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The Federal Criminal Justice Act of 1964: Catalyst in the Continuing Formulation of the Rights of the Criminal Defendant

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I. Introduction

"The right of competent counsel must be assured every man accused of crime in a Federal court regardless of his means."1

In the 1938 case of Johnson v. Zerbst,2 the Supreme Court, through Mr. Justice Black, held that unless intelligently waived, a criminal defendant in a federal court had the right to have counsel appointed if unable to secure his own. That opinion made the newly articulated right an absolute one, the sixth amendment being interpreted to render all convictions void, for lack of proper jurisdiction, where counsel was not appointed in such circumstances.3 For the next quarter century, however, the Johnson v. Zerbst doctrine4 was often honored more in form than in substance. Young and inexperienced attorneys were appointed, sometimes haphazardly, to represent most of the resourceless criminal defendants. There was no provision made for the financing of the investigative and other services necessary for an adequate defense, much less for the reimbursement of the assigned counsels' out-of-pocket expenses, and counsel were appointed, not at the defendant's initial appearance, but later at his arraignment. The legislative response to the obvious inadequacies of this system came finally with the passage of the Federal Criminal Justice Act of 1964,5 which not only assures counsel for all federal criminal defendants financially unable to retain their own, from their initial appearance through appeal, but also compensates such counsel, and provides funds for investigative, expert and "other" services necessary for an adequate defense. No discussion of "Justice and the Poor" would be complete without an analysis of this recent enactment.

The Criminal Justice Act is unquestionably the most far-reaching present-day statute, state or federal, dealing with the resourceless criminal defendant. In the short period6 the Act has been in effect it has deeply involved a sub-

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1 John F. Kennedy, State of the Union Address, January 14, 1963.
2 304 U.S. 458 (1938).
3 Id. at 468. It seems clear as originally written and often used, the sixth amendment guaranteed little more than the right of a prisoner to hire an attorney if he so wished:

   History denied such a meaning [the Johnson v. Zerbst interpretation] to the counsel provision of the Sixth Amendment, and no responsible authority, scholarly or judicial, had held it to be within the scope of the Amendment. Yet, as has so often been true with other doctrines, it was possible for a court deeply conscious of the value of individual rights to transform the right to counsel in federal courts into a comprehensive safeguard for all defendants, whether indigent or financially able. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 32-3 (1955).

4 See also Holtzoff, Right of Counsel Under the Sixth Amendment, 20 N.Y.U.L. Rev. 1, 7-9 (1944).

5 The doctrine has been incorporated into Fed. R. Crim. P. 44: "If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceedings unless he elects to proceed without counsel or is able to obtain counsel."


7 Except those charged with petty offenses. See § (b) of the Act.

8 Although signed by President Johnson on August 20, 1964, the Criminal Justice Act did not go into effect until August 20, 1965.
notable portion of the American legal profession in the field of criminal defense, although the results of this involvement are not yet measurable. Though applying only to the federal court system, this enactment will surely prove to be a major catalyst for further advances on the state level, as have so many previous federal programs in other areas. The purpose of this Note is to explain the background, provisions and implementation of the Act, in the light of its professed goal of securing a better brand of justice for the financially disadvantaged.

II. Background of the Act

As early as 1937, the Judicial Conference of the United States called for the enactment of a program whereby public defenders would be named to handle the indigent criminal work in those districts which had a sufficient volume of such cases. As for districts without a good number of criminal cases involving indigents, the Conference also went on record as favoring compensation for counsel who would be assigned on an individual basis. This idea was a continuing one, being consistently advocated by the Judicial Conference and successive Attorneys General. Although several bills managed to receive a degree of favorable treatment in the Congress, not enough interest was generated to secure passage.

In early 1961, Attorney General Robert F. Kennedy, continuing the efforts of his predecessors, appointed a nine-man committee, chaired by Professor Francis A. Allen of the University of Michigan Law School, to study poverty and the administration of criminal justice in the federal court system. The Allen Committee Report, the product of this group's two-year study, cited impressive statistics which seemed to demonstrate clearly the inadequacies of assigning uncompensated counsel. For example, the study showed that during 1961 in the Northern District of Illinois seventy-five per cent of those defendants assigned counsel pleaded guilty, whereas only twenty per cent of those who retained private counsel so pleaded. The report, however, wisely cautioned against conclusions based solely on these statistics, pointing out that much of the disparity was attributable to the fact that an impoverished criminal was more than likely
to have committed a crime of high visibility, with correspondingly less chance of a plausible defense and often no real doubt as to guilt.\[^{25}\] Basing its conclusions, then, on direct observation and the informed judgment of competent observers,\[^{14}\] rather than statistics, the report indicted the indigent representation procedure of the day for having (a) encouraged guilty pleas, due to the futility of defenses without resources, (b) adversely affected the quality of the defenses made, and (c) constituted an unfair burden, at times even an economic hardship,\[^{16}\] on the legal profession.\[^{16}\] It is interesting to note that in contrast to this critical report a contemporaneous survey of district court judges and United States attorneys indicated that they generally considered the quality of such representation to be quite adequate,\[^{27}\] possibly due to their intimate connection with its operation. They were, however, heavily in favor of a system of compensation.\[^{18}\]

The Allen Committee Report\[^{19}\] gave the reform movement added impetus by attracting strong support from the Kennedy Administration.\[^{20}\] The Administration support, together with a well-organized drive on the part of the American Bar Association,\[^{21}\] was decisive, and the bill was passed in late summer of 1964.\[^{22}\]

It might seem that at this point a discussion of the Criminal Justice Act's legislative history would be appropriate. However, this legislative history is extensively treated elsewhere.\[^{23}\] It might be noted here that the congressional debate was not without some rather caustic criticism of the Act's underlying

\[^{13}\] \textit{Id.} at 28–9:

\[\text{[T]he impoverished accused most often will commit offenses that have a high degree of visibility. In the federal courts he is likely to be charged with such crimes as sale of narcotics, transportation of stolen vehicles, and thefts against the mails. In many situations the defendant is apprehended in the streets as he commits the offense or with incriminating goods or objects on his person. Frequently such a defendant has signed a confession before counsel enters the case. It is thus true that in these cases there is often no substantial question of guilt and that representation must be directed primarily to the issue of sentence or other disposition. Accordingly, statistics showing, for example, a higher percentage of pleas of guilty among cases in which defendants are represented by assigned counsel may reveal more about the character of the crimes committed than the quality of the representation.}\]

\[^{14}\] \textit{Id.} at 29.

\[^{15}\] \textit{Id.} at 29–30. For example, in one murder case in the District of Columbia where counsel was assigned, the defendant was tried five times and took an appeal. Cases like this not only consume hundreds of hours of the assigned counsel's time, but also result in a critical loss of income.

\[^{16}\] \textit{Id.} at 29.

\[^{17}\] Note, \textit{The Representation of Indigent Criminal Defendants in the Federal District Courts}, 76 Harv. L. Rev. 579, 599 (1963). The conclusions of this Note were based in part on a detailed questionnaire sent to every district judge and U.S. attorney. Thirty per cent of those responding considered assigned counsel's work "excellent," thirty per cent rated it "good," while less than ten per cent thought it to be "inadequate." Some even considered representation by assigned counsel better than that given by privately retained counsel.

\[^{18}\] \textit{Id.} at 605. One-eighth preferred the noncompensatory system, one-tenth were undecided, and the rest preferred some plan providing compensation to assigned counsel.

\[^{19}\] It should be noted that the Allen Committee Report also dealt with problems other than those the Criminal Justice Act attempts to alleviate, such as bail.

\[^{20}\] President Kennedy's remark in his 1963 State of the Union Address, the introductory quote to this Note, was cited by Kutak as the "turning point in the history of the legislation." Kutak, \textit{supra} note 8, at 715.

\[^{21}\] \textit{Id.} at 716.


\[^{23}\] See authorities cited nn. 8 and 9, \textit{supra}.\]
rationale of compensation for services rendered. Moreover, one key provision of the original bill, the establishment of full-time public defenders in districts with a heavy load of criminal cases, was killed just before passage due to substantial opposition.

III. Provisions of the Act

A. Aid for the “Financially Unable”

Prior to the Criminal Justice Act, the commissioner or judge before whom a defendant made his initial appearance was obliged only to advise the defendant of his right to retain counsel if he so wished. That right has been enlarged considerably by the Criminal Justice Act, section (b) of which provides that at his initial appearance the criminal defendant shall be advised that,

[H]e has the right to be represented by counsel and that counsel will be appointed if he is financially unable to do so. Unless the defendant waives the appointment of counsel, the United States commissioner or the court, if satisfied after appropriate inquiry that the defendant is financially unable to obtain counsel, shall appoint counsel to represent him. (Emphasis added.)

The term “financially unable” is ambiguous, but necessarily so. The Allen Committee Report had recommended the use of this terminology rather than “indigent” because the constitutional right to counsel had not been based on total destitution, but rather on a lack of sufficient resources for the defendant to retain counsel. Thus, if the test adopted had been “indigency,” the resulting statute would have been much too narrow, if not unconstitutional in some cases.

As to how the court or commissioner is to determine whether or not a particular defendant is “financially unable,” the Act itself only states that it is to be done by “appropriate inquiry.” Despite the absence of detailed procedures for this determination, however, the courts should not have a great deal of difficulty. One aid to the “appropriate inquiry” has been furnished by the Administrative Office of the United States Courts which has issued forms to be completed and sworn to by all defendants asking for appointed counsel. The shorter form, to be used in cases where there is little doubt as to the defendant’s financial status, requires that he list all liquid assets and property owned, in addition to his place of employment, rate of compensation, and number of dependents. In closer cases where more detailed information is thought necessary, the long form of affidavit is used. In addition to the information called for in the short form, this requires more detailed data as to real and personal

24 See, e.g., The Wall Street Journal, Aug. 18, 1964, p. 10, col. 4-5. This article darkly suggested that judges might hand out cases to old friends short of cash, and that the program would prove to be so costly and unmanageable that it would soon be abandoned.

25 Ibid. The strongest objection to the establishment of a Public Defender system was that it would expand the federal bureaucracy, and amount to government agencies both prosecuting and defending. See also Dimock, The Public Defender: A Step Towards a Police State?, 42 A.B.A.J. 219 (1956).


27 The Act will not be formally cited since it is reprinted in its entirety in the Appendix.

28 Allen Committee Report, p. 7.

29 CJA Form 1, Administrative Office of U.S. Courts (1965).
property, debts and other obligations. The court's duty is not ended with these affidavits, however, for the Act itself places the tribunal under a continuing obligation either to terminate the appointment of counsel or to authorize part payment by the defendant if it appears at any time after appointment of counsel that the defendant is actually able to retain his own lawyer. Another aid to the district courts, in addition to the affidavits, in their determination of whether or not a defendant is financially unable to retain counsel is the experience and precedent developed under other federal statutes and rules which provide gratuitous services for indigent defendants.

B. Method and Time of Counsel's Appointment

Under the previous practice, several district courts followed the "system" of assigning counsel from among the lawyers who happened to be in court on arraignment day. This often resulted in the appointment of inexperienced (or mediocre) counsel, some of whom were primarily interested in the prompt disposition of the case or in the extraction of a fee from their assigned client. This type of arrangement could, of course, work well in the smaller districts, where the judge would know and be able to evaluate the competency of these attorneys, but in the more populous districts such judicial scrutiny was impossible. Section (b) of the Criminal Justice Act ends this haphazard procedure; it states unequivocally that assigned counsel "shall be selected from a panel of attorneys designated or approved by the court." Of course this language does not of itself assure competent and conscientious counsel, but many courts, with the aid of local bar associations and defender organizations, have initiated detailed screening processes for the filling of these panels.

Section (c) of the Criminal Justice Act, which provides that a resourceless defendant "shall be represented at every stage of the proceeding from his initial appearance . . . through appeal," also represents a break with the past. Although it has long been the federal rule that a defendant in a capital case must be assigned counsel immediately upon his request, it has been held that in a

31 Section (c) also provides that if a defendant who has retained his own lawyer later becomes unable to pay him, the court may appoint counsel for him. In addition, § (f) gives the court the power, whenever it finds funds are available "from or on behalf of" a defendant with assigned counsel, to authorize and direct payment by the defendant to his appointed attorney.
32 See Carter and Hauser, The Criminal Justice Act of 1964, 36 F.R.D. 67 (1964). Some of the statutes with like terms which the authors discuss are: 28 U.S.C.A. § 1915 ("unable to pay . . . costs or give security therefor"); Fed. R. Crim. P. 15(c) ("cannot bear the expense thereof"); 28 U.S.C.A. § 2250 (indigent petitioner entitled to documents without cost). The authors review many of the cases that have developed under these statutes, and set forth typical situations which arise in trial courts in passing on the question as to whether the defendant is unable to secure counsel.
34 See textual discussion accompanying nn. 73-77, infra.
35 18 U.S.C. § 3005:

Whoever is indicted of treason or other capital crime, shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried or some judge thereof, shall immediately, upon his request, assign to him such counsel . . .
noncapital case, a plea of not guilty at arraignment without counsel does not require reversal, unless prejudice is shown.\(^8\) Section (c) not only assures counsel at arraignment but, more importantly, at the initial appearance before the court or commissioner, thus recognizing the admitted value of counsel at this stage of the proceedings. As one authority had noted, with reference to the earlier practice:

\[\text{[T]he present system of generally denying counsel until arraignment on the plea is patently unfair to the defense . . . The possible defense witness who is never found, the prosecution witness' story that might have been different if the defense had obtained an early interview, suggest the range of various "might have been" factors aiding the defense which are eliminated by the tardy appointment of counsel. And when an appellate court determines that a trial is not lacking in fundamental fairness it must of necessity overlook the possible unseen harm of this nature suffered by the defendant.}\(^7\)

The Act is silent with regard to the actual mechanics of the appointment of counsel. However, as to the time of appointment, it seems clear that the moment a defendant states he wants counsel, the initial appearance proceedings should stop, and counsel should either be immediately assigned, or the defendant should be given the opportunity to retain an attorney.\(^8\) Although the Act clearly gives commissioners the right to appoint counsel, most of the judges of the Judicial Conference's Committee to Implement the Act were of the opinion that district judges would have to directly supervise such appointments.\(^9\) Furthermore, the district judge does not have to accept the commissioner's appointment, and can terminate it when the defendant appears in court.\(^40\)

In actual practice the appointment procedures vary from district to district. For example, in the Western District of Texas the commissioner notifies the judge and the judge then appoints counsel, although the commissioner may appoint when the judge is not available.\(^41\) Some plans have the commissioner appoint counsel only to serve in the hearings before him, but in this case there is a danger period of nonrepresentation between the initial appearance and the trial, which would contravene the Criminal Justice Act's philosophy of "continuity of representation."\(^42\)

To insure implementation of the right of representation "through appeal"\(^43\) given defendants by the Criminal Justice Act, the Judicial Conference of the

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36 See, e.g., Anderson v. United States, 352 F.2d 945 (D.C. Cir. 1965). The court did note that "the problem presented by accepting not guilty pleas from uncounseled defendants should not recur. Appellant here was arraigned before the effective date of the Criminal Justice Act of 1964 . . . ." 352 F.2d at 947 n.3.
38 Ibid. Judge Ainsworth also notes that the defendant does not have the right to select his own counsel from the panel.
40 Id. at 360.
41 Ibid.
42 Ibid.
43 See § (c) of the Act in Appendix.
United States\textsuperscript{44} has recommended that every district court's representation plan include the provision that,

in the event a defendant is convicted following trial, counsel appointed hereunder shall advise the defendant of his right of 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.\textsuperscript{45}

Such advice from assigned counsel will, most probably, result in an increasing number of appeals which had been criticized as being too numerous and too easily allowed under the previous system.\textsuperscript{46} However, the Allen Committee Report was of opinion that the right of appeal should be expanded and improved,\textsuperscript{47} and its viewpoint was adopted in the Act.

C. Compensation for Counsel and Other Services

Traditionally the common law has recognized a duty on the part of the bar to render gratuitous legal services to the resourceless.\textsuperscript{48} However, since \textit{Johnson v. Zerbst}\textsuperscript{49} made such representation an obligation owed by society and not by any particular class, it seems patently unjust to continue saddling the legal profession with the sole financial burden.\textsuperscript{50} Moreover, besides placing an unjust burden on the profession, the system of noncompensation often occasioned inequitable treatment of the indigent defendant. It practically guaranteed representation by young and inexperienced attorneys,\textsuperscript{51} the result of which, in many

\textsuperscript{44} Section 3 of the Act, Pub. L. No. 455, 88th Cong., 2d Sess. (Aug. 20, 1964) authorized the Judicial Conference of the United States to issue rules and regulations for the formulation of the representation plans by the district courts.


\textsuperscript{47} The Committee is of the view that one basic objective of a system of criminal appeals is no different from that of other areas of criminal-law administration: namely, the establishment of procedures adequate to protect the legitimate interests of the accused irrespective of his financial status. We believe that this objective has not yet been achieved in the federal appellate process and that the present system is deficient both with reference to the proper assertion of defendant's rights and to the efficient administration of justice. \textit{Allen Committee Report} at 90.

\textsuperscript{48} One recent federal case, which had attracted a great deal of attention for breaking with the traditional view, is \textit{Dillon v. United States}, 230 F. Supp. 487 (D. Ore. 1964), noted in \textit{78 Harv. L. Rev.} 1654 (1965). There Judge East awarded an indigent's counsel the reasonable value of his services, under an eminent domain theory, in an action under the Tucker Act. This decision, however, was reversed in \textit{United States v. Dillon}, 346 F.2d 633 (9th Cir. 1965). The Ninth Circuit took the traditional view that an attorney has a duty to render free services when requested to do so.

\textsuperscript{49} \textit{304 U.S. 458 (1938).}

\textsuperscript{50} This was explicitly recognized by the \textit{Allen Committee Report}, at 42:

\texttt{[T]he proper functioning of the adversary system of justice, in which the nation as a whole has an important stake, demands that the defense of accused persons proceed at a level of zeal and effectiveness equivalent to that manifested in their prosecution. The notion that the defense of accused persons can fairly or safely be left to uncompensated attorneys reveals the fundamental misconception that the representation of financially deprived defendants is essentially a charitable concern. On the contrary, it is a public concern of high importance. A system of adequate representation, therefore, should be structured and financed in a manner reflecting its public importance.}

cases, was a second-rate defense. In addition, the probability of a less than adequate defense was compounded many times over by a refusal to reimburse for out-of-pocket expenses and investigative services.

Sections (d) and (e) of the Criminal Justice Act, undoubtedly the most controversial provisions, attempt to alleviate these serious defects by allowing compensation and reimbursement of out-of-pocket expenses to assigned counsel and to those who furnish investigative, expert or "other" necessary services. Section (d), which deals specifically with counsel, allows remuneration at $15.00 per hour for court services and $10.00 per hour for out-of-court services, in addition to reimbursement of reasonable expenses incurred, up to a maximum of $500.00 for a felony and $300.00 for a misdemeanor. It also provides the same schedule and limits for appellate work. Section (e) allows, in addition to expenses reasonably incurred, compensation to those who render investigative, expert or other services, with a limit of $300.00 for each person or organization rendering them. This section also provides that the defendant requesting such services make an ex parte application to the court, and that the court make an appropriate inquiry, also ex parte, as to the necessity of such services. Section (e) does provide that in situations where the services cannot wait prior authorization they may be later ratified by the court, but it is evident that these applications will not be looked upon with favor by the courts.

52 Congressman Emanuel Celler (D. N.Y.), Chairman of the House Committee on the Judiciary, made the following remarks during the House debate on the Criminal Justice Act:

There is no compensation provided for counsel. Young attorneys seeking experience covet these assignments in the Federal court. They are not skilled in matters of this kind enough to pit themselves against the expertise of the U.S. attorney with the result that the defendant does not, in common parlance, get a fair shake. These lawyers have not yet cut their eye teeth, so to speak, when they try these cases, to the woeful disadvantage of the defendant.

53 Note, The Representation of Indigent Criminal Defendants in the Federal District Courts, 76 Harv. L. Rev. 579, 598 (1963): "Lack of reimbursement of out-of-pocket expenses clearly burdens assigned counsel and inhibits preparation of a satisfactory defense by all but the wealthiest or most dedicated lawyers."

54 Id. at 599. District court judges and U.S. attorneys were asked whether preparation of defenses suffered from lack of funds for investigation. Nearly forty per cent felt that such preparation was "seriously hampered." Less than ten per cent thought that preparation was not hampered.

55 To illustrate the strong feelings stirred by this provision, Congresswoman Griffiths stated during the House debate that, "as a lawyer, I have defended people in Federal court without charge, and I considered it an honor and a privilege. . . . This is likely to become a racket." 110 Cong. Rec. 420 (daily ed. Jan. 15, 1964).

56 That section states, however, that payments in excess of these limits, for work on the trial level, will be allowed in extraordinary circumstances if the district court certifies that such payment is necessary to provide fair compensation for protracted representation. The excess payment, however, must be approved by the chief judge of the circuit in which the case arose. The payment itself is made to the assigned attorney, or to the bar association or legal aid agency which makes the attorney available for assignment.

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58 Whether the Act would preclude the presence of the United States Attorney to oppose contradictorily when defense counsel requests authorization is not clear. Certainly there can be situations where the United States Attorney would not be entitled to know what steps are being taken by the defense in the investigative and expert field in preparation for trial.

59 The Judicial Conference has recommended that each of the Plans adopted by
The limitations of $500.00 and $300.00, in felony and misdemeanor cases respectively, have been criticized as being unrealistic and unfair, especially for the more difficult cases. This type of situation can be avoided, however, if the courts and the chief judge of each circuit take a flexible and realistic approach to the Act's provision for payment in excess of the limits for protracted and difficult cases. It is certainly true, however, that the hourly rates set by the Act are much lower than prevailing legal fees. However, in the light of the congressional criticism of the Act they seem to be as high as could be expected. Moreover, it could be argued that the hourly rate strikes a fair balance between the profession's duty to serve and society's duty to compensate. As to the actual making of payments, the Director of the Administrative Office of United States Courts has been charged by the Judicial Conference with this responsibility. The central disbursement office instituted by the Director must be notified of every appointment of counsel and authorization of other services, vouchers for payment must be sent there, and payments are to be made from that office directly to the persons concerned.

IV. Implementation of the Act

The comparatively small number of criminal cases in the federal courts, approximately a third of which will probably come under the provisions of the Criminal Justice Act, make the program both manageable and relatively inexpensive. The first reports, in fact, indicate that the average payment to assigned counsel is approximately one-fifth the maximum permitted by the Act.

the District Court include the provision that applications for the ratification of expenses incurred without court approval are not looked upon with favor except in most unusual situations.


[This is quite unrealistic and would operate very unfairly because an attorney might have a long and very difficult felony case and wind up getting less than the minimum wage for labor whereas someone who had a rather easy misdemeanor case could get the maximum fifteen dollars an hour.]

36 E.g., the hourly rate under Michigan's suggested minimum state-wide fee schedule was $25.00. 43 Mich. S.B.J. 9, 28 (Aug. 1964).


62 Some 30,000 criminal cases were filed in the district courts during fiscal year 1964. Annual Report of the Director of the Administrative Office of the United States Courts 147 (1964).

63 During the ten-month period from July, 1963 to April, 1964, counsel were assigned to approximately thirty per cent of the criminal defendants acquitted or sentenced. Report of the Judicial Conference of the United States, Report of the Ad Hoc Committee to Develop Rules, Procedures and Guidelines for an Assigned Counsel System, 36 F.R.D. 277, 381 (1965). One caveat is, however, that during that period the resourceless defendants were told only that they had the right to counsel. Now that they are to be informed that they have the right to have counsel appointed and paid for if they are financially unable to do so, it is probable that the number of waivers will diminish considerably, with a corresponding increase in the percentage of cases where counsel are assigned.

64 The first full year of the Criminal Justice Act's operation is expected to cost $7,500,000. Judge Ainsworth's Address, 1965 Judicial Conference of the Fifth Circuit, 38 F.R.D. 351, 354 (1965).

65 As of February 1, 1966, $123,108 had been paid to assigned counsel in 1,471 cases, with the average payment being $82.08. Chicago Sun-Times, Mar. 28, 1966, p. 22, col. 3. However, with the average payment so low, one is led to wonder whether the Criminal Justice Act is having the desired effect of encouraging more time and effort in such cases.
Undoubtedly the most serious problem confronting the Criminal Justice Act's implementation is the disinterest of most attorneys in criminal law, and the attitude on the part of many that their professional obligation in that field may be lightly put aside. This apparent cavalier attitude on the part of the bar is the most serious problem because the Act itself leaves nearly all the administrative duties to the already overburdened district courts, which in turn shift the real burden to the organized bar.

Although the Act has been in operation too short a time for any definitive statements, there are several examples of an excellent response from the bar. The Fort Worth-Tarrant County Junior Bar Association has instituted "refresher courses" in criminal law and procedure in that district so that attorneys there who have dealt only with "civil law" might be able to better discharge their responsibilities. In Dallas, an elaborate system was set up by the local bar association. All 2,500 of the city's attorneys were exposed to an elaborate three-level screening process before the final panel was selected. The Dallas plan then provided for two panels, the regular panel consisting of all those who had practiced law three years and passed the screening, and the second consisting of attorneys who had practiced less than three years. The members of the second panel are to work as co-counsel, without compensation, with their counterparts from the senior panel, and are to graduate to the senior panel after having practiced for three years. One feature of the Chicago program is that students from the city's six law schools work without compensation as aides to the assigned counsel. Mr. Justice Clark has expressed the hope that such a program will be extended to the entire federal system.

However, the response of the bar has not been altogether encouraging. For example, one city limited its panels to younger attorneys and was criticized for making the program a "'junior bar duty,' from which older and more affluent lawyers should be exempt." Such a program is, of course, in direct violation of the spirit of the Criminal Justice Act, since the idea behind compensation, however small, was to induce the more experienced attorneys to take such cases.

67 In over half of the states reporting to an American Bar Association survey of the legal profession it was not considered unprofessional to reject criminal cases and in many it was common practice to reject them. SCHWARTZ, CASES AND MATERIALS ON PROFESSIONAL RESPONSIBILITY AND THE ADMINISTRATION OF CRIMINAL JUSTICE 104 (1961).
68 See The Wall Street Journal, Aug. 18, 1964, p. 10, col. 3-4:
70 Id. at 369-71.
71 Chicago Sun-Times, Mar. 28, 1966, p. 22, col. 1. The opinion was originally expressed in an article appearing in the 1966 SAN DIEGO L. J. which has not been distributed as of this writing.
73 See remarks of Congressman Celler, note 52 supra.
A few cases of interest have thus far arisen under the Criminal Justice Act. In *United States v. Boyden*, Judge James M. Carter of the Southern District of California held that the Act applied to a hearing to revoke probation, thus allowing compensation for the assigned counsel's services. He reasoned, quite correctly it seems, that such a hearing was a "criminal case" for the purposes of the Act and that "since the Criminal Justice Act covers all procedures up through appeal, *a fortiori* it covers all proceedings prior to appeal." In *Dirring v. United States*, Chief Judge Aldrich, speaking for the First Circuit, held that the Act did not entitle a defendant to appointed counsel to prosecute a post-appeal motion for new trial after he had had the assistance of counsel through appeal, the rationale being that,

appellant had counsel "through appeal" as required by the Criminal Justice Act... We do not construe that phrase to include motion for a new trial. Nor do we so interpret the Sixth Amendment. There must be an end... After final conviction the appointment of counsel must rest in the discretion of the court. We see no abuse of discretion in this case.77

The legislative history of the Criminal Justice Act seems to make it clear that the Act does not apply to proceedings for writs of habeas corpus, to proceedings to vacate sentences under section 2255 of the Judicial Code or to any other proceedings of a similar character which are collateral to the original case. However, in *Application of Hagler*, the District Court for Hawaii allowed compensation to an attorney who filed a writ of habeas corpus, where application for the writ was made before the defendant was required to plead and was equivalent to, and cast in the form of, motions pursuant to Rules 12 and 48 of the Federal Rules of Criminal Procedure.

V. Conclusion

The Criminal Justice Act recognizes that the requirement of equal justice for all is not satisfied if a poor man is tried without the aid of a competent attorney and whatever other services might be necessary for an adequate defense. It also recognizes that the duty of providing counsel and other services is a responsibility shared by society as a whole, and not merely the legal profession. In this respect it is a milestone in the history of America's attitude toward both the poor and the criminal law. It is also indicative of the fact that the legislative branch of our government is now responding in an area the judicial branch had been too long allowed to carry the burden alone.

The Act cannot, and will not, however, succeed in operation if the legal profession in the United States does not render wholehearted support to its administration. Extreme care must be taken to insure that each district court's

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75 Id. at 292.
76 353 F.2d 519 (1st Cir. 1965).
77 Id. at 520.
panels are filled with the most competent and conscientious attorneys available. If, despite the Criminal Justice Act, the burden of representing resourceless criminal defendants continues to be borne only by the younger and more inexperienced members of the profession, the effort and sacrifice behind its passage will, in large part, have been to no avail. The organized bar has thus far seemed to have responded to the challenge. It is hoped that this initial reaction is a fundamental and continuing one, and will not later be ascribed to a temporary infatuation with a new program.

Only an infinitesimally small percentage of all American criminal cases are filed in the federal courts. As other articles in this symposium issue indicate, greater strides have been taken on the state and local levels to insure more equal treatment of the poor criminal defendant, although there remains much to be done. In this respect, no greater accolade could be given the Criminal Justice Act than for all the states to enact similar programs. If this is to be the case, then the Criminal Justice Act will have performed its greatest service by catalyzing state reform, as have so many previous federal programs. This tendency for reform in one level of our government to initiate repercussions in the others is, in truth, the real strength of our unique system.

John J. Haugh

APPENDIX

THE FEDERAL CRIMINAL JUSTICE ACT OF 1964

3006A. Adequate representation of defendants.—(a) Choice of Plan.—Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for defendants charged with felonies or misdemeanors, other than petty offenses as defined in section 1 of this title, who are financially unable to obtain an adequate defense. Representation under each plan shall include counsel and investigative, expert, and other services necessary to an adequate defense. The provision for counsel under each plan shall conform to one of the following:

1. Representation by private attorneys;
2. Representation by attorneys furnished by a bar association or a legal aid agency; or
3. Representation according to a plan containing a combination of the foregoing.

Prior to approving the plan for a district, the judicial council of the circuit shall supplement the plan with provisions for the representation on appeal of defendants financially unable to obtain representation. Consistent with the provisions of this section, the district court may modify a plan at any time with the approval of the judicial council of the circuit; it shall modify the plan when directed by the judicial council of the circuit. The district court shall notify the Administrative Office of the United States Courts of modifications in its plan.

(b) Appointment of Counsel.—In every criminal case in which the defendant is charged with a felony or a misdemeanor, other than a petty offense, and appears without counsel, the United States commissioner or the court shall advise the defendant that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel. Unless the defendant waives the appointment of counsel, the United States commissioner or the court, if satisfied after appropriate inquiry that the defendant is financially unable to obtain counsel, shall appoint counsel to represent him. The United States commissioner or the court shall appoint separate counsel for defendants who have such conflicting interests that they cannot properly be represented by the same counsel, or when other good cause is shown. Counsel appointed by the United States commissioner or a judge of the district court shall be selected from a panel of attorneys designated or approved by the district court.

(c) Duration and Substitution of Appointments.—A defendant for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States commissioner or court through appeal. If at any time after the appointment of counsel the court having jurisdiction of the case finds that the defendant is financially able to obtain counsel or to make partial payment for the representation, he may terminate the appointment of counsel or authorize payment as provided in subsection (f), as the interests of justice may dictate. If at any stage of the proceedings, including an
appeal, the court having jurisdiction of the case finds that the defendant is financially unable to pay counsel whom he had retained, the court may appoint counsel as provided in subsection (b) and authorize payment as provided in subsection (d), as the interests of justice may dictate. The United States commissioner or the court may, in the interests of justice, substitute one appointed counsel for another at any stage of the proceedings.

(d) Payment for Representation.—An attorney appointed pursuant to this section, or a bar association or legal aid agency which made an attorney available for appointment, shall, at the conclusion of the representation or any segment thereof, be compensated at a rate not exceeding $15 per hour for time expended in court or before a United States commissioner, and $10 per hour for time reasonably expended out of court, and shall be reimbursed for expenses reasonably incurred. A separate claim for compensation and reimbursement shall be made to the district court for representation before the United States commissioner of that court, and to each appellate court before which the attorney represented the defendant. Each claim shall be 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 or received in the same case from any other source. The court shall, in each instance, fix the compensation and reimbursement to be paid to the attorney, bar association or legal aid agency. For representation of a defendant before the United States commissioner and the district court, the compensation to be paid to an attorney, or to a bar association or legal aid agency for the services of an attorney, shall not exceed $500 in a case in which one or more felonies are charged, and $300 in a case in which only misdemeanors are charged. In extraordinary circumstances, payment in excess of the limits stated herein may be made if the district court 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 circuit. For representation of a defendant in an appellate court, the compensation to be paid to an attorney, or to a bar association or legal aid agency for the services of an attorney, shall in no event exceed $500 in a felony case and $300 in a case involving only misdemeanors.

(e) Services Other Than Counsel.—Counsel for 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. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the defendant is financially unable to obtain them, the court shall authorize counsel to obtain the services on behalf of the defendant. The court may, in the interests of justice, and upon a finding that timely procurement of necessary services could not await prior authorization, ratify such services after they have been obtained. The court shall determine reasonable compensation for the services 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 services from any other source. The compensation to be paid to a person for such service rendered by him to a defendant under this subsection, or to be paid to an organization for such services rendered by an employee thereof, shall not exceed $300, exclusive of reimbursement for expenses reasonably incurred.

(f) Receipt of Other Payments.—Whenever the court finds that funds are available for payment from or on behalf of a defendant, the court may authorize or direct that such funds be paid to the appointed attorney, to the bar association or legal aid agency which made the attorney available for appointment, to any person or organization authorized pursuant to subsection (e) to render investigative, expert, or other services, or to the court for deposit in the Treasury as a reimbursement to the appropriation, current at the time of payment, to carry out the provisions of this section. Except as so authorized or directed, no such person or organization may request or accept any payment or promise of payment for assisting in representation of a defendant.

(g) Rules and Reports.—Each district court and judicial council of a circuit shall submit a report on the appointment of counsel within its jurisdiction 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. The Judicial Conference of the United States may, from time to time, issue rules and regulations governing the operation of plans formulated under this section.

(h) Appropriations.—There are authorized to be appropriated to the United States courts, out of any money in the Treasury not otherwise appropriated, sums necessary to carry out the provisions of this section. When so specified in appropriation acts, such appropriations shall remain available until expended. Payments from such appropriations shall be made under the supervision of the Director of the Administrative Office of the United States Courts.

(i) Districts Included.—The term "district court" as used in this section includes the District Court of the Virgin Islands, the District Court of Guam, and the district courts of the United States created by chapter 5 of title 28, United States Code [28 §§ 81-144]. (Aug. 20, 1964, P. L. 88-455, § 2, 78 Stat. 552.)