represented by the same attorney, or when other good cause is shown. When the Judge finds that an adequate defense requires the services of more than one attorney for a defendant, in the interest of justice such representation may be so provided.

DURATION AND SUBSTITUTION OF APPOINTMENT

A defendant for whom counsel has been appointed shall be represented at every stage of the proceeding from his initial ap-

* The forms, vouchers, and instructions are deleted from this printing.

pearance before the United States Commissioner or Judge through his final appeal. Counsel appointed by a United States Commissioner shall continue to represent the defendant until further order of the Judge. The Judge may re-appoint counsel appointed by the United States Commissioner for the defendant or may appoint new counsel. Such counsel shall represent the defendant throughout the proceeding in District Court. In the event that the defendant is convicted following trial, counsel appointed by the Judge shall advise the defendant of his right to appeal and of his right to counsel on appeal. If requested to do so by the defendant, counsel shall file a timely notice of appeal, and he shall continue to represent the defendant unless, or until, he is relieved by the Court of Appeals.

If the defendant desires not to proceed with an appeal, a statement shall be filed by him signifying that he was advised of his right to appeal and of his right to counsel on appeal and that he elects not to appeal. If the defendant refuses to acknowledge in writing that he has been advised of his right to appeal and of his right to counsel on appeal, counsel for the defendant shall certify that such advice was so given. (See Appendix 3: Suggested Forms Not To Proceed with Appeal and for a Certificate by Counsel.)*

The Court may re-examine the need for counsel at any time after the appointment has been made. If the Judge finds that the defendant is financially able to obtain counsel, or make partial payment for his representation, he may terminate the appointment of counsel or he may direct that payment be made to the appointed counsel, to the legal aid agency or to the Court for deposit in the treasury of the United States. (See Appendix 1: CJA Forms 6 and 7 and instructions.)*

If at any stage of the proceeding the Judge finds that a defendant for whom counsel has not been previously appointed under this plan is financially unable to pay counsel whom he has retained, the Judge may appoint the same counsel or substitute counsel as provided in this plan.

The United States Commissioner or the Judge may, in the interest of justice, substitute one appointed counsel for another at any stage of the proceeding. The geographical distance between the place where the United States Commissioner holds his pro-

* The forms, vouchers, and instructions are deleted from this printing.

ceeding and where the defendant will appear before the Court shall be considered in determining the appropriateness of such substitution.

SERVICES OTHER THAN COUNSEL

Counsel appointed for, or retained by, a defendant who is financially unable to obtain investigative, expert or other services necessary to an adequate defense in his case, may request them in an ex parte application to the Court.

The fact finding services contemplated by the plan are similar to, but are not necessarily the same as, the services utilized in careful police work or required by a diligent United States Attorney. In passing on an application for such fact finding services, the Judge need only be satisfied that they reasonably appear to be necessary to assist counsel in his preparation and trial of his case and that the defendant is unable to pay for them.

Upon making appropriate inquiry and so finding, the Judge shall authorize counsel to obtain the services on behalf of the defendant. When appropriate and not deemed prejudicial to the defendant's case, it should be determined whether reasonable stipulations may be entered into to avoid the expense. The Judge may establish a limit on the amount to be approved for each such service. (See Appendix 1: CJA Form 8 and instructions.)*

Any statement made by or on behalf of the defendant in support of the request, other than by his attorney, shall be made either by affidavit or under oath in open court. When presented as an ex parte application, the Judge may, in the interest of justice, direct that such affidavit be sealed and the testimony withheld from the public and the United States Attorney.

The Court may, in the interest of justice and upon the finding that timely procurement of necessary services could not await prior authorization, ratify such services after they have been obtained. The services contemplated by the plan as being needed immediately are those services necessary to preserve evidence which may be lost by delay. (See Appendix 1: CJA Form 10 and instructions.)*

The United States Commissioner shall not authorize the obtaining of investigative, expert or other services.

* The forms, vouchers, and instructions are deleted from this printing.

PAYMENT FOR REPRESENTATION AND FOR SERVICES
OTHER THAN COUNSEL

An attorney appointed pursuant to this plan or the legal aid agency which made an attorney available for appointment, shall at the conclusion of the representation or any segment thereof be compensated on submission of a claim in accordance with the rules, regulations and forms prescribed by the Administrative Office of the United States Courts and supported by a written statement specifying the time expended, services rendered and expenses incurred while the case was pending before the United States Commissioner or Court, and the compensation and reimbursement applied for and received in the same case from any other source. Expenses reasonably incurred are limited to out-of-pocket expenses, and shall not include any allocation for general office overhead. (See Appendix 1: CJA Form 4 and instructions.)*

The Court shall, in each instance, fix the compensation and reimbursement to be paid to the attorney or legal aid agency.

In extraordinary circumstances, payment in excess of the limit for representation stated in the Act may be made if the Court determines and so certifies that such payment is necessary to provide fair compensation for protracted representation, and the amount of the excess payment is approved by the Chief Judge of the United States Court of Appeals for the Eighth Circuit. (See Appendix 1: CJA Form 5 and instructions.)*

The Court shall determine and fix reasonable compensation for services other than counsel and direct payment to the organization or person who rendered them upon the filing of a claim for compensation supported by an affidavit specifying the time expended, services rendered and expenses incurred on behalf of the defendant, and the compensation received in the same case or for the same service from any other source. (See Appendix 1: CJA Form 9 and instructions.)*

All claims for counsel fees or other services shall be submitted for payment within 45 days following the conclusion of such service, unless an extension of time is granted by the Court for good cause shown.

Except as authorized or directed by the Court, no appointed attorney or legal aid agency, and no person or organization au-

* The forms, vouchers, and instructions are deleted from this printing.

thorized by the Court to render investigative, expert or other services, may request or accept any payment or promise of payment for assisting in the representation of a defendant. If any information should come to counsel indicating that the defendant can make payment, in whole or in part, for legal services or for services other than counsel furnished under this plan, it shall be his duty to report such information to the Court, so that appropriate action may be taken.

The Clerk shall forward all approved vouchers to the Administrative Office of the United States Courts for payment.

FORMS

The forms prepared and furnished by the Administrative Office of the United States Courts, copies of which are attached in Appendix 1, shall be used, where applicable, in all proceedings under this plan. Any revisions of these forms or any additional forms as may be prescribed by the Administrative Office of the United States Courts under the authority of the Judicial Conference of the United States or of the Committee Of That Conference To Implement The Criminal Justice Act of 1964, shall likewise be used, where applicable, in all proceedings under this plan.

RULES AND REPORTS

The Clerk is directed, on behalf of the Court, to submit a report on the appointment of counsel to the Administrative Office of the United States Courts in such form and at such times as the Judicial Conference of the United States may specify. This plan shall be subject to such rules and regulations of the Judicial Conference of the United States governing the operation of the plans under this Act, as may be made from time to time.

Representation on appeal of defendants financially unable to obtain representation will be provided under a plan adopted by the Judicial Council of the Eighth Circuit.

AMENDMENTS

Amendments to this plan may be made from time to time by this Court, subject to the approval of the Judicial Council of the Eighth Circuit.

EFFECTIVE DATE

This plan shall take effect on the effective date of the Criminal Justice Act of 1964, provided it shall have been approved by

the Judicial Council of this Circuit.

Adopted by the United States District Court for the District of Nebraska on February 19th, 1965.

/s/ RICHARD E. ROBINSON
CHIEF JUDGE

/s/ ROBERT VAN PELT
JUDGE