REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE

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Submitted to the Honorable Robert F. Kennedy,
Attorney General of the United States,
February 25, 1963

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Office of the Attorney General
Washington, D. C.

March 28, 1963

Professor Francis A. Allen
University of Michigan Law School
Ann Arbor, Michigan

Dear Professor Allen:

The illuminating report which you have submitted on behalf of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice honors the finest traditions of our profession. The Committee has my deep appreciation for the comprehensive study and challenging recommendations it has made in this vital area.

The first step in carrying out the Committee's recommendations concerning the representation of impoverished defendants was taken by the President on March 8 when he transmitted the proposed "Criminal Justice Act of 1963" to the Congress. I am hopeful the Congress will promptly enact this legislation. We are now carefully reviewing the Committee's remaining recommendations with respect to the bail system, appellate review, and other aspects of the judicial process in which the influence of poverty may disturb the balance of justice.

I am certain that the distinguished contribution which you and the Committee have made will be reflected in the enlightened administration of justice in the years ahead.

Sincerely,

Attorney General

LETTER OF TRANSMITTAL

February 25, 1963

Honorable Robert F. Kennedy
Attorney General of the United States
United States Department of Justice
Washington, D.C.

My dear Mr. Attorney General:

It is my pleasure and honor to submit to you the Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice.

The Report is the product of two years of study and discussion by the Committee. It seeks to identify some of the principal problems posed for the system of federal justice by accused persons of limited means and to offer suggestions for their solutions. Included in the Report is the draft of proposed legislation to establish a system of adequate representation, the enactment of which we believe to be a matter of great urgency and importance.

Each member of the Committee would wish me to express his appreciation for the opportunity to participate in this important work. We are fully aware that the Report does not represent a definitive statement either of the problems or of their solutions. Nevertheless, we are hopeful that these efforts will advance awareness and consideration of the issues discussed and intelligent action in their solution; for we believe that the problems of poverty and criminal justice are of profound importance and provide no small challenge to the capacity and good will of a free society.

With sincere regards, I remain

Very truly yours,

Francis A. Allen
Chairman,
Attorney General's
Committee on Poverty and
the Administration of
Federal Criminal Justice

THE COMMITTEE

John Bodner, Jr., Attorney, associated with Howrey, Simon, Baker & Murchison, Washington, D.C. LL.B., Northwestern University 1953; Bigelow Teaching Fellow, University of Chicago, 1953-1954; Lecturer, George Washington University Law School, 1960-1961; Attorney, Appellate Section, Antitrust Division, Department of Justice 1954-1956. Member of the bars of the District of Columbia and Illinois.

Joseph Goldstein, Professor of Law, Yale University, LL.B., Yale University, 1952; Ph.D., London School of Economics, 1950. Author of *Criminal Law: Problems for Decision in the Promulgation, Invocation, and Administration of a Law of Crimes*, and various articles in legal and psychiatric journals.

John F. Grady, Attorney associated with Snyder, Clarke, Dalziel, Holmquist & Johnson, Waukegan, Illinois. LL.B., Northwestern University, 1964. Assistant United States Attorney, Northern District of Illinois, 1956-1961 (Chief, Criminal Division, 1960-1961). Member of the Illinois bar.

Walter E. Hoffman, United States District Judge Eastern District of Virginia, Norfolk, Virginia. LL.B., Washington and Lee University, 1931. Admitted to Virginia Bar, 1931; private practice in Norfolk, Virginia; member of the faculty of the College of William and Mary, 1933-1942; referee in bankruptcy, Eastern District of Virginia, 1942-1944. United States District judge since 1954.

James M. Marsh, Attorney, associated with LaBrum and Doak, Philadelphia, Pennsylvania. Admitted to the Pennsylvania bar, 1948; Law clerk to Mr. Justice Robert H. Jackson, Supreme Court of the United States, 1947-1949; Special Counsel to the State Treasurer of Pennsylvania, 1961.

George Nye, Attorney, Oakland, California. Formerly Public Defender, Alameda County, California; President, California Public Defender and Legal Aid Association, 1951-1952; Member of the Special Committee to Study Defender Systems, Association of the Bar of the City of New York and The National Legal Aid and Defender Association, 1956-1959.

Herbert L. Packer, Professor of Law, Stanford University. LL.B., Yale University, 1949. Admitted to practice in New York, 1950, United States Supreme Court, 1953. Practice in Washington, D.C., 1950-1955. Author of *Ex-Communist Witnesses: Four Studies in Fact Finding* (1962), and various articles on problems of criminal law in legal and general periodicals.

Walter V. Schaefer, Associate Justice, Supreme Court of Illinois. J.D., University of Chicago, 1928. Admitted to the bar of Illinois in 1928; Assistant Corporation Counsel of the City of Chicago, 1937-1940; Professor of Law, Northwestern University, 1940-1951; Chairman, Illinois Commission To Study State Government, 1949-1951. Appointed to the Supreme Court of Illinois in March, 1951, and subsequently elected in June, 1951. Ernst Freund Lecturer, University of Chicago, 1955; Oliver Wendell Holmes Lecturer, Harvard University, 1956.

Francis A. Allen, Chairman, Professor of Law, University of Michigan. LL.B., Northwestern University, 1946; J.D. (hon.), Cornell College, 1958. Formerly member of the faculties of Northwestern University, Harvard University, and the University of Chicago. Law Clerk to Mr. Chief Justice Fred M. Vinson, Supreme Court of the United States, 1946-1948; Chairman, Drafting Subcommittee, Illinois Criminal Code of 1961; Associate Editor, Journal of Criminal Law, Criminology, and Police Science. Author of various articles in legal and criminological periodicals.

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The Committee wishes to give special acknowledgement to the services of Mr. Daniel J. Freed of the Department of Justice, who participated actively and helpfully in the work of the Committee from its inception.

SUMMARY OF RECOMMENDATIONS

Chapter I

1. The Committee recommends that the Department give consideration to the administration of immigration legislation as an appropriate area for futher study.
2. The Committee commends the Department's interest in persons committed to federal correctional institutions and suggests an expansion of efforts in this important area.
3. The effort to improve all aspects of federal justice should be accepted by the Department on a continuing basis. We recommend that these functions be budgeted by the Department and that their performance be given the assistance of staff and other facilities within the Department. We believe that it is sound practice to involve in these activities interested and informed citizens not otherwise associated with the Department. It is equally important that some members of the Department's staff be involved in such work as part of their regular duties. Above all, the functions should be performed on a systematic and regularized basis that will permit such continuous attention to the problems over a period of time as is sufficient to insure effectiveness of the effort.

Chapter II

4. The Committee recommends that the Department of Justice continue to direct its sympathetic attention to the District of Columbia legal aid program and lend its support to appropriations needed to enhance the quality and quantity of its services.
5. We recommend that the Department of Justice give vigorous support to the prompt enactment of legislation to guarantee the proper defense of defendants in the federal courts who are financially unable to obtain adequate representation.
6. Legislation establishing a system of adequate representation in the federal courts should delegate to the individual districts the power to devise a plan that will, at the same time, guarantee adequate representation and reflect local needs and circumstances.

   a) Within one year of enactment of such legislation each district court, with the approval of the judicial council

of the circuit, should place in operation in the district a plan for adequate representation. The plan should be devised in accordance with one of the following options:

   (1) representation by compensated private attorneys;

   (2) representation by a full-time or part-time federal public defender;

   (3) representation by attorneys associated with legal aid associations, voluntary defender programs, bar association groups, or a public defender organization providing services in the state in which the district is located; or

   (4) representation in accordance with a plan combining elements of two or more of the other options.

   b) The independence of action of the public defender should be protected by appointment to a four-year term by the judicial council of the circuit. Removals should be authorized only for cause following fair hearings conducted by the judicial council of the circuit.

   c) In the interests of guaranteeing the adequacy of representation provided in any district and of preserving genuine freedom of choice in devising plans for adequate representation, legislative provisions fixing arbitrary maximum limits on the amounts to be expended in any district should be avoided.

7. a) Counsel for an accused who is financially unable to obtain representation should be appointed by the United States Commissioner at a time not later than the accused's first appearance before the commissioner. If the accused is brought first before the court, rather than the commissioner, the judge should appoint counsel at that time.

   b) A lawyer appointed by the commissioner or the court should represent the accused in the subsequent stages of the proceedings, including the trial and any appellate proceedings. Provision, however, should be made for the substitution of counsel at any stage of the proceedings when good cause is shown.

8. Any legislation providing for the representation of the accused financially unable to obtain adequate representation should authorize the utilization of services essential to the proper conduct of the defense, including investigatory services, the assistance of experts, transcripts

of the proceedings, and the like. Appointed counsel should be reimbursed for expenses found by the court to have been actually and necessarily incurred by him in defense of his client. When circumstances justify, a district electing a federal public defender plan should be authorized to include in its plan of representation an investigatory staff in the public defender's office. The plan may also include regulations governing the resort to such services by defense counsel.

9. Legislation should define persons eligible for appointment of counsel and other defense services at government expense as persons "financially unable to obtain adequate representation". The terms "indigent" or "indigency" should be avoided.

10. Legislation should provide the accused who is or becomes financially incapacitated at any stage of the proceedings, with services necessary for a proper defense, including investigatory services, the assistance of experts, transcripts of proceedings, and the like. Eligibility for such services should be based upon the inability of the defendant to pay for the particular service necessary to his defense and should not be foreclosed by the fact that at the outset of the proceedings the accused was able to pay for some of the requirements of his defense.

11. The principle of adequate compensation for lawyers performing defense services is an indispensable element of federal legislation providing for a system of adequate representation.

    a) Private attorneys appointed by the court should receive compensation determined by the court at a rate not exceeding fifteen dollars an hour for time necessarily and properly expended by the attorney and should be reimbursed for expenses necessarily incurred in performance of his duties.

    b) Salaries of public defenders should be established within a maximum limit determined by the salary authorized to be paid the United States Attorney in the same district. Assistant public defenders should receive salaries not in excess of that authorized to be paid assistant United States Attorneys in the district.

12. The Department of Justice should give attention to the solution of problems of adequate representation arising in the habeas corpus cases and Section 2255 proceedings. Solution of these problems should be guided by the principle that appointed counsel participating in these proceedings are entitled to receive reasonable compensation for their services and reimbursement for expenses necessarily and properly incurred in performing their duties.

13. The Department should give immediate attention to the problems of fair procedure in parole and mandatory release revocation proceedings. In approaching solution of these problems the Department should accept the principle that such hearings should encompass the elements of orderly fact-finding, including the provision of counsel for prisoners financially unable to retain counsel.

Chapter III

14. Recent efforts to re-examine and re-evaluate the institution of bail are highly important and the Department of Justice should participate actively in the process of re-appraisal.

15. The Committee recommends that the Department of Justice undertake or sponsor a careful inquiry into existing practice of bail bondsmen doing business in the federal courts with a view of discovering in detail what those practices are, whether they properly advance the policy of pre-trial release of accused persons, and whether additional legislation is required to regulate and supervise the business of supplying bonds to accused persons in the federal courts.

16. The Department of Justice should review practices in the various districts relating to the use of the summons as a substitute for arrest. A national policy regarding the use of the summons should be expressed and communicated to all United States Attorneys. That policy should direct use of the summons in those cases in which an arrest is not required to protect the proper functioning of the criminal process.

17. Release of the accused on his own recognizance without additional financial securities, in proper cases, contributes importantly to solution of the problems of pre-trial release. The use of this procedure should be enlarged in the federal district courts.

    a) The Department of Justice should inform all United States Attorneys that, in the interests of pre-trial liberty of accused persons, it is the policy of the government that prosecuting officers recommend the release of accused

persons on their own recognizances when the circumstances warrant.

b) The Department should be regularly supplied with statistics relating to bail dispositions made in the various districts, including the number of cases in which the United States Attorneys recommend and do not recommend r. o. r. and the number of cases in which defendants are released on their own recognizances.

18. To insure sound bail decisions, more effective fact-finding devices are required than those currently employed in the federal courts. Measures should be adopted that will supply adequate staff and budget to the Federal Probation Service for performance of this obligation. Pending the enactment of such measures, the Department should encourage experimentation with other devices to improve the fact-finding function in federal bail administration.

19. It is vital to the development of a sound policy of pretrial release in the federal courts that a system of nonpecuniary inducements to appearance of the accused at the trial be devised. The Department should assist in formulating such a system and should vigorously support its adoption.

a) Either through legislation or amendment to the Federal Rules of Criminal Procedure, officials possessing the bail-setting powers should be authorized to release accused persons without financial security subject to such conditions as shall place the accused under reasonable supervision while at liberty and deter flight and forfeiture of the bail obligation. The accused admitted to bail should be informed of the criminal penalties attaching to failure to appear at trial as directed and efforts should be made to insure that the accused fully understands the nature of the bail obligation.

b) The Department should give careful consideration to measures which would extend the functions of the Federal Probation Service to the supervision and assistance of persons granted liberty pending trial. No proposal for the extension of the functions of the Federal Probation Service should be considered, however, that does not provide additional budget and staff for the Service fully adequate to perform the new functions.

20. Either through legislation or by amendment to the Federal Rules of Criminal Procedure, officials possessing bail-setting powers should be authorized to accept as

security for appearance at the trial, cash or other property of a value less than the bail amount. The cash or other securities so deposited should be returned to the accused upon his performance of the bail obligation by presenting himself to the court for trial.

Chapter IV

21. The Committee recommends that the Department of Justice communicate to the United States Attorneys that, so long as the "screening" procedures are part of federal law, it is the policy of the Department that opposition to applications for leave to appeal in forma pauperis be made only in those cases in which the application clearly presents "frivolous" issues; and further, in cases in which leave to appeal in forma pauperis has been granted, it is the policy of the Department not to file motions to dismiss the appeal as frivolous except when that action is clearly and indisputably justified.

22. Present practices fail to provide a system of adequate representation in the federal appellate process for the financially incapacitated defendant. A system of adequate representation, proposed in Chapter II, that will supply, when required, counsel and necessary defense services at all stages of the appellate process, should be promptly established by appropriate legislation.

23. The present system of forma pauperis appeals fails adequately to advance the legitimate interests of the financially disadvantaged defendant and the larger interest the system of federal criminal justice is called upon to serve. The Department of Justice should sponsor legislation which would provide transcripts of trial proceedings to convicted defendants financially unable to purchase transcripts whenever such defendant files a notice of appeal and makes appropriate showing of his financial status. The provision of the transcript should not be conditioned on a preliminary scrutiny of the issues defendant seeks to present to the court of appeals.

Conclusion

24. The Committee's proposals for the solution of problems of financial incapacity in the federal criminal courts are not self-executing. Some of the Committee's recommendations contemplate further inquiries, the drafting of legis-

lative proposals, and the taking of other measures. It is of the highest importance that a mechanism be established in the Department of Justice for the kind of continuing attention and activity that will result in effective implementation of the Committee's proposals. The Committee recommends that implementation of these recommendations and the further development of the Department's program in this area be placed in the hands of a full-time staff member, preferably a Special Assistant to the Attorney General or to the Deputy Attorney General. The Special Assistant should be supplied with staff services sufficient for the effective performance of these functions. In addition, an advisory council of experienced and knowledgeable private citizens should be appointed to share fully in the work of implementing and developing the Department's program.

Chapter 1

INTRODUCTION: SCOPE OF STUDY AND BASIC CONCEPTS

1. *The Nature and Scope of the Committee's Study*

On April 6, 1961, the Attorney General of the United States announced the appointment of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice. The mandate given the committee was a broad one. The committee was instructed to study the system of federal criminal justice with the purpose of identifying problems faced by persons of limited means charged with federal crimes and problems created for the system of federal justice by the presence of such persons in its courts. The Committee was also asked to present to the Department of Justice a series of recommendations for the solution or amelioration of problems so identified.

Pursuant to these instructions the Committee set about its tasks of collecting and analyzing data and of considering proposals for the solution of the various problems suggested by the data. From the time of its appointment until submission of this Report to the Attorney General, the Committee met at frequent intervals in two-day sessions either at Chicago, Illinois, or Washington, D. C. At the same time, the Committee launched a number of inquiries into various aspects of federal criminal-law administration and consulted informally with the Department on proposed legislation and administrative practices relating to areas within the Committee's concern. In July, 1962, the Deputy Attorney General appointed an intradepartmental task force consisting of members of the Department's staff to provide liaison between the Department and the Committee and to give assistance in implementing the recommendations of the Committee.[1] Members of the task force have since participated in the deliberations of the Committee and have made other useful contributions to its work.

(a) *Research and Sources of Information.* The Committee has proceeded to its work without the services of a trained research staff or of a budget that would permit the financing of extensive empirical research. In collecting data the Committee has relied on its own efforts and on assistance generously provided by individuals, educational institutions, a private foundation, and public agencies. The Report, which is the product of these efforts, is in no way represented by the Committee to constitute a definitive or exhaustive research into the problems of poverty and the

administration of federal justice. That such a study is needed and would make invaluable contributions to the strengthening of justice in state, as well as federal, courts can hardly be doubted. We are hopeful that the data presented and the problems identified here will encourage more comprehensive inquiries in the future. Nevertheless, the Committee is persuaded that what is presented here is sufficient to delineate many of the most important issues that must be confronted and to provide ample factual basis for evaluating the proposals submitted in this Report.

The principal studies undertaken by, or on behalf of, the Committee are as follows:

(1) *The Four-District Study.* The most ambitious factual study undertaken by the Committee consists of a detailed inquiry into certain aspects of criminal-law administration in the District of Connecticut, the Northern District of Illinois, the Sacramento Division of the Northern District of California, and the San Francisco Division of the Northern District of California. In each district, teams of law students recruited from Yale University, the University of Chicago, or Stanford University, studied the records in every case coming before the court in the year ending June 30, 1961. Data for the previous fiscal year were also collected in the two divisions of the Northern District of California. Information relating to a broad range of matters, including representation of persons unable to employ counsel, bail administration, and the *in forma pauperis* appeal, was recorded on a form designed for processing on an electronic computer. The data so obtained and analyzed have been freely employed in the discussion of the various problems considered in the following chapters of this Report.[2] The Vera Foundation, Inc., of New York generously supplied funds to pay for the work of data collection and processing. The Committee wishes to express its appreciation to the Vera Foundation and to its Executive Director, Mr. Herbert Sturz, for this important contribution to the Committee's work.

(2) *Questionaires to the United States Attorneys.* At the request of the Committee, the Department of Justice in 1961 submitted a questionnaire to the United States Attorney in each of the federal districts of the United States. The inquiries related principally to matters of bail administration and speedy trial. Responses were obtained from approximately two-thirds of the districts. The data so collected throw important light on the variations of practice within the federal system on a series of issues, most importantly on the question of the release of accused

persons on their own recognizances prior to trial. These data have been incorporated in the discussion of bail administration in Chapter III.

(3) *The Southern District of New York Bail Study.* In August and September of 1961, the Vera Foundation, Inc., of New York conducted for the Committee and submitted without cost an extensive study of bail administration in the District Court for the Southern District of New York. The study proceeded under the supervision of Mr. Herbert Sturz, Executive Director of the Foundation. It supplements the data on bail matters collected in the 4-District Study, mentioned above, and has been utilized in the preparation of the later chapters of this Report.

(4) *Interviews and Other Inquiries.* Throughout the life of the Committee numerous interviews have been conducted by Committee members or by others acting for and under the supervision of the Committee. Persons interviewed include a substantial number of federal judges, United States Commissioners, staff members in the offices of United States Attorneys, lawyers with experience in federal criminal litigation, and lawyers with extended experience in the legal-aid movement in this country. Inquiries have been made by mail to many of the agencies of the federal government that perform functions in the area of the Committee's concern. The Committee has also attempted to canvass the body of literature relating to the problems of poverty and criminal-law administration published in the United States. This literature includes the reports of such official agencies as the Administrative Office of the United States Courts, the Federal Bureau of Prisons, and the Legal Aid Agency of the District of Columbia. It also includes numerous volumes and articles in legal and other publications. In addition, the Committee has attempted to survey on a selective basis the literature relating to poverty and the administration of criminal justice in other nations.

(b) *Scope of the Report.* A moment's reflection will reveal that the range of problems involving the impact of poverty on the administration of justice is very great. These problems are not all of the same kind or of the same order of importance. It very early became apparent to the Committee that if its task was to be kept within useful and manageable limits, some selection of issues would have to be made. Accordingly, in this Report we have attempted to identify and discuss those areas that appear to be of the greatest practical significance and in which measures most urgently need now to be taken. The Report directs its primary attention to three large problem areas:

(1) *Chapter II* is devoted to the concept of "adequate representation". The discussion is concerned, in part, with the implementation of the constitutional "right to counsel" of persons unable by their own means to hire counsel. Among the questions considered are those that relate to the time of appointment of counsel and the most effective measures for the supplying of counsel. But "adequate representation" entails more than making lawyers available to those who would otherwise lack counsel. It includes also a range of services,—including pre-trial investigation, location of witnesses, obtaining of expert testimony and the like,—the absence of which in many cases may deprive a defendant of adequate defense even though a lawyer speaks for the accused in court. Moreover, "adequate representation" encompasses more than the proceedings leading to conviction or acquittal. Consideration is given to comparable problems that arise in habeas corpus proceedings, Section 2255 proceedings, and proceedings leading to the revocation of probation or parole.

(2) *Chapter III* is concerned with problems of bail administration and pre-trial detention as they involve accused persons of limited means. The discussion describes the impact on such persons of bail administration as traditionally practiced and offers a series of recommendations for measures calculated to insure the presence of accused persons at their trials with a minimum of interference with the liberty of such persons prior to trial and conviction.

(3) *Chapter IV* is concerned with *in forma pauperis* appeals in the federal courts. It surveys the problems that have arisen under current legislation and practice and submits a series of recommendations relating to appeals procedure, representation of appellants on appeal, and provision of trial transcripts for impoverished defendants seeking appellate review of their convictions.

This classification of subject matters does not imply that the various problems are unrelated or may be considered in isolation. On the contrary, the problems interact in the most decisive fashion. Thus, one of the bases for concern with traditional bail administration is that it may on occasion adversely affect the quality of defense an accused is able to offer at his trial. So also, in a system which makes the appeal an integral part of the criminal process, consideration of the problem of adequate representation cannot realistically be confined to trial proceedings.

It is apparent from the foregoing that many problems of considerable importance are excluded from the scope of this

Report. In some instances these exclusions were made reluctantly by the Committee. The Report, for example, does not discuss problems arising from criminal prosecutions or administrative proceedings in the immigration area. The Committee believes on the basis of general knowledge and of some special study that these proceedings sometimes result in inequities and that these hardships are likely to fall with particular force on persons of limited means. Because of the pressures of time and because the problems of immigration arise in a context distinct from that discussed in this Report, the Committee chose to eliminate even those immigration problems directly involving the administration of criminal justice from the scope of this study. *The Committee respectfully recommends, however, that the Department give consideration to the administration of immigration legislation as an appropriate area for further study.*

Another area of great importance, but one not extensively considered in this Report, encompasses the prisoner in federal institutions and the plight of the man recently released from penal custody. Extreme poverty is characteristic of most persons in, or recently released from, penal confinement. There is sound evidence to suggest that lack of means and lack of employment opportunities are factors that strongly inhibit a proper adjustment of the prisoner to the free community upon release from custody.[3] These are facts long familiar to the Department. Their recognition underlies the establishment of federal "half-way houses" or Pre-Release Guidance Centers in several of our large cities.[4] *The Committee commends the Department's interest in persons committed to federal correctional institutions and suggests an expansion of efforts in this important area.*

2. *Poverty and Criminal Justice: the Nature of Government's Obligation.*

The importance of the issues which the Committee has been delegated to identify and consider cannot be doubted. Over a generation ago, Mr. Chief Justice William Howard Taft observed: "Of all the questions which are before the American people, I regard no one as more important than the improvement of the administration of justice. We must make it so that the poor man will have as nearly as possible an equal opportunity in litigating as the rich man, and under present conditions, ashamed as we may be of it, this is not the fact." More recently the late Judge Learned Hand remarked: "If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice."

One of the prime objectives of the civilized administration

of justice is to render the poverty of the litigant an irrelevancy. While this is true of the entire range of judicial administration, the interests involved make the attainment of this objective peculiarly urgent in the administration of criminal justice. The interests sought to be protected by the enforcement of criminal statutes involve no less than the order and internal security of the community. At the same time, the administration of criminal justice raises fundamental problems as to the relations of the individual to the state; for it is in the criminal law that the most stringent sanctions at the disposal of government are sought to be imposed on the individual. Here government proposes to deprive the individual of his property, his liberty, and even, on occasion his life.

Concern with the just administration of the criminal law need not be based on the conviction that egregious wrongs and shocking inequities are now being practiced. The work of the Committee proceeded on no such assumption. Indeed, we have been heartened by the numerous evidences of concern for the fairness and decency of the criminal process in the federal courts. The purpose of this Report is to contribute to a tradition of justice already strongly expressed in the courts of the United States. That the emphasis of this Report is on shortcomings of the present system reflects the fact that improvement must be preceded by an awareness of deficiencies.

The Committee is persuaded that the interest of the Department of Justice in the problems here considered is a fact of genuine significance. Of all the Departments of the Executive Branch, the Department of Justice has the greatest responsibilities in these areas. We believe that its expressed interest in the problems of poverty and criminal justice reveals a conception of the Department's role as encompassing more than the vigorous enforcement and prosecution of federal laws, important as these activities undoubtedly are. Its concern is consistent with a view of the Department's functions as including those of a genuine ministry of justice. Such a view assumes the acceptance of an obligation to improve the administration of justice in all its aspects. In performing this obligation the Department will not only make contributions to the quality of the federal system, but may, through precept and example, provide leadership in the quest for justice at the state and local levels of government.

The experience of the Committee in the present effort suggests certain principles that may be useful in the performance of such functions by the Department in the future. *We believe that*

the effort to improve all aspects of federal justice should be accepted by the Department on a continuing basis. We recommend that these functions be budgeted by the Department and that their performance be given the assistance of staff and other facilities within the Department. We believe that it is a sound practice to involve in these activities interested and informed citizens not otherwise associated with the Department. It is equally important that some members of the Department's staff be involved in such work as part of their regular duties. Above all, the functions should be performed on a systematic and regularized basis that will permit such continuous attention to the problems over a period of time is sufficient to insure effectiveness of the effort.

a. *The Concept of "Poverty"*. The mission of this Committee has been to consider the impact of poverty on the administration of federal criminal justice. At the outset of the Committee's deliberations the necessity for agreement upon some workable definition of the "poverty" concept became clear. The concept proved an elusive one and the difficulties of definition substantial. It is apparent that a total absence in the accused of all means and resources cannot be adequate for these purposes. Even the constitutional rights to the appointment of counsel are not conditioned on a showing of total destitution. Rather, the criterion appears to be a lack of financial resources adequate to permit the accused to hire his own lawyer. Reflection led the Committee to the conclusion that the poverty must be viewed as a relative concept with the consequence that the poverty of accused must be measured in each case by reference to the particular need or service under consideration.

Thus in the criminal process a problem of poverty may arise at each stage of the proceedings. There is a problem of poverty if the defendant is unable to obtain pre-trial release by reason of financial inability to meet the bail requirements or to retain a lawyer to represent him at the trial .There is also a problem of poverty if the accused is unable to finance a pre-trial investigation of the case or to obtain the services of expert witnesses when such investigation or testimony is essential to an adequate defense. So, too, in the appellate process, there is a problem of poverty if through lack of means the accused is inhibited or prevented from presenting grounds of reversal to the appellate court or from making adequate presentation.

It follows that concern with poverty and the administration of criminal justice requires attention to be extended beyond those

who are unable at the outset of the proceedings to obtain release on bail or to hire counsel. It requires consideration, also, of those who, although possessing means to obtain some elements of an adequate defense (such as hiring a lawyer), lack means to secure other essential elements. Indeed, it requires attention be given to the plight of the accused with substantial means rendered indigent by the levy of a jeopardy assessment and thus unable to hire the services of an accountant in defense of a net-worth tax prosecution.[5] These and related problems are given extensive consideration in the following chapters of this Report.

In summary, the Committee believes that, for the purposes at hand, poverty must be conceived as a relative concept. An impoverished accused is not necessarily one totally devoid of means. A problem of poverty arises for the system of criminal justice when at any stage of the proceedings lack of means in the accused substantially inhibits or prevents the proper assertion of a right or a claim of right.

b. *The Obligation of "Equal Justice"*. Concern for the proper administration of criminal justice involves more than an expression of humanitarian sentiment or the extension of public charity. On the contrary, the Committee firmly believes that solution of the problem discussed in this Report falls squarely within the area of governmental obligation. This is true because the requirements of just administration can never be regarded simply as matters of grace and because, in any event, much broader interests are affected than the welfare of the particular individuals proceeded against in the federal courts.

The nature of governmental obligation in dealing with the impoverished accused, however, has not often been adequately analyzed or articulated. This failure of analysis and articulation has produced unfortunate practical consequences, for it results in public attitudes that confuse the nature of the problems and obstruct their effective solution. Frequently, concern for the problems of poverty in criminal-law administration is justified by reference to the aspiration for "Equal and exact justice to all men, of whatever state or persuasion. . . . ", expressed by President Jefferson in an early year of the nation's history. More recently, an opinion in the Supreme Court of the United States announced the proposition that "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[6] The Committee believes that, properly understood, the problems in this Report do pose genuine issues of equal justice. The concept of equal justice is not self-defining, however;

and more needs to be said if the nature of government's obligation in these areas is to be clearly expressed.

It should be understood that governmental obligation to deal effectively with problems of poverty in the administration of criminal justice does not rest or depend upon some hypothetical obligation of government to indulge in acts of public charity. It does not presuppose a general commitment on the part of the federal government to relieve impoverished persons of the consequences of limited means, whenever or however manifested. It does not even presuppose that government is always required to take into account the means of the citizen when dealing directly with its citizens. Few would maintain that in disposing of surplus property, for example, government is required to set prices at such levels that all citizens are rendered equally able to buy.

The obligation of government in the criminal cases rests on wholly different considerations and reflects principles of much more limited application. The essential point is that the problems of poverty with which this Report is concerned arise in a process *initiated* by government for the achievement of basic governmental purposes. It is, moreover, a process that has as one of its consequences the imposition of severe disabilities on the persons proceeded against. Duties arise from action. When a course of conduct, however legitimate, entails the possibility of serious injury to persons, a duty on the actor to avoid the reasonably avoidable injuries is ordinarily recognized. When government chooses to exert its powers in the criminal area, its obligation is surely no less than that of taking reasonable measures to eliminate those factors that are irrelevant to just administration of the law but which, nevertheless, may occasionally affect determinations of the accused's liability or penalty. While government may not be required to relieve the accused of his poverty, it may properly be required to minimize the influence of poverty on its administration of justice.

The Committee, therefore, conceives the obligation of government less as an undertaking to eliminate "discrimination" against a class of accused persons and more as 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. Such a concept of "equal justice" does not confuse equality of treatment with identity of treatment. We assume that government must be conceded flexibility in devising its measures and that reasonable classifications are permitted. The crucial question is, has government done all that can reasonably be required of it to eliminate those factors that inhibit the proper and effective assertion of

grounds relevant to the criminal liability of the accused or to the imposition of sanctions and disabilities on the accused at all stages of the criminal process?

c. *Poverty and the Adversary System.* It is not only the interests of accused persons that require attention be given to the problems of poverty in criminal-law administration. Other and broader social interests are involved. We believe that the problems considered in this Report concern no less than the proper functioning of the rule of law in the criminal area and that, therefore, the interests and welfare of all citizens are in issue.

American criminal procedure is accusatorial in nature and is founded upon the adversary system. It "presumes" the innocence of the accused. It requires the government to establish the guilt of the defendant beyond reasonable doubt. It imposes procedural regulations on the criminal process by constitutional command. In the modern era it is not always fully understood that the adversary system performs a vital social function and is the product of long historical experience. The state trials in sixteenth- and seventeenth-century England demonstrated that a system of justice that provides inadequate opportunities to challenge official decisions is not only productive of injuries to individuals, but is itself a threat to the state's security and to the larger interests of the community. The adversary system is the institution devised by our legal order for the proper reconciliation of public and private interets in the crucial areas of penal regulation. As such, it makes essential and invaluable contributions to the maintenance of the free society.

The essence of the adversary system is challenge. The survival of our system of criminal justice and the values which it advances depends upon a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process. The proper performance of the defense function is thus as vital to the health of the system as the performance of the prosecuting and adjudicatory functions. It follows that insofar as the financial status of the accused impedes vigorous and proper challenges, it constitutes a threat to the viability of the adversary system. We believe that the system is imperiled by the large numbers of accused persons unable to employ counsel or to meet even modest bail requirements and by the large, but indeterminate, numbers of persons, able to pay some part of the costs of defense, but unable to finance a full and proper defense. Persons suffering such disabilities are incapable of providing the challenges that are indispensable to satisfactory operation of the system. The loss to the interests of accused individuals, occasioned by these failures, are great and apparent. It is also clear that a situation in which persons are required to contest a serious accusation but are denied access to the tools of contest is offensive to fairness and equity. Beyond these considerations, however, is the fact that the conditions produced by the financial incapacity of the accused are detrimental to the proper functioning of the system of justice and that the loss in vitality of the adversary system, thereby occasioned, significantly endangers the basic interests of a free community.

Chapter I

NOTES

1 Members of the intradepartmental task force included Mr. John T. Duffner, Executive Assistant to the Deputy Attorney General; Mr. Howard P. Willens, Executive Assistant to the Assistant Attorney General in charge of the Criminal Division; Mr. Harold H. Greene, Chief of the Appeals and Research Section of the Civil Rights Division; and Mr. Daniel J. Freed, of the Antitrust Division. Letter to the Chairman by the Honorable Nicholas deB. Katzenbach, Deputy Attorney General, dated July 30, 1962.

2 See Appendix I for a fuller discussion of the methods employed in and the data obtained from the Four-District Study.

3 See, e.g., Frym, "The Treatment of Recidivists," 47 J. Crim. L., C., & P.S. 1 (1956); Lykke, "Attitude of Bonding Companies toward Probationers and Parolees," Fed. Probation (December, 1957) p. 36.

4 Early in 1961, the Attorney General recommended to Congress that funds be appropriated to the Bread of Prisons to establish a series of experimental projects to test methods for treatment of juvenile and youthful offenders committed to his custody by the federal courts. After study, priority was given to the establishment of pre-release guidance centers in metropolitan areas where the number of releasees would justify such facilities. Three such centers were initially established in Chicago, Los Angeles, and New York. Additional centers are contemplated.

5 See, e.g., United States v. Brodson, 136 F. Supp. 158 (E. D. Wis. 1955).

6 Griffin v. Illinois, 351 U.S. 12, 19 (1956).

Chapter II

THE PROVISION OF "ADEQUATE REPRESENTATION"

Few problems in the administration of criminal justice have been more frequently canvassed than that of providing adequate representation for accused persons financially unable to retain counsel. Despite this attention, complete solutions have not been devised; and the problem retains a position of central importance for the administration of justice in both state and federal courts. The reasons for the intractibility of these problems are many, not the least of which may be a lack of general understanding of the basis and nature of governmental obligation in the area, discussed in the first chapter of this Report.

Investigation quickly reveals that provision for adequate representation entails more than supplying lawyers to persons lacking financial resources to hire counsel in proceedings leading to conviction or acquittal on criminal charges. First, it must be recognized that the presence of even a highly competent lawyer in court does not guarantee adequate representation. The appointed lawyer must be armed with means to undertake adequate pre-trial preparation and investigation if witnesses are to be discovered, scientific aids and testimony utilized, and cross-examination effectively conducted. Second, defendants with means sufficient to retain counsel may frequently be wholly unable to finance pre-trial preparation and investigation of their cases and, thus because of financial incapacity, be denied the essentials of adequate representation. Third, the problems of adequate representation arise not only in the criminal trial or in proceedings leading to trial but in a variety of other proceedings in which issues of the highest importance are resolved. It is with these problems and their solutions that this chapter is concerned. Consideration of problems of representation in the appellate process is deferred until Chapter IV.

1. *The Constitutional Rights of Counsel.*

The right to counsel in criminal proceedings has been recognized in American constitutional law from the earliest period of the nation's history.[1] The Sixth Amendment, ratified in 1791, provides: "In all criminal prosecutions, the accussed shall enjoy the right . . . to have the Assistance of Counsel for his defence." Even earlier, in the Judiciary Act of 1789, Congress had announced that "in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of . . . counsel . . . ."[2] The following year statutory

provision was made for the assignment of counsel, when necessary, to defendants in capital cases.[3]

The attention of the Supreme Court of the United States was not drawn to the constitutional rights of counsel, however, until a much later period. The first important[4] statement of the Court was directed, not to the language of the Sixth Amendment, but to the rights of fair trial guaranteed accused persons by the due process clause of the Fourteenth Amendment. The much-quoted statement of Mr. Justice Sutherland for the Court in *Powell v. Alabama* still provides the basis for modern consideration of the problem:

> "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 inadmissable. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."[5]

The same note was struck by the Court some years later in the case of *Williams v. Kaiser*, when it said:

> "A layman is usually no match for the skilled prosecutor whom he confronts in the court room. He needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment.
>
> "These are reasons why the right to counsel is 'fundamental'."[6]

It was in the case of *Johnson v. Zerbst*, decided in 1938, that the Court first turned to the language of the Sixth Amendment and to the definition of rights of representation in the federal, as contrasted to the state, courts. The right of the defendant to the services of counsel was stated in broad and uncompromising

terms: "The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel."[7]

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.

2. *Provision of Counsel in Federal Prosecutions.*

a. *The Present Statutory Situation and Proposals for Reform.* The constitutional requirements relating to the appointment of counsel is given recognition in Rule 44 of the Federal Rules of Criminal Procedure:

> "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 proceeding unless he elects to proceed without counsel or is able to obtain counsel."

Recognition of the principle has not been accompanied by any comprehensive legislative scheme for the implementation of the constitutional right. In the absence of such a system the federal courts, outside the District of Columbia, have been required to place the entire burden of representation upon appointed attorneys who receive no compensation from the court, have available no fund to pay the cost of most essential defense services, and who in general do not receive compensation for even out-of-pocket expenses actually incurred in the course of the defense.[8]

The Committee has discovered widespread dissatisfaction with present procedures for the supplying of counsel to defendants in the federal courts who are financially unable to obtain adequate representation. We are impressed by the frequently expressed conviction of knowledgeable persons that these methods are unsatisfactory and that a thorough-going legislative solution of the problem is urgently required.[9] Nor is this opinion wholly new. As early as 1937 the Judicial Conference of the United

States adopted a resolution calling for the appointment of public defenders in those districts in which the amount of criminal litigation justified the presence of such an officer.[10] Regularly, at almost yearly intervals, the Conference has since repeated this or similar recommendations.[11] Every Attorney General of the United States since 1937 has urged enactment of legislation for the representation of the "indigent" accused.[12] In his testimony before the Committee on the Judiciary of the House of Representatives on May 6, 1959, the Honorable Warren Olney, III, Director of the Administrative Office of the United States Courts, after tracing the position of the Judicial Conference on this issue, remarked: "Notwithstanding the clarity and finality of [the constitutional] declaration of providing legal counsel in criminal cases, we have been attempting to meet the need by asking or requiring private persons in the legal profession to undertake the defense of the indigent and to meet this community responsibility without compensation and, for the most part, at their own personal expense. The unfairness of this to the lawyers involved is altogether evident. But there is good reason for believing that it may have been or at least is very likely to become unfair to the indigent defendant as well."[13]

The present situation in the federal courts has been the subject of serious concern for many members of Congress. From the late 1930's to the present, bills intended to place the representation of financially disadvantaged persons on a systematic basis have been introduced in both houses of Congress. In the 85th and 86th Congress, bills were passed by the Senate but failed of approval in the House.[14] During the same period the House Judiciary Committee conducted an extensive inquiry into proposals for public defender legislation.[15] Again, in the closing days of the 87th Congress the Senate passed S.2900, introduced by Senator Hruska for himself and Senators Keating, Cotton, and Ervin.[16] The vote in the Senate came too late, however, for action in the House of Representatives. The bills recently introduced reveal much thought and intelligent concern for the problems of adequate representation. Although, as indicated in detail at a later point in this chapter, the Committee feels that the proposals submitted in Congress are subject to improvement in several important particulars, we believe that they are of the highest importance and that they have substantially advanced the eventual successful resolution of the problems by legislation.

b. *Description and Evaluation of Present Practices.*

(1) *The Numbers of Defendants Requiring Appoint-*

ment of Counsel in the Federal Courts. Any detailed consideration of present methods of supplying counsel in the federal courts may well begin with an effort to determine the numbers of accused persons who stand in need of appointment of counsel. The Committee believes that, at best, only an approximate figure can be offered. It has been estimated that in the country as a whole, in state as well as federal courts, about sixty percent of the accused are financially unable to obtain counsel.[17] In some courts, particularly the small-crimes courts in our large cities, the number of unrepresented defendants may often far exceed even that fraction.

It cannot be assumed, however, that estimates derived from state systems of justice adequately reflect the situation in the federal courts. Except in the District of Columbia and in the territories, the federal courts do not exercise a general criminal jurisdiction. Since certain types of offenses are more likely to be committed by the financially deprived defendant than others, the nature of federal criminal jurisdiction may be expected to influence the numbers of such persons brought before the federal courts. Moreover, within the federal system one may expect to discover significant differences in the percentages of such defendants among the various districts, reflecting differing patterns of crime and social conditions throughout the country.

According to the Report of the Director of the Administrative Office of the United States Courts, counsel was assigned to 25.7 per cent of the criminal defendants whose cases were disposed of by the federal courts in the fiscal year 1959.[18] The figure for fiscal 1961 was 29.3 per cent.[19] It should be observed that these statistics are directed only to cases in which counsel was assigned. It does not follow that the balance of the defendants were represented by counsel of their own choice, for many defendants reject the court's offer of counsel and waive the constitutional right.[20] Thus the Committee discovered that in the fiscal years 1960 and 1961, approximately two-thirds of the defendants in the Sacramento Division of the Northern District of California were unrepresented by reason of waiver of counsel.[21] Other factors need also to be taken into account. In the Northern District of Illinois, for example, where counsel is regularly appointed by the United States Commissioner at the preliminary hearing stage, such lawyers ordinarily continue representation of the accused at the trial; but an order re-appointing counsel at the trial is not always entered in the court's records. It should also be noted that the 1959 figures do not include the totals of defendants represented by the Philadelphia Voluntary Defender's Association in the Eastern District of Pennsylvania.[22]

Perhaps more significant than the average figures for all districts is the range of percentages for the individual districts. Thus, the 1959 statistics of the Administrative Office reveal that in eleven districts over half the defendants were represented by assigned counsel. In thirty-one districts (approximately one-third of the total) over 33 1/3 per cent of the defendants were represented by assigned counsel. On the other hand, in nineteen districts less than ten per cent of the defendants were so represented.[23] The Committee's studies show that in fiscal 1960 and 1961, approximately eleven per cent of defendants in the Sacramento Division of the Northern District of California were represented by assigned counsel. In the San Francisco Division the figure was 52 per cent. In fiscal 1961, 47 per cent were so represented in the Northern District of Illinois and 26 per cent in the District of Connecticut had such representation.[24]

The Committee is aware that statistics showing the numbers of persons for whom counsel was assigned are not a wholly reliable index of the *need* for such services. This is true both because, as already indicated, certain factors adversely affect the reliability of such statistics and because, in all likelihood, varying standards of need are applied from district to district or even from judge to judge. Certainly it should be understood that even reliable estimates of the need for the appointment of counsel do not in any way accurately reflect the need for other defense services essential to the providing of adequate representation. Restricting consideration at this point, however, to the need for appointment of counsel, and recognizing that any estimate is not likely to be completely precise, it is the Committee's best judgment that in the country as a whole something over one-third of federal defendants are financially unable to supply themselves with competent counsel and that in many federal districts one-half or more of such defendants find themselves in this position.

(2) *Present Practices in Selected Federal Districts.* The absence of legislative provision for the adequate representation of federal defendants has led to improvisation of practices in the various federal district courts. Except for those obtaining in the District of Columbia, these practices have certain elements in common: assigned lawyers are awarded no compensation for their services, and, with the exceptions already noted, are supplied with no funds to meet the most ordinary and essential expenses of maintaining a defense, and are not compensated for out-of-pocket expenses actually incurred in the course of repre-

sentation.[25] Within these limitations, however, variations in local practices have developed. Some additional description of practices pursued in particular federal district courts is required to supply a basis for appraisal of the current situation and for evaluation of proposed solutions of current problems.

Northern District of Illinois. The most important and distinctive feature of the practices that have evolved in the Northern District of Illinois is the assignment of counsel by the United States Commissioner when the defendant is first brought before the commissioner. In all instances in which the accused appears without a lawyer, inquiry is made as to defendant's financial ability to hire counsel. When the defendant indicates that he lacks funds, the commissioner then and there appoints counsel or continues the hearing until a lawyer can be contacted and assigned. At the time of the Committee's inquiry some six lawyers, all engaged in private practice in Chicago, were receiving appointments from the commissioner in these cases. Two, or at most three, attorneys were handling well over half the cases.[26]

The assigned lawyer represents his client in all proceedings before the commissioner. Typically, he continues his representation at trial and in other proceedings before the court. It appears that on occasion this may occur without formal re-appointment of the attorney by the court. In very rare instances a lawyer appointed initially by the commissioner has extended his representation through the appeal stage.[27] When an accused is arrested on a bench warrant following return of an indictment, he is brought directly before the court. In such cases assignment of counsel is made by the judge. Often, perhaps typically, the lawyer appointed by the judge is one of the group most frequently selected for assignments by the United States Commissioner.

In determining the need to appoint counsel for the accused, the commissioner appears to place primary reliance on the defendant's assertion that he lacks funds. If after his appointment the lawyer discovers that his client, in fact, possesses financial resources, he may accept a fee. In the alternative, he may be permitted to withdraw from the case. In the latter event the assigned lawyer is sometimes, but by no means invariably, retained by the accused on a fee basis. The assigned lawyers, while permitted to accept "voluntary contributions" from their clients, are made clearly to understand that no improper pressures may be exerted to this end. While on their face these practices may be thought to contain the potentiality of abuse, the Committee has discovered no evidence or suggestion of overreaching.

Interviews of persons familiar with the administration of justice in the Northern District of Illinois indicate a general opinion that the assigned lawyers perform their services competently. Indeed, many observers assert that the representation afforded by the assigned lawyer is of considerably higher quality than that which the accused with some, but limited, means is likely to obtain from privately employed counsel. The Committee believes that there may be some substantial grounds for this appraisal. It is clear, however, that only on rare occasions do assigned counsel in the Northern District of Illinois elect to contest the guilt of their clients and virtually never pursue a case through the appellate process. There is no doubt that these practices reflect to a very considerable extent the nature of the cases assigned to counsel and that similar professional judgments would typically be made in any system of representation, however adequate. The degree to which such judgments are forced by a system that provides little by way of financing the expenses of adequate representation is reserved for consideration in a later section of this chapter.

Northern District of California. In the San Francisco Division of the Northern District of California, appointed counsel first enters the case by order of the court at arraignment. We are informed that, by reason of an informal arrangement between the Chief Judge and the United States Commissioner, the latter is authorized to appoint counsel in the preliminary proceedings when he believes this to be necessary, as in cases in which the defendant appears to suffer from mental disorder or when a difficult question of search and seizure law may be presented. The evidence suggests, however, that this authority is infrequently exercised.

Counsel assigned by the court are selected from a panel of volunteers supplied by the San Francisco Bar Association. At the time inquiry was made the panel contained the names of about 75 lawyers. There appears to be considerable variation in the periods of service on the panel, some of the lawyers making themselves available for comparatively short intervals and others serving for a number of years. The attorneys are assigned by rotation and are ordinarily notified at least two weeks in advance of the hearing. We are told that during one twelve-month period some 329 appointed attorneys served in 590 cases and made 987 appearances in court. In the same period assigned lawyers appeared in 27 trials in which guilt was contested. Of this total, 20 were tried to juries and seven to the court. Members of the panel average about one day in court in each period of six weeks.

The judge appointing inexperienced counsel at the arraignment may require the participation of a second and more experienced lawyer. The court will ordinarily grant a continuance before plea is entered, if requested by the assigned lawyer; and if the case is to be tried on a plea of not guilty, trial is set at a date that takes into account the needs of pre-trial preparation. As in the Northern District of Illinois, assigned counsel is permitted to accept a fee from his client if counsel discovers that, despite his claim of indigency, the accused has resources available for this purpose.

Data collected in the Sacramento Division of the District Court indicate that a remarkably large number of defendants, some two-thirds of the total, waive their right to counsel and proceed to the completion of their cases without representation.[28] Those expressing a desire to be represented and indicating a lack of means to employ counsel are assigned attorneys from a panel of volunteers supplied the court by the local bar association. Again, the appointed lawyer is permitted to negotiate for a fee if he discoveres that his client has means to pay for the services rendered.

Interviews of knowledgable persons in the Northern District of California revealed a considerable range of opinion as to the adequacy of the methods of representation there employed. Thus, high regard was frequently expressed for the diligence and competence of the San Francisco volunteers. As in the Northern District of Illinois, the view was sometimes expressed that the quality of representation provided is often superior to that which can be obtained by the accused with some, but limited, resources. At the same time, many observers doubted that the system adequately serves the interests of the accused and described the task assumed by the uncompensated volunteer attorneys as burdensome and inequitable.

Southern District of New York and Eastern District of Pennsylvania. One important variation in the methods employed to provide representation for financially disadvantaged persons in the federal courts is found in those districts in which a significant share of the burden of representation is borne by attorneys employed by voluntary legal aid associations. According to a study prepared for the Committee, approximately 90 per cent of all cases in which counsel is assigned in the Southern District of New York are those in which representation is supplied by the Legal Aid Society of New York. In 1960, 787 cases were assigned to the Society. In addition, some 407 cases already assigned were carried over from 1959, representing a total case-load of

1,194. in 1960, 727 cases in which defendants were represented by appointed counsel were disposed of by the court. In all but about one-seventh of them counsel employed by the Society participated. Cases assigned to the Society are the primary responsibility of one full-time attorney who may, however, obtain part-time assistance from the New York City office when an emergency requires. The attorney does not appear before the United States Commissioner and normally first makes contact with his client at the arraignment. With few exceptions the defendants so represented are those who have failed to make bail.[29]

In the Eastern District of Pennsylvania the major burden of representing the impoverished accused falls upon the Voluntary Defender Association of Philadelphia.[30] In recent years the number of cases handled by the Association has ranged from 80-125. The Association restricts its representation to defendants in jail and unable to make bail or defendants at liberty but on relief. Some cases in the Eastern District involve representation by attorneys drawn from a panel of Junior Bar members. These are cases for which representation is not provided by the Defender Association because of conflicts of interest or for some other reason. We are informed that the number of these cases is not large. A letter from the Chief Judge indicates that counsel other than those supplied by the Association or the Junior Bar panel are rarely appointed by the court.[31]

(3) *The Legal Aid Agency for the District of Columbia.* The District of Columbia Legal Aid Act, approved June 27, 1960,[32] represents, in the judgment of the Committee, an event of genuine importance. The legislation is significant, not only as the first congressional effort tending toward systematic handling of the representation problem, but as a source of experience valuable in devising solutions for the other federal districts and for state systems of criminal justice.

Three features of the District of Columbia legislation are entitled to particular notice: (1) the effort to create administrative autonomy in a legal aid agency free of direct judicial or other governmental supervision; (2) the involvement of a large segment of the legal profession in providing adequate representation; and (3) the recognition of the importance of investigatory and other staff services in the provision of adequate representation.

(1) The powers of the Agency are vested in a Board of Trustees composed of seven members. The Board is appointed by a nominating panel consisting of the Chief Judges of the Court of Appeals for the District of Columbia, the District Court, the

Municipal Court, and the Municipal Court of Appeals, the Judge of the Juvenile Court, and the President of the Board of Commissioners of the District of Columbia.[33] The Board of Trustees appoints the Director of the Agency and performs other usual supervisory functions. Ultimate administrative responsibility is thus placed with a group of private citizens, who, at the present time, are all attorneys practicing in the District. The objective secured is that of creating an agency that both possesses and appears to possess independence of the judicial and prosecuting arms of government.

(2) The Act contemplates that, despite the existence of an agency possessing a staff of compensated, full-time attorneys, a significant share of the burden of representation shall be borne by volunteer attorneys engaged in private practice. The statute thus authorizes a "mixed" system for the representation of financially incapacitated persons. By order of the Chief Judge of the District Court, the Agency has taken over the entire function of recommending lawyers for assignment in that court.[34] A vigorous effort has been undertaken to recruit private attorneys for these purposes, and the effort has been rewarded by considerable success. Thus in the fiscal year 1962, of 652 cases in which counsel were assigned in the District Court, volunteers appeared in 519.[35] Private attorneys played an even more significant role in the proceedings of some of the other courts and agencies of the District. Important co-operation has been secured from the Junior Bar Section of the local Bar Association in recruiting and training young lawyers for volunteer services. Valuable assistance has also been secured from graduate students participating in Georgetown University's legal internship program.[36] The Committtee regards the response of the District bar as impressive and believes that one of the important values secured by the program is the broad sharing of responsibility by a significantly large segment of the profession in the District of Columbia.

(3) The operation of the Legal Aid Agency demonstrates recognition that adequate representation entails more than placing attorneys in court and encompasses various other defense services. At the end of fiscal 1962, the staff of the Agency included the Director, four lawyers, four investigators, one secretary, three clerk-stenographers and a temporary clerk engaged in recruiting volunteer attorneys.[37] The Committee believes the emphasis on investigatory personnel to be wholly warranted. It is significant that these services are made available to the volunteer attorneys and that the latter are making use of them. Indeed, in

fiscal 1962, of the 189 investigations undertaken by the staff, 113 were made at the request of volunteer attorneys.[38] It should also be observed that volunteer attorneys may be assisted by such staff services as the furnishing of legal memoranda, assistance in the preparation and filing of pre-trial motions, and reimbursement of the attorney for out-of-pocket expenses properly incurred by him.

It should be noted that the Act directs representation to be provided, not only at the trial stage in felony proceedings, but in misdemeanor cases in which the maximum sentence may be one year or more, in preliminary proceedings in the Municipal Court, before the United States Commissioner, and at inquests before the Coroner, in proceedings before the Juvenile Court and before the Commission on Mental Health.[39] By the end of fiscal 1962, services had been extended in all these areas, although in some, expansion of services is still required.

The Committee believes that the program going forward in the nation's capital represents an important experiment in the provision of adequate representation and that its continued development has significance for the country as a whole. This development will require increased appropriations in order that services may be expanded and that capable legal staff can be retained against the pressure of more lucrative professional opportunities. *The Committee therefore recommends that the Department of Justice continue to direct its sympathetic attention to the District of Columbia's legal aid program and lend its support to appropriations needed to enhance the quality and quantity of its services.*

(4) *An Evaluation of Current Representation Practices in the Federal Courts.* The Committee is firmly of the view that present efforts in the federal district courts to supply financially incapacitated persons with counsel and to guarantee the other essentials of adqate defense are insufficient to achieve these important purposes. It follows that it is the Committee's judgment that substantial changes in these practices are urgently required. These conclusions rest first and most importantly on the Committee's observations of practices prevailing in various districts throughout the country. In addition, the Committee has been impressed by the many similar appraisals of present procedures made by judges, prosecutors, defense counsels, and other knowledgeable observers of federal criminal justice. It is the purpose of this section to identify what appear to the Committee to be some of the salient weaknesses and strengths of the current practices.

Stage of the Proceedings at which Counsel Is Appointed. In most federal districts appointed counsel first enters the case when the accused is brought before the court on arraignment and is required to plead to the indictment. The Committee is persuaded that an adequate system of representation would make counsel available to the accused in the earlier stages of the proceedings. We are aware that in some cases such delay in the appointment of counsel does not work to the disadvantage of the accused and that frequently even retained counsel may not enter the case until arraignment. Nevertheless, in many situations lack of representation of the accused in the earlier phases of the proceedings operates to the prejudice of defendant's rights. This is particularly likely to be true in those cases in which the guilt of the accused is to be contested and in which there is need to locate witnesses for the defense and to plan trial strategy. The handicaps of delay cannot be fully overcome by a policy of liberal continuances; for defense counsel is required to enter the litigation after preparation of the prosecutor's case is virtually complete and after considerable time may have elapsed since commission of the alleged criminal act. We believe that the Special Committee of the Association of the Bar of New York and the National Legal Aid and Defender Association was correct when it said: "The earlier any investigation is initiated the more effective it is likely to be."[40] The failure of the practices in most districts to provide early representation of the accused must, therefore, be regarded as a serious deficiency.

The Committee is persuaded that experience in the Northern District of Illinois and in the District of Columbia clearly indicates the utility of supplying counsel to accused persons when they first appear before the United States Commissioner and that the absence of similar procedures in many other districts represents a substantial weakness in the practices generally prevailing. Counsel appointed by the commissioner may afford the accused realistic advice on whether to waive or insist upon a preliminary hearing. On the occasions, admittedly infrequent, when preliminary hearings are held, the advantages to the defendant in being represented by competent counsel can hardly be doubted.[41] In addition, presence of counsel may importantly affect the levels at which bail is set. Counsel may prove useful in advising defendant of his rights relating to removal under the provisions of Rule 20 of the Federal Rules of Criminal Procedure.[42] He may perform a range of other vital services at the pre-arraignment stage, such as bringing special circumstances to the attention of the United States Attorney that may result in a decision to defer

the prosecution under the terms of the so-called "Brooklyn Plan". It should also be noted that the advantages of representation of the accused at the pre-indictment stage are not exclusively those of the defendant. Indeed, we are informed that a primary consideration leading to the appointment of counsel by the United States Commissioner in the Northern District of Illinois is the belief that the presence of counsel contributes to a more orderly and enlightened performance of the functions associated with the preliminary proceedings.

The Committee has not encountered evidence of practices in any district resulting in the provision of counsel in the period immediately following arrest of the accused and prior to his production before the commissioner. Consideration of this matter is deferred until a later point in the chapter.

Quality of Appointed Counsel. Generalizations as to the competency of lawyers appointed in the more than ninety federal district courts must inevitably prove fallible. The Committee has collected numerous expressions of opinion on this matter from persons familiar with the administration of criminal justice in particular federal districts. As might be expected, there is considerable divergence in the views expressed. On the whole, however, the evaluations have been favorable. As mentioned above, many observers expressed the opinion that assigned counsel often possess ability and dedication superior to that displayed by lawyers sometimes retained by defendants possessing limited means. On the basis of its own observations, the Committee believes that such is the fact in a significant number of instances.

Some observers complain that on occasion young and inexperienced counsel are appointed who, because of lack of experience and maturity, fail adequately to protect the interests of their clients. It appears to the Committee that in many instances, the problem pointed to is a real one. A recent study of the federal system expressed the matter as follows:

> "There are many aspects of the present uncompensated assignment system which would appear to inhibit attainment of the ideal of providing adequate representation of each indigent defendant. A prominent defect is the dependence upon young, inexperienced lawyers for all but the most difficult or serious cases. The typical assigned counsel is little versed in the technicalities of the criminal law or the questioning of accused persons, and has had little if any previous courtroom experience. But use of inexperienced lawyers seems almost inevitable under a noncompensatory system. . . ."[43]

On the other hand, the Committee has been impressed by the numerous instances within our observation in which the young volunteer has conducted the defense with remarkable zeal and proficiency. Moreover, we believe that there are positive values to be gained from the sharing of the obligations of representation in these cases by a significantly large segment of the bar, including the younger members of the bar. The difficulties, however, are real; and the Committee believes that there is much truth in the observation that "Whether an indigent under present conditions receives excellent or mediocre representation is largely fortuitous."[44]

In sum, the Committee believes that among the deficiencies of the present system is the quality of some lawyers recruited under procedures that afford no compensation for professional services or even payment of out-of-pocket expenses. More fundamental, however, are the conditions under which assigned counsel are required to operate, for these limit the effectiveness of the most proficient and experienced lawyers who participate in the defense of financially disadvantaged persons. These conditions include, among others, the time at which appointment is made and the fact that counsel lack resources to provide the range of defense services essential to adequate representation.

Defense Services Available to the Accused. The failure of the practices prevailing in all the district courts outside the District of Columbia to provide assigned counsel with resources to contest the guilt of defendant or violations of his constitutional rights is, in the judgment of the Committee, a fundamental deficiency of the present system.[45] We believe that the consequences are serious and unfortunate. First, in some cases assigned counsel is induced to advise a plea of guilty because he is aware that resources adequate to challenge abuse of authority or the government's accusation are lacking. Second, when a decision is made to go to trial, the absence of such resources handicaps conduct of the defense and places the accused at a disadvantage not shared by the defendant in possession of adequate means. It is not possible to determine the percentage of cases in which these deficiencies reach serious proportions. It is clear, however, that the impact on the individual defendant is devastating when it does occur and that no system of representation worthy of the name can complacently tolerate such consequences.

At present there is no federal legislation, applicable to the country as a whole, that provides means by which a financially disadvantaged person can *locate* and *identify* witnesses in his

behalf. The result is that, unless defendant has been released on bail and hence may, however inadequately, perform the pre-trial investigation himself, this basic function is not likely to be performed at all. If defendant knows who his witnesses are, he is entitled to a subpoena. Rule 17(b) of the Federal Rules of Criminal Procedure provides that the costs of the subpoena for the "indigent defendant" shall be borne by the government. Rule 17(b) further provides, however, that such a subpoena may issue only upon a motion supported by an affidavit "in which the defendant shall state the name and address of each witness and the testimony which he is expected by the defendant to give if subpoenaed, and shall show that the evidence of the witnesses is material to the defense, ..." The Committee has found that experienced defense counsel appointed to represent defendants often are reluctant to proceed under Rule 17(b), since it forces a form of discovery of the defendant's case.[46] Whatever may be said of the merits of broader discovery procedures in the federal criminal courts, there are obvious inequities in imposing obligations of disclosure on impoverished defendants not applicable to other accused persons.

The present practices make no adequate provision for psychiatric witnesses or other expert testimony when required by defense counsel in the defense of accused. It was suggested in the course of the Committee's deliberations that Rule 28 of the Federal Rules of Criminal Procedure occasionally has been used for this purpose. That Rule authorizes the court to appoint expert witnesses. The witness so appointed is required to advise the parties of his findings after which he may be called to testify for either party at the trial. The Committee has made inquiries in several districts relating to the administration of Rule 28. We have found little evidence of its widespread use to supply needed expert testimony. Most defense counsel interrogated on the subject were of the opinion that the Rule is not well adapted to this purpose, a conclusion which the Committee shares. The Committee has discovered that in some districts psychiatrists practicing in government hospitals are made available to defense counsel through informal arrangements effected through the cooperation of the court or the United States Attorney. Such arrangements, however, do not often provide the psychiatrist sufficient time or result in the establishment of the proper relationship between doctor and the accused to satisfy the defendant's legitimate needs for expert testimony at the criminal trial. The Committee concludes that the problem of supplying the accused with access to expert

testimony when essential to his defense has not been solved by present practices in the federal district courts.

The Committee is aware that an accurate understanding of the position of the financially disadvantaged accused in the federal courts requires that account be taken of the earnest efforts of many judges and prosecutors to overcome the deficiencies of the system. We have encountered numerous examples of assistance and co-operation extended to appointed counsel. There is no doubt that these practices contribute significantly to the decency of the system. The Committee is also impressed by the contributions made by the Federal Probation Service through its pre-sentence investigations and by its many manifestations of practical concern for the welfare of the accused. These enlightened efforts constitute an important ameliorative influence, and their significance should be fully conceded. Nevertheless, the Committee believes that, after taking into account all the practical accomodations that have developed, the present practices in the federal courts significantly fail to achieve a system of adequate representation. Moreover, we maintain that adequate representation should be conceived as a matter of right, not of grace, and that it is inconsistent with the theory of the adversary system of justice that rights of representation should rest ultimately on the good will of prosecuting, judicial, or administrative personnel.

Any effort at statistical demonstration of the inadequacies of a system of representation must inevitably confront serious difficulties. This is true basically for the reason that financial status may determine in large measure what sorts of offenses an individual will commit and the circumstances in which he will commit them. Thus the 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. For these reasons the Committee has rested its conclusions on the deficiencies of present practices on direct observation and the informed judgment of competent observers rather than on the statistics now to be presented. Nevertheless the figures collected by the Committee in four federal districts are of interest. It may be of significance that they are consistent with the conclusions reached by the Committee on other grounds.

In the judgment of the Committee, present practices sometimes induce a plea of guilty because appointed counsel recognizes the futility of electing a contest in the absence of resources to litigate effectively. The facts indicate that in all the districts studied, pleas of guilty are entered much more frequently by defendants with assigned counsel, than those represented by private counsel. Thus, in the Northern District of Illinois in fiscal 1961, an initial plea of guilty was entered by approximately 75% of all defendants represented by assigned counsel whereas the figure was about 20% in cases represented by private counsel. In the District of Connecticut the figures for the same year were 60% and 41%. In fiscal 1960 and 1961 the figures were 75% and 53% in the San Francisco Division of the Northern District of California, 53% and 45% in the Sacramento Division.

The Committee has also concluded that the deficiencies of the present system adeversely affect the quality of the defense made. In the San Francisco Division it will be found that 9% of the prosecutions were dismissed as to defendants represented by assigned counsel and 16% represented by private counsel. Something over 1% of the former and 2% of the latter were acquitted. Some 42% of defendants represented by assigned counsel were sentenced to prison while about 29% of those represented by private counsel received prison terms. On the other hand, 44% of the former and 34% of the latter were released on probation.[47]

A full compilation of statistics on these and other matters is represented in Appendix I of this Report.

Burden on the Appointed Lawyer. That the attorney as an officer of the court has peculiar obligations relating to representation of the needy accused will be universally conceded. But a system that relies wholly on the uncompensated services of private attorneys on occasion imposes unconscionable burdens on particular lawyers. Such a system also enhances the possibility that less than adequate representation will sometimes be provided the client. The Committee is familiar with several situations in which an assigned case in the federal courts resulted in genuine economic hardship to a conscientious attorney. The recent

Stewart case in the District of Columbia illustrates what these problems may be.[48] The prosecution was of a defendant for first-degree murder. He was five times tried and four times convicted. In his last trial, which occupied about a month, defendant was represented by the Director of the Legal Aid Agency. Virtually the full-time services of an assistant were also contributed to the defense. An appeal remains to be taken. It is not difficult to appreciate the seriousness of the burden that such representation would have created had it been made the obligation of an uncompensated lawyer; nor is it difficult to perceive that such burdens are often an obstacle to providing adequate services for the client. The problem of insuring the availability of adequate representation to accused persons in the federal courts is of national concern. It follows that the costs of representation should be shared by the nation as a whole.

An acute awareness of the burdens created by uncompensated representation has led some districts to sanction the acceptance of fees by appointed counsel when they discover that their clients, in fact, have some financial resources. As indicated above, the Committee has no evidence of abuse of this privilege by the appointed attorneys. Nevertheless, the Committee believes the arrangement to be far from ideal. It is surely preferable that the court establish the eligibility of the accused to receive the services of appointed counsel after meaningful and appropriate inquiry and that, thereafter, the lawyer look to the court, rather than to the client, for reasonable compensation.

3. *Provision of Representation in Other American Jurisdictions and in Europe.*

It should be clearly understood that the principle of providing compensated counsel as part of a system of adequate representation for financially disadvantaged defendants represents no innovation. The inadequacies and inequities of reliance on the uncompensated services of appointed counsel have been widely recognized both in this country and abroad.[49] Here and abroad systems of repersentation employing compensated counsel have been established and are presently in operation. The Committee's recommendations in this area, therefore, rest on a considerable fund of practical experience.

a. *United States.* Programs supplying the compensated services of lawyers to persons financially unable to retain counsel are in operation in many American states and localities. The programs differ widely in quality, coverage, and concept. No attempt will be made in this Report to analyze or describe these systems in detail.[50] It is important, however, to observe that in

the United States widespread recognition has beeen given to the necessity and utility of such services. According to statistics of the National Legal Aid and Defender Association, there were on June 30, 1961, ninety-eight defender organizations in operation in the United States. Of these, eighty-one were public defender offices, financied entirely by public funds. Twelve programs were financed by private donations and five were supported both by public funds and private contributions.[51] In the calendar year 1960, seventy reporting defender organizations handled 115,118 new criminal cases.[52] In many states provision is made for the compensation of appointed private counsel in at least some cases.[53]

b. *Europe.* The nations of western Europe have likewise been confronted by the challenge of the financially deprived accused, and, as might be expected, have responded in significantly differing ways. Provision for the representation of such defendants in Europe ranges from the apparently meager programs in France and Scotland[54] to the elaborate systems operating in the Scandinavian countries. Switzerland presents an interesting example of a system of representation resulting primarily from court interpretation of a constitutional provision, in this instance Article 4 of the Swiss Constitution, which states: "All Swiss are equal before the law."[55] In this Report, however, attention will be directed principally to the practices pursued in England and in the Scandinavian countries.[56]

(1) *England.* Legislative provision for compensated counsel dates from the Poor Prisoner's Defense Act, 1930,[57] and, in cases of appeals from convictions, from the Criminal Appeal Act, 1907.[58] It is generally conceded, however, that the services provided under these acts were inadequate. Substantial improvement followed the report of the Rushcliffe Committee in 1944 and the passage of the Legal Aid and Advice Act, 1949.[59] Under the latter act considerable discretion is vested in the courts. According to the Right Honorable Lord Parker of Waddington, Lord Chief Justice of England, "the tendency today is to grant legal aid in all cases, at all stages of the trial and of any appeal and whether or not there is a plea of guilty."[60] It appears that the right to counsel is not recognized in the magistrates' courts except in cases of preliminary inquiry into a murder charge. When provided, legal assistance is made available from the first appearance of the accused in court.

Names of counsel and solicitors who are willing to provide services in these cases are listed, and from these lists assignments are made. Apparently there is no shortage of volunteers.

We are informed that some courts on occasion permit the accused to select names from the panel. Remuneration is fixed in the superior courts by judges of those courts in accordance with regulations established by the Home Secretary. Compensation may include an amount covering investigation and the hiring of experts. Interviews with members of the legal profession in England reveal an apparently general opinion that the system works well to protect the interests of the accused and that adequate remuneration for services rendered is being provided.

(2) *Scandinavian Countries.* The most elaborate schemes for the provision of legal aid in criminal cases yet devised may well be those operating in Norway, Sweden, and Denmark. The services provided are made available to all accused persons; no test of financial capacity is applied in the first instance as a condition to the receiving of services. The defendant is entitled to select consel from a panel drawn up by the Ministry of Justice. We are informed that the lawyers on the lists include most of those experienced in the trial of criminal cases. Counsel appointed under this plan are compensated by public funds administered by the Ministry. He is required to submit a statement of work done and may be required to produce the file of the case to establish his fee. There appeara to be general satisfaction among the lawyers in the three countries as to the adequacy of remuneration. The services provided by the system encompass more than the provision of counsel. The appointed lawyer is regularly supplied the complete government file against the accused. In preparing the defense, appointed counsel may make use of government laboratories and consult with experts at the expense of the state.[61]

As mentioned above, these services are made available to all defendants, regardless of means. If the accused is acquitted, no effort is made to collect the costs of defense services from the defendant. If he is convicted, inquiry as to his means is made in Sweden and Denmark. Upon a finding of financial capacity he is charged with the costs of representation. In Norway, however, apparently no effort is made to establish the means of the defendant or to charge him with costs, even when he is convicted.

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Any survey of experience in this country and abroad reveals an enormous range of variations in the schemes devised to provide representation for the accused unable to provide adequate services

for himself. Some of the programs express concepts and assumptions that may be subject to challenge and, in any event, are not directly applicable to the problems of representation in the federal district courts. Much of the experience, however, is directly relevant. Moreover, all of these efforts serve to demonstrate the pervasive character of the problems of adequate representation and to illustrate the widespread conviction that their solution is a matter or urgent importance.

4. *Criteria of a System of Adequate Representation in the Federal Courts.*

For reasons expressed at length in the earlier sections of this Report, the Committee concludes that present practices in the federal courts do not constitute a system of adequate representation for the financially deprived accused. *Accordingly, we recommend that the Department of Justice give vigorous support to the prompt enactment of legislation to guarantee the proper defense of defendants in the federal courts who are financially unable to obtain adequate representation.*

The discussion which follows identifies and discusses elements of such legislation that the Committee believes essential to the provision of adequate representation in the federal courts. Appendix II presents the text of a bill which is the product of the joint efforts of the Committee and the Department of Justice and which the Committee believes would satisfy, if enacted, the major requisites of a system of adequate representation.

a. *The Principle of Local Option.* Any survey of the movement to provide adequate representation immediately reveals that several different approaches to the problem have emerged. Each of these schemes has its proponents and each has been subjected to criticism. It seems clear to the Committee that all of the various plans have elements of strength and that the appropriateness of one plan as opposed to another depends ultimately on the conditions and circumstances that prevail in a given locality. It also seems clear that the best estimate of the needs existing in a given district is likely to be made by those intimately familiar with the administration of criminal justice in each particular district. We believe that the recognition of a power of choice in the individual districts is not only correct in principle but may go far toward overcoming objections to representation legislation sometimes expressed in Congress. We conclude, therefore, that the legislative proposal should avoid imposition of any single pattern of representation on all federal districts, for no single scheme is

adequate to satisfy the differing needs and preferences of all the federal districts. On the contrary, legislation should provide a wide range of choice that will, at the same time, guarantee adequate representation in all districts and permit the devising of schemes responsive to local needs and local preferences.

Accordingly, the Committee proposes that within a specified period after adoption of the act, each district court should, with the approval of the judicial council of the circuit, devise and place in operation a plan for adequate representation in the district. The plan should reflect one of four options: (1) representation provided by compensated private attorneys; (2) representation by a full-time or part-time federal public defender; (3) representation by attorneys associated with local legal aid societies, voluntary defender programs, bar association groups, or a public defender organization providing services in the state in which the district is located; or (4) representation according to a plan that combines elements of two or more of the other options. Each of these options is capable of providing the basis for a system of adequate representation, and each should be included within the area of choice granted to every district.

First, it seems clear to the Committee that federal legislation should not preclude the extensive use of compensated private attorneys in meeting the problem of the accused who is financially unable to obtain adequate representation in the federal courts. Systems relying primarily on the services of appointed private counsel have operated successfully throughout the world. In many of the federal districts such a plan may prove the most feasible and congenial. The Committee believes that positive values are gained from the widespread participation of the bar in these cases. Indeed, we believe many problems in the administration of criminal justice, both at the federal and state levels, result from absence of involvement of most lawyers in the practice of criminal law. An almost indispensable condition to fundamental improvement of American criminal justice is the active and knowledgeable support of the bar as a whole. There is no better way to develop such interest and awareness than to provide wider opportunities for lawyers to participate in criminal litigation at reasonable rates of compensation.[62] The Committee believes it is highly important that the system of adequate representation should encourage rather than obstruct such participation.

Second, the Committee is strongly of the view that a federal public defender system should be included among the options available to the individual districts. Considerable literature

by proponents and opponents of the public defender scheme has appeared in recent years. We are aware of the view, sometimes expressed, that the placing of defense functions in the hands of a public employee gives rise to certain dangers.[63] We believe that such apprehensions are entitled to respectful consideration and that practical measures should be taken to minimize the incidence of such anticipated perils. We conclude, for example, that the power of appointment of public defenders should reside in the judicial council of the circuit, rather than in the court before which the defender practices. The public defender's independence of action should be further protected by a tenure based, not on the discretion of the court, but on a four-year term, renewable by the judicial council in which the power of appointment will rest. Removals prior to conclusion of the term of office should be authorized only for cause following fair and orderly hearings, likewise provided by the judicial council. The Committee believes that experience with the public defender system in several parts of the country unmistakably demonstrates that it is capable of providing zealous and highly competent defense.[64] Although many districts may conclude to reject this option, others, particularly those of large population, may decide that a plan placing partial or primary reliance on a public defender represents the most satisfactory and sensible solution of local problems.

Third, at the present time at least two of the large federal districts assign the representation of most "indigent" defendants to attorneys associated with legal aid or voluntary defender associations. The Committee believes that the further development of such arrangements represents a wholly acceptable approach and that such a plan should be included among the options available to any district. Under such a scheme, compensation should be made directly to the association on the same basis and according to the same terms as in the case of any appointed private attorney. The Committee also believes that the option should be broadened to encompass arangements with other private groups, such as bar association committees, or with public defender organizations providing services in the courts of the state in which the district is located.

Fourth, and highly important, each district should be free to devise a scheme of adequate representation containing elements of two or more of the various options discussed above. The Committee is hopeful that a substantial number of districts may elect to divide the burden of representation between a federal public defender or a legal aid association, on the one hand, and private attorneys, on the other. The experience in the District

of Columbia suggests something of the potentialities that might profitably be exploited. Thus, the public defender's office might not only assume responsibility for the defense of a substantial number of accused persons but might make its investigatory and secretarial staffs available to private attorneys appointed in other cases. Such a "mixed" system combines the advantages of a continuing and experienced defense organization in the district with those derived from the participation of a substantial segment of the bar in the work of criminal defense. The fourth option, therefore, presents the opportunity of a wide range of variations in the plans for adequate representation and affords assurance that the system employed will be that best adapted to the conditions and requirements of the particular district.

For the reasons stated, the Committee feels that the advantages to be derived from the option principle are substantial. It is important, however, that the legislation not only make formal provision for such choices but that freedom of choice at the local level be protected from other provisions that may have the effect of forcing decisions in favor of some particular plan of representation. Thus, some of the bills introduced in Congress in recent years contained provisions establishing arbitrary maximum limits on the amounts that might be expended in any year by any district for the provision of representation. These limitations have often been set at such levels that no populous district could elect any scheme other than a public defender.[65] Consequently the possibility of making substantial use of the compensated services of private attorneys would have been effectively foreclosed.

It is also important to recognize that, although each district should be afforded a broad range of discretion to devise a plan of representation most suitable to local needs and preferences, the legislation should place upon each district the unmistakable obligation to devise and place in operation some plan of representation conforming to the statutory options provided. For a quarter-century the constitutional rights of counsel have failed to receive full implementation in the federal courts. In no district has a system of adequate representation been achieved; nor, for reasons stated in this chapter at length, are the practices employing the uncompensated services of attorneys capable of constituting such a system. While reliance may wisely be placed on local views as to what form the system of adequate representation should take, the question whether adequate representation will be provided should in no event be open.

In summary, the Committee recommends the following:

Legislation establishing a system of adequate representation in the federal courts should delegate to the individual districts the power to devise a plan that will, at the same time, guarantee adequate representation and reflect local needs and circumstances.

Within one year of enactment of such legislation each district court, with the approval of the judicial council of the circuit, should place in operation in the district a plan for adequate representation. The plan should be devised in accordance with one of the following options:

(1) *representation provided by compensated private attorneys;*

(2) *representation by a full-time or part-time federal public defender;*

(3) *representation by attorneys associated with legal aid associations, voluntary defender programs, bar association groups, or a public defender organization providing services in the state in which the district is located; or*

(4) *representation in accordance with a plan combining elements of two or more of the other options.*

The independence of action of the public defender should be protected by appointment to a four-year term by the judicial council of the circuit. Removals should be authorized only for cause following fair hearings conducted by the judicial council of the circuit.

In the interests of guaranteeing the adequacy of representation provided in any district and of preserving genuine freedom of choice in devising plans for adequate representation legislative provisions fixing arbitrary maximum limits on the amounts to be expended in any district should be avoided.

b. *Early Appointment of Counsel.* It is clear that a system for adequate representation requires more than the appointment of competent counsel. One of the essentials of such a system is that counsel be appointed early enough in the criminal proceedings to insure protection of defendants' legitimate interests. For reasons stated in an earlier section of this chapter, the Committee believes that the presently prevailing practices in the federal district courts are deficient in this respect and that delaying appointment of counsel until arraignment may often substantially imperil the adequacy of representation. The Committee strongly believes that the interests of the financially disadvantaged accused and the demands of orderly procedure at the preliminary stages require that counsel be appointed for the accused not later

than at his first appearance before the United States Commissioner. If, of course, the defendant is brought first before the court, rather than the commissioner, the judge should appoint counsel at that time. The considerations supporting this view have already been fully stated and need not be repeated here.

A lawyer appointed by the commissioner or the court should continue to represent his client in the subsequent stages of the proceedings including trial and, if need be, in the appellate courts. Provision should be made for substitution of counsel at any stage of the proceedings when good cause is shown.

The Committee is aware that these conclusions leave untouched the needs for representation and advice in the period following arrest but prior to the accused's production before the commissioner. Although the Committee is not unanimous on this matter, a majority believes that services of counsel should be supplied at this stage to the accused financially unable to obtain representation. The majority holds to the view expressed in 1959 by the Special Committee of the Association of the Bar of the City of New York and the National Legal Aid Association: ". . . if the rights of the defendant are to be fully protected, the defense of a criminal case should begin as soon after arrest as possible."[66] There is a strong argument that the time a defendant needs counsel most is immediately after his arrest and until trial. The majority points to the fact that the Supreme Court of the United States has clearly indicated that in at least some situations an arrested person in police custody may have a constitutional right of counsel.[67] It is not beyond the realm of possibility that an expansion of these rights will be recognized in the near future. Moreover, a majority of the Committee has been impressed by the practices undertaken in accordance with the California public defender legislation. Section 27706 of the California Code authorizes the public defender to perform duties of representation "Upon request of the defendant *or* upon order of the court. . . ."[68] We are informed that, pursuant to this direction, the public defender often enters a case while the accused is in police custody and before preliminary hearing and that these practices have in no way disrupted or adversely affected the orderly prosecution of criminal cases in that state.

After careful consideration, however, the Committee has concluded not to recommend a similar provision for the federal law at this time. We recognize that such a proposal would be vigorously opposed by those who fear its consequences on law enforcement. We believe that a program for the general improve-

ment of the federal procedures ought not to be imperiled or made contingent upon the extension of counsel services into the pre-commissioner stage of the proceedings. Moreover, there are administrative difficulties attending such extension of services in any district electing a system of adequate representation that does not include a federal public defender. The conclusion of the Committee, however, serves to underscore its recommendation that it is indispensable to a system of adequate representation that the appointment of counsel occur not later than the first appearance of the accused before the United States Commissioner.

Accordingly, the Committee recommends as follows:

Counsel for an accused who is financially unable to obtain representation should be appointed by the United States Commissioner at a time not later than the accused's first appearance before the commissioner. If the accused is brought first before the court, rather than the commissioner, the judge should appoint counsel at that time.

A lawyer appointed by the commissioner or the court should represent the accused in the subsequent stages of the proceedings, including the trial and any appellate proceedings. Provision, however, should be made for the substitution of counsel at any stage of the proceedings when good cause exists.

c. *Provision of Defense Services other than Counsel.* In an indeterminate number of cases in the federal courts, the provision of adequate representation requires that a range of services, in addition to the appointment of counsel, be made available to the defense. These services include those of pre-trial investigation and those of experts such as psychiatrists, accountants, and other specialists. As is pointed out in earlier sections of this chapter, present practices in the federal courts make no provision or inadequate provision for such services. This failure may adversely affect the quality of the defense made or force a decision to plead guilty to a criminal charge in situations in which the charge might otherwise be properly contested. The need for such services has been recognized in all well-developed systems of representation for financially incapacitated defendants, both in this country and abroad. Until the present practices are rectified and such services are made available, the procedures in the federal courts cannot fairly be characterized as a system of adequate representation. One of the assumptions of the adversary system is that counsel for the defense will have at his disposal the tools essential to the conduct of a proper defense. Nor is this a new insight. Over thirty years ago the Supreme Court of the United States referred

to the period before trial as "perhaps the most critical period of the proceedings . . . when consultation, thorough-going investigation and preparation were vitally important."[69]

The Committee, therefore, recommends the following:

Any legislation providing for the representation of the accused financially unable to obtain adequate representation should authorize the utilization of services essential to the proper conduct of the defense, including investigatory services, the assistance of experts, transcripts of the proceedings, and the like. Appointed counsel should be reimbursed for expenses found by the court to have been actually and necessarily incurred by him in the defense of his client. When circumstances justify, a district electing a federal public defender plan should be authorized to include in its plan of representation an investigatory staff in the public defender's office. The plan may also include regulations governing the resort to such services by defense counsel.

d. *Provision of Defense Services to Defendants with Some, but Inadequate, Means.* As developed at length in the first chapter of this Report, the Committee conceives of "poverty" as a relative concept. A problem of "poverty" or financial incapacity exists whenever any service necessary to adequate defense is out of the reach of the defendant, even though the accused is able to bear some of the expenses of his defense. As also developed in Chapter I, solution of these problems is not essentially a charitable enterprise undertaken to attain welfare objectives. On the contrary, these problems involve fundamental issues of justice to the individual accused and the larger public interests involved in the proper and vigorous operation of the adversary system. Whenever financial incapacity prevents the defense from providing active and creative challenges to assertions of governmental power in the criminal area, the adversary system, and the public interests dependent upon it, are placed in jeopardy.

It follows that the nomenclature of any legislation designed to solve these problems should adequately express the statute's fundamental objectives. It follows also that the language employed ought not to suggest that the measure is one of public charity. We believe, accordingly, that the terms "indigent defendant" or "indigency" are inappropriate for these purposes. These terms, derived from the poor-laws, tend to reinforce a popular impression that the objectives of legislation designed to establish a system of adequate representation are essentially similar to laws enacted for relief of the poor. Moreover, they are inaccurate and imprecise since they suggest, not financial inability to obtain

some essential defense service, but a total absence of financial resources. The Committee believes that the defendant eligible for appointment of counsel or other necessary defense services should be identified as a person "financially unable to obtain adequate representation."

One of the most acute and difficult problems confronting American criminal justice is that posed by the defendant with funds adequate to employ a lawyer, and perhaps, sufficient to meet minimal bail requirements, but who is incapable of financing an adequate pre-trial investigation of his case or other indispensable services. Equally acute are the problems of the accused who, at the outset of the proceedings may possess sufficient resources to meet the minimum requirements of adequate defense, but whose funds are exhausted before the end of a prolonged trial or who is unable to meet the costs of a new trial or the expenses of appeal. More than one observer has been led to the conclusion that such a defendant may often find himself in a more dangerous position in our courts than the accused who is entirely lacking in means.[70] Accordingly, the conclusion is inescapable that a system of adequate defense must make provision for such cases and that eligibility should not be foreclosed by the circumstance that the accused is able to pay for some other elements of adequate defense or that he possessed resources at the beginning of a prolonged prosecution.

The Committee recommends as follows:

Legislation should define persons eligible for appointment of counsel and other defense services at government expense as persons "financially unable to obtain adequate representation." The terms "indigent" or "indigency" should be avoided.

Legislation should provide the accused who is or becomes financially incapacitated at any stage of the proceedings, with services necessary for a proper defense, including investigatory services, the assistance of experts, transcripts of the proceedings, and the like. Eligibility for such services should be based upon the inability of the defendant to pay for the particular service necessary to his defense and should not be foreclosed by the fact that at the outset of the proceedings the accused was able to pay for some of the requirements of his defense.

e. *Adequate Compensation of Counsel.* Lawyers have peculiar responsibilities for the just administration of the law, and these responsibilities include providing advice and representation for needy persons. To a degree not always appreciated by the public at large, the bar has performed these obligations with

zeal and devotion. The Committee is persuaded, however, that a system of justice that attempts, in mid-twentieth century America, to meet the needs of the financially incapacitated accused through primary or exclusive reliance on the uncompensated services of counsel will prove unsuccessful and inadequate. The principle of just compensation for lawyers performing defense services is supported both by considerations of fairness to the appointed lawyer and by appropriate concern for the interests of the accused. But there are other considerations. We suggest that no one would be likely to urge that the government's interest in effective prosecution of criminal cases can be adequately advanced by delegating the prosecuting function to lawyers who receive no compensation for their services or reimbursement for expenses incurred in performing their duties. Yet the 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.

We recognize that any level of compensation authorized by statute in these cases will often prove inadequate when compared to fees an attorney may be able to command for similar services in private practice. It is neither necessary nor feasible that the fees authorized in these cases approach such levels. Nevertheless, the legislation should provide for reasonably adequate remuneration. We believe that fees for private appointed counsel should be set by the court within maximum limits established by the statute. The Committee also believes that fees calculated on an hourly, rather than a daily, rate will tend more accurately to measure the value of the services actually performed. After careful study of fees charged in private law firms for similar services throughout the country, suggested fee schedules prepared by bar association, and other materials, the Committee has come to the conclusion that an hourly maximum rate of fifteen dollars represents the lowest statutory limit consistent with the objectives of reasonable compensation for the assigned lawyer and adequate representation for his client.[71]

Districts electing the public defender system should have discretion to set salaries of the public defender and assistant public defender within upper limits, stipulated by statute, generally comparable to those governing salaries of other government lawyers performing duties requiring comparable skills and experience. There may be considerable variation among the districts in the amount and complexity of work required to be performed by the public defender, and the statutory limits should be sufficiently flexible to reflect these differences. We believe that a provision establishing a maximum salary in absolute figures creates the danger of its becoming outmoded with the passage of time, requiring statutory amendment to bring it into accord with changed circumstances. Accordingly, we propose that the public defender be paid a salary not in excess of that authorized to be paid the United States Attorney in the same district. Salaries for assistant public defenders should be governed by the same limits applied to salaries of assistant United States Attorneys in the district.

The Committee summarizes its recommendations on these points as follows:

The principle of adequate compensation for lawyers performing defense services is an indispensable element of federal legislation providing for a system of adequate representation.

Private attorneys appointed by the court should receive compensation determined by the court at a rate not exceeding fifteen dollars an hour for time necessarily and properly expended by the attorney and should be reimbursed for expenses necessarily incurred in performance of his duties.

Salaries of public defenders should be established within a maximum limit determined by the salary authorized to be paid the United States Attorney in the same district. Assistant public defenders should receive salaries not in excess of that authorized to be paid assistant United States Attorneys in the district.

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The foregoing discussion has identified what the Committee believes to be six of the salient features required to be included in any legislation providing for adequate representation in the federal courts. These are (1) the principle of local option, (2) the early appointment of counsel, (3) the identification of persons eligible to receive defense services by reference to "financial incapacity" rather than "indigency", (4) the provision of essential

defense services other than counsel, (5) the provision of essential defense services to persons with some, but inadequate, means, and (6) the principle of adequate compensation of attorneys performing defense services.

An adequate legislative proposal, however, requires the resolution of many issues not discussed above. The reader is referred to Appendix II for a draft of a bill which the Committee believes would, if enacted, establish a system of adequate representation in the federal courts. The text of the bill is accompanied by explanatory commentary.

5. ***Criteria of Adequate Representation: Collateral Proceedings.***

In the foregoing discussion we have considered the problems of adequate representation in the criminal trial and in proceedings leading to trial or sentence. Chapter IV includes discussion of problems of representation in appellate proceedings. This section and the section following deal with problems of representation in certain special proceedings. In reserving the latter problems for separate discussion in these sections the Committee does not imply that they are unimportant or that they may be safely ignored. We recognize, however, that the Department may reasonably conclude that action on these problems should be deferred until the essential features of a system of adequate representation are successfully established in the federal courts. While acceding to this view, the Committee believes that the Department should be fully aware of the problems arising in the special proceedings and that a high priority should be given to efforts directed to their solution.

In the course of the past generation the significance of collateral proceedings instituted to attack the validity of criminal convictions has increased markedly in both state and federal courts. The large number of such petitions may be regarded as one of the consequences of the developments in due process doctrine that have occured during the last thirty years. In the federal courts the impact of these developments has been felt particularly strongly in the exercise of habeas corpus jurisdiction involving state prisoners held in confinement under the authority of state convictions.[72] It is said that in the decade following 1949 some 6,000 habeas corpus petitions were filed in the federal district courts.[73] Statistics published by the Administrative Office of the United States Courts reveal that in fiscal 1959, 553, and in fiscal 1960, 767 habeas corpus petitions, in other than deportation cases, were presented to the district courts.[74] Undoubtedly a

large fraction of these were filed by state prisoners. It should be understood, however, that many of such petitions are patently frivolous and are summarily dismissed. Only a small percentage of the total are set for hearing.[75]

Although habeas corpus hearings are few in number, they present, on occasion, difficult issues of law and fact.[76] Indeed, it is not infrequently true that the burdens and difficulties confronting the appointed lawyer in the habeas corpus case are substantially greater than those faced by assigned counsel in a federal prosecution. It is also true that, although large numbers of the petitions are without merit, those set for hearing may present issues of great seriousness and importance. The case to be made for extension of the system of adequate representation to include the habeas corpus proceedings, therefore, appears compelling. The Committee recognizes that problems of some delicacy are presented when the federal government undertakes to provide the compensated services of counsel for one engaged in attacking the validity of a state conviction. It may well be that a federal public defender ought not to be employed for these purposes and that representation of the habeas corpus petitioners should be placed in the hands of private attorneys. If, however, the court concludes that in the interests of fairness and orderly procedure the services of assigned counsel are required, we see no reason to exclude the attorney participating in the habeas corpus case from the principle of reasonable compensation. Certainly, there can be no quarrel with the proposition that such a lawyer should be reimbursed for expenses necessarily and properly incurred in performing his duties. Although the Committee does not now undertake to make detailed recommendations in this area; we believe that guiding principles are clear: In exercising its habeas corpus jurisdiction the federal courts, as in other cases, are under obligation to provide the essentials of a fair hearing. When a fair hearing requires representation of petitioner by counsel and petitioner lacks means to obtain adequate representation, counsel should be appointed. Counsel so appointed should be permitted to make as effective presentation as the merits of petitioner's case allow. This, in turn, requires that counsel be granted reasonable compensation for his services and that he be reimbursed for expenses properly incurred.

What is true of the habeas corpus cases is also true of proceedings brought by federal prisoners under Section 2255 of the federal judicial code, to vacate, set aside, or correct their sentences.[77] Indeed, in some respects the extension of the system of adequate representation to Section 2255 proceedings presents

fewer difficulties, for these cases involve no problems of accommodating the exercise of federal power to state authority.

In summary, the Committee recommends:

The Department of Justice should give attention to the solution of problems of adequate representation arising in habeas corpus cases and Section 2255 proceedings. Solution of these problems should be guided by the principle that appointed counsel participating in these proceedings are entitled to receive reasonable compensation for their services and reimbursement for expenses necessarily and properly incurred in performing their duties.

6. ***Criteria of Adequate Representation: Parole Revocation.***

Attention has been given in recent years to difficult problems of adequate representation in an area highly important to the administration of federal criminal justice, that of parole and mandatory release revocation proceedings before the United States Board of Parole. Somewhat comparable problems are presented by probation revocation proceedings in the federal courts.[78] Since the Committee's earlier recommendations relating to the provision of adequate representation in the federal courts at all stages of the proceedings encompass and apply to the probation revocation hearing, no further comments on the latter problems need to be offered at this point.

Parole revocation proceedings are proper subjects of public concern since they involve questions of the security of the community and the liberty of persons. We are informed that during 1961, the Board of Parole issued 1,241 parole violation warrants as compared to 1,063 warrants in 1960.[79] The federal statute, 18 U. S. C. § 4207, requires that a prisoner taken upon such a warrant "to be given an opportunity to appear before the Board, a member thereof, or an examiner designated by the Board." The statute does not, however, define the elements of the hearing to be provided. Apparently in response to certain decisions of the Court of Appeals for the District of Columbia,[80] the Board has twice in recent years revised its regulations. The most recent revision, date August 14, 1962,[81] provides, insofar as pertinent:

> §2.40. *Revocation hearing By Board.* A prisoner who is retaken pursuant to a warrant issued by the Board or a Member thereof and returned to a Federal institution shall be afforded an opportunity to appear before the Board, a Member thereof, or an examiner designated by the Board. The Board may then or at any time within its discretion revoke and terminate the order of parole or mandatory release or modify the terms and conditions thereof. Whenever a parole or mandatory release is thus revoked, the prisoner may be required to serve all or any part of the remainder of the term for which he was sentenced, less such good time as he may earn following his recommitment.
>
> §2.41. *Same; legal counsel and witnesses at revocation hearings.* Each alleged parole or mandatory release violator shall be advised that he may be represented by counsel and that voluntary witnesses who have information relevant and material may testify at the revocation hearing authorized by §2.40: *Provided*, That the alleged violator arranges for the appearance of counsel and witnesses in accordance with procedures prescribed by the Board.

The regulations now effective thus authorize the presence of witnesses and counsel at the revocation hearing when this can be "arranged" by the prisoner. No provision is made, however, either for the appointment of counsel for the prisoner who is without adequate means or for the subpoena or travel expenses of the prisoner's witnesses. Whether these and other rights are required to be recognized by the constitution or federal statutes has been raised in litigation now pending in the Court of Appeals for the District of Columbia.[82] At the time of this writing, the court had not decided these cases.

The Committee believes that it is neither feasible nor proper for it at this time to submit detailed recommendations relating to parole revocation procedures. We shall, however, make some general comments. First, it seems apparent that however the issues raised in the pending litigation are resolved, the Department is called upon to give careful consideration to the devising of new legislative and administrative proposals in this area. Should the courts decide that the Board is required by existing statutes or as a matter of constitutional law to provide representation for prisoners financially unable to retain counsel, compulsory process, rights of cross-examination, confrontation, and the like, substantial modification of existing porcedures will have to be effected. But even if these changes are not compelled by judicial decision, the Committee believes that the Department will still be called upon to give careful consideration to these problems. We believe that the government's obligations will be met only when the procedures before the Board reflect the standards of sound policy and scrupulous fairness and that this goal should be pursued however the constitutional minima may be defined by the courts.

Second, we believe that certain general propositions can be advanced for the solution of these problems. It is apparent that a proposal like that of supplying counsel to the prisoner without adequate means presents problems both of principle and practice. As a practical matter, it has been doubted that the Board has or can properly be given authority to require attorneys to provide representation in these cases and it has been questioned whether the courts possess authority to appoint counsel to serve in administrative hearings, like the parole revocation proceedings. Without attempting to resolve these issues, the Committee points out that the adoption of a plan of adequate representation in the federal courts, such as that proposed in ealier sections of this chapter, would make a significant contribution to the problem of representation before the Board. There can at least be no doubt that Congress might properly authorize the federal public defender to assume the obligations of such representation in those districts that elect the public defender system. It is clear, however, that the Department needs to give further consideration, not only to the problem of supplying counsel, but to the other elements of fair hearing in the revocation proceedings.

Whatever the problems of practical implementation, the Committee urges that the principle of supplying counsel to the prisoner without adequate means be fully accepted by the Department in approaching the problems of the revocation area. As expressed by Professor Kadish, "it would seem patently at war with the central concept of procedural justice to deny to a person with his liberty at stake the opportunity to hear and meet the specific charge against him with the benefit of counsel."[83] The principle of representation in revocation proceedings has sometimes been challenged on the theory that parole and conditional release are matters of grace, rather than of right, and that, consequently, the parolee's liberty may be terminated by an act of administrative discretion freed from the ordinary requirements of procedural regularity. That the revocation decision requires the exercise of sense and judgment, we should not be disposed to deny. But the judgment is one not to be exercised capriciously or at large. Presumably the revocation decision should advance and be guided by the purposes and policy of the parole laws. If the facts of the prisoner's behavior while on parole are relevant to the revocation decision—and this can scarcely be denied—, it surely follows that the procedures employed by the Board should be adapted to orderly fact-finding. At the minimum this contemplates a procedure capable of developing conflicting version of the facts and of testing the validity of the differing

versions. In a large majority of revocation cases heard by the Board the proceedings are predicated on criminal acts allegedly committed by the prisoner while at liberty on parole.[84] Whether these acts were actually committed by the prisoner must surely be the crucial issue in many revocation decisions. We believe that the effective presentation and preparation of the prisoner's case and the testing of the accusations against him require skills and opportunities rarely possessed by the prisoner and which can be supplied only by the provision of counsel.

Even if we were less persuaded than we are that the provision of counsel in the revocation hearings is of fundamental importance, the recent revisions of the Board's rules would lead us to conclude that, as a matter of equity, counsel should be supplied the prisoner who is financially unable to obtain representation. The Board's rules recognize that the prisoner with adequate means or who is otherwise capable of "arranging" representation, is entitled to make use of the services of counsel at the hearing. We strongly feel that this advantage cannot fairly be confined to those financially able to purchase it and that the situation as it has now developed gives rise to serious inequity.[85]

On the basis of the foregoing, the Committee recommends the following:

The Department should give immediate attention to the problems of fair procedure in parole and mandatory release revocation proceedings. In approaching solution of these problems the Department should accept the principle that such hearings should encompass the elements of orderly fact-finding, including the provision of counsel for prisoners financially unable to retain counsel.

Chapter II

NOTES

1 The history is traced in Beaney, The Right to Counsel in American Courts (1955); Feldman, The Defendant's Rights (1958) 112-115; "The Constitutional Right to Counsel in Federal Courts," 30 Neb. L. Rev. 559 (1951). At common law defense counsels were denied the privilege of full participation in the criminal trial. It was not until 1836 that England afforded full recognition of the defense attorney's role in felony prosecutions. 6 & 7 Wm. IV, c. 114 (1836). A similar provision relating to treason prosecutions was enacted earlier, 7 & 8

Wm. III, c. 111 (1695-6). Against this background, the "counsel" provisions in American constitutions were sometimes understood, not as creating a right in the impoverished accused to demand appointment of counsel, but simply as insinuring that a lawyer retained by defendant would be permitted to participate at the trial in the accused's behalf.

2 1 Stat. 73, 92 (1789).

3 1 Stat. 112, 118 (1790).

4 Before the end of the nineteenth century complaints of denial of counsel in state proceedings had reached the Court. See, *e.g.*, Slocum v. Brush, 140 U. S. 698, 35 L. Ed. 753 (1891).

5 287 U. S. 45, 68-69 (1932).

6 323 U. S. 471, 476 (1945).

7 304 U. S. 458, 463 (1938).

8 A complete and fully accurate description of the situation in the federal courts must take into account the provisions of certain federal statutes and rules of court. These provisions, while important, are largely peripheral and represent in their totality less than a tenative first step in the direction of a system for adequate representation of needy defendants. Thus, Rule 17 (b) of the Federal Rules of Criminal Procedure authorizes the court to order that "a subpoena be issued upon motion or request of an indigent defendant." In cases in which a defense attorney is required to travel to take a deposition, the court by Rule 15 (c) may direct payment of the lawyer's expenses of travel and subsistence when the defendant is unable to bear such expenses. The per diem allowance has recently been raised from $12.00 to $16.00. Section 753 of Title 28, U.S.C., authorizes payment of fees for transcripts furnished "indigent" defendants in criminal cases. Section 1915 of the same Title deals with various aspects of the *in forma pauperis* appeal. The latter section is given careful consideration in Chapter IV of this Report.

9 Note especially the "Resolution on Indigent Representation" unanimously adopted by the Judicial Council of the Ninth Circuit:

"RESOLVED by the Council of the Circuit Judges for the Ninth Circuit, at a meeting held on December 12, 1962, that there is nrgent need for legislation which will establish a means whereby indigent persons who are accused of crime can have assigned to them counsel who will be compensated for

their time and effort on behalf of such persons, thus assuring to such indigent persons representation by counsel who are both able and experienced in the handling of the defense of accused persons.

"Various means have been suggested for the accomplishment of this necessary result, including, but not limited to, the establishment in those districts where the volume of business warrants it, of the office of public defender, or the allocation of funds to a legal aid or comparable no-profit organization having a staff of attorneys competent to do the work, or the provision of a fund which can be used by the judges to compensate individually appointed attorneys on a case by case basis. This Council is not committed to any one of the foregoing methods, but is firmly of the opinion, in the light of experience in the Ninth Circuit, that the prompt provision of a means for compensating counsel for indigent defendants is of the utmost importance to the proper administration of criminal justice in the United States Courts. We therefore urge that the Congress, at the earliest possible moment, adopt legislation which will enable the United States Courts to assign to the defense of persons accused of crime adequately compensated counsel. We further suggest that some provision be made for the employment, where necessary, of investigative assistants to appointed counsel, and for the payment of other necessary expenses of preparation for trial."

10 "We approve in principle the appointment of a public defender where the amount of criminal business of a district court justifies the appointment. In other districts the district judge before whom a criminal case is pending should appoint counsel for indigent defendants, unless such assistance is declined by the defendant. In exceptional cases involving a great amount of time and effort on the part of counsel so assigned, suitable provision should be made for compensation for such service, to be fixed by the court and to be a charge against the United States." Report of the Judicial Conference (September, 1937) pp. 8-9.

11 Consult the testimony of the Honorable Warren Olney III before the House Committee on the Judiciary, Hearings on H.R. 4185 (86th Cong., 1st Sess., May 6, 1959) pp. 23-26. See also, Report of the Proceedings of the Judicial Conference of the United States (Special Session, March 10-11, 1960) p. 401.

12 Celler, "Federal Legislative Proposals To Supply Paid Counsel to Indigent Persons Accused of Crime," 45 Minn. L. Rev. 697, 700 (1961).

13 House Committee on the Judiciary, Hearings on H.R. 4185 (86th Cong., 1st Sess., May 6, 1959) pp. 27-28.

14 See Senate Report No. 2261 (87th Cong. 2d Sess., October 2, 1962) p. 3.

15 See, *e.g.*, House Committee on the Judiciary, Hearings on H.R. 4185 (86th Cong., 1st Sess., May 6 and 14, 1959).

16 Congressional Record (87th Cong., 2d Sess., October 4, 1962) p. 21079.

17 Equal Justice for the Accused (Assoc. of the Bar of the City of New York and Nat. Legal Aid and Defender Assoc., 1959) p. 38.

18 1959 Report, p. 239.

19 See statement of Senator Keating, Cong. Rec. (87th Cong., 2d Sess., October 4, 1962) p. 21079.

20 See statement of Hon. Warren Olney III, House Committee on the Judiciary, Hearings on H.R. 4185 (86th Cong., 1st Sess., May 6, 1959) p. 30.

21 See Appendix I.

22 1959 Report, p. 239.

23 Id. at 239-240.

24 See Appendix I.

25 See Note 8, *supra*.

26 The Committee is informed that about 85% of the time spent in professional practice by one of the attorneys is devoted to cases of impoverished defendants in the District Court.

27 Interviews with several of the defense counsel receiving appointments in the Northern District of Illinois disclosed no more than one or two instances of the appointed lawyer's continuing representation through the appellate stage.

28 See note 21, *supra*.

29 Information derived from a report of the Committee by the Vera Foundation, "The Administration of Bail in the Southern District of New York" (September 6, 1961).

30 See Pollock, "Equal Justice in Practice," 45 Minn. L. Rev. 737, 749 *et. seq.* (1961); Note, "Legal Aid to Indigent Criminal Defendants in Philadelphia and New Jersey," 107 U. Pa. L. Rev. 812, 836 *et. seq.* (1959).

31 Letter of Honorable J. Cullen Ganey to James M. Marsh, Esq., dated July 11, 1961.

32 74 Stat. 229-231 (1960).

33 Section 4, *Id.* at 230.

34 Annual Report, 1961-1962 (Legal Aid Agency D.C.) 3.

35 *Id.* at Appendix

36 *Id.* at 4-5, 13.

37 *Id.* at 2-3.

38 *Id.* at 11.

39 Section 3, 74 Stat. 229 (1960).

40 Equal Justice for the Accused (1959) p. 60.

41 Rule 5 (c) of the Federal Rules of Criminal Procedure makes clear that important services may be performed by the lawyer in the preliminary examination proceedings: "If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf."

42 Rule 20 on its face reveals the relevance of representation of counsel in the transfer proceedings: "A defendant arrested in a district other than that in which the indictment or information is pending against him may state in writing, after receiving a copy of the indictment or information, that he wishes to plead guilty or *nolo contendere*, to waive trial in the district in which the indictment or information is pending and to consent to disposition of the case in the district in which he was arrested, subject to the approval of the United States attorney for each district. . . . If after the proceeding has been transferred the defendant pleads not guilty, the clerk shall return the papers to the court in which the prosecution was commenced and the proceeding shall be restored to the docket of that court. The defendant's statement shall not be used against him unless he was represented by counsel when it was made.

43 "The Representation of Indigent Criminal Defendants in the Federal District Courts," 76 Harv. L. Rev. 579, 596 (1963).

44 *Id.* at 613.

45 It should not be inferred that all such services are provided in the operation of the Legal Aid Agency in the District of Columbia. The Committee is informed by some lawyers with experience in that system that the problem of providing the defense with the services of persons capable of giving expert testimony, for example, remains to be solved.

46 These difficulties are well illustrated in the very recent case in the Court of Appeals for the District of Columbia Circuit, Greenwell v. United States, No. 17121 (January 17,1963).

47 See, *e.g.*, Criminal Justice in Cleveland (Pound and Frankfurter, dirs., 1922) 310-311.

48 Washington Evening Star (November 20, 1962) p. B-1, col. 8.

49 *Cf.* Lord Parker, "The Development of Legal Aid in England since 1949," 48 A.B.A. Jour. 1029 (1962): "However, there are many factors which have contributed to making a largely voluntary system out-worn and, indeed, impracticable in the twentieth century. Already, before the Second World War, the machinery for providing legal aid on a semi-voluntary basis was creaking, and, by the end of the war, it had become apparent in England that a thorough inquiry was needed with a view to finding a more rational and workable system."

49 *Cf.* Lord Parker, "The Development of Legal Aid in England programs in the United States, see Equal Justice for the Accused (Comm. of the Assoc. of the Bar of the City of N.Y. and the Nat. Legal Aid Assoc., 1959).

51 Statistics of Legal Aid Work in the United States and Canada (1960) 1.

52 *Id.* at 3.

53 See *e.g.*, Ill. Rev. Stat. c. 38, secs. 730 and 730a.

54 The Legal Aid Act for Scotland, 1949, authorizes the establishment of a system similar to that in England. The scheme, however, has not as yet been placed in operation.

55 See discussion in Jacoby, "Legal Aid to the Poor," 53 Harv. L. Rev. 940, 942-944 (1940).

56 Much of the information contained in the following paragraphs is derived from a memorandum prepared by Samuel Dash, Esq., of Philadelphia. The Committee gratefully acknowledges its obligations to Mr. Dash.

57 20 & 21 Geo. 5, c. 32 (1930).

58 7 Edw. VII, c. 23 (1907).

59 12 & 13 Geo. 6 c. 51 (1949).

60 *Op. cit. supra*, note 49, at 1030. Cf. Jackson, The Machinery of Justice in England (3d ed. 1960) 130-135.

61 Note comments on the Scandanavian practice in Frank and Frank, Not Guilty (1957) 87.

62 "Those who represent the indigent are better situated than any other group in society to report on what is going on in the largely invisible world of criminal procedure, particularly in the police station, in the magistrates' court and in the office of the prosecutor. Their accumulation of information about the criminal process can have an incalculably beneficial effect upon legislative reform." A. Goldstein, Book Review, 28 U. Chi. L. Rev. 772, 773 (1961).

63 See, *e.g.* Dimock, "The Public Defender: A Step Towards a Police State?" 42 A.B.A. Jour. 219 (1956).

64 See, *e.g.*, Cuff, "Public Defender System: The Los Angeles Story," 45 Minn. L. Rev. 715 (1961); David, "Institutional or Private Counsel: A Judge's View of the Public Defender System," 45 Minn. L. Rev. 753 (1961).

65 Thus, S. 655, 87th Cong., 1st Sess., would have limited the "aggregate amount expended for compensation and reimbursement of such counsel in any district" to $5,000 in any fiscal year.

66 Equal Justice for the Accused (1959) 60.

67 See Crooker v. California, 357 U. S. 433 (1958); Cicenia v. LaGay, 357 U.S. 504 (1958). See also Beaney, "Right to Counsel before Arraignment," 45 Minn. L. Rev. 771 (1961).

68 Italics supplied.

69 Powell v. Alabama, 287 U. S. 45, 57 (1932).

70 See, *e.g.*, Frank and Frank, Not Guilty (1957) 89.

71 All evidence suggests that the $15 hourly rate is conservative and considerably below that which is charged by retained counsel for similar services. No member of the Committee believes the figure is genuinely compensatory. It is believed, however, to represent a reasonable accomodation in view of the urgent need and public importance of lawyer services in this area. The Manual of Fees and Charges (Ill. State Bar

Assoc., July, 1962), widely consulted in Illinois, suggests *minimum* fees of $25.00 per hour for office consultation, the same rate for general office work, $300 for the first day of a criminal trial in federal court and $275 for each subsequent day, $150 per day or part of a day for preliminary hearings in a felony case, and $30 per hour for such items as preparation prior to preliminary hearing. Id. at 11, 41.

We are informed that in Philadelphia, office consultation in cases of the kind considered here is billed at a rate not less than $25 per hour, and for experienced counsel the rate may range from $25 to $40 per hour. On a daily basis typical fees are said to range from $200 to $350, depending on the nature of the problem and the services required.

The Schedule of Suggested Fees of the Alameda County (California) Bar Association (adopted September 6, 1962) indicates the following *minimum* charges:

COURT MATTERS

United States District Court

Criminal:	
Appearance and plea, felony	$250.00
(This fee covers the first two appearances)	
For each additional appearance, add	50.00
Trial per diem	250.00

OFFICE MATTERS

Consultation and Research:	
(a) Office visit	
Only service rendered under 30 min.	$10.00
Over 30 minutes, per hour	25.00
(b) Home visit including travel time per hour	25.00
(c) Office work only, per hour	25.00

For further consideration see American Bar Association, Special Committee on Economics of Law Practice, The 1958 Lawyer and His 1938 Dollar (Economics of Law Practice, Series No. 1, 1958). See also, "The Representation of Indigent Criminal Defendants in Federal District Courts," 76 Harv. L. Rev. 579, 612 (1963): "Less than one-eighth of the judges responding to the questionnaire felt that $35 [per day] was sufficient, and more than half thought that $50 was inadequate. Thus of the maximum figures that have been suggested, $100 per day seems the most satisfactory."

72 28 USC §§2241 (c), 2254.

73 Reitz, "Federal Habeas Corpus: Postconviction Remedy for State Prisoners," 108 U. Pa. L. Rev. 461, 478 (1960) for a summary of the data.

74 1960 Report, p. 231.

75 See Reitz, *loc. cit. supra*, note 73.

76 One example is afforded by the case of Leyra v. Denno, 347 U.S. 556 (1954).

77 28 USC §2255. See Boskey, "The Right to Counsel in Appellate Proceedings," 45 Minn. L. Rev. 783, 799-801 (1961).

78 See Escoe v. Zerbst, 295 U.S. 490 (1935).

79 Annual Report, U.S. Board of Parole, 1960-61, p. 17.

80 Glen v. Reed, 289 F. 2d 462 (D.C. Cir. 1961); Reed v. Butterworth, 297 F. 2d 776 (D.C. Cir. 1961). And see Fleming v. Tate, 156 F. 2d 848 (D.C. Cir. 1946).

81 F.R. (August 24, 1962) 8487-8491.

82 A large number of cases are pending disposition in the Court of Appeals, inculding, among others: No. 17,041, Neiswenter v. Chappell; No. 17,042, Fitzpatrick v. Chappell; No. 17,043, Williamson v. Chappell; No. 17,059, Jamison v. Chappell.

83 "The Advocate and the Expert—Counsel in the Peno-Correctional Process," 45 Minn. L. Rev. 803, 833 (1961).

84 In 1961 approximately 80% of the parole violation warrants charged commission of a new crime. Annual Report, U.S. Board of Parole, 1960-61. p. 17.

85 *Cf.* Griffin v. Illinois, 351 U.S. 12 (1956).

Chapter III

BAIL AND PRE-TRIAL RELEASE

The purpose of this chapter is to survey federal pre-trial release practices. A complete study would encompass more than the impact of federal bail administration on the financially disadvantaged defendant. Nevertheless, consideration of the problems of poverty in this area is peculiarly appropriate, for in probably no other important aspect of judicial administration are the rights and privileges of persons predicated so frankly and directly on the financial resources the individual is able to command. That modern bail administration places the accused with limited means at sharp disadvantage and that these disadvantages proceed from the express assumptions of the system, can scarcely be doubted.

The problems of pre-trial release arise from the tension of competing considerations. At stake in the determination whether to release a person accused of crime from custody prior to trial is the value of individual liberty. Our system of justice assumes that only in exceptional situations, and then only so long as necessity requires, may the power of government be employed to deprive persons of their liberty without the formal processes of criminal trial or plea of guilty. But the interest in individual liberty in cases of pre-trial release involves more than a concern that persons "not be punished before conviction," important as this concern undoubtedly is. There is persuasive evidence that a person held in custody in the interval between arrest and trial may thereby be deprived of opportunity to make adequate defense to the charges against him. The concern for pre-trial liberty therefore encompasses interests in individual justice and the viability of the adversary system, to which this Report has directed attention in earlier chapters.

On the other hand, it is apparent that our system of criminal justice could not tolerate trials *in absentia*. Reasonable assurance that persons accused of crime will appear for trial at the stipulated times and places is essential to the performance of even its most basic and rudimentary functions. The overriding problem in the administration of pre-trial release is the reconciliation of these various values with minimum of loss to each. Bail is the device principally employed by American systems of justice to govern the release of accused persons prior to trial. It relies primarily on the assumption that threat of financial deprivation will induce the accused to appear for trial. There is reason to assert that bail administration in the United States often fails to

attain satisfactory levels of efficiency and rationality and that, in general, it fails adequately to accommodate the competing values at stake. These problems of pre-trial release are by no means peculiar to the federal courts. They are common to all American systems of criminal justice; indeed, many are encountered in more aggravated forms in the states. The Committee is persuaded that these problems are among the most important in criminal-law administration and that their solution warrants close attention and serious concern.

1. *The Theory of the Right to Bail in Federal Law.*

The origins of modern bail practices are lost in history and antedate the development of the English common law.[1] Something like the modern concept of bail may be discerned in the practices of the medieval English sheriff who, on occasion, allowed persons accused of crime to be released pending trial after accepting the oaths of responsible persons to stand as sureties for the accused.[2] These purely local arrangements between sheriff and the accused were systematized in the thirteenth century by the passage of the statute of Westminister,[3] and modern English practice developed thereafter.

The right to bail was first given official recognition in this country by the Massachusetts Body of Liberties[4] in 1641, which presumably supplied the basis for the provision of the Eigth Amendment: "Excessive bail shall not be required. . . ." The language of the Constitution does not, except by implication, define the scope of the bail right but only provides protection against bails set at excessive figures. Prior to the ratification of the Bill of Rights, however, Congress had provided in the Judiciary Act of 1789 as follows:

> ". . . upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the supreme or a circuit court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offense, and of the evidence and usages of law."[5]

Thus, as remarked by the Supreme Court of the United States, from the beginnings of the nation's history "federal law has unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail."[6] This historical understanding is reflected in the present provisions of Rule 46(a)(1) of the Federal Rules of Criminal Procedure:

"A person arrested for an offense not punishable by death shall be admitted to bail. A person arrested for an offense punishable by death may be admitted to bail by any court or judge authorized by law to do so in the exercise of discretion, giving due weight to the evidence and to the nature and circumstances of the offense."

The legal theory of the bail right in federal law can thus be clearly defined. Release of persons accused of crime pending trial, at least in non-capital cases, is to be the norm. All such persons are entitled as of right to be admitted to bail; and bail should be set at levels calculated to provide reasonable assurance of the accused's presence at the trial, not to insure his retention in custody.[7] Indeed, by definition, excessive bail is that which is set at levels above those required to assure defendant's appearance for trial. Unlike the law of certain other countries,[8] the sole relevant consideration governing the setting of bail in the federal law is that of assuring the defendant's presence at trial. Bail-setting does not properly encompass such speculations as the possibility of the accused's committing crimes while at liberty on bail or the dangers of the defendant's suppressing evidence or tampering with witnesses. Certainly it is not contemplated that bail will be employed as a device to insure pre-trial confinement as a punitive or treatment measure.

That the legal theory of the bail right is not always respected in practice is strongly suggested by studies of state systems of justice operating under legal principles similar or identical to those recognized in federal law.[9] It is suggested by these studies that bail determinations are sometimes influenced by such considerations as the accused's assumed danger to the community or the availability of pre-trial confinement as a punitive weapon to give the accused "a taste of jail" before releasing him on probation or making other disposition of his case. Such *sub rosa* and extra legal uses of the bail-setting power are encouraged and made possible by the fact that the great bulk of bail decisions are not subjected to the supervision of appellate courts. These conditions have led to the suggestion that the quality of American bail administration might be enhanced by frank recognition, as a matter of legal theory, that in some non-capital cases no bail right should be recognized and by providing speedy and routine procedures to review such decisions at the appellate level.[10] It is argued that these measures might encourage candid consideration of factors now given effect only *sub rosa*, and might thereby contribute to a more rational, and even more liberal, pre-trial release policy than now sometimes obtains.[11]

The Committee offers no recommendations on this matter and is not prepared to present an evaluation of its merits. The question poses the fundamental issue of what, in legal contemplation, the bail right ought to be. Although the administration of bail has long been a source of complaint by observers of American criminal justice,[12] there has until recently been comparatively little serious thought directed to the assumptions on which it rests or even any consistent effort to describe the practices actually pursued.[13] *We believe that recent efforts to re-examine and re-evaluate the institution of bail are highly important and that the Department of Justice should participate actively in this process of re-appraisal.* For the purposes at hand, however, the Committee proposes to direct its attention principally to what are perhaps the most immediate and pressing problems of pre-trial release: the impact of the practices on the economically disadvantaged and the means by which the problems so produced may be eliminated or lessened.

2. *Present Practices in the Federal Courts and Their Consequences.*

Most initial bail determinations pending trial in the federal courts are made by the United States Commissioners. When, after apprehension, the accused is first brought before a judge, as in cases in which an arrest is made on a bench warrant following return of an indictment, the initial bail decision is made by the judge. A sampling of cases in the Southern District of New York indicates that, in the three-year period 1958-1960, initial bail determinations were made by the commissioners in over three-quarters of the cases.[14]

Persons are admitted to bail and the amount of bail is set at a hearing. One permitted to give bail is required to execute a personal bond for his appearance and to supply a surety bond, cash, or other acceptable securities. In some situations defendants are "released on their own recognizances" upon executing a personal bond in the bail amount without offering additional financial securities. A statute enacted by Congress in 1954 makes criminal the failure of any person admitted to bail to surrender himself within thirty days of forfeiture of bail.[15]

a. *The Bail Hearing.*

The hearing before commissioner or judge at which the amount of bail is determined and security requirements are established is an obviously crucial stage in the administration of bail. Bailsetting involves a prophecy as to one aspect of the accused's future behavior. The difficult task of judge or commis-

sioner is to establish bail requirements which, at the same time, afford reasonable assurance that defendant will be present at the criminal trial and intrude no further than necessary into the accused's liberty before conviction. It is patent that the satisfactory performance of such a function requires both sound judgment and adequate data upon which to base judgment. The criteria for bail determinations provided by Rule 46(c) of the Federal Rules of Criminal Procedure make this point abundantly clear:

> "If the defendant is admitted to bail, the amount thereof shall be such as in the judgment of the commissioner or the court or judge or justice will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant."

Consideration of such factors as the "financial ability of the defendant" and his "character" presupposes a fact-finding process sufficient to produce reliable information relating to the defendant's prior criminal record, if any, his employment situation, his family status, his ties to the community, and more.

It is disturbing to discover, therefore, that American bail administration largely fails to provide the bail-setting authority with relevant factual data indispensable to sound bail decisions.[16] This failure in the fact-finding process transforms what must, at best, be a difficult task into one impossible of satisfactory performance. In many instances, both in state and federal courts, virtually the only pertinent facts supporting the initial bail decision are the charge upon which the defendant was arrested and such other circumstances surrounding commission of the alleged offense as may be communicated by the prosecuting attorney. The consequence is that many highly relevant considerations are not adverted to or, at most, are given insufficient weight. The result may be dangerous, not only to the liberty of the accused, but, on occasion, to the security of the criminal process. The absence of a proper factual basis for decision may also encourage consideration of irrelevant factors, thereby leading to improper and *sub rosa* uses of the bail-setting power.[17]

Except in a few federal courts, like those in the Northern District of Illinois and the District of Columbia, counsel is never or rarely assigned to the financially incapacitated accused by the United States Commissioner. Accordingly, bail determinations affecting such persons are made without professional representation and protection of the defendant's interests. Nor are persons financially unable to retain lawyers ordinarily represented by assigned counsel when initial bail determinations are made by judges. Of equal or even greater importance is the fact that in cases of adult offenders there are few investigative or fact-finding mechanisms available to commissioner or judge to secure reliable information relevant to the bail decision. Except in cases of juveniles, the probation service is not called upon to supply reports. The chief sources of information are likely to be uncorroborated statements of the accused, who may not possess intelligent understanding of the proceedings, and the representations of the prosecuting officer who, at the time of the initial bail setting, may himself lack extensive information concerning the offense or the character and record of the accused.

The sometimes perfunctory nature of the bail-setting process is accompanied by other disadvantages. Thus there is reason to believe that the unrepresented accused does not always gain from the bail hearing a satisfactory understanding of the bail obligation. The Committee is informed that in many districts the defendant admitted to bail is ordinarily not warned of the criminal consequences of bail jumping, thereby depriving the system of such deterrent effects as the statute defining that offense might be expected to produce.[18]

That the quality of bail decisions may be materially improved by the provision of appropriate fact-finding mechanisms is strongly indicated by the experience already gained by the Manhattan Bail Project, conducted by the Vera Foundation in the state courts of New York in conjunction with the New York University Law School and the Institute of Judicial Administration.[19] The procedures there employed are essentially simple. Adult prisoners brought to the Magistrates' Felony Court are interviewed by a group of law students from the evening division of New York University. Information is obtained on a variety of factors relevant to the prisoner's eligibility for pre-trial release, including his place of residence, employment, relatives living in New York City, criminal record, and period of residence in the city. With the prisoner's consent, his statements are verified, principally by phone but occasionally by sending a student into the field for further investigation. Cases are identified in which the information collected suggests that the accused may safely be released without requiring a surety bond or other securities. In some such cases a recommendation for release is made to the courts. Others are placed in a control group, maintained to test the efficacy of the program; and in these no recommendations

are made. In addition, letters of notification are sent to persons released by the court explaining when and where they are obliged to appear for trial. Of the first 200 cases in which information and recommendations for release were offered the courts, the court granted pre-trial liberty in 120 instances. Of the first 200 cases in the control group—those in which the Foundation was prepared to recommend release but refrained from doing so—35 were granted liberty by the court. Of the first 200 cases in which pre-trial liberty was granted only two failed to appear.[20]

The Committee commends these activities of the Vera Foundation. The results of this experience go far to demonstrate both the importance of the provision of adequate factual data to those making bail decisions and the feasibility of establishing fact-finding and verification processes in the context of bail administration. We believe that the services being performed by the student workers should be institutionalized and made part of the routine administration of criminal justice in both state and federal courts.[21] Recommendations to this end are considered at a later point in this chapter.

It is, of course, true that initial bail decisions are subject to reconsideration in response to motions for reduction of bail. Such motions are sometimes made by assigned counsel. Moreover, the federal statutes expressly provide authority to require additional bail from an accused already admitted to bail, on a finding that he is "about to abscond, and that his bail is insufficient."[22] The Committee is persuaded, however, that provision for reconsideration of the bail amount affords no basis for complacency in viewing the problems associated with initial bail determinations. First, a reduction in bail may be ordered only after a considerable period of detention and may not, therefore, save the accused the disadvantages of deprivation of liberty at a crucial stage in the criminal process. Second, orders reducing bail may be entered less frequently in some districts than is sometimes supposed. The Committee does not have reliable national data on this matter. A study of bail administration in the Southern District of New York over a three-year period, however, indicated that in less than 4% of the cases was bail set by a commissioner later reduced by a judge.[23] It appears, therefore, that the initial bail decision is of crucial importance in the administration of pre-trial release and that improvement of procedures at this stage is urgently required.

b. *Duration of Pre-Trial Detention.*

Before consideration is given to the causes and consequences

of failure to make bail, attention should be directed to the length of pre-trial detention in the federal courts in those cases in which it occurs.

According to statistics published by the Federal Bureau of Prisons for the fiscal year ending June 30, 1960, there were 23,811 instances of persons held in detention pending trial.[24] The average period of detention from arrest to disposition of the case by dismissal, acquittal, probation, sentence, or the like, was 25.3 days. In particular districts the average period of detention of offenders aged 22 years and over ranged from a low of eleven days[25] to a high of 49 days.[26] Since in a large majority of the criminal cases the accused pleaded guilty,[27] it may be assumed that the larger part of the detention periods occurred before defendants were brought to court for trial and disposition of their cases.

The Committee has collected other evidence relating to the duration of pre-trial detention in the federal courts. A questionnaire relating to this and other matters was submitted to the United States Attorney in each of the federal districts. Of the 63 districts responding, only nine reported that in the three-year period 1958-60 no defendants were detained for as long as three months before trial. One district reported 41 persons detained at least three months. The longest periods of pre-trial detention in the three-year period reported in the 63 districts ranged from three weeks to over one year.

Careful evaluation of the statistics cited above is required if erroneous conclusions are to be avoided. In most cases special circumstances explain the occurrence of unusually prolonged periods of pre-trial detention, such as the necessity of subjecting defendants to psychiatric examinations prior to trial.[28] Indeed, the Committee has been impressed by the efforts made and the concern expressed by United States Attorneys and federal judges to bring "jail cases" to trial with a minimum of delay. In many districts defendants who fail to make bail are often brought to trial within two weeks or even shorter periods. It is our impression that, in general, these problems are handled more effectively in the federal courts than is often true in state systems of criminal justice.[29] Moreover, it should be noted that the objective of speedy trial must be accomodated to the necessity of providing the accused adequate time for pre-trial preparation.

Nevertheless, the duration of pre-trial restraint of those unable to make bail presents problems to the federal system of criminal justice. It appears that efforts to reduce the period of

pre-trial detention have generally proved most successful in populous districts in which the federal grand jury meets at frequent intervals. Particularly acute problems may, however, arise in districts in which the court sits in several different locations and in which prisoners may therefore be confined at places geographically remote from that at which the court is in session. A problem of prolonged pre-trial detention may also confront the accused unable to make bail in a case involving multiple defendants, some of whom are released on bail.

Although we believe the federal courts have generally exerted conscientious efforts to avoid extended periods of pre-trial detention, the considerations marshalled in later sections of this chapter demonstrate that any substantial deprivation of liberty at the crucial pre-trial stage may place the accused at serious disadvantage. Moreover, the evidence adduced leads to the conclusion that extended periods of pre-trial detention in the federal system are not as infrequent as may sometimes be supposed.

c. *Financial Resources of the Defendant as a Determinant of Pre-Trial Release.*

Any system of pre-trial release that relies exclusively or primarily on financial incentives to induce appearance of the accused at trial must inevitably operate to the disadvantage of the accused who possesses limited financial resources to pledge for this purpose. Thus to a significant degree the ultimate determinant of pre-trial release are the means which the accused is able to command. The consequence is that for a significant fraction of the accused population—those who possess inadequate means—the administration of the constitutional "right to bail" is itself the principal obstacle to the enjoyment of liberty pending trial.

Every detailed study of bail administration in the United States clearly delineates the relationship between the financial status of the accused and the enjoyment of the bail right. This pattern is made apparent by Table IV in Appendix I, which reports data collected in the Committee's Four-District Survey. In two of the four districts, over half of those required to provide financial security as a condition to pre-trial releases were unable to do so when bail was set at the $1,501-$2,500 levels. In one district over three-quarters of the accused failed to make bail even at the lowest levels. In the fourth, over 50% failure did not occur until bail was set between $5,001 and $10,000. A sampling of cases from a three-year period in the Southern District of New

York shows that over half of the accused were denied pre-trial liberty when bail was set at the $501-$1,500 levels.[30]

Perhaps even more startling are the data indicating inability of large numbers of the accused to post a surety bond or provide other sufficient security when bail requirements are set at the most modest levels. In the four districts encompassed in the Committee's survey the following percentages represent those unable to meet bail requirements of $500 or less: 29, 78, 36, and 11. The percentages at the $501-$1,500 level were 60, 76, 37, and 27. The study of the Southern District of New York reveals 36% of the accused unable to supply bail when set at $500 or below.[31] These results are consistent with studies made of state systems of criminal justice.[32] It may be assumed that a similar pattern obtains in other federal districts for which the Committee has not collected data.[32]

It is thus clear that a large proportion of accused persons in the federal courts are unable to meet the bail requirements imposed by commissioner or judge,[34] and it appears uncontestable that a principal factor in this failure is the financial inability of accused persons.[35] Certainly in most, though perhaps not all, cases in which bail is set at the lower levels, the decision reflects a judgment of the bail-setting authority that the accused can safely be released pending trial if only the most modest inducements for appearance at trial are provided. This judgment is, of course, not binding on the bail bondsman, however, who may refuse to supply a surety bond for the accused on his own estimate of the risk involved or for any other reason that may appear sufficient to him. In some cases the accused may not be able to pay the premium on the bond, but in others the defendant fails because of inability to provide such collateral security as the bondsman may require. The Committee does not have reliable data on how frequently collateral security is demanded, but we believe the practice is not uncommon. It follows, therefore, that the critical decision as to whether an accused person is able to secure the advantages of pre-trial release is often one not made in court but in the office of a private businessman, the bail bondsman. Given the crucial role of the bail bondsman in current federal pre-release practices, it is clear that he is engaged in a business "affected by a public interest." So long as the bondsman performs such functions, the government is under clear obligation to insure that his practices are consistent with the important objectives of public policy in the area of pre-trial release. *Accordingly, the Committee recommends that the Department of Justice*

undertake or sponsor a careful inquiry into existing practices of bail bondsmen doing business in the federal courts with a view of discovering in detail what those practices are, whether they properly advance the policy of pre-trial release of accused persons, and whether additional legislation is required to regulate and supervise the business of supplying bonds to accused persons in the federal courts.

But the concern aroused by a system placing primary reliance on financial incentives to induce appearance encompasses more than its tendency to deny pre-trial release to persons of inadequate means. It may fairly be asked whether financial incentives constitute the most effective device to secure the presence of persons who succeed in obtaining liberty prior to trial. The Committee is aware of no study that carefully examines the causes of bail forfeitures. Such an inquiry could be well justified. *A priori*, it would appear likely that the accused most disposed to jump bail, such as the defendant involved in organized criminality, might be the accused least deterred by the prospect of bail forfeiture.[36] If this be true, the system of financial incentives fails, not only in insuring pre-trial liberty to those entitled to that privilege, but in providing the best assurance that the accused at liberty will be present for trial.

d. *The Consequences of Pre-Trial Detention.*

(1) *Punitive Consequences of Detention.* Among the clearest and least contestable consequences of financial inability to meet bail requirements is the deprivation of the liberty of the accused before his guilt has been established through the processes of a criminal trial. The right to be free from restraint at the hands of government until it has proved a criminal violation is expressed in the Anglo-American law by its recognition of the "presumption of innocence." The right to freedom before formal proof of guilt is, of course, not absolute, as is illustrated by the legal authority to arrest persons believed "on reasonable grounds" to have committed criminal offenses. But limitations on liberty prior to conviction are narrowly drawn and are governed by the principle of necessity. The viability of the presumption if innocence is threatened by a conception of "necessity" founded on the lack of means of the accused and a failure of ingenuity on the part of government to devise a system of non-pecuniary inducements to insure the presence of accused persons at trial.

Nor is the deprivation of liberty resulting from pre-trial detention of the accused merely one of theoretical concern. As is demonstrated in an earlier section of this chapter, the duration

of detention in many cases is not insignificant. Moreover, attention needs to be directed to the conditions under which accused persons are held. The situation widely prevailing in our jails and detention facilities has not sufficiently engaged the attention and conscience of the American people.[37] It is characterized by conditions of overcrowding, bad sanitation, indiscriminate mixing of offenders of all degrees of sophistication, lack of adequate recreational facilities, and much more. Nor should it be assumed that the conditions to which the accused held in custody pending trial is subjected are generally better. It is a startling fact that, in the country as a whole, American correctional practice has not yet succeeded in drawing the most elementary distinctions between the accused and the sentenced offender. In many institutions the unconvicted accused is provided the same facilities and treatment as that afforded the entire jail population.[38] What is even more remarkable is that in other institutions the conditions of imprisonment sustained by the accused are more rigorous and less desirable than those provided the sentenced offender. Commenting on the situation observed in a study of pre-trial release in the state courts of New York, Professor Foote has remarked: "Indeed, the most ironic finding in the whole study is the revelation that accused persons, whom our law presumes to be innocent and who are not to be punished, are confined pending trial under conditions which are more oppressive and restrictive than those applied to convicted and sentenced felons."[39]

Despite vigorous and persistent efforts of the Federal Bureau of Prisons, the conditions identified above are descriptive of those to which persons accused of federal, as well as state, crimes are often subjected. Mr. James V. Bennett, Director of the Federal Bureau, has stated: "The [conditions] of pre-trial imprisonment continue to be deficient in many areas, seriously so in a good many. As you know, we contract with local institutions throughout the country to provide detention for persons charged with Federal crimes. Out of more than 3200 county jails in the country, we use about 700. But even these in some sections of the country are substandard, cause many problems, and are a constant source of worry to me."[40]

It is apparent that the problems described above are not obviated by the fact that in some cases a period of pre-trial detention may be taken into account by the judge in determining the length of sentence to be imposed on the convicted offender.[41] Not only does the observation fail to take into account the fact, developed in later portions of this chapter, that pre-trial deten-

tion occurs at a crucial stage in the proceedings and may adversely affect the ability of the defendant to make an adequate defense to the charges against him, but it has no relevance for the accused who is ultimately acquitted or whose case is dismissed.[42] Moreover, it should be observed that pre-trial detention is expensive and, when avoidable, places unnecessary demands on funds urgently needed for other correctional purposes. The problems of expense and overcrowding of facilities produced by the detention of persons awaiting trial have reached critical proportions in some localities.[43] We are informed that in a three-year period the average daily cost for pre-trial detention of men in the Southern District of New York was $6.19 per person. In the same period the costs were $7.36 per day for the custody of persons accused of federal crimes in the New York City House of Detention for Women.[44]

(2) *Consequences of Pre-Trial Detention in the Defense and Disposition of Criminal Cases.* The adverse effects of pre-trial detention go beyond those resulting from the loss of liberty *per se*, or from the hardships and inconveniences associated with confinement in custodial institutions. The Committee is persuaded that the administration of bail operates to create obstacles to the maintenance of an adequate defense by accused persons of limited means and, on occasion, may adversely affect the sentence imposed or other dispositions made when the defendant pleads guilty or is convicted after trial of a criminal offense. Consequences so serious must be of concern to a system dedicated to the quest for justice and to the advancement of the public interest through the full and proper operation of the adversary system.

First,[45] it should be observed that a system of pre-trial release that requires extensive use of the surety bond may impose hardships even on the defendant of limited means able to make bail. Funds expended on bond premiums are not recoverable, and are, therefore, not available to pay counsel fees and other expenses of criminal defense. Moneys urgently required to establish the defendant's case are thereby diverted to the purchase of pre-trial liberty.

Of much greater significance, however, are the problems created for the accused unable, because of lack of resources, to pay the costs of the bond or to pledge the collateral security required by the bail bondsman. Pre-trial detention almost invariably results in termination of income, and often in loss of employment, at a time when unusual and urgent demands on the resources of the accused are being made. The consequences are

that the defendant is deprived of funds that might contribute to the costs of defense and is rendered incapable of providing support for his family and his dependents. The effects of pre-trial detention may be felt for a period long after disposition of the case, even by the accused who is acquitted or whose case is dismissed. If arrest and detention result in loss of a job, new employment may not be readily available. In any event, loss of wages in the period of detention can rarely be recovered.

But the most serious losses sustained by the detained accused may not be of a pecuniary character. Almost inevitably an accused unable to meet bail requirements will lack resources to finance an adequate pre-trial investigation of his case. If witnesses are to be located, interviewed, and brought to the attention of counsel, these functions must performed, if at all, by the accused, himself. Confinement of the defendant in the period leading up to trial may thus prevent adequate preparation for trial. Nor are these problems wholly solved by a system of representation which includes investigative services, of the sort discussed and recommended in Chapter II of this Report. We are told by experienced defense counsel that in some cases it is only the accused who can locate and induce reluctant witnesses to come forward. In any event, it may be assumed that the assistance of the accused might often importantly supplement such investigatory services as are made available to the defense.

Pre-trial detention may interfere with the making of an adequate defense in other ways. It often impedes the lawyer's contacts with his client. Detention facilities are frequently located at places remote from the attorney's office, thereby imposing burdens of time and travel on the lawyer engaging in necessary consultation with his client. Moreover, the facilities available for interviewing in many jails are not conducive to effective consultation. In some districts the marshal, on request, will transport the accused from the jail to court house for purposes of pre-trial consultation with his lawyer. But the procedure is cumbersome and the results are far from optimum.

These considerations lead the Committee to the conclusion that not infrequently pre-trial detention of the accused seriously inhibits the maintenance of an adequate defense.[46] Defendant and his counsel, aware that a full-scale contest on the issue of guilt cannot effectively be made, may be induced to enter a plea of guilty. In those instances in which a decision is made to go to trial, the challenge to the prosecution's case is rendered less effective than the merits of the defense might otherwise make possible. Moreover, it may be expected that in at least some cases

the fact of pre-trial detention may affect the court's disposition of the case adversely to defendant's interests. One would assume, for example, that a defendant who has been at liberty during the pendency of his prosecution and has been able to maintain his employment and his family relationships may be regarded a more favorable prospect for probation than would otherwise be true. It should also be noted that in some cases pre-trial detention may obstruct the purposes of probation. Probation is often granted to first offenders on the assumption that rehabilitation is more likely to be achieved by sparing defendant a prison experience. A defendant who has been confined prior to trial under the conditions prevailing in many detention facilities may already have been subjected to contacts and influences which are at war with the rehabilitative objectives of the probation disposition.

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The foregoing discussion advances the proposition that the bail system administered in the federal courts, relying primarily on financial inducements to secure the presence of the accused at the trial, results in serious problems for defendants of limited means, imperils the effective operation of the adversary system, and may even fail to provide the most effective deterrence of non-appearance by accused persons. The Committee's conclusions are predicated primarily on its own observations and studies, on interviews of knowledgeable observers of federal criminal justice, and on studies of pre-trial release in state systems of criminal justice.

Statistical demonstrations of the adverse effects of pre-trial detention on the ability of the defendant to make an adequate defense or receive a favorable disposition of his case are attended by serious difficulties. Here, as in Chapter II, a caveat needs to be sounded against the uncritical use of such statistical correlations. It may, however, be of interest to observe that the correlations presented in Appendix I, Tables XII-A—XII-D, are generally consistent with the conclusions reached by the Committee by direct observation and interviews. Thus, it will be seen that the accused unable to make bail, more frequently pleaded guilty and, hence, less frequently contested questionable official conduct or guilt before judge or jury. His case less frequently resulted in acquittal or dismissal. He more frequently received sentences of imprisonment and, except in one district, less frequently received probation.

3. *Proposals for a Rational System of Pre-Trial Release in the Federal Courts*

Pre-trial release policy in the federal courts is largely the product of an historical inheritance. That the bail institution in the American systems of criminal justice does not represent the only possible approach to these problems is demonstrated by even cursory examination of the practices developed in other countries.[47] Although bail administration has been the subject of complaint and concern in the United States for many years, there has been comparatively little disposition to subject the assumptions on which it proceeds to critical examination or even to identify the practices actually pursued. Above all, little ingenuity has been displayed in devising solutions for the most obvious and pressing problems created by the present system.

In the paragraphs that follow the Committee considers certain proposals for the improvement of present practice. The Committee recognizes that its proposals do not respond to all the problems of pre-trial release and that more study and thought urgently needs to be directed to this area. We believe, however, that the proposals advanced are important, that they are worthy of immediate consideration and would, if applied, make significant contributions to the solution of many problems most requiring immediate attention.

a. *Use of Summons as a Substitute for Arrest.*

It is apparent that the most forthright approach to the problem of pre-trial detention of accused persons is through more frequent resort to notification procedures that do not subject the defendant to detention prior to trial. The Federal Rules of Criminal Procedure authorize the use of a summons as a substitute for arrest when, after complaint is made before the United States Commissioner, the attorney for the government so requests.[48] The rules also provide that after the return of the indictment or information, "[t]he clerk shall issue a summons instead of a warrant upon the request of the attorney for the government or by direction of the court."[49]

The studies of the Committee did not produce any considerable body of data relating to summons practices in the federal district courts. Such information as was collected is presented in Table V of Appendix I. The data, although incomplete and insufficient to support reliable conclusions, strongly suggest that practices vary considerably among the various districts as to the frequency with which the summons is employed. Further inquiry may well reveal a range of differing assumptions as to the pro-

priety of the use of the summons and the situations in which it may sensibly be employed. There are, therefore, grounds to infer that a national policy in this regard has not been clearly articulated or has not been generally understood.

The Committee is aware that in many cases the arrest of the accused is the procedure clearly indicated. On the other hand, experience in the administration of criminal justice at the state levels indicates that arrests are often made unnecessarily.[50] There are obvious advantages in the use of the summons procedure when this can safely be done, and practice in the various districts should reflect an awareness of this fact.

Accordingly, the Committee recommends the following:

The Department of Justice should review practices in the various districts relating to the use of the summons as a substitute for arrest. A national policy regarding the use of the summons should be expressed and communicated to all United States Attorneys. That policy should direct use of the summons in those cases in which an arrest is not required to protect the proper functioning of the criminal process.

b. *Release on the Defendant's Own Recognizance.*

In the federal practice release of the defendant "on his own recognizance" refers to the procedure whereby the accused is granted liberty upon his execution of a personal bond in the bail amount without being required to supply additional assurances of his presence at trial in the form of a surety bond or other acceptable securities. When this practice can be safely employed, it combines the advantages of a solemn undertaking by the accused in circumstances of some formality with the relieving of the defendant of financial requirements he is often unable to fulfill. The Committee believes that the expansion of r.o.r. practices in many districts is feasible and that its greater use in proper circumstances will contribute substantially to the rationality of federal pre-trial release policy.

The Committe has made inquiry into r.o.r. practices in the various federal districts. In a questionnaire submitted to all United States Attorneys information was sought relating to the use of r.o.r. and to cases on non-appearance of those so released. Returns were received from 63 districts. Although in some instances the figures submitted represented esimates made by the United States Attorney, we believe that the replies delineate the present situation wih reasonable accuracy.

The first fact that sharply emerges from these returns is the remarkable range of differences in r.o.r. policy in the various

districts. The District of Connecticut, for example, estimates that in the three-year period, 1958-1960, 65% of all defendants were released on their own recognizances. Large numbers of accused were reported so released in several other districts, notably the Western District of Texas, the Eastern District of New York, and the Northern District of Illinois. At the other extreme, four districts report no such releases in the same three-year period.[51] It is, no doubt, true that some of the variations in r.o.r. policy can be explained by reference to particular local circumstances.[52] In general, however, no such explanation appears valid. Significant differences appear when populous urban districts are compared. Variations also emerge in the comparison of less populous districts. The inescapable conclusion to be drawn is that r.o.r. practice proceeds in the federal distric courts with little or no reference to any national policy in this matter.[53]

The returns from the questionnaire also throw light on the risks of non-appearance associated with the r.o.r. procedure. Although the District of Connecticut reported that 65% of all defendants in the three-year period were so released pending trial, no cases of non-apperance were reported. Of a total of 3390 cases of r.o.r. reported by all 63 districts, 118 instances of non-appearance were recorded, representing some 3% of the total. Even this rate considerably overstates the risks, for it appears to include technical violations of the release privilege as well as wilful failures to appear. Experience warrants the conclusion that r.o.r. practices have worked well where employed. There appears to be no valid reason to anticipate less favorable experience in those districts in which the procedure is never or rarely used today.

The Committee is strongly of the view that the Department of Justice should communicate to the United States Attorneys that the policy favoring pre-trial release of accused persons[54] should be advanced by recommendations of prosecuting officers to the bail-setting authority that accused persons be released on their own recognizances when the circumstances warrant. We recognize that the limited use of the r.o.r. procedure in certain districts may be explained in some degree by the failure of defense counsel to urge such releases. We believe, however, that a responsibility to take the initiative resides in the prosecuting officer when the justification for release without financial security is clear. Moreover, we note that under present practice many bail decisions are made in the absence of counsel representing the accused. It is apparent that any departmental policy in this area must concede a large area of discretion and judgment

to the prosecuting officer acting in particular cases. It is important, however, that the Department articulate the general outlines of its policy, for there is reason to believe that, in some instances, the utilization of r.o.r. has been impeded by doubts on this matter in the field. We believe, also, that the Department's interest in this area may be more effective if it is regularly supplied with statistics from the districts relating to bail dispositions being made, including the numbers of cases in which r.o.r. is granted.

Accordingly, the Committee offers the following recommendations:

Release of the accused on his own recognizance without additional financial securities, in proper cases, contributes importantly to solution of the problems of pre-trial release. The use of this procedure should be enlarged in the federal district courts.

The Department of Justice should inform all United States Attorneys that, in the interests of pre-trial liberty of accused persons, it is the policy of the government that prosecuting officers recommend the release of accused persons on their own recognizances when the circumstances warrant.

The Department should be regularly supplied with statistics relating to bail dispositions made in the various districts, including the number of cases in which United States Attorneys recommend and do not recommend r.o.r. and the number of cases in which defendants are released on their own recognizances.

c. *Improved Fact-Finding Mechanisms for Bail Decisions.*

The range of factors and the nature of the competing interests that are required to be taken into account in performance of the bail-setting function demonstrates the vital necessity that bail decisions be based upon reliable factual information. As observed in earlier sections of this chapter, however, bail decisions characteristically are made without recourse to information indispensable to the exercise of sound discretion and judgment. The serious consequences of this situation are that bail decisions are frequently made without reference to relevant considerations. Moreover, the absence of relevant data may, on occasion, encourage resort to irrelevant or improper criteria. It may be assumed that by reason of the failure of the fact-finding processes bail decisions err in some instances on the side of severity and in others on the side of leniency.

It is clear that at present in the federal courts initial bail decisions are often made in the absence of counsel representing the accused's interests. The recommendations relating to the

provision of adequate representation in Chapter II and the terms of the proposed legislation in Appendix II are sufficient to rectify this defect in bail procedure.

The Committee is persuaded, however, that more needs to be done by way of providing the bail-setting authority with information sufficient to support sound bail decisions. The problem is a difficult one, for the interval between arrest and initial bail decision is frequently too short to permit elaborate investigations. Nevertheless, experience, particularly that provided by the Vera Foundation project in the state courts of New York, has demonstrated that even relatively simple and expeditious techniques of inquiry are capable of contributing information of great value to the bail-setting function. The Committee believes that such factual investigations should be incorporated into bail procedure as a routine feature of the administration of federal criminal justice. We believe that the agency best equipped to perform this function is the Federal Probation Service and that the Service should be suppiled with budget and staff adequate to perform this and other responsibilities, to be discussed, in the administration of pre-trial release. Pending measures to this effort, we believe that the Department should encourage experimentation with other means to improve the fact-finding function in federal bail administration.[55]

The Committee offers the following recommendations:

To insure sound bail decisions, more effective fact-finding devices are required than those currently employed in the federal courts. Measures should be adopted that will supply adequate staff and budget to the Federal Probation Service for performance of this obligation. Pending the enactment of such measures, the Department should encourage experimentation with other devices to improve the fact-finding function in federal bail administration.

d. *Provision of Non-Pecuniary Inducements for Appearance at Trial.*

The traditional administration of bail in the United States relies primarily on a system of financial inducements to insure the presence of the accused at the trial. Liberty pending trial is conditioned upon the accused's supplying financial securities which are subject to forfeiture in the event of non-appearance. The heart of the difficulty lies in the fact that a large proportion of accused persons lack means sufficient to supply even modest financial securities, with the result that liberty pending trial is rendered unattainable for such persons. The Committee is aware of no evidence of any consistent correlation between financial

incapacity and the risk of non-appearance. As indicated in the previous section, significant gains could be achieved by a more liberal use of the r.o.r. procedure, even without other alterations in the present system. It is clear, however, that the security of the criminal process requires in many cases more than the promise of the accused to appear for trial. It follows, therefore, that, if the values of pre-trial liberty are to be extended to encompass the accused with limited means, a system of non-pecuniary inducements needs urgently to be devised and applied in the federal courts.

It should be observed initially that the federal system of criminal justice possesses certain advantages in its capacity to deter non-appearance at trial. The reach of federal justice is national, and the difficulties of fleeing the geographical jurisdiction of the federal courts present, in most districts, a restraint to flight that is both real and apparent to the accused. The federal system is policied by national law-enforcement agencies of high efficiency and reputation. A federal statute imposes criminal sanctions on non-appearance after forfeiture of bail.[56] The Committee believes that the deterrent capacities of the federal system are impressive and, with slight effort, could be rendered more effective. Thus we believe that persons released pending trial should in all cases be informed of the criminal penalties attending bail jumping[57] and that such offenses should be vigorously prosecuted. We believe also that great care should be taken at the bail hearing that the accused understand the nature of the obligation to appear for trial and that this understanding be reinforced by the sending of letters to persons at liberty restating the accused's obligation to present himself for trial.

Much more direct methods to insure the presence of the accused, however, are capable of being devised and applied. These methods not only afford the opportunity of pre-trial liberty to those presently unable to secure it, but in many cases provide greater assurances against forfeiture and flight than those supplied by a system relying principally on pecuniary inducements. The problems of deterring non-appearance by persons at liberty on bail are not different in kind from other problems long sucessfully managed by American systems of criminal justice. One of the most remarkable aspects of current bail administration is its failure to take advantage of the techniques employed and experience gained in other areas. The supervision of persons at liberty to guard against violation of the conditions upon which liberty was granted is a problem wholly familiar to the legal order. The rich

fund of experience derived from decades of administration of parole and probation laws is highly relevant to the formulation of a sound policy of pre-trial release in the federal courts. Moreover, less formal procedures requiring persons to "check in" periodically with the police and other official personnel are not unknown in many American and foreign jurisdictions.[58]

The Committee strongly believes that officials exercising bail-setting powers in the federal courts should be authorized, in the interest of advancing the policy of pre-trial liberty, to release accused persons without financial security subject to such conditions as shall place the accused under reasonable supervision and deter flight and forfeiture of the bail obligation. We note with approval that such a proposal is included in the Preliminary Draft of amendments to the Federal Rules of Criminal Procedure.[59] Such conditions might require the accused to report to designated officials or private persons or organizations at periodic intervals pending trial. Any failure of the accused to comply with the conditions would immediately be communicated to the court or commissioner and might be taken by the latter as evidence of a danger of non-appearance at the trial. In many cases evidence of imminent flight would thus come to the attention of the court much sooner than when reliance is placed on the filing of a surety bond.

The Committee believes that the Department should give careful consideration to the possibility of employing the resources of the Federal Probation Service in providing supervision and assistance to persons granted liberty pending trial. It should be clearly understood that performance of such a function would not be unprecedented in the federal system. We are informed that in juvenile cases the probation office is immediately called in upon arrest of the alleged offender and is often requested to consult on the advisability of pre-trial release.[60] The wider use of probation services in bail administration presents a number of important advantages. First, as already mentioned, a probation officer called into the case upon arrest of the accused would have the opportunity to collect and present information useful in providing a factual basis for the bail decision. Second, the advice and assistance afforded the accused by a skilled probation officer at the pre-trial stage may in many instances prove a considerable value to the accused and contribute to his rehabilitation. Among other things, the probation officer might assist in stabilizing the accused's employment situation in the interval between arrest and trial and thus provide a more secure basis for a subsequent

order placing defendant on probation in the event of his conviction or plea of guilty. Third, supervision by the officer would provide a check on the accused's activities and, through observation and persuasion, constitute effective deterrence to flight or forfeiture of the bail obligation by the accused.

Although the Committee is convinced that the Federal Probation Service is capable of making important contributions to a rational program of pre-trial release in the federal courts, we believe that the proposal should be accompanied by an important *caveat*: In no event should the Federal Probation Service be required to assume additional responsibilities in this area until it is supplied with additional staff and budget fully adequate to perform these new functions. We believe that the Service presently makes vital contributions to the decency and quality of federal criminal justice and that the proper performance of the functions now assigned ought not to be jeopardized by further responsibilities until adequate provision of funds and manpower is made.

In view of the considerations discussed above, the Committee offers the following recommendations:

It is vital to the development of a sound policy of pre-trial release in the federal courts that a system of non-pecuniary inducements to appearance of the accused at the trial be devised. The Department should assist in formulating such a system and should vigorously support its adoption.

Either through legislation or amendment to the Federal Rules of Criminal Procedure, officials possessing the bail-setting powers should be authorized to release accused persons without financial security subject to such conditions as shall place the accused under reasonable supervision while at liberty and deter flight and forfeiture of the bail obligation. The accused admitted to bail should be informed of the criminal penalties attaching to failure to appear at trial as directed and efforts should be made to insure that the accused fully understands the nature of the bail obligation.

The Department should give careful consideration to measures which would extend the functions of the Federal Probation Service to the supervision and assistance of persons granted liberty pending trial. No proposal for the extension of the functions of the Federal Probation Service should be considered, however, that does not provide additional budget and staff for the Service fully adequate to perform the new functions.

d. *Provision of Pecuniary Inducements for Appearance at Trial.*

Skepticism as to the justice and efficacy of a system of pre-trial release that places primary reliance on financial inducements does not preclude recognition of the utility of such inducements when the circumstances appear clearly to warrant their use. The considerations already discussed, however, indicate the necessity of minimizing the hardships such devices often impose on accused persons of limited means. As pointed out in earlier sections of this chapter, accused persons are sometimes unable to meet bail requirements, not because of inability to pay premiums on a surety bond in the bail amount, but because of inability to meet the requirements for collateral security imposed by the bail bondsman. While in some cases the requirements of additional security made by the bondsman may reasonably reflect the risks of forfeiture, there is reason to believe that such demands often are not consistent with the public interest sought to be expressed in the system of pre-trial release.

With these considerations in view, the Committee concludes that in cases in which financial security as a condition to pre-trial release appears to be necessary, the bail-setting official should possess authority to accept cash or other property in the amount of, or of a value less than, the bail figure. In such cases the accused would be required to execute a personal bond in the bail amount but would be required to furnish additional financial security of a value ranging from approximately that which he would be required to pay as premiums on a surety bond in the bail amount to some higher fraction of the bail figure. Upon the accused's making appearance at the trial as directed, the cash or other securities would be returned to him. Substantially this proposal is advanced in the preliminary draft of the amendments to the Federal Rules of Criminal Procedure[61] and a somewhat similar provision is contained in the recently-drafted Proposed Illinois Code of Criminal Procedure.[62]

Granting authority to the bail-setting official to accept security of a value less than the bail amount achieves certain important objectives. It will provide opportunities for pre-trial release in those cases in which the accused possesses or can borrow a sum approximating the premiums that would be required for a surety bond in the bail amount, but who is unable to provide the bondsman collateral security in the bail amount. Since, unlike premiums paid on a surety bond, the cash deposit is returnable, the proposed practice contains elements of deterrence

not present when an accused is able to secure a surety bond without providing collateral securities. The return of the deposit on appearance constitutes an economy of some importance at a time when the financial resources of the accused are subjected to the unusual demands of criminal litigation. The fact that the deposit is returnable may also enlarge the opportunities of the accused to borrow funds for these purposes.

The Committee, accordingly, submits the following recommendation:

Either through legislation or by amendment to the Federal Rules of Criminal Procedure, officials possessing bail-setting powers should be authorized to accept as security for appearance at the trial, cash or other property of a value less than the bail amount. The cash or other securities so deposited should be returned to the accused upon his performance of the bail obligation by presenting himself to the court for trial.

Chapter III

NOTES

1 A brief account of the relevant history may be found in "Bail: An Ancient Practice Reexamined", 70 Yale L. Jour. 966 (1961).

2 Pollack and Maitland, History of English Law (1899) 584-590.

3 Edw. I, c. 15 (1275).

4 Mass. Body of Liberties 18 (1641).

5 I Stat. 73, 91 (1789).

6 Stack v. Boyle, 342 U.S. 1, 4 (1951).

7 *Id.* at 4-5, 8. See also Rule 46(c), FRCP: "If the defendant is admitted to bail, the amount thereof shall be such as in the judgment of the commissioner or court or judge or justice will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant."

8 See "Bail Before Trial: Reflections of Scottish Lawyer", 108 U. Pa. L. Rev. 305 *et seq.*

9 Consult Beeley, The Bail System in Chicago (1927); "Compelling Appearance in Court: Administration of Bail in Philadelphia", 102 U. Pa. L. Rev. 1031 (1954); "A Study of the Administration of Bail in New York City", 106 U. Pa. L. Rev. 693 (1958); "Bail: An Ancient Practice Reexamined", 70 Yale L. Jour. 966 (1961); Ares and Sturz, "Bail and the Indigent Accused", 8 Crime and Delin. 12 (1962).

10 70 Yale L. Jour. 966, 975-977 (1961).

11 *Id.* at 976. Note also that despite the fact that the law of England permits factors other than probable appearance of the accused at the trial to be considered in bail decisions, "English detention rate for comparable crimes is apparently lower" than in the United States. Foote, "Introduction: The Comparative Study of Conditional Release", 108 U. Pa. L. Rev. 290, 297 (1960).

12 *Cf.* Beeley, The Bail System in Chicago (1927) vii: "The use and abuse of bail has long been recognized as one of the most troublesome, if not scandalous, elements in our conglomerate political administration of criminal justice."

13 The importance of the studies carried forward by the University of Pennsylvania Law School should be acknowledged. See note 9, *supra.* Also of prime importance are the recent activities of the Vera Foundation, Inc. of New York in this field.

14 The Administration of Bail in the Southern District of New York (Vera Foundation, 1961) (Unpublished) p. 2.

15 68 Stat. 747, 18 USC § 3146 (1954).

16 This matter is identified as a source of concern in studies of state systems of bail administration. See, *e.g.*, "A Study of the Administration of Bail in New York City," 106 U. Pa. L. Rev. 693, 706-707 (1958); Ares and Sturz, "Bail and the Indigent Accused," 8 Crime and Delin. 12, 14 (1962).

17 The Committee did not specifically inquire into the improper uses of the bail-setting power in the federal courts. In the course of its investigation the Committee was told of certain instances of allegedly improper or abusive uses of the bail-setting power. Thus, in one district it was reported that persons accused of narcotics offenses are initially subjected to bail requirements far exceeding the means of defendant, but that bail is reduced upon recommendation of the prosecutor when defendant agrees to reveal his source of supply. We are unable to say, however, how frequently such instances occur or whether they may be deemed in any sense characteristic of the administration of federal criminal justice.

18 See note 15, *supra*.

19 An account of the Vera Foundation Program, written in the early stages of the project, is presented in Ares and Sturz, "Bail and the Indigent Accused," 8 Crime and Delin. 12 (1962). For a more recent account see Ares, Rankin, and Sturz, "The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parol," New York University Law Review (January, 1963).

20 Information generously supplied by the Vera Foundation, Inc.

21 Note Address by the Honorable Robert F. Wagner, Mayor of the City of New York at the annual meeting of the New York State Bar Association, January 25, 1963 (New York Law Journal, January 29, 1963): "As a further development on this same front, the city has taken over and will utilize the experience gained in the carefully-conducted and even historic experiment sponsored and paid for by the Vera Foundation which went on for two years in the felony part of the Magistrates' Court and in the Women's House of Detention. This experiment clearly established that a very large number of those arrested who cannot raise bail can be safely released on their own recognizance, to go back to their jobs and their homes, with full assurance that they will be on hand when they are brought to trial. In fact, there turned out to be a somewhat lower ratio of skips among these people so released without bail, than there were among those not in the experiment who were duly released *on* bail. Of course, careful screening of the individual, his family and his job background is required; this was done in the Vera Foundation experiment and will be done in the city's continuing use of the results of this experiment."

22 18 U.S.C. § 3143.

23 The Administration of Bail in the Southern District of New York (Vera Foundation, 1961) (Unpublished) p. 6.

24 Federal Prisons, 1960. Table 22, pp. 60-61.

25 District of Columbia and the District of Alaska. *Ibid.*

26 District of Puerto Rico. The figure was 46 days for the District of Minnesota and 44 days for the District of South Dakota. *Ibid.*

27 United States Attorneys Statistical Report (October, 1960) Table 2.

28 In some districts other factors are at work. Thus, in the Western District of Texas the unusually large numbers of persons detained prior to trial is explained by the proximity of an international boundary and the tendency of the alien defendants to flee trial and defeat the jurisdiction of the court by escaping over the boundary.

29 See, *e.g.*, Beeley, The Bail System in Chicago (1927), passim: "A study of the Administration of Bail in New York City", 106 U. of Pa. L. Rev. 693, 727-729 (1958).

30 The Administration of Bail in the Southern District of New York (Vera Foundation, 1961) (Unpublished) p. 7.

31 *Ibid.*

32 The Philadelphia study revealed that in the Magistrates' Courts of that city, 15% of the defendants failed to make bail when set below $500, 22% when set between $500-$750, 32% when set between $750-$1,000, 68% when set over $1,000. "Compelling Appearance in Court: Administration of Bail in Philadelphia", 102 U. Pa. L. Rev. 1031, 1032 (1954). The New York study revealed that over half the accused failed to furnish bail when set at the $2,500 level. At $500, 28% failed to make bail. At $1,000, 38% failed to make bail. "A Study of the Administration of Bail in New York City", 106 U. Pa. L. Rev. 693, 707 (1958). Both studies were undertaken by students at the University of Pennsylvania Law School under the supervision of Professor Caleb Foote.

33 Note the figures relating to federal defendants collected in "Compelling Appearance in Court: Administration of Bail in Philadelphia", 102 U. Pa. L. Rev. 1031, 1033 (1954).

34 Table III in Appendix I reveals the following percentages of accused persons required to furnish financial security who failed to make bail in the four districts surveyed: 58, 83, 43, 23. For statistics relating to English experience, see Report of the Interdepart. Comm. on the Business of the Criminal Courts (February, 1961) p. 3 *et seq.*

35 *Cf.* Korean Code of Criminal Procedure (1954) ch. IX, art. 98(2), as translated in U. N. Yearbook of Human Rights 184, 185 (1954): ". . . the court shall not fix bail money beyond the financial ability of the accused." And note the comment of Mr. Justice Douglas in Bandy v. United States, 81 S. Ct. 197, 198 (1960): "To continue to demand a substantial bond which the defendant is unable to secure raises considerable problems for the equal administration of the law. We have

held that an indigent defendant is denied equal protection of the law if he is denied an appeal on equal terms with other defendants, solely because of his indigence. Griffin v. Illinois, 351 U.S. 12. . . . . Can an indigent be denied freedom where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?"

36 *Cf.* "Bail: An Ancient Practice Reexamined", 70 Yale L. Jour. 966, 971 (1961): "Today, however, a defendant who has sufficient collateral to meet his bondsman's requirements, or to post his own bond, is likely to have other liquid assets in excess of any amount he may forfeit, enabling him, in effect, to 'buy' his freedom. Thus, the bail system neither accommodates the presumption of innocence, nor provides an effective deterrent against flight." An evaluation of these conclusions, however, requires that consideration be given the supervision exerted over the released defendant by the bail bondsman. See 18 USC § 3142.

37 A classic discussion of the problems, still generally descriptive of present conditions, is Bates, Prisons and Beyond (1936).

38 "When a poor man is arrested, he goes willy-nilly to the same institution, eats the same food, and suffers the same hardships as he who has been convicted. The well-to-do, the rich, and the influential, on the other hand, find it requires only money to stay out of jail at least until the accused has had his day in court." Address by Honorable James V. Bennett, Director of the United States Bureau of Prisons, February 24, 1939.

39 Foote, "Forward: Comment on the New York Bail Study", 106 U. Pa. L. Rev. 685, 689 (1958).

40 Letter to the Chairman of the Committee by Honorable James V. Bennett, dated October 10, 1961.

41 *Cf.* 18 USC § 3568 (Effective date of sentence).

42 See Appendix I, Tables XII-A—XII-D.

43 We have been informed that concerns of this sort have recently been expressed in New York City.

44 The Administration of Bail in the Southern District of New York (Vera Foundation, 1961) p. 22.

45 The various studies of bail administration, heretofore cited, include discussion of the effects of pre-trial detention on the rights and interests of the accused. Many of these obser-

vations are consistent with those presented by the Committee in this and following paragraphs. Reference is made generally to the materials cited in notes 9, 11, 14, and 32, *supra*.

46 Various other effects of pre-trial detention have been suggested. See, *e.g.*, Ares and Sturz, "Bail and the Indigent Accused", 8 Crime and Delin. 12, 15 (1962): "The defendant enters court in the company of a guard, a fact not lost on jurors."

47 See, *e.g.*, "Introduction: The Comparative Study of Conditional Release", 108 U. Pa. L. Rev. 290 *et seq.* (1960).

48 Rule 4(a).

49 Rule 9(a).

50 See, *e.g.*, Beeley, The Bail System in Chicago (1927) 16 *et seq.*

51 District of Delaware, District of Columbia (information relates only to defendants charged with felonies under the United States Code), Middle District of Georgia, and the Eastern District of Washington.

52 Thus, the United States Attorney for the Canal Zone writes that ". . . so far as the personnel of this office can recall, no criminal defendants have been released pending trial on their own recognizance. The reason for not releasing any defendants on their own recognizance is the fact that most of the defendants reside beyond the jurisdiction of the court in the Republic of Panama." The Committee is also informed that in some districts the U.S. Attorneys favor the posting of nominal security as an alternative to r.o.r. "In Hawaii, for example $1.00 bail is required in lieu of r.o.r." Letter to the Chairman by Mr. John Duffner, Executive Assistant to the Deputy Attorney General, dated December 4, 1962.

53 One example of these variations is provided by comparing r.o.r. cases for the three-year period in the Eastern District of Pennsylvania (42) with those in the Northern District of Illinois (471), the Eastern District of New York (547), and the Eastern District of Virginia (221). Note also that in the year 1960 the Eastern District of Washington reported no r.o.r. cases, whereas the Western District of Washington reported 32.

54 The Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the United States District Courts (December, 1962), provides: "Rule 46. Bail. (c) Amount. If the defendant is admitted to bail, the terms thereof shall

be such as in the judgment of the commissioner or court or judge or justice will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail, the character of the defendant, *and the policy against unnecessary detention of defendants pending trial.*"

55 In some districts provision for performance of these duties by legal-aid associations or other interested groups might be made on a temporary basis. Some districts might also find it appropriate to include some provision in their plan of representation required to be established under the terms of the proposed legislation set out in Appendix II.

56 68 Stat. 747, 18 USC § 3146 (1954).

57 "Each person admitted to bail shall have called to his attention the penalties imposed by law for wilful failure to appear in accordance with the terms of the bond." Rule 46(d), Preliminary Draft of Proposed Amendments to rules of Criminal Procedure for the United States District Courts (December, 1962) p. 34.

58 As in cases of "station adjustments" made by the police in some localities in dealing with juvenile offenders not brought before the juvenile courts for disposition.

59 ". . . or may authorize the release of the defendant without security upon such conditions as may be prescribed to insure his appearance." Rule 46(d), Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the United States District Courts (December, 1962) p. 34.

60 *Cf.* 18 USC § 5035 (1948).

61 ". . . may authorize the acceptance of cash or bonds or notes of the United States in an amount equal to or less than the face amount of the bond . . ." Rule 46(d), Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the United States District Courts (December, 1962) p. 34.

62 Section 46-7 provides: "(a) The person for whom bail has been set shall execute the bail bond and deposit with the clerk of the court before which the proceeding is pending a sum of money equal to ten per cent of the bail. (b) Upon depositing this sum the person shall be released from custody subject to the conditions of the bail bond . . . . (f) When the conditions of the bail bond have been performed and the accused has been discharged from all obligations in the cause the clerk

of the court shall return to the accused ninety per cent of the sum which had been deposited and shall retain as bail bond costs ten per cent of the amount deposited." Tentative Final Draft of the Proposed Illinois Code of Criminal Procedure 1963 (1962) p. 44.

Chapter IV

ACCESS TO APPELLATE REVIEW

Although the criminal appeal is a device of comparatively recent origins, it has become an important and integral part of the administration of criminal justice in the United States. In the modern period few would deny that the exercise of appellate power in the criminal area has contributed to the uniform administration of justice and has served as an important protection against mistake and abuse in proceedings leading to the conviction of persons charged with crimes. Recent developments in constitutional doctrine and the increasing attention to problems of fairness and efficiency in judicial administration made it inevitable that the position of the financially disadvantaged defendant in the appellate process should become the subject of active concern. Providing such persons access to appellate review in the federal courts has presented problems both of policy and implementation. 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.

1. *The Right to Appeal in Federal Constitutional Law.*

In relation to the whole history of Anglo-American Legal development the criminal appeal may be regarded as almost a modern innovation. It is sometimes forgotten that it was not until 1879 that the Circuit Courts in the federal system were authorized to issue writs of error in criminal cases—and even then on a discretionary basis.[1] In England, not until enactment of the Criminal Appeal Act, 1907, was appellate review of criminal convictions placed on a modern and satisfactory footing.[2] Since the criminal appeal is a comparatively recent device, the problems of formulating and applying constitutional principles of fair procedure have proved to be somewhat different from those involving the criminal trial and proceedings leading to trial. There is, for example, no similar body of common-law experience and precedent to guide application of constitutional standards to the criminal appeal. Although recent years have seen important developments of constitutional doctrine relating to the appellate process in both state and federal courts, these problems have less frequently engaged the attention of the Supreme Court of the United States; and a full statement of the constitutional criteria is yet to be expressed. The same factors that have delayed full consideration of these problems in the courts have operated on legislative bodies. This may be demonstrated by the remarkable fact that, as recently as 1959, convicted aliens were denied access to the *forma pauperis* appeal in the federal courts.[3]

Nevertheless, the criminal appeal has become one of the characteristic features of American systems of criminal justice. In all jurisdictions it is recognized as an integral and indispensable part of the criminal process. The importance of the appeal as a source of protection to the interests of the accused may be demonstrated in a variety of ways. Thus, according to statistics of the Administrative Office of the United States Courts, in a five-year period approximately twenty per cent of the cases reaching the Courts of Appeals in the federal system resulted in reversals of judgments of the lower courts.[4] Even higher percentages of reversal occur in some state systems of criminal justice.[5] For practical purposes, appellate review in the United States represents an extension of rights to fair hearing accorded the accused in the criminal process. This being true, ready access to appellate review by convicted defendants of whatever financial status must necessarily constitute an essential objective of criminal justice administration.

The rights of access to the appellate process have received emphatic recognition from the Supreme Court of the United States. Although the Court observed in an early case that appellate review "was not and is not now a necessary element of due process of law,"[6] it has also recognized that "where . . . an appeal is provided, . . . the proceedings in the appellate tribunal are to be regarded as part of the process of law under which he is held in custody by the State. . . ."[7] Consistent with the latter view, the Court has intervened to correct abuses of power at the appellate level[8] and to invalidate obstructions to appellate review impeding the access of particular groups of convicted offenders.[9]

By far the most important statement of constitutional principle involving the appellate process yet made appears in the case *Griffin v. Illinois*.[10] Although the decision involves an interpretation of the Fourteenth Amendment, and hence is directly applicable to state proceedings, it may be assumed that the basic theory expressed is no less relevant to the administration of justice in the federal courts. In *Griffin* the Supreme Court invali-

dated state procedures which had the practical effect of barring from appellate review defendants possessing insufficient resources to pay the costs of stenographic transcripts of the trial proceedings. The opinion announcing the judgment of the court asserts that "[t]here is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor adequate appellate review accorded to all who have money enough to pay the costs in advance."[11] The principles of equal protection and due process require that "[d]estitute defendants . . . be afforded as adequate appellate review as defendants who have money enough to buy transcripts."[12] The *Griffin* case left open certain questions relating to the kinds of procedures that may be deemed to satisfy the constitutional minima; and not all of these questions have been resolved since that time.[13] Nevertheless, the *Griffin* case provides the basic principle from which analysis and evaluation of any system of *forma pauperis* appeals must proceed.

2. *The Forma Pauperis Appeal in Current Federal Law and Practice.*

As recently observed by the Supreme Court of the United States, "[p]resent federal law has made an appeal from a District Court's judgment of conviction in a criminal case what is, in effect, a matter of right."[14] Thus, the United States Code provides that "The courts of appeals shall have jurisdiction from all final decisions of the district courts . . . , except where a direct review may be had in the Supreme Court."[15] Assertion of the right to appeal, of course, necessitates compliance with jurisdictional and procedural requirements. A notice of appeal must be filed within ten days after entry of judgment;[16] and this requiremen cannot be waived.[17] Thereafter the record of appeal must be filed and the appeal docketed in the appellate court within the period specified by the Federal Rules, and the docketing fees paid.[18]

The convicted defendant who is unable to pay the fees or to meet the costs of preparing the record must take further steps, however, to perfect his appeal. The *forma pauperis* procedures, described in detail in later sections of this chapter, may at this point be briefly summarized as follows: After filing notice of appeal defendant is required to apply to the district court for leave to appeal in *forma pauperis*. The application, in affidavit form, contains "the defendant's representations of poverty, a statement of the case, and his belief that he is entitled to redress."[19] In acting on the application, the district court is referred

to the statutory standard, which provides that an "appeal may not be taken in *forma pauperis* if the court certifies in writing that it is not taken in good faith."[20] In the event that the district court determines that the appeal is not in "good faith" and denies the application, defendant is entitled to apply to the court of appeals for similar relief. If on the face of the papers it appears that defendant's case presents issues for review "not clearly frivolous",[21] the court of appeals is required to grant leave, appoint counsel, and proceed to a consideration of the case on its merits. If, however, the papers presented do not provide a sufficient basis for the court to act on defendant's application, recent decisions of the Supreme Court require the court of appeals to appoint counsel and to supply a record of the trial sufficient to test the district court's determination of "bad faith".[22] If thereafter sufficient grounds are made to appear, defendant's application must be granted and the case adjudicated on its merits, as in cases of prepaid appeals.

The elaborate procedures surrounding access of financially disadvantaged defendants to appellate review in the federal courts are to be justified, if at all, as devices to "screen out" frivolous appeals and thereby effect economies of effort and money and contribute to the efficiency of the system of justice. It is wholly apparent that the financially disadvantaged defendant is subjected to requirements not demanded of persons possessing resources adequate to pay the costs of appeals. In the view of the Committee, however, the central point of concern is not the fact *per se* that present federal practice defines a class of convicted defendants in terms of financial capacity. Equality of treatment does not necessarily import identity of treatment, so long as the classification is reasonably calculated to secure legitimate objectives and does not place in peril other vital interests and values.

The effort to "screen out" frivolous *forma pauperis* appeals, initially at the trial-court level and later in the courts of appeals, is based on the assumption that granting leave to appeal *in forma pauperis* without such screening would engender substantial numbers of frivolous appeals. It is assumed that, in consequence, the government would be subjected to large and unjustified expense in providing transcripts and in waiving fees ordinarily required of litigants, that appellate dockets would be unjustifiably burdened resulting in losses in the quality of judicial performance at the appellate levels, and that unconscionable burdens would be placed on public officials required to resist such appeals in the courts and on attorneys appointed to represent appellants.

The first and most important question that must be confronted in any appraisal of present federal practices and the considerations advanced to justify them is whether, despite recent attention and concern manifested by the Supreme Court of the United States, current procedures tend to discourage the assertion of meritorious grounds for reversal by convicted defendants in the federal courts. We believe there should be general agreement with the proposition that, if such a tendency exists in any significant degree, the situation must be rectified despite the expense and effort that may thereby be required. This proposition seems clearly valid under any circumstances, but, as suggested by the Supreme Court in the recent *Coppedge* case,[22] it possesses particular force so long as a system of adequate representation continues not to be available to the financially deprived accused in the trial of criminal cases in the district courts. A second question that may fairly be asked is whether the procedures as presently defined are not largely self-defeating and impose upon the system losses in time, money, and effort equal or comparable to losses that might be associated with a system eliminating preliminary screening as a condition to appeal. Third, it may be inquired whether, in addition to the possibility that present procedures may inhibit access to the appellate courts by persons possessing meritorious grounds for review, they are attended by other serious disadvantages, such as the delay of justice. Insofar as these questions are answerable, they appear clearly pertinent to the appraisal of the present procedures and to any recommendations for alteration of the federal laws.

a. *Numbers and Character of Federal Forma Pauperis Appeals.*

Appraisal of federal practices involving the *forma pauperis* appeal is impeded by the absence of reliable statistical information. The Committee is aware of no national statistics indicating the number of applications for leave to appeal *in forma pauperis* in the district courts and in the courts of appeals, the actions taken on such applications, or the disposition of such appeals when cases are decided on the merits following the granting of leave to appeal. We believe that the routine collection of such data on a national basis would contribute importantly to sound auditing of the performance of the federal system.

It should be noted, in the first instance, that the totals of all criminal appeals, whether prepaid or *in forma pauperis*, are comparatively small. Thus, according to Reports of the Director of the Administrative Office of the United States Courts, the total

of criminal appeals terminated each year in the period 1958-62, ranged from 580 to 633.[24] In each year a substantial fraction of the appeals were disposed of without hearing or submission, the numbers ranging from 139 to 190.[25] Some impression of the order of magnitude of these figures can be gained when it is noted that in 1960, of the 3,713 cases terminated in the courts of appeals, 580 were criminal cases.[26]

The factors affecting the total number of criminal appeals in the federal courts can be identified with reasonable accuracy. The character of federal criminal jurisdiction and the quality of federal law-enforcement activity and prosecution practice tend to result in a high percentage of cases terminated in the district courts on pleas of guilty. Thus in the fiscal year 1960, some 91% of defendants convicted in the federal district courts were convicted on pleas of guilty or *nolo contendere*.[27] It would appear to follow that a larger number of criminal appeals would be taken in the District of Columbia, where, unlike most other federal districts, the criminal dockets include many crimes of the common-law variety, such as those ordinarily prosecuted in state courts. Inquiry supports this inference, for in recent years approximately 20% of the total criminal cases terminated in all courts of appeals were decided in the District of Columbia.[28] Even in that jurisdiction, however, the absolute numbers are comparatively modest. A study conducted by Judge Bazelon, cited by the Supreme Court in the *Coppedge* case,[29] indicates that the Court of Appeals for the District of Columbia heard 86 criminal appeals in one 15-month period. A more recent study, conducted by the clerk of the same court, found that in fiscal 1961, the court disposed of 84 criminal appeals, including seven dismissed for want of prosecution.[30]

The numbers of appeals *in forma pauperis* or the numbers of applications for leave to appeal and their dispositions cannot be determined with accuracy. Data collected by the Committee and other interested observers indicate that the totals are not large. The Committee's studies reveal that in a two-year period, 19 applications for leave to appeal *in forma pauperis* were made in the San Francisco Division of the Northern District of California. Ten applications were granted.[31] Answers to a questionnaire addressed to the Chief Judge or one of the Circuit Judges of each of the courts of appeals indicate that, among the circuits answering, the courts of appeals in the fiscal year 1960 granted leave to appeal *in forma pauperis* in from 6 to 37 cases and denied leave in from 5 to 22 cases.[32] It should be noted, as remarked by

the Supreme Court, that such evidence as exists indicates that cases coming to the courts of appeals *in forma pauperis* are not distinguished by a lack of substance in the issues presented.[33] In his concurring statement in *Jones v. United States,* Judge Bazelon reported: "From September 1, 1957, through February 28, 1959, we decided 24 appeals in which we had granted leave to appeal in forma pauperis although the District Court had previously denied leave on the ground that the appeal lacked merit. *We reversed the convictions in 11 of these 24 cases.* In 6 of the other cases the convictions were affirmed by split decisions. Thus in 17 of the 24 cases at least one judge of this court thought the conviction should be reversed. In all 17 of these cases, the Government had opposed the petitions for leave to appeal in forma pauperis."[34]

Available evidence appears to indicate that, except perhaps in the District of Columbia, criminal appeals impose only moderate burdens on the dockets of the federal courts and that, of the criminal appeals docketed, comparatively few are taken *in forma pauperis*. Various implications may be derived from these facts. First, some have concluded that, even allowing for a considerable increase in the number of *forma pauperis* appeals that might follow elimination of the "screening" procedures, the resulting burdens of expense and court time are not likely to be overwhelming but, on the contrary, are likely to be considerably less than is sometimes assumed. This matter is given more careful attention in later sections of this chapter.

Second, the comparatively small number of applications for leave to appeal *in forma pauperis* strongly suggests that in a substantial, but indeterminate, number of cases the system has operated improperly to obstruct access to federal appellate review of persons unable to pay the costs of appeals. Observations of the Committee tend to support this implication. Thus, we have found that under generally prevailing practices counsel assigned to represent the accused at trial does not ordinarily consider it part of his obligation to advise his client respecting the latter's right to appeal or to represent him in the procedures established to provide leave to appeal. It appears highly likely that in a significant number of cases the accused loses his right to appeal because of ignorance of the jurisdictional requirement that a notice of appeal be filed within ten days after entry of judgment.[35] Moreover, the Supreme Court has noted that in those cases in which a timely notice to appeal is filed, the application for leave to appeal *in forma pauperis* is ordinarily prepared by

the accused without professional advice or assistance.[36] Interviews with lawyers of experience as assigned counsel in the federal courts reveal other practical inhibitions. Very few of such lawyers had, in fact, carried an assigned case from the district court to the court of appeals. One of the difficulties pointed to is the failure of the system to provide for all out-of-pocket expenses of appeal. Thus, an order dispensing with the necessity of printed beliefs does not relieve counsel of obligation to provide typewritten briefs; and the typing expenses prove not insignificant to many young practitioners. Finally, the Committee believes that the considerable delays that attend the process of establishing even leave to appeal *in forma pauperis* operate to discourage resort to the appellate process and that the result is sometimes to discourage the assertion of meritorious grounds for reversal in the appellate courts.

b. *The Criterion of "Good Faith".*

The only standard provided by the federal statute to guide the district courts and the courts of appeals in performing the "screening" function is that supplied by Section 1915 (a), Title 28, of the United States Code: "An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." The concept of "good faith" in this context is not self-defining; and the interpretation of the statute has proved to be a continuing source of difficulty.

It is apparent that at least until the recent series of cases in the Supreme Court was decided, the statutory language was widely understood as conferring on the lower federal courts authority to deny leave to appeal whenever the issues presented were thought not to afford a substantial possibility of reversal in the appellate court. Even within the limits of this understanding, widely differing standards were, in fact, applied.[37] Recent decisions of the Supreme Court have emphasized, however, that a "bad faith" finding can be justified only when the issues presented for review may be deemed "frivolous". Thus in *Ellis v. United States,* the Court said: "Unless the issues raised are so frivolous that the appeal would be dismissed in the case of a nonindigent litigant, Fed. Rules Crim. Proc. 39 (a), the request of an indigent for leave to appeal *in forma pauperis* must be allowed."[38] The elaborate opinion of the Court in *Coppedge* v. *United States,* decided in 1962, (1) makes clear that the standard of "good faith" is an objective, rather than a subjective, test, (2) strongly reaffirms the *Ellis* interpretation of the standard of "good faith", and (3) forcefully places the burden of demonstration on the

party asserting the frivolity of the issues presented, not on the convicted defendant seeking review.[39] In connection with the last point, the Court said:

> "The point of equating the test for allowing a pauper's appeal to the test for dismissing paid cases, is to assure equality of consideration for all litigants. The equation is intended to place the burdens of proof and persuasion in all cases on the same party—in these cases, on the Government. Since our statutes and rules make an appeal in a criminal case a matter of right, the burden of showing that that right has been abused through the prosecution of frivolous litigation should, at all times, be on the party making the suggestion of frivolity. It is not the burden of the petitioner to show that his appeal has merit, in the sense that he is bound, or even likely, to prevail ultimately. He is to be heard, as is any appellant in a criminal case, if he makes a rational argument on the law or facts."[40]

It is important to note that the Court's view of the criteria governing consideration of applications for leave to appeal *in forma pauperis*, involves more than an interpretation of the statutory language and reflects its understanding of what the applicable constitutional principles require.[41]

The effects of the *Coppedge* opinion on federal practice are not yet entirely clear. Until that decision was announced, considerable resistance to the Court's direction in this area was manifested both in the lower federal courts and in the action of many federal prosecuting officials. As to the latter, there is evidence that some federal prosecutors routinely resisted the granting of applications for leave to appeal, almost without regard to the substantial character of the issues being advanced for review.[42] It seems apparent to the Committee that if a "screening" system is to be retained in the federal courts, the only way that system can be made to approach compliance with the constitutional principles expressed in *Griffin* v. *Illinois* is through full and ungrudging acceptance of the Court's interpretation of the "good faith" criterion. We believe, further, that it is part of the obligations of federal prosecuting personnel to avoid indiscriminate opposition to applications for leave to appeal. *Accordingly, the Committee recommends that the Department of Justice communicate to the United States Attorneys that, so long as the "screening" procedures are part of federal law, it is the policy of the Department that opposition to applications for leave to appeal in forma pauperis is to be made only in those cases in*

which the application clearly presents "frivolous" issues in the sense in which that term has been defined by the Supreme Court of the United States; and further, in cases in which leave to appeal in forma pauperis has been granted, it is the policy of the Department not to file motions to dismiss the appeal as frivolous, except when that action is clearly and indisputably justified.

The Committee is persuaded, however, that the *Coppedge* decision, even if fully implemented in the lower federal courts, does not represent an adequate solution of the problems of *forma pauperis* appeals. Cases arising since *Coppedge* demonstrate that important questions remain unresolved.[43] Moreover, we believe that the criterion of "good faith" announced in recent cases casts serious doubt on the utility of the effort to identify and "screen out" frivolous appeals before consideration of their merits is reached in the courts of appeals. The *Coppedge* principle equates the notion of the "frivolous" appeal in the *forma pauperis* procedure to the standards of frivolity applied by the courts of appeals under Rule 39(a), when dismissing as frivolous appeals reaching those courts in ordinary course. In the past, however, this power of dismissal has been used very infrequently by the courts of appeals.[44] A literal application of the *Coppedge* rule, therefore, should significantly reduce the occasions in which applications for leave to appeal are denied. It seems apparent that such justification as can be offered for the elaborate and time-consuming "screening" procedures must rest principally on the assumption that the dockets of the courts of appeals are being protected from substantial burdens. If, however, the power to deny leave to appeal *in forma pauperis* is to be exercised as sparingly and according to the same criteria as the power of dismissal in ordinary appeals, the gains realized from the elaborate "screening" apparatus would seem minimal and wholly inadequate to compensate for its many substantial disadvantages.[45]

c. *Burdens and Delays of the Screening Process*

Since the justification of the "screening" procedures presently employed in the federal courts must rest upon their supposed economies of money and effort, it becomes pertinent to examine in some detail the practical operation of the system. The Committee believes that the alleged economies are largely illusory and that the screening procedures produce other consequences imperiling the equity and efficiency of the administration of federal justice in the appellate area.

As has already been noted, the convicted defendant must file a notice of appeal within ten days after the entry of the judgment, if the right to appeal is to be preserved. Since an assigned counsel under present practices often does not conceive it to be part of his obligations to adivse the defendant of his right to appeal or to assist in perfecting that right, and since many district courts do not routinely advise the defendant of his appeal rights, some financially disadvantaged defendants, because of their ignorance of the jurisdictional requirements, irrevocably lose their rights to appeal. The defendant who is unable to pay the costs of a trial transcript or to pay court costs is required to apply for leave to appeal *in forma pauperis*. The application, which is in affidavit form, contains allegations of financial incapacity and the reasons relied on by defendant to obtain redress in the appellate courts. Because normally no provision is made for counsel at this stage of the proceedings, the application is often inexpertly prepared and conceived, frequently resulting in injury to the defendant's interests and to the sound administration of justice.[46] The issue presented to the district judge is whether the appeal is taken in "good faith", which, as interpreted by the Supreme Court, requires a judgment whether the questions presented are "plainly frivolous". If the trial judge finds the appeal to be in good faith, counsel is ordinarily appointed, a transcript prepared, and the appeal docketed in the court of appeals. In the event the judge disallows the application, he is under obligation to certify in writing that the appeal is not taken in good faith.[47] He is not, however, under obligation to prepare a memorandum stating the reasons for his conclusions. The Committee is aware that at least one circuit requires a written statement of reasons whenever the district judge gives a "bad faith" certification,[48] and the same practice is followed by some district judges throughout the country. The Committee believes that so long as the screening procedures are retained, the memorandum requirement should be made general. We believe that such a requirement would make contributions to careful consideration of these decisions in the district courts and would provide a sounder basis for subsequent decisions in the courts of appeals.

Procedures relating to leave to appeal do not end in the district courts. A defendant denied leave below may renew his application in the court of appeals. In recent years substantial numbers of such applications have been granted despite the observation of the Supreme Court that "weight"[49] or "great

weight"[50] should be given to the district court's certification. If the papers presented to the appellate court establish defendant's right to appeal *in forma pauperis*, the application should be granted. Often, however, the situation is one in which the papers submitted by the defendant *pro se* are not adequate to permit the court of appeals to come to a decision. At least since the decision of *Johnson v. United States*[51] in 1957, it has been clear that the court is under obligation to appoint counsel in defendant's behalf and that counsel must be permitted to advance reasons why leave to appeal should be granted. Counsel appointed in such a case receives no compensation for his services and is often confronted by difficult and time-consuming obligations.[52] Since the lawyer appointed in the court of appeals is not likely to have participated in the trial of the case, he will ordinarily lack personal knowledge of the occurances at trial. He must, therefore, seek to provide some basis to determine whether defendant's points are frivolous or possess substance, such as entering into an agreed statement of facts with the prosecutor, requesting the court reporter to read back all or portions of the shorthand notes of the trial, or inspecting the notes of the trial judge if such exist and are made available. "Such efforts are apt to be incredibly time-consuming and frustrating, and sometimes may arouse in counsel a feeling that he would be well advised to avoid future assignments of appellate *in forma pauperis* work. But worse than that, in many instances these efforts will be wholly unsatisfactory as a means of safeguarding the defendant's rights."[53]

Often counsel will conclude that the only "appropriate means"[54] of determining the character of defendant's grounds for appeal is a trial transcript. A motion to this effect with accompanying memorandum must be filed. Typically the request will be opposed by the Government. In many cases the transcript, even when supplied, will be only partial, thereby depriving defendant of the possibility of reversal on the ground that the record contains "plain error" of which the defendant was unaware and of which he might have had the benefit had he possessed means adequate to purchase a complete transcript.[55]

If upon completion of counsel's presentation and the filing of the Government's response, the court grants leave to appeal *in forma pauperis*, the case will thereafter be heard and disposed of in the same manner as an ordinary appeal. In some cases a further complication has been introduced when the issues raised by counsel in the court of appeals go substantially beyond those presented in the district court when certification was refused.

In this event, cases have sometimes been remanded to the district court for consideration of the new issues raised.[56] Moreover, after expending great effort to identify and evaluate defendant's points, counsel may conclude they are wholly frivolous and feel obliged to ask permission to withdraw from the case.[57] When, as is usual, he persists in his representation and leave to appeal is refused, counsel may feel under obligation to challenge the ruling by a petition for certiorari in the Supreme Court of the United States.[58] All of these efforts, it should be noted, are expended on procedures that do not involve consideration of the appeals on their merits.

It will be observed, first, that the existing procedures are enormously expensive in time and effort. The efforts of assigned counsel to search out, in the absence of an adequate transcript of the trial,[59] a sufficient basis for granting leave to appeal is wasteful not only of the lawyer's time, but that of the officials whom he must contact and interview for this purpose. Every application for leave to appeal involves the potential of at least two judicial proceedings, one in the district court and one in the court of appeal, even when a further hearing on the merits is never reached. In some situations, however, many more than two proceedings occur, some leading to full-scale opinions—again, without the merits of the appeal being reached. Perhaps the most oppressive burdens of time and effort fall on assigned counsel. In the District of Columbia alone, 108 appointments of counsel were made in these cases in 1958;[60] and many other appointments have been made in other circuits.[61] It is not far from the truth to say that the federal system seeks to avoid the expenses of supplying transcripts to all financially disadvantaged defendants desiring to appeal by shifting the burdens to lawyers required to serve without compensation or reimbursement of expenses. Nor can the system be defended as an effective device to protect the legitimate interests of convicted defendants. As pointed out above, the system operates at various points to provide the defendant required to invoke the *forma pauperis* procedures with less than equal opportunities to invoke full appellate review.

Second, the delays associated with the "screening" procedures are of such character as frequently to amount to justice denied. The *Coppedge* case itself is illustrative. Although the accused was indicted in June, 1958, it was not until December, 1962, that a petition for certiorari was filed in the United States Supreme Court to review on the merits the court of appeal's affirmance of his conviction. Other recent cases have consumed

from two to six and one-half years between indictment and ultimate disposition.[62] The recent case of William H. Kemp, arising in the District of Columbia, illustrates the complexity of the *forma pauperis* procedures, the attendant delays, and the resulting injuries to the accused. The procedural history of the case follows:

1960	December 13	Joint indictment with one Gray for the crime of housebreaking, petty larceny, and unauthorized use of vehicle. Crim. No. 1033-60.
	December 16	Kemp pleaded not guilty.
1961	February 3	Gray convicted of all three counts; Kemp acquitted of housebreaking and larceny, convicted of unauthorized use of motor vehicle.
	March 17	Judgment entered sentencing Kemp to imprisonment for a period of one to three years.
	March 21	Kemp's application to proceed on appeal without prepayment of costs was denied as plainly frivolous and not taken in good faith.
	April 17	Application to proceed on appeal without prepayment of costs filed in the court of appeals.
	May 18	Application for leave to appeal denied by a panel of the court of appeals, one judge dissenting.
	June 1	Petition for rehearing *en banc* filed.
	June 15	Petition for rehearing *en banc* denied, two judges noting that they would grant the petition.
	July 14	Petition for leave to proceed *in forma pauperis* and petition for writ of certiorari filed in the Supreme Court of the United States. Misc. No. 311.
1962	May 14	Motion for leave to proceed *in forma pauperis* and petition for certiorari granted; judgment vacated and case remanded for consideration in light of *Coppedge*.

July 18	Per curiam order in court of appeals directing that petitioner be allowed to appeal without prepayment of costs and with transcript at government expense.
December 13	Per curiam reversal and remand with directions to enter a judgment N.O.V. and discharge of appellant.

Kemp was arrested on November 24, 1960. At the time of the opinion ordering his release, he had been confined well over two years. Had he been possessed of adequate means it is likely that there would have been no significant period of confinement.

3. *Elimination of "Sifting" Procedures in Other Jurisdictions.*

The survival of the sifting procedures in the federal system of *forma pauperis* appeals reflects the view that, despite the delays, frustrations, and inequities produced, these procedures cannot safely be abandoned. In this connection it becomes highly relevant to observe that in many American jurisdictions the effort to eliminate "frivolous" *forma pauperis* appeals before consideration of their merits by appellate courts, has been abandoned or significantly modified, and that the dangers of excessive expense or unreasonable burdens on court dockets have largely failed to materialize. Due to the pressures of time the Committee has been unable to collect full data on the operation of alternate plans or to offer a complete evaluation of their operation. The Committee believes, however, that the materials discussed in this section are pertinent and constitute evidence of the feasibility of alternate approaches to the problem of *forma pauperis* appeals in the federal courts.

a. *Illinois*

The Illinois system of appellate review *in forma pauperis* is of particular significance, since in 1957 that state was required to devise new procedures to conform to the decision of the Supreme Court of the United States in the *Griffin* case.[63] At the time of Griffin, direct review of criminal convictions in Illinois was accomplished by writ of error. Unless a bill of exceptions was included in a properly certified record, review in the appellate court was restricted to the so-called common law or mandatory record. The latter consists of such items as the indictment, record of arraignment, pleas, verdict, and judgment. When review was taken on the mandatory record, only errors appearing on the face of these documents could be considered. Thus, one seeking review of a criminal conviction on the mandatory record was foreclosed from raising such issues as sufficiency of evidence, errors in rulings on evidence, prejudicial behavior on the part of court or counsel, errors in instructions, and the like: in short, most of the issues that provide the grist of ordinary appellate review. To include such issues in the record required the filing of a bill of exceptions or report of proceedings within the statutory period. But for practical purposes, the filing of a bill of exceptions required the submission of a stenographic transcript of the trial proceedings; and in the pre-*Griffin* period, transcripts for appeal were supplied financially incapacitated defendants only in capital cases.

Confronted by the mandate in *Griffin* v. *Illinois* that "[d]estitute defendants . . . be afforded as adequate appellate review as defendants who have money enough to buy transcripts",[64] the supreme court of the state adopted its Rule 65-1, which instituted entirely new procedures in these cases.[65] Basically, Rule 65-1 authorizes the convicted defendant to file with the trial court a petition requesting that he be furnished with a stenographic transcript of the proceedings at his trial. The petition is required to be verified and to state facts showing "that he was at the time of his conviction and is at the time of filing the petition without financial means to pay for the transcript." Upon a finding that defendant is "without financial means", the court is required to direct the reporter to transcribe an original and one copy of his notes. The prisoner then files a petition for the issuance of a writ of error and for the appointment of counsel with the clerk of the state supreme court. Counsel is routinely appointed in all cases except those in which a plea of guilty was entered at the trial. It is estimated that approximately 600 lawyers from Cook County have been appointed in these cases since the procedures were established in 1956.[66] In a few cases counsel are unable to find any proper basis on which to attack the convictions. A motion setting forth the facts and requesting leave to withdraw is then filed. The court thereupon makes an independent study of the facts and a decision on the motion is made. Even if leave to withdraw is granted, the writ of error is not dismissed at this time; and the prisoner, if he sees fit, is permitted to file his own brief and abstract. The number of withdrawals by counsel, however, is small, averaging perhaps 10 or 12 in any year. Rule 65-1 also made provision to review the judgments of persons convicted before the *Griffin* decision. Transcripts were similarly supplied to such prisoners who made application before a stated cut-off date.

The Illinois system has proved simple and expeditious; and data relating to its expenses and its burdens on court dockets are important to the consideration of similar procedures in the federal courts. In translating the Illinois figures into meaningful comparisons, several factors should be taken into account. First, the prison population of Illinois is something over one-third that of the federal system.[67] The number of *forma pauperis* cases that might be anticipated from the adoption of a similar system in the federal courts might, therefore, be roughly approached by multiplying the Illinois figures by a factor of three. This, however, may overstate the number of federal cases, assuming comparable experience; for it is likely that a higher fraction of federal prisoners are convicted on pleas of guilty[68] and hence that relatively fewer submit their cases for appellate review. Second, in estimating the relative burdens of providing freer access to appellate review, it should be noted that in Illinois review of all felony cases is provided by one court, the Supreme Court of Illinois, whereas in the federal system the burden is distributed among the courts of appeals of eleven circuits.

The number of writs of error filed under Rule 65—1 in Illinois are as follows:

1957	—	31
1958	—	43
1959	—	128
1960	—	195
1961	—	243

It should be observed that these figures and those to be given, include not only the cases of persons convicted in the current years, but a considerable back-log of cases of persons convicted in the years before the *Griffin* decision and deprived of appellate review under the old procedures.

The Committee lacks data on the total number of transcripts ordered in Illinois since the new procedures were instituted. The following figures, relating to the numbers of transcripts prepared by court reporters in the Criminal Court of Cook County, are representative, however, since the great bulk of these cases arise in that court:

1956	—	148
1957	—	166
1958	—	258
1959	—	306
1960	—	283
1961	—	288

Total state-wide expenditures for transcripts in these cases, as supplied by the Illinois auditor of public accounts, are as follows:

1956	—	$15,263.55
1957	—	37,149.70
1958	—	63,835.00
1959	—	77,052.67
1960	—	53,444.00
1961	—	92,000.00

The Illinois system instituted after the decision of the *Griffin* case has achieved the major purposes of a system of *forma pauperis* appeals and has done so without imposing extraordinary burdens of expense on the state or an unmanageable case load on the Supreme Court of Illinois. It is true that the system has increased the criminal business of that court.[69] Even here, however, it should be observed that the Rule 65-1 procedures may have served to reduce resort to other state collateral remedies such at the Post-Conviction Hearing Act.[70] Hence even the increased investment of court time in the *forma pauperis* review proceedings may be partially compensated by other indirect savings of time. Most important, however, is the fact that the Illinois system provides a rational and equitable means of protecting the interests of the financially incapacitated defendant and, accordingly, makes important contributions to the quality of criminal justice in that state.

b. *Other State Systems.*

A number of the other states administer systems of *forma pauperis* appeals in which any person desiring to appeal, but unable to pay the costs, is provided with a transcript upon submitting a declaration of financial status. It has not been possible for the Committee to conduct detailed administrative studies of these systems. What follows is a sampling of illustrative state statutory provisions and judicial decisions.

In Texas, when a felony case is appealed and the defendant is unable to pay for a transcript, he may make affidavit of that fact. Upon receiving defendant's affidavit the trial court is required to direct the official court reporter to make a narrative state of facts and deliver it to defendant. In cases "where the court is required to and does appoint an attorney to represent the defendant in a criminal action," the reporter is required to furnish the attorney with a transcript, if after defendant's conviction, an appeal is prosecuted.[71] The statute has been interpreted as conferring no discretion on the court to withhold a transcript when required by the financially incapacitated defend-

ant to perfect his appeal. As remarked by the Texas Court of Criminal Appeals: "This statute when complied with imposes a mandatory duty upon the trial court to make and enter an order requiring the court reporter to prepare the transcript of evidence."[72]

In California even broader practices appear to prevail. Recent cases indicate that any defendant appealing a felony conviction, regardless of financial status, is entitled as a matter of right to a transcript of trial proceedings at the expense of the state.[73]

The pertinent statutes of Florida provide that when notice of appeal is filed in a criminal case, the trial court shall direct the court reporter to transcribe his notes of the proceeding. The defendant is required to pay the costs of the stenograhpic report unless he is "insolvent", in which event the costs are paid by the county.[74]

The Iowa statutes direct the judge to order a transcript to be made at county expense for any defendant who has perfected an appeal and who satisfies the court "that he is unable to pay for a transcript of the evidence."[75] The Iowa Supreme Court has ruled that a showing of the merits of the appeal is not necessary on application for a transcript. In *State v. Harris*, the court observed: "The only . . . reason that could be given for the ruling would be that the defendant had a fair trial and was undoubtedly guilty, and, in fact, that was one of the reasons advanced by the state in resistance to the application. But the defendant has the legal right to have the trial below reviewed in this court, and the trial court that convicted him should not be permitted to prevent a consideration of the appeal by an order refusing a necessary record."[76]

The applicable Missouri statutes provide that "in criminal cases where an appeal is taken . . . by the defendant, and it shall appear to the satisfaction of the court that the defendant is unable to pay the costs of such transcript for the purpose of perfecting the appeal, the court shall order the same to be furnished and the court reporter's fees for making the same shall be taxed against the state or county as may be proper. . . ."[77]

The foregoing examples by no means constitue a complete survey of relevant state law and practice.[78] They may serve to demonstrate, however, that many state systems of justice have found it feasible to provide full appellate review to financially disadvantaged defendants without the elaborate "screening" devices that characterize the federal procedures.

c. *Review Procedures in the Administration of Military Justice.*

Under the Uniform Code of Military Justice a remarkably comprehensive system of review procedures for persons convicted by military courts has been established. The experience gained by the federal government in its administration of military justice should be consulted in any serious consideration of new appeals procedures in the civil courts.

The Code and the 1951 *Manual for Courts-Martial* require that the accused be represented by counsel in general courts martial and that counsel advise the defendant of his appeal rights.[79] Review of the case begins with preparation of a record of trial. In general courts martial and in special courts martial that result in sentences of bad conduct discharge, the record must contain a verbatim transcript. Even in cases tried by special courts martial in which no punitive discharge is imposed, and a maximum confinement sentence of six months is possible, the accused receives a summarized record of his trial. The record is supplied the defendant at government expense. In cases in which the defendant has been sentenced to some form of non-honorable discharge, review by the appellate agencies proceeds automatically without any act of initiation required of the defendant. If he so desires, the defendant will be represented by counsel in the appellate proceedings. Official statistics indicate that in 1961, 6,027 cases were considered by the military boards of review.[80] It is significant to note that, despite the great liberality of the procedures, only one out of ten persons eligible to do so elects to seek ultimate review of his case by filing a petition with the Military Court of Appeals.[81] Also important is the fact that the free accessibility and quality of appellate review has reduced collateral attacks on sentences imposed by courts martial to an absolute minimum. "In fact, a recent survey indicates that since the adoption of the Code only two attempts have been made to obtain a writ of error *coram nobis* in the military courts."[82]

The Committee is aware that not all features of the military system of appellate review can or should be made part of the procedures of the civil courts. We believe, however, that the military experience demonstrates the essential fact that free access to appellate review is an indispensable feature of an enlightened system of criminal justice. We are persuaded that the expression of this principle has contributed significantly to the quality of justice administered by the military tribunals and that the mili-

tary experience illustrates the importance of its fuller expression in the civil courts.

4. ***Proposals for a Modern System of Criminal Appeals in the Federal Courts.***

a. *"Adequate Representation" in the Appellate Process.*

Even cursory investigation of the federal criminal appeals procedures quickly reveals the importance of counsel and other defense services in the appellate process. It is only recently that the Supreme Court of the United States has given close attention to the constitutional rights of counsel in the criminal appeal. A number of questions remain unresolved.[83] In *Johnson v. United States*, the Court announced that counsel must be appointed in proceedings in the courts of appeals on applications to appeal *in forma pauperis*.[84] In *Ellis v. United States* it was made clear that counsel must act "in the role of advocate" and that appointment of an *amicus curiae* is not enough.[85] It is also clear that the Court's requirements involve more than an exercise of its supervisory powers over the federal judicial establishment; for in the *Johnson* case, the Court squarely based its decision on the authority of the Sixth Amendment.[86] However the constitutional rights of counsel in the appellate process are ultimately to be defined, it cannot be doubted that they extend to proceedings in which the courts of appeals consider the merits of the case, as well as those involving applications for leave to appeal. The observation of Mr. Bennett Boskey in this connection should be noted:

> "Analyzing and presenting a case from the appellate standpoint normally calls particularly for the professional judgment of a lawyer, not merely a layman—even a layman having far better education and learning than most indigent defendants. Whether the judge's rulings on the admissiblity of evidence were erroneous; whether the prosecutor's tactics were unfair; whether the judge's charge was incorrect or inadequate; whether the evidence was insufficient to support the verdict; whether errors which occurred were sufficiently important to be prejudicial; whether the trial was affected by some 'plain error' which should be noticed on appeal; whether an effort should be made to have some previous decision modified or overruled—these and other appellate issues are normally beyond the reach of whatever analytical skills an indigent defendant should be expected or presumed to possess.

> "The indigent is badly in need of counsel's help—first, in deciding whether the case contains something warranting an appeal, and then (assuming an appeal is lodged) in making a sufficient and professional appellate presentation of the issues. Though his case may be saturated with reversible error, this fact would often be of little avail to an indigent defendant if he were deprived of the assistance of counsel in connection with an appeal. Moreover, refusal to furnish counsel to indigent defendants at this critical stage of the proceedings would be countenancing serious discrimination between the rich and the poor when liberty is at stake."[87]

The Committee is persuaded that, despite the Court's recognition of constitutional rights of counsel in the appellate process, current practices fail to approach a system of adequate representation. These considerations reinforce the Committee's view that prompt enactment of legislation proposed in Chapter II of this Report is urgently required. That proposal contemplates the provision of full defense services to the financially incapacitated defendant at all stages of the criminal process, including the appellate stage when the defendant elects to pursue his remedies in the courts of review.

The deficiencies in the present practices are serious. The Committee's studies indicate that few lawyers appointed in the district courts take their clients' cases to the courts of appeals for review or recognize an obligation to advise him of his rights to appeal. In some instances appeal rights are lost in consequence. Typically, the defendant is without counsel in the critical period between sentence and disposition of the application for leave to appeal *in forma pauperis*. One result is that defendant often prepares his application without professional assistance, sometimes to his substantial disadvantage. The Committee has discovered that one factor inhibiting assigned counsel in the district court from pursuing the appellate remedies of his client is the failure of the system to make provision for all the expenses of appeal.

When counsel is appointed to represent defendant's interests in the appellate process, he ordinarily enters the case without having participated in the trial proceedings. He is confronted by onerous and time-consuming obligations. For his services he receives no compensation and no reimbursement for out-of-pocket expenses. The problems associated with uncompensated representation in the trial courts are presented in full measure in the appellate courts. These include, not only the imposition of un-

conscionable burdens on assigned counsel, but, despite sometimes extraordinary efforts on the part of counsel, injury to the interests of the financially disadvantaged defendant.

These conditions, and others noted in earlier sections of this chapter, lead the Committee to the conclusion that a system of adequate representation encompassing the appellate process needs now to be adopted in the federal courts. As outlined in Chapter II, such a system will supply counsel at all stages of the appellate process and will make provision for reasonable compensation for the expenses of representation, not only for the defendant requiring assignment of counsel, but for the defendant possessing some, but inadequate, means to pay other necessary costs associated with the appeal. The system will also encompass defendants who possessed some resources at the outset of the prosecution but whose means have been exhausted in the earlier stages of the criminal proceedings.

Accordingly, the Committee submits the following recommendation:

Present practices fail to provide a system of adequate representation in the federal appellate process for the financially incapacitated defendant. A system of adequate representation, proposed in Chapter II, that will supply, when required, counsel and necessary defense services at all stages of the appellate process, should be promptly established by appropriate legislation.

b. *Full Access to the Appellate Courts.*

On the basis of its investigations the Committee concludes that present appellate practices in the federal courts involving a multi-step process directed to "screening out" frivolous appeals are unsatisfactory either from the standpoint of proper protection of the defendant caught up in these procedures, the interests of efficient judicial administration, or the larger interests a system of criminal justice is called upon to serve. We propose the enactment of legislation which would provide the convicted defendant with a transcript of trial proceedings whenever the defendant files a notice of appeal and is found to be financially unable to pay the costs of a transcript. The provision of the transcript should not be conditioned upon any preliminary finding as to the substantiality of the issues sought to be presented for review in the court of appeals. The objective of such legislation would be to place access of the financially disadvantaged defendant to the appellate courts on the same footing as that of any other defendant invoking appellant review. The appeal taken *in forma pauperis*, like any other appeal, would, of course,

be subject to dismissal as frivolous by the court of appeals whenever the facts warrant that action.

The considerations supporting this conclusion are several. First and foremost, we believe that present complex and piecemeal procedures deny full and equal protection to the interests of the financially incapacitated defendant in the appellate process. That the present federal statutes are inadequate to give proper protection to the defendant's constitutional rights was given explicit recognition by the Supreme Court of the United States in the *Coppedge* case, when it said: "In so holding we have been impelled by considerations beyond the corners of 28 U.S.C. §1915, considerations that it is our duty to assure to the greatest degree possible, within the statutory framework for appeals created by Congress, equal treatment for every litigant before the bar."[88] The Committee is persuaded, however, that it is highly desirable that the statutes themselves fully recognize and protect the defendant's basic interests. We believe that any system requiring preliminary scrutiny of the questions presented before full consideration of the case on the merits, will tend toward more constricted access to appellate review for the financially incapacitated defendant than that enjoyed by other defendants and that this is likely to occur regardless of how the standards of "good faith" are articulated. On the other hand, if this should not be true, and if the lower federal courts, consistently with *Coppedge*, apply a standard of "good faith" identical to that presently employed by the appellate courts when dismissing ordinary appeals as frivolous, we believe the effectiveness of the procedures as a screening device will be so reduced as to provide no gains sufficient to compensate for the other disadvantages of the system. We note, also, that the present system has on occasion resulted in inordinate delays and that, as pointed out in earlier sections of this chapter, the delays in justice, so experienced, have sometimes amounted to denials of justice.

Second, the Committee believes that the present practices are largely self-defeating and that they can be abandoned without creating unmanageable burdens of costs or necessitating undue expenditures of judicial time. Every justification of the present practices which has come to the Committee's attention is predicated on the assumption that the screening procedures are required to prevent an inundation of frivolous appeals and that the increases in the number of appeals will result in large monetary costs to the government and in substantial burdens on adjudication in the courts of appeals. We believe that even if these fears were substantial, such considerations are not entitled to be given

decisive weight by a system of criminal justice dedicated to the objective of full and equal justice to all accused persons and to the proper and vigorous operation of the adversary system. The Committee notes, however, that many American states—some sufficiently populous to provide reasonable comparisons with the federal system of justice—have granted financially disadvantaged defendants full access to appellate review without experiencing burdens approaching the magnitude of those sometimes predicted as the consequence of similar measures in the federal courts. We believe, also, that forecasts of inordinate burdens do not take adequate account of the fact that the proliferation of motions and petitions produced by present practice is highly expensive of judicial time. Nor, for reasons indicated in previous paragraphs, do we believe that these problems have been brought to an end by the *Coppedge* decision.

The Committee believes that proper evaluation of comparative costs requires that attention be directed to the "hidden costs" of the present system. First there are the costs in judicial time in the district courts and courts of appeals, just noted, that result from the administration of the present system. Second are the costs in the time of public officials required to be interviewed by assigned counsel in his effort to establish a record or to justify the ordering of a transcript in proceedings involving leave to appeal *in forma pauperis*. Third are the costs of time, effort, and expense of assigned counsel. The present system is able to function at all only by shifting a large part of the burdens of the system on lawyers who are required to serve without compensation or reimbursement. It should be carefully noted that in a system of adequate representation involving the use of compensated counsel the shifting of many of these burdens to counsel will no longer be possible. In many cases the provision of a transcript at the outset of the appellate process will involve substantially less expense to the government than the payment of attorneys' fees for time spent by counsel in an effort to settle a record for disposition of the application to appeal *in forma pauperis* and in other proceedings made necessary by the present system. Fourth, a system that obstructs access to direct review is likely to encourage resort by prisoners to collateral attack on their convictions and sentences with losses of time and money thereby occasioned. Such has been the uniform experience of state systems of criminal justice.[89] We have already noted that one of the consequences of the liberal review procedures in the administration of military justice has been the almost complete absence of collateral attacks on sentences imposed by courts martial.

The Committee has not undertaken an estimate of the direct costs of a system providing direct access to appellate review without preliminary screening of *forma pauperis* appeals.[90] We believe, however, that these costs may prove less than is sometimes supposed. The principal item of direct costs involves the expenses of transcripts for appeal.[91] We are informed that in the fiscal year 1962, the total costs of all transcripts for appeals *in forma pauperis* was $127,000, which sum included one item of $23,300 for the transcript of a trial requiring almost a year to complete.[92] If the legislative proposal advanced by the Committee were to result in a demand for transcripts five times as large as that in 1962, the additional transcript costs of the government would, on these assumptions, amount to only about a half-million dollars.[93] It should be added, however, that the Committee believes that no such extraordinary increase in the numbers of appeals *in forma pauperis* can reasonably be anticipated.

For the reasons indicated, the Committee believes that present federal practice does not provide full and equal access to appellate review. We believe, both on the basis of experience in the federal system and in state systems of criminal justice, that the solution of the problems of federal *forma pauperis* appeals is, when necessary, to provide defendants with transcripts of trial proceedings without preliminary screening, leaving the elimination of frivolous appeals to the courts of appeals in the ordinary course of appellate review.

Accordingly, the Committee submits the following recommendations:

The present system of forma pauperis appeals fails adequately to advance the legitimate interests of the financially disadvantaged defendant and the larger interests the system of federal criminal justice is called upon to serve. The Department of Justice should sponsor legislation which would provide transcripts of trial proceedings to convicted defendants financially unable to purchase transcripts whenever such defendant files a notice of appeal and makes appropriate showing of his financial status. The provision of the transcript should not be conditioned on a preliminary scrutiny of the issues defendant seeks to present to the court of appeals.

Chapter IV

NOTES

1 20 Stat. 354, c. 176 (1879). And see 26 Stat. 826, c. 517 (1891).

2 7 Edw. VII, c. 23 (1907).

3 28 USC §1915(a), as amended by Pub. L. 86-320, 73 Stat. 590 (1959).

4 The Percentages are as follows: 1958—20.8%; 1959—19.6%; 1960—17.7%; 1961—21.4%; 1962—20.9%. See Annual Reports of the Director of the Administrative Office of the United States Courts (1958-62).

5 Thus, in the period 1949-1954, nearly 30% of Illinois criminal appeals resulted in reversals. Even higher percentages in other states are reported in Brief for Petitioners, Griffin v. Illinois (No. 95, October Term, 1955, Sp. Ct. of the U.S.) 21 et seq.

6 McKane v. Durston, 153 U.S. 684, 687 (1894).

7 Frank v. Mangum, 237 U.S. 309, 327 (1915).

8 See, *e.g.*, Cole v. Arkansas, 333 U.S. 196 (1948).

9 See *e.g.*, cases involving prisoners prevented by institutional rules from filing petitions in court: Cochrane v. Kansas, 316 U.S. 255 (1942); Dowd v. Cook, 340 U.S. 206 (1951).

10 351 U.S. 12 (1956).

11 *Id.* at 18.

12 *Id.* at 19.

13 See, especially, Eskridge v. Prison Board, 357 U.S. 214 (1958) in which the Court ruled that the petitioner had been unconstitutionally deprived of rights to appeal by the refusal of the trial court to order a transcript under a state statute authorizing provision of transcripts to persons financially unable to obtain them, when justice so requires. And see "Appellate Review for Indigent Criminal Defendants in the Federal Courts," 26 U. Chi. L. Rev. 454 (1959).

14 Coppedge v. United States, 369 U.S. 438, 441 (1962).

15 28 U.S.C. §1291.

16 Rule 37 (a) (2), FRCP, provides, in part: "An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if motion for a new

trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion.

17 United States v. Robinson, 361 U.S. 220 (1960). Although the 10-day requirements is deemed jurisdictional and not subject to waiver on grounds of "excusable neglect" or otherwise, the cases have shown considerable liberality in interpreting papers filed by defendants as "notices of appeal". See cases cited in Coppedge v. United States, 396 U.S. 438, 442 n. 5 (1962). The Committee believes that the question whether the 10-day requirement is too short and should be enlarged is entitled to serious consideration. *Cf.* the 30-day provision, Rule 73(a), Fed. Rules Civil Proc.

18 See Rule 39, FRCP. According to the Court in the Coppedge case, the fee for docketing an appeal in the courts of appeals is $25. 369 U.S. 438, 443 n. 6 (1962).

19 Coppedge v. United States, 369 U.S. 438, 444 (1962).

20 28 U.S.C. §1915 (a).

21 Coppedge v. United States, 369 U.S. 438, 446 (1962).

22 See, *e.g.*, Johnson v. United States, 352 U.S. 565 (1957); Farley v. United States, 354 U.S. 521 (1957); Ellis v. United States, 356 U.S. 674 (1958); Coppedge v. United States, 369 U.S. 438 (1962).

23 369 U.S. 438, 450 (1962): "Particularly since litigants *in forma pauperis* may, in the trial court, have suffered disadvantages in the defense of their cases inherent in their impecunious condition, is appellate review of their cases any less searching than that accorded paid appeals inappropriate."

24 See Reports (1958-62).

25 *Ibid.*

26 Report of the Director of the Admin. Office of the U.S. Courts (1960) 210.

27 Figure derived from *id.* at 304. A substantial number of defendants who initially plead not guilty subsequently change their pleas. Consult Appendix I.

28 Thus in 1960, approximately 20.7% of the cases terminated in the courts of appeals were disposed of in the District of Columbia. *Id.* at 210.

29 369 U.S. 438, 449 n. 16 (1962).

30 Information supplied by a special Committee of the Junior Bar Section of the Bar Association of the District of Columbia, composed of former motions law clerks in the Court of Appeals for the District of Columbia Circuit. The committee consists of Peter D. Ehrenhaft, Chairman; Louis M. Kaplan; David Rubin; Richard S. Salzman; Daniel M. Singer. Their report (herinafter identified as Report of the Special Committee) has been frequently consulted in the preparation of this chapter. We gratefully acknowledge this assistance.

31 Appendix I, Table X.

32 Survey conducted by Mr. Bennett Boskey of the District of Columbia bar. The replies indicated the following for the year 1960: First Circuit, 7 appeals granted, 7 appeals denied; Second Circuit, 9 appeals granted, 11 denied; Third Circuit, 6 granted, 5 denied; Fourth Circuit, 29 granted, 16 denied; Fifth Circuit, 12 granted, 22 denied; Sixth Circuit, 36 granted, 17 denied; Seventh Circuit, no data; Eighth Circuit, 63 cases (no indication of disposition); Ninth Circuit, 120 cases (no indication of disposition); Tenth Circuit, 37 granted, 14 denied; District of Columbia, 24 granted, 136 denied. In the same year the district courts of the Third Circuit granted 8 leaves to appeal; Fifth Circuit, 33; District of Columbia 60. These figures relate to both direct appeals and to appeals in collateral attacks on conviction or sentence initiated by federal prisoners. Report of the Special Committee (1963) Chart IV.

33 "Statistic compiled in the court below illustrate the undeniable fact that as many meritorius criminal cases come before that court through applications for leave to proceed *in forma pauperis* as on the paid docket, and that no *a priori* justification can be found for considering them, as a class, to be more frivolous than those in which costs have been paid." Coppedge v. United States, 369 U.S. 438, 449 (1962).

34 266 F. 2d 924, 926 (D.C. Cir. 1959) (Italics in the original).

35 Rule 37 (a) (2), FRCP, provides that "When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant." We are informed, however, that since assigned counsel is almost invariably in court at the time of the sentencing, the provision has had small effect. Cf. statement of the Court in the Coppedge case: "The salutary purpose of this provision may,

however, not be achieved when the defendant appears at sentencing with counsel. If neither counsel, whether retained or court appointed, nor the district judge imposing sentence, notifies the defendant of the requirement for filing a prompt notice of appeal, the right of appeal may irrevocably be lost." 369 U.S. 438, 443 n. 8 (1962).

36 Coppedge v. United States, 369 U.S., 438, 446 (1962).

37 See, *e.g.*, "Appellate Review for Indigent Criminal Defendants in the Federal Courts," 26 U. Chi. L. Rev. 454 (1959) and the materials there cited.

38 356 U.S. 674 (1958).

39 369 U.S. 438 (1962).

40 *Id.* at 447-448.

41 *Id.* at 447 n. 13.

42 Thus in Coppedge, the Court notes that the Government resisted granting leave to appeal, not on the ground that the issues presented were "frivolous", but that they were "not sufficiently substantial". *Id.* at 451. See also Jones v. United States, 266 F. 2d 924, 925 n. 2, 926 (D.C. Cir. 1959).

43 See, *e.g.*, two cases in the Court of Appeals for the District of Columbia: Hardy v. United States, Misc. No. 1834, decided October 24, 1962, pending on petition for certiorari in the United States Supreme Court as Misc. No. 783, October Term 1962; Ingram v. United States, Misc. No. 1797, decided December 6, 1962. Report of the Special Committee (1963) p. 11, n. 11.

44 "The virtual non-existence of reported cases in which a criminal appeal has been dismissed as frivolous suggests strongly that virtually every defendant convicted in a federal court can now have that conviction reviewed by a Court of Appeals." Ehrenhaft, "Are the Paupers Pampered? Indigent Appellants in the Federal Courts," 46 A.B.A. Jour. 646, 647 (1960).

45 Note the concurring opinion of Mr. Justice Stewart, joined by Mr. Justice Brennan, in Coppedge v. United States, 369 U.S. 438, 458 (1962): "This suggests that each Court of Appeals might well consider whether its task could not be more expeditiously and responsibly performed by simply granting applications to appeal from criminal convictions *in forma pauperis* as a matter of course, and appointing counsel to brief and argue each case on the merits. The Government would then be free in any case to file before argument a motion to

dismiss the appeal as frivolous, as every appellee is always free to do."

46 "In an effort to reduce the fragmented consideration of i.f.p. appeals, and in consonance with its understanding of the requirements . . . of *Coppedge*, the Court of Appeals for the District of Columbia Circuit has announced that it will generally order at least a partial transcript automatically for an indigent seeking leave to appeal *in forma pauperis*. The parts to be ordered are to be limited to those relating to the claims of error made by the indigent in his application for leave to appeal. The soundness of this rule appears questionable, since it is unlikely that most laymen will be able to recognize, much less articulate, the claims to be made that would merit an appellate court's attention. The attorneys appointed by the court to represent such appellants are then also burdened with a limited record of the trial they are asked to review for error and are, in effect, still thrown back to the time consuming task of personal investigation by interviews with the participants in the trial in order to fulfill their responsibilities. Such a restrictive view of the requirements of *Coppedge* has already led to two divided decisions by the Court, one of which is currently pending before the Supreme Court on petition for certiorari." Report of the Special Committee (1963) pp. 10-11. See note 43, *supra*.

47 28 U.S.C. §1915 (a).

48 United States *ex rel.* Breedlove v. Dowd, 269 F.2d 693 (7th Cir. 1959).

49 Coppedge v. United States, 369 U.S. 438, 446 (1962).

50 Johnson v. United States, 352 U.S. 565, 566 (1957).

51 352 U.S. 565 (1957).

52 The materials discussed in this and the two paragraphs following derive in principal part from Boskey, "The Right to Counsel in Appellate Proceedings," 45 Minn. L. Rev. 783 (1961).

53 *Id.* at 793.

54 Johnson v. United States, 352 U.S. 565, 566 (1957).

55 See Boskey, *op. cit. supra*, note 52, at 793.

56 *Id.* at 794, n. 37.

57 "But representation in the role of an advocate is required. If counsel is convinced, after conscientious investigation, that

the appeal is frivolous, of course, he may ask to withdraw on that account. If the court is satisfied that counsel has diligently investigated the possible grounds of appeal, and agrees with counsel's evaluation of the case, then leave to withdraw may be allowed and leave to appeal may be denied." Ellis v. United States, 356 U.S. 674, 675 (1958).

58 Note the case of *Kemp* discussed *infra*. It should also be observed that the Supreme Court has frequently reversed the denial of leave to appeal in cases coming to the court on certiorari from the circuit courts. See Coppedge v. United States, 369 U.S. 438, 450, n. 16 (1961).

59 A partial record or transcript may have been prepared in the district court. See Rifge, "The Indigent Defendant," 24 F.R.D. 241.

60 Jones v. United States, 266 F.2d 924, 927, n. 9 (D.C. Cir. 1959). According to information supplied by the Clerk of the Court of Appeals for the District of Columbia Circuit, the number of appointments has markedly increased in the years between 1958 and 1962. In the latter fiscal year, counsel were assigned in 238 instances to represent appellants in a total of 163 cases. The difference of 75 between these two figures results from occasions where counsel were granted leave to withdraw for cause and other counsel were substituted and from the limited number of cases in which more than one lawyer was appointed to represent an appellant. Of the 163 cases, 121 were appeals from judgments of conviction. Report of the Special Committee (Supplement, 1963).

61 Boskey, "The Right to Counsel in Appellate Proceedings," 45 Minn. L. Rev. 783, 792, n. 31 (1961).

62 See Coppedge v. United States, 369 U.S. 438, 452 n. 17 (1962).

63 351 U.S. 12 (1956). Much of the material in this and the following paragraph is derived from Allen, "Griffin v. Illinois: Antecedents and Aftermath," 25 U. Chi. L. Rev. 151, 157-161 (1957).

64 351 U.S. 12, 19 (1956).

65 Rule 65-1, Illinois Supreme Court Rules, Ill. Stat. Ann. (Smith-Hurd, 1956) c. 110, §101.65-1.

66 The statistical information in this and following paragraphs was supplied by the Hon. Walter V. Schaefer, Associate Justice of the Supreme Court of Illinois, in a letter to the Chairman dated November 2, 1962.

67 The prison population of the federal prison system at the end of 1959 was 22,492. The prison population in Illinois on the same date was 8,660. See Federal Bureau of Prisons, Federal Prisons 1960, Tables 34 and 35, pp. 77 and 78.

68 See note 27, *supra*, and accompanying text.

69 Letter of Hon. Walter V. Schaefer to the Chairman, dated November 2, 1962. It should be noted that from 1958-1962, reversals were ordered by the Supreme Court of Illinois in at least sixty-one cases brought before the court under Rule 65-1. See Petitioner's Brief: Norvell v. Illinois, No. 513, Supreme Court of the United States, October Term, 1962, pp. 41-46.

70 Ill. Stat. Ann. (Smith-Hurd) c. 38, §826 *et seq.* "Whether failure to take advantage of the provisions of Rule 65-1 will now bar the petitioner from raising claims in the post-conviction proceeding that might have been submitted to the supreme court on direct review, has not as yet been definitely settled. If the *Jennings* doctrine (411 Ill. 21) is adhered to, there appears no good reason to doubt that this result will follow, at least in cases in which petitioner was represented by counsel at the trial or was otherwise informed of his rights under Rule 65-1 in time to take advantage of its provisions. It this be true, the Illinois Act will be employed in the future largely as a device to hear claims of constitutional deprivations occuring dehors the record." A.B.A., Section of Juridical Administration, Effective State Post-Conviction Procedures (August, 1958) 30.

71 Texas Code Crim. Proc. Ann. (Vernon, 1950) §760 (6).

72 Zamora v. State, 309 S.W.2d 447, 449 (Tex. Cr. 1957).

73 People v. Pavia, 31 Cal. 2d 503, 190 P.2d 604 (1948); People v. Smith, 34 Cal.2d 449, 211 P.2d 561 (1949); Hidalgo v. Municipal Court, 129 Cal. App. 2d 244, 277 P.2d 36 (2d Dist. 1954). But see Douglas v. California, No. 34 Supreme Court of the United States, October Term, 1962.

74 Fla. Stat. Ann. §924.23.

75 Iowa Code Ann. (1950) §793.8.

76 151 Iowa 234, 237, 130 N.W. 1082 (1911).

77 Mo. Rev. Stat. (1952) §485.100 (Supp. 1956).

78 For a survey of state law at the time of the Griffin decision see "The Effect of Griffin v. Illinois on the States' Administration of Criminal Law," 25 U. Chi. L. Rev. 161 (1957).

79 A useful brief summary of the military review procedures is included in Ehrenhaft, "Are Paupers Pampered? Indigent Appellants in the Federal Courts," 46 A.B.A. Jour. 646, 648 (1960). See also Everett, Military Justice (1956) 260 *et seq.*

80 This is the lowest total in a four-year period. In 1958 the boards of review considered 9,444 cases; 8,011 in 1959, and 7,159 in 1960. See Annual Reports of the United States Court of Military Appeals, the Judge Advocates General of the Armed Forces and the General Counsel of the Treasury Department.

81 The statement relates to the situation in the mid-fifties. See Everett, Military Justice (1956) 284.

82 Ehrenhaft, *op. cit. supra*, note 79, at 648. Of equal or greater significance is the fact that collateral attacks in the civil courts have been very few. See Bishop, "Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions," 61 Colum. L. Rev. 40, 60 (1961); Warren, "The Bill of Rights and the Military", 37 N. Y. U. L. Rev. 181, 188-89 (1962).

83 Thus, in a number of cases the courts of appeals have limited the Supreme Court's holding in the *Johnson* case relating to the appointment of counsel to appeals from a judgment of conviction and have held that it does not extend to an appeal from a preceeding instituted under 28 USC §2255 to set aside a judgment of conviction in the district court. Gershon v. United States, 243 F.2d 527 (8th Cir. 1957), *cert. denied*, 355 U.S. 873; Hill v. Settle, 244 F.2d 311 (1957); Young v. United States, 246 F.2d 901, *cert. denied*, 355 U.S. 917 (1958).

84 352 U.S. 565 (1957).

85 356 U.S. 674 (1958).

86 "Moreover, a Court of Appeals must, under *Johnson v. Zerbst*, 304 U.S. 458, afford one who challenges that certification the aid of counsel unless he insists on being his own." 352 U.S. 565, 566 (1957).

87 Boskey, "The Right to Counsel in Appellate Proceedings," 45 Minn. L. Rev. 783, 786 (1961).

88 369 U.S. 438, 446-47 (1962).

89 See, *e.g.*, A.B.A. Section of Judicial Administration, Effective Post-Conviction Procedures (1958) pp. 20-24. Thus, more petitions for certiorari were filed *in forma pauperis* in the Su-

preme Court of the United States in the October 1946 term by Illinois prisoners than those filed by the combined prison populations of all other states and the federal prison system. Most of the Illinois petitions sought review of cases arising from collateral attack on convictions in the state courts. One significant cause for this was the fact that in the period before decision of the *Griffin* case, direct appellate review was for practical purposes unavailable in Illinois to the convicted defendant financially unable to purchase a transcript.

90 We believe that the Department would be well advised to accompany legislative proposals in this area by studies establishing a detailed cost estimate of the proposed system.

91 We are informed that another important item of cost is that of preparing and printing a joint appendix of relevant portions of the transcript and record. It has been suggested that techniques are available to minimize the cost of reproducing the relevant portions of the record, once the transcript is made available. Report of the Special Committee (1963) p. 9, n. 8.

92 Letter to the Chairman by Mr. Will Shafroth, Deputy Director of the Administrative Office of the United States Courts, dated February 12, 1963.

93 The Report of the Special Committee (1963) p. 14, states: "Available facts point to costs well under $500,000 per year for all federal criminal cases."

CONCLUSION

In these pages the Committee has considered various aspects of the problems of financial incapacity and federal criminal justice. We have endeavored to indicate the nature of governmental obligation in this area and to identify the public and private interests importantly affected. We have preesnted a range of recommendations, including an important proposal for the legislative establishment of a system of adequate representation in the federal courts. The Committee is aware that, although this Report canvasses a considerable number of particular problems, it does not present a comprehensive survey. In some instances our recommendations are for further inquiry and, in others, the Committee's proposals anticipate the enactment of legislation not yet drafted. In no instance are the Committee's recommendations self-executing. In short, the Committee believes that this Report represents only the first steps required to be taken and that, if the efforts hitherto expended are to have important and lasting consequences, a system of implementing the Committee recommendations needs to be established in the Department of Justice.

The Committee has been impressed by the great interest displayed by the Department in the creation of the Committee and in the Committee's subsequent studies and activities. We have enjoyed full and intelligent cooperation from the very considerable number of Departmental staff members with whom we have worked and spoken during the course of the Committee's life. We believe that the interest and enthusiasm displayed within the Department should not be permitted to dissipate for want of an effective and continuing mechanism by which these problems can be addressed and solutions applied.

The Committee believes that the task of implementing its recommendations and undertaking further activities relating to the improvement of federal criminal justice can best be placed in the hands of a regular Departmental staff member serving in the capacity of Special Assistant to the Attorney General or to the Deputy Attorney General. We believe the Special Assistant should be afforded staff assistance as may be required to conduct further inquiries, draft legislative proposals and administrative directives, and to advance other aspects of the Department's program in this area. The Committee is persuaded that the persistent and continuous attention required for effective implementation of that program can be provivded only by regular, full-time members of the Department's staff. We do believe, however, that the diversified experience and wide range of views

that can be contributed by private citizens, not otherwise connected with the Department, represent a contribution to this work that can be supplied from no other source. In our judgment, therefore, an advisory council consisting of private citizens who are interested and knowledgeable in the problems of this area, should be appointed and should share fully in the work of implementing the Committee's recommendations and the development of additional proposals and measures to the same important ends.

Accordingly, our concluding recommendation, and one which the Committee believes to be of the highest importance, is:

The Committee's proposals for the solution of problems of financial incapacity in the federal criminal courts are not self-executing. Some of the Committee's recommendations contemplate further inquiries, the drafting of legislative proposals, and the taking of other measures. It is of the highest importance that a mechanism be established in the Department of Justice for the kind of continuing attention and activity that will result in effective implementation of the Committee's proposals.

The Committee recommends that implementation of these recommendations and the further development of the Department's program in this area be placed in the hands of a full-time staff member, preferably a Special Assistant to the Attorney General or to the Deputy Attorney General. The Special Assistant should be supplied with staff services sufficient for the effective performance of these functions. In addition, an advisory council of experienced and knowledgeable private citizens should be appointed to share fully in the work of implementing and developing the Department's program.

Appendix I

REPORT OF THE FOUR-DISTRICT SURVEY

This report presents the results of a field study undertaken in connection with the work of the Attorney General's Committee. Because of the scarcity of data concerning the impact of financial inability on the defense of criminal cases in the federal courts it seemed desirable for the Committee to undertake a limited factual inquiry. Since the Committee operated without a staff or a budget, the enterprise necessarily had to be of modest scope. It was undertaken by the three academic members of the Committee with the aid of students at their respective schools. It would have been impossible to conduct even as small-scale a research project as this one without some financial support. A generous grant from the Vera Foundation, Inc. met this need. The committee is grateful to the Foundation and its Executive Director, Mr. Herbert Sturz, for their interest and support. Thanks also are due to Messrs. Thomas Culver and John Doty, students at the Stanford Law School, for assistance in the technical design of the study and in colating the work sheets from the various districts, respectively, and to Mr. Joseph Carter, Research Associate, Stanford Computation Center, for programming the data for processing on the Center's equipment.

The study consisted of examining and recording data appearing in the Docket Books of four Federal District Courts: Northern District of California, San Francisco Division; Northern District of California, Sacramento Division; Northern District of Illinois; and District of Connecticut. Thanks are due the clerks of those courts and their staffs for making facilities available for the study.

The subject of the study was the docket sheets for each defendant in each of the four districts against whom criminal proceedings were commenced during the fiscal year ending June 30, 1961. In the Northern District of California, San Francisco Division, the availability of student manpower made it possible to examine also the sheets for the fiscal year ending June 30, 1960. Excluded from consideration were persons against whom proceedings were commenced for revocation of probation and to establish prior convictions in connection with narcotics offenses. Data were recorded but not tabulated for cases in which no final disposition appeared in the record, such as cases that were transferred to another district. The universe of tabulated data, then, consisted of persons against whom criminal proceedings were

commenced during the relevant period and whose cases were finally disposed of. For the four districts these numbered as follows:

N.D. Cal.	(S.F.)	1102
N.D. Cal.	(Sac.)	342
N.D. Ill.		645
D. Conn.		267

The purposes for which these data were collected and studied were: (a) to provide a general picture of the criminal process in the federal courts, with special reference to the problem of financial inability; and (b) to examine the impact of financial inability on the conduct of an adequate defense. As will appear, the first of these objectives, a purely descriptive one, was far easier to accomplish than the second, which required analysis based on premises that are not beyond question.

A cautionary word needs to be said about the limitations inherent in the data studied. No criminal case is precisely the same as any other case. A purely quantitative study based on formal and summary records, like this one, leaves out of account qualitative considerations that may be important, indeed decisive, in any adequate appraisal of the problem of financial inability. This general caveat will be spelled out in detail at several points in this Report; but it should be understood as qualifying and limiting the study as a whole.

The results of the study are presented in seventeen Tables. Tables I through X serve the first purpose mentioned above: to present a general picture of the criminal process in the federal courts, with special reference to the problem of financial inability. Tables XI—A through D and XII—A, B and D* serve the second purpose: to examine the impact of financial inability on the conduct of an adequate defence.

Table I shows the general situation with respect to representation of criminal defendants. Here as elsewhere wide variations in local conditions appear. The proportion of retained counsel, for example, varied from a high of 67% in the District of Connecticut to a low of 21% in the Sacramento Division of the Northern District of California. Similarly, the proportion of cases in which counsel was waived varied from a high of 67% in Sacramento to a low of less than 1% in San Francisco.

Table II shows the amounts of bail required. The modal

*Because of a discrepancy in the recording of data there is no Table XII for the Northern District of Illinois.

amount was $501-$1,500 in two districts,* $1,501-$2,500 in one district, and $2,501-$5,000 in one district. The proportion of cases in which bail was not required ranged from a high of 40% to a low of 19%. It will be observed that in only one district (Connecticut) did the proportion of cases in which over $5,001 was required exceed 10%. It is possible that these differences may be in part accounted for by differences in the distribution of types of offense, but we are unable so to assert. An attempt was made to break down the cases by types of offense but only fragmentary results were obtained. No useful purpose would be served by recording these scattered results. Nonetheless, it appears that an attempt to make such a breakdown would be an interesting subject for future study.

Table III examines the cases in which bail was required and shows the proportion of such cases in which bail was made. Here, again, wide variations are recorded, perhaps suggesting that in some districts more successful procedures for ascertaining realistic bail levels in individual cases are being employed than in other districts.

Table IV presents a further breakdown of the data examined in Table III, in terms of the amounts at which bail was made (following the breakdown in Table II). Again, the results are highly variant but taken as a whole they suggest that bail operated as a successful device for securing pre-trial liberty only at relatively low required amounts.

Table V shows the proportion of cases in which the initial process employed was summons rather than arrest. It would take considerable additional study to determine whether adequate use is being made of this device as a means of maximizing pre-trial liberty. For example, it would be important to conduct a detailed examination of the types of offenses in which the summons device was used. The results presented here are at best suggestive of the problem. The wide variation in the incidence of use of the summons device obviously calls for some explanation.

Table VI examines the proportion of "failures" in cases where the defendant enjoyed pre-trial liberty, either because he was summonsed rather than arrested or because he was able to make bail or both. The "failure" experience was very low, in no case exceeding 7% and in general being much below that figure. It should be noted that the index of "failure" is a notation that the defendant failed to appear at some stage of the proceeding.

*The term "district" is used herein to refer either to a district or a division.

Many such instances presumably involved minor technical defaults. It is thought that comparatively few of them were cases of "bail-jumping" in which the defendant disappeared to avoid trial or punishment. Thus qualified, these "failure" figures may be thought to raise a question whether pre-trial liberty involves a substantial practical enforcement problem.

Tables VII through X are generally descriptive in gross terms of the principal characteristics of the litigation process in federal criminal cases. Table VII shows the initial plea. In all districts the pleas of guilty or nolo substantially outnumbered the plea of not guilty. It by no means follows, of course, that all or indeed most cases in which an initial plea of not guilty is entered go to trial. As Table VIII shows, the overwhelming majority of cases in the districts studied did not go to trial, ranging from a low of 79% in Connecticut to a high of 95% in Sacramento. The primary reasons, as shown by Table IX, are dismissals and changes in plea. The latter explanation is particularly important for purposes of this study, involving as it does the phenomenon of plea-bargaining, which is generally understood to be an important aspect of an adequate defense in criminal cases. It will be noted that the great majority of the cases studied were terminated by conviction on a plea of guilty, ranging from a low of 61% in Connecticut to a high of 85% in Sacramento. Table X shows the relative infrequency of the appeal in criminal cases and reveals one effect of the roadblock placed in the way of appeals by persons suffering financial inability.

Tables XI and XII represent an attempt to test, however imperfectly, the existence of some of the disadvantages that allegedly result from financial inability in the criminal process. The method employed was to isolate factors that appeared in the records studied and that were thought to signify financial inability and then to compare cases possessing and not possessing those factors with respect to a number of crucial points in the criminal process. Two "indexes of financial inability" were used. The first was the appearance of assigned rather than retained counsel. For each district the cases in which counsel was retained were compared with those in which counsel was assigned. These results appear in the tables of Series XI. The other "index of financial inability" was inability to make bail. This involved comparing for each district those cases in which bail was required and made with those cases in which bail was required but not made. This series of tables is headed XII.

Some of the results of these comparisons are detailed below. A prefatory word of caution needs to be said, however. Leaving aside the numerous questions that might be raised about the validity of the "indexes of financial inability," there remains an overriding doubt as to the general significance of the results. These results, broadly stated, tend to suggest that those persons who are financially unable to provide themselves with an adequate defense do more poorly in the criminal process than those who are financially able, as measured by such critical factors as initial plea, mode of trial, outcome and correctional disposition. But these comparisons do not and cannot tell us whether such persons do more poorly *because* of financial inability. Conceivably many of them do more poorly because their cases are less meritorious. Conceivably their financial inability, as recorded here, often results from the consciousness that their cause is not worth spending money on, i.e., they do not retain counsel or post bail even though they might be able to do so. It would take far more detailed and expensive studies than these to assess the weight properly to be accorded such relevant doubts. When all this is said, however, it remains true that the data exhibited in these tables presents a general picture entirely in keeping with the common-sense hypothesis that, other things being equal, defendants who are able to retain counsel of their own choice or to be at liberty pending disposition of their cases will be enabled to play their hands better than those who have to be assigned unpaid counsel or who are hampered in assisting in the preparation of their own defense by being confined in jail pending trial. This congruity with normal expectations may in itself justify the presentation of these admittedly ambiguous data.

Series XI, as previously stated, compares the situations of privately represented defendants in each of the four districts with that of defendants represented by assigned counsel. The first comparison is in relation to *Bail Disposition*. Not surprisingly, there turns out to be a uniformly high correlation between ability to hire a lawyer and ability to make bail. In each district, the comparison as to *Initial Plea* shows that a defendant who is represented by assigned counsel is far likelier to plead guilty at the outset than is one represented by retained counsel. In San Francisco, for example, 54% of those in the retained counsel group entered an initial plea of guilty or nolo, while 76% of those in the assigned counsel group did so. The disparity was even more extreme in the Northern District of Illinois, where only 20% of those who had retained counsel entered an initial plea of guilty or nolo, while 76% of those in the assigned counsel

group did so. One possible inference that may be drawn from this discrepancy will be clear to anyone who is familiar with the criminal process. By pleading guilty at the outset to the charge brought against him, the defendant precludes himself from later pleading guilty to a lesser included offense or changing his plea in return for a prosecutor's recommendation of leniency in sentence, or some other such concession. The defendant who pleads not guilty retains a significant advantage in his ability to put the prosecution to its proof, an advantage that he can later trade for substantial consideration. That he may trade it, for whatever consideration, is suggested by inspection of the figures on *Mode of Trial*, as well as by the figures under *Outcome* that show the cases disposed of by a plea of guilty, which clearly demonstrate that many of those who initially plead not guilty subsequently change their plea. In general, this is shown to be far more characteristic of the retained counsel group than of the assigned counsel group. It cannot be asserted that the suggested inference is necessarily the only one that might be drawn. It has been suggested, for example, that the initial plea of not guilty may sometimes represent counsel's attempt to give himself enough time to collect his fee. It is of course outside the scope of this study to show whether these changes in plea were tactically motivated or, if they were, whether they were tactically advantageous.

It likewise appears generally true that a larger proportion of those who retain counsel stand trial than is true of those who have counsel assigned. These differences are obscured, however, by the very large proportion in both groups who do not stand trial.

The figures as to *Outcome* are quite striking in their demonstration of apparent disadvantage to the assigned counsel group. In each group the outcomes favorable to the defendant—Dismissal or Acquittal—were a substantially larger percentage of the total for the retained counsel than for the assigned counsel group. And, as presaged by the earlier figures on *Initial Plea* and *Mode of Trial*, it was generally true that the outcome Guilty—Adjudication showed a higher proportion in the retained counsel than in the assigned counsel group, while the converse was true for the outcome Guilty—Plea. In short, the retained counsel group put up more of a fight than did the assigned counsel group. As previously suggested, these results do not in themselves permit a very confident assertion that the quality of representation is the crucial variable.

The figures on *Correctional Disposition** also appear to reflect an advantage in the retained counsel group. Taking Imprisonment as the least advantageous disposition, the assigned counsel group heavily outweighed the retained counsel group in receiving it. Since this tabulation includes, under the heading No Correctional Disposition, the favored outcomes of Dismissal and Acquittal, it does not explicitly provide the basis for comparing the relative experience of the two groups with respect to Imprisonment and Probation. Inspection of the figures, however, does suggest that, of those convicted and subjected to correction, the retained counsel group did somewhat better in drawing probation rather than imprisonment than did the assigned counsel group. Whether these differences between the two groups are to be explained by variations in the quality of representation, variations in the personal characteristics of defendants, or, as seems most likely, variations in some indeterminate combination of these and other factors, is not demonstrable.

Finally, a significantly higher proportion of appeals were attempted by the retained counsel group than by the assigned counsel group, although in both groups only a small fraction of the cases showed an attempt to appeal.

In general, the Bail Disposition breakdown in Series XII reflects the same experience as that shown in the tables of Series XI and lends itself to the same variety of interpretations.

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*Because of discrepancies in the recording of date, no figures on *Correctional Disposition* appear in Table XI-C, Northern District of Illinois.

Table I—REPRESENTATION*

	Retained	Assigned	Waived	No Record
N.D. Cal. (SF)	511	574	7	10
	(46)	(52)	(1)	(1)
N.D. Cal. (Sac)	72	39	228	3
	(21)	(11)	(67)	(1)
N.D. Ill.	202	309	10	124
	(32)	(47)	(2)	(19)
D. Conn.	179	71	10	7
	(67)	(26)	(4)	(3)

* In these tables, figues in parentheses are percentages, rounded off to the nearest whole number.

Table II—BAIL

	500 or Under	501-1,500	1,501-2,500	2,501-5,000	5,001-10,000	10,001-25,000	Over 25,000	Bail Not Required
N.D. Cal. (SF)	126	209	140	81	51	61	4	430
	(11)	(19)	(13)	(7)	(5)	(6)	(Under 1)	(39)
N.D. Cal. (Sac)	9	83	88	38	10	7	1	106
	(3)	(24)	(26)	(11)	(3)	(2)	(Under 1)	(31)
N.D. Ill.	47	169	45	90	25	11	0	258
	(7)	(26)	(7)	(14)	(4)	(2)	(0)	(40)
D. Conn.	62	44	13	61	14	18	5	50
	(23)	(16)	(5)	(23)	(5)	(7)	(2)	(19)

Table III—BAIL DISPOSITION

	Made	Not Made
N.D. Cal. (SF)	285	386
	(42)	(58)
N.D. Cal. (Sac)	41	195
	(17)	(83)
N.D. Ill.	229	158
	(57)	(43)
D. Conn.	154	58
	(77)	(23)

Table IV—ABILITY TO FURNISH BAIL AT CERTAIN AMOUNTS

	Amount	Bail Made	Bail Not Made
N.D. Cal. (SF)	500 or less	89 (71)	37 (29)
	501- 1,500	83 (40)	126 (60)
	1,501- 2,500	66 (47)	74 (53)
	2,501- 5,000	28 (35)	53 (65)
	5,001-10,000	10 (20)	41 (80)
	10,001-25,000	8 (13)	53 (87)
	Over 25,000	1 (25)	3 (75)
N.D. Cal. (Sac)	500 or less	2 (22)	7 (78)
	501- 1,500	20 (24)	63 (76)
	1,501- 2,500	6 (7)	82 (93)
	2,501- 5,000	11 (29)	27 (71)
	5,001-10,000	2 (20)	8 (80)
	10,001-25,000	0 (0)	7 (100)
	Over 25,000	0 (0)	1 (100)
N.D. Ill.	500 or less	30 (64)	17 (36)
	501- 1,500	107 (63)	62 (37)
	1,501- 2,500	22 (49)	23 (51)
	2,501- 5,000	54 (60)	36 (40)
	5,001-10,000	14 (56)	11 (44)
	10,001-25,000	2 (18)	9 (82)
	Over 25,000	0	0
D. Conn.	500 or less	55 (89)	7 (11)
	501- 1,500	32 (73)	12 (27)
	1,501- 2,500	10 (77)	3 (23)
	2,501- 5,000	43 (70)	18 (30)
	5,001-10,000	6 (43)	8 (57)
	10,001-25,000	8 (44)	10 (56)
	Over 25,000	0	5 (100)

Table V—USE OF SUMMONS

	Summons
N.D. Cal. (SF)	316 (29)
N.D. Cal. (Sac)	25 (7)
N.D. Ill.	46 (7)
D. Conn.	96 (36)

Table VI—RELATION BETWEEN PRE-TRIAL LIBERTY AND NON-APPEARANCE

	Summons		Free on Bail	
	Failed to Appear at Some Stage	All Others	Failed to Appear at Some Stage	All Others
N.D. Cal. (SF)	22 (7)	294 (93)	7 (2)	278 (98)
N.D. Cal. (Sac)	— —	25 (100)	— —	41 (100)
N.D. Ill.	2 (4)	44 (96)	29 (7)	379 (93)
D. Conn.	1 (1)	95 (99)	3 (2)	151 (98)

Table VII—INITIAL PLEA

	Not Guilty	Guilty or Nolo	Other
N.D. Cal. (SF)	331 (30)	718 (65)	53 (5)
N.D. Cal. (Sac)	48 (14)	271 (79)	23 (7)
N.D. Ill.	272 (42)	333 (52)	40 (6)
D. Conn.	110 (41)	128 (48)	29 (11)

TABLE VIII—TRIAL

	Jury	Court	No Trial
N.D. Cal. (SF)	101 (9)	48 (4)	953 (87)
N.D. Cal. (Sac)	9 (3)	8 (2)	325 (95)
N.D. Ill.	23 (3)	36 (6)	586 (91)
D. Conn.	41 (15)	15 (6)	211 (79)

Table IX—OUTCOME

	Dismissal	Acquittal	Guilty-Plea	Guilty-Adjudication	Other
N.D. Cal. (SF)	146 (13)	19 (2)	825 (75)	108 (10)	4 (Under 1)
N.D. Cal. (Sac)	23 (7)	3 (1)	291 (85)	9 (3)	16 (5)
N.D. Ill.	20 (3)	16 (4)	435 (67)	36 (5)	138 (21)
D. Conn.	60 (23)	13 (4)	163 (61)	25 (10)	6 (2)

Table X—APPEAL

	In forma Granted	In forma Denied	Ordinary Appeal	No Appeal
N.D. Cal. (SF)	10 (1)	9 (1)	24 (3)	1059 (95)
N.D. Cal. (Sac)	0 (0)	1 (Under 1)	0 (0)	341 (100)
N.D. Ill.	1 (Under 1)	2 (Under 1)	5 (1)	637 (99)
D. Conn.	3 (1)	5 (2)	3 (1)	256 (96)

Table XI-A

INDEX OF FINANCIAL INABILITY— REPRESENTATION

N.D. Calif. (SF Div.)

	Retained Counsel		Assigned Counsel	
Bail Disposition				
Made	212	(42)	71	(12)
Not Made	98	(19)	279	(49)
Other	201	(39)	224	(39)
Initial Plea				
Not Guilty or Nolo	215	(42)	116	(20)
Guilty	274	(54)	435	(76)
Other	22	(4)	23	(4)
Mode of Trial				
Jury	65	(13)	36	(6)
Court	25	(5)	23	(4)
None	421	(82)	515	(90)
Outcome				
Dismissal	86	(17)	52	(9)
Acquittal	11	(2)	8	(1)
Guilty-Plea	349	(68)	467	(81)
Guilty-Adjudication	64	(13)	44	(8)
Other	1	(Under 1)	1	(1)
Correctional Disposition				
Imprisonment	149	(29)	244	(43)
Probation	175	(34)	254	(44)
Other	90	(18)	16	(3)
None	97	(19)	60	(10)
Appeal				
Attempted	32	(6)	11	(2)
Not Attempted	479	(94)	563	(98)

Table XI-B

INDEX OF FINANCIAL INABILITY— REPRESENTATION

N.D. Calif. (Sac. Div.)

	Retained Counsel		Assigned Counsel	
Bail Disposition				
Made	18	(25)	4	(10)
Not Made	30	(42)	6	(16)
Other	24	(33)	29	(74)
Initial Plea				
Not Guilty or Nolo	32	(44)	16	(41)
Guilty	33	(46)	21	(54)
Other	7	(10)	2	(5)
Mode of Trial				
Jury	6	(8)	3	(8)
Court	8	(11)	-	
None	58	(81)	36	(92)
Outcome				
Dismissal	15	(21)	3	(7)
Acquittal	1	(2)	2	(5)
Guilty-Plea	43	(60)	32	(82)
Guilty-Adjudication	8	(11)	1	(3)
Other	4	(6)	1	(3)
Correctional Disposition				
Imprisonment	30	(42)	30	(77)
Probation	16	(22)	4	(10)
Other	9	(12)	-	
None	17	(24)	5	(13)
Appeal				
Attempted	-		1	(3)
Not Attempted	72	(100)	38	(97)

Table XI-C

INDEX OF FINANCIAL INABILITY— REPRESENTATION

N.D. Illinois

	Retained Counsel		Assigned Counsel	
Bail Disposition				
Made	158	(78)	179	(58)
Not Made	27	(13)	108	(35)
Other	17	(9)	22	(7)
Initial Plea				
Not Guilty or Nolo	147	(73)	68	(22)
Guilty	40	(20)	234	(76)
Other	15	(7)	7	(2)
Mode of Trial				
Jury	17	(8)	4	(1)
Court	14	(7)	13	(4)
None	171	(85)	292	(95)
Outcome				
Dismissal	9	(4)	5	(2)
Acquittal	9	(4)	4	(1)
Guilty-Plea	94	(47)	269	(87)
Guilty-Adjudication	17	(9)	13	(4)
Other	73	(36)	18	(6)
Appeal				
Attempted	7	(3)	1	(1)
Not Attempted	195	(97)	308	(99)

Table XI-D

INDEX OF FINANCIAL INABILITY— REPRESENTATION

D. Conn.

	Retained Counsel		Assigned Counsel	
Bail Disposition				
Made	111	(62)	31	(44)
Not Made	19	(11)	35	(49)
Other	49	(27)	5	(7)
Initial Plea				
Not Guilty or Nolo	82	(46)	28	(39)
Guilty	74	(41)	43	(61)
Other	23	(13)	-	
Mode of Trial				
Jury	31	(17)	10	(14)
Court	11	(6)	4	(6)
None	137	(77)	57	(80)
Outcome				
Dismissal	46	(26)	8	(11)
Acquittal	10	(6)	3	(3)
Guilty-Plea	101	(56)	51	(71)
Guilty-Adjudication	16	(9)	9	(12)
Other	6	(3)	3	(3)
Correctional Disposition				
Imprisonment	31	(17)	30	(42)
Probation	62	(35)	27	(38)
Other	27	(15)	3	(4)
None	59	(33)	11	(16)
Appeal				
Attempted	8	(4)	2	(3)
Not Attempted	171	(96)	69	(97)

Table XII-A

INDEX OF FINANCIAL INABILITY—BAIL

N.D. Calif. (SF Div.)

	Bail Made *285 cases*		Bail Not Made *386 cases*	
Initial Plea				
Not Guilty or Nolo	146	(51)	95	(25)
Guilty	121	(43)	276	(71)
Other	18	(6)	15	(4)
Mode of Trial				
Jury	51	(18)	26	(7)
Court	17	(6)	14	(3)
None	217	(76)	346	(90)
Outcome				
Dismissal	57	(20)	49	(13)
Acquittal	6	(2)	5	(1)
Guilty-Plea	171	(60)	304	(79)
Guilty-Adjudication	50	(18)	27	(7)
Other	1	(Under 1)	-	
Correctional Disposition				
Imprisonment	94	(33)	222	(57)
Probation	100	(35)	100	(26)
Other	28	(10)	10	(3)
None	63	(22)	54	(14)
Appeal				
Attempted	20	(7)	12	(2)
Not Attempted	265	(93)	374	(98)

Table XII-B

INDEX OF FINANCIAL INABILITY—BAIL

N.D. Calif. (Sac. Div.)

	Bail Made *41 cases*		Bail Not Made *195 cases*	
Initial Plea				
Not Guilty or Nolo	25	(61)	16	(8)
Guilty	14	(34)	171	(88)
Other	2	(5)	8	(4)
Mode of Trial				
Jury	4	(10)	3	(2)
Court	5	(12)	0	
None	32	(78)	192	(98)
Outcome				
Dismissal	11	(27)	4	(2)
Acquittal	1	(2)	1	(1)
Guilty-Plea	24	(59)	182	(93)
Guilty-Adjudication	5	(12)	2	(1)
Other	-		5	(3)
Correctional Disposition				
Imprisonment	20	(49)	160	(82)
Probation	5	(12)	21	(11)
Other	4	(10)	9	(5)
None	12	(29)	5	(2)
Appeal				
Attempted	-		1	(1)
Not Attempted	41	(100)	194	(99)

Table XII-D

INDEX OF FINANCIAL INABILITY—BAIL

D. Conn.

	Bail Made *154 cases*		Bail Not Made *58 cases*	
Initial Plea				
Not Guilty or Nolo	70	(45)	18	(31)
Guilty	75	(49)	31	(53)
Other	9	(6)	9	(16)
Mode of Trial				
Jury	21	(14)	7	(12)
Court	10	(6)	2	(3)
None	123	(80)	49	(85)
Outcome				
Dismissal	34	(22)	8	(14)
Acquittal	9	(6)	1	(2)
Guilty-Plea	99	(64)	36	(62)
Guilty-Adjudication	12	(8)	7	(12)
Other	-		6	(10)
Correctional Disposition				
Imprisonment	31	(20)	30	(52)
Probation	61	(40)	18	(31)
Other	16	(10)	1	(2)
None	46	(30)	9	(15)
Appeal				
Attempted	3	(2)	6	(10)
Not Attempted	151	(98)	52	(90)

Appendix II

THE CRIMINAL JUSTICE BILL: TEXT AND COMMENTARY

The prposed legislation set forth in this Appendix represents the joint product of the Committee and the Department of Justice. Close attention was given both to the general purposes and theory of legislation providing for a system of adequate representation and to the concrete problems that require solutions if these purposes are to be realized. Consideration was given to legislation enacted in the American states and by foreign nations and to the many excellent suggestions contained in bills to provide for a system of representation in the federal courts, introduced in recent sessions of Congress.

The Committee believes that the legislative proposal here submitted satisfies the major requisites of a system of adequate representation in the federal courts. In Chapter II of its Report the Committee has identified six salient essentials of such legislation. These are (1) the principle of local option, (2) the early appointment of counsel, (3) the provision of defense services other than counsel, (4) the identification of persons eligible to receive defense services by reference to "financial incapacity" rather than "indigency", (5) the provision of defense services to defendants with some, but inadequate, means, and (6) the principle of reasonable compensation for attorneys performing defense services. The bill proposed satisfies all these conditions. In addition, provision is made for the many other requisites of an operating system.

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A BILL

To promote the cause of criminal justice by providing for the representation of defendants who are financially unable to obtain an adequate defense in criminal cases in the courts of the United States.

Be it enacted by the Senate and House of Represeniatives of the United States of America in Congress assembled,

That this Act may be cited as "The Criminal Justice Act of 1963"

Sec. 2. Title 18 of the United States Code is amended by adding immediately after section 3006 the following new section:

§ 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 designed to effectuate the provisions of this section 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 such 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 a full-time or part-time federal public defender and assistants;

(3) Representation by attorneys furnished by a bar association, or a legal aid society or other local defender organization; or

(4) Representation according to a plan containing any 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 Director of the Administrative Office of the United States Courts of modifications in its plan.

****

This subsection expresses the principle of "local option". Each district court is required to place in operation a plan of representation containing certain basic elements. Each district, however, is permitted to devise a plan conforming to any of the various options provided, thereby making possible the formulation of a system which, at the same time, protects the rights of the accused and reflects local conditions and preferences. Such plan must be approved by the judicial council of the circuit, which, prior to approval, is required to supplement the plan by provisions for representation on appeal of defendants financially unable to obtain representation. Provision is made for subsequent modifications by the district court with approval of the judicial council or at the initiative of the latter. The district court is required to notify the Director of the Administrative Office of the United States Courts of any modifications of the plan.

It will be observed that the draft avoids the use of such terms as "indigent" or "indigent defendant". Instead, reference is made to persons "who are financially unable to obtain an adequate defense." This choice was deliberately made, both because the usage of the draft more accurately expresses the scope of the proposed legislation and because avoidance of the term "indigent", with its connotations dervied from welfare and poor-law legislation, emphasies that this legislation has not simply a charitable objective but serves broader public purposes, including that of strengthening the adversary system.

****

(b) *Appointment of Counsel.* In every criminal case in which the defendant 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 good cause is otherwise shown.

****

The section expresses the constitutional command that the accused be informed of his right to counsel, and, at the same time, incorporates the constitutional principles governing the waiver of counsel. See *Johnson v. Zerbst*, 304 U.S. 458 (1938). Obligation to determine whether the accused is eligible to receive appointment of counsel is placed on the court or commissioner before whom the accused is brought. In some cases in which two or more defendants are charged with the same offenses the interests of the accused are adverse, and the same lawyer cannot properly represent all the accused. The subsection, accordingly, makes provision for the appointment of additional counsel to avoid conflict-of-interest situations or when other good cause is shown.

****

(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, or from any subsequent stage at which counsel is appointed, through appeal. If at any time after the appointment of counsel the court having jurisdiction of the case is satisfied 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 (h), as the interests of justice may dictate. The United States commissioner or the court may substitute one appointed counsel for another at any stage of the proceedings.

****

This language makes explicit the important proposition that the financially incapacitated accused is entitled to representation at all stages of the proceedings from his initial appearance before the United States commissioner and that counsel may be appointed at any subsequent stage when appoinment was not made earlier and when need for such appointment later appears. Thus a defendant who has exhausted his financial resources in the trial of his case may receive the services of appointed counsel in the appellate proceedings. Counsel appointed in the earlier stages continues to serve in subsequent stages of the proceedings without the necessity of re-appointment, thereby avoiding "gaps" in representation that sometime characterize present practices. Provision is made for withdrawal of appointment when it is discovered that defendant is, in fact, able to employ counsel or make partial payments. Authority is granted the court to permit counsel to receive payment as provided in subsection (h). Although the financially incapacitated defendant is assured counsel at all stages of the proceedings, the necessary authority to substitute counsel is vested in the commissioner or court.

****

(d) *Services other than Counsel.* The plan for each district shall contain provisions for furnishing investigative, expert, or other services necessary to an adequate defense to each defendant determined by the United States commissioner or the court after

appropriate inquiry to be financially unable to obtain them. The plan shall set forth the circumstances under which specific authorization will be required for a defendant to obtain particular services. Any plan may provide for services to be furnished by salaried staff personnel or by personnel retained specially in each case, or by a combination of such means. Except where services are rendered by salaried staff personnel, the court which authorized them, or the district court in any case in which the United States commissioner authorized them, shall direct the payment of reasonable compensation to the person who rendered them. A claim for compensation shall be 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 from any other source.

****

This subsection expresses the fundamental principle that the requirements of adequate representation may on occasion require the provision of services other than, or in addition to, counsel. These include investigatory services, access to expert witnesses, transcripts of proceedings, and the like. The language makes clear that in appropriate cases these services may be secured by those charged with crime who have resources sufficient to obtain some of the necessary services, but insufficient to pay for other services essential to adequate representation. The language also makes clear that the plan of representation may specify when prior specific authority must be obtained before the services are contracted. The plan may also specify that hearings on such requests shall be held *ex parte,* thereby avoiding a discovery of defendant's case in situations in which such discovery is not required of defendants with means adequate to obtain defense services. Cf. Rule 17 (b), Federal Rules of Criminal Procedure. All payments for other than salaried personnel, including those for services authorized by the commissioner, shall be directed by the court. Claims for compensation under this subsection are required to be supported by affidavit.

****

(e) *Private Attorneys.* A private attorney appointed pursuant to this section shall at the conclusion of the representation or any segment thereof be compensated at a rate not exceeding $15 per hour for time reasonably expended and 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 or that court, and to each appellate court before which the attorney represented the defendant. Each claim shall be supported by affidavit 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 the attorney.

****

This subsection expresses the principle of reasonable compensation and reimbursement for lawyers performing defense services. Recognition of this principle is essential to the broad public purposes of this legislation. Compensation at $15 represents a maximum rate. After careful consideration the Attorney General's Committee concluded that a lower maximum limit is inconsistent with the objectives of proper protection of defendant's interests and reasonable compensation for the services of counsel. See Chapter II of the Report. An hourly, rather than a daily, rate is preferable in that it will more accurately measure the services actually performed and will avoid ambiguity when less than a full day's services are performed. The subsection makes possible the paying of compensation upon completion of any segment of the proceedings, thereby avoiding burdensome delays in making compensation to attorneys who provide services in cases continuing over substantial periods of time. Determination of the amount of compensation and reimbursement is made by the district court for services rendered in that court and before the United States commissioner. Appellate courts make similar determinations for services rendered by counsel before those courts. Claims for compensation and reimbursement are required to be supported by affidavit.

****

(f) *Federal Public Defenders.* A federal public defender who is to serve in any district pursuant to this section shall be appointed by the judicial council of the circuit after receiving recommendations from the district court. Such appointment, whether on a full-time or part-time basis, shall be for a term of

four years unless sooner terminated by the judicial council of the circuit for incompetency, misconduct, or neglect of duty. The salary of a full-time federal public defender shall not exceed that of the United States attorney in the same district; the salary of a part-time federal public defender shall be adjusted accordingly. The federal public defender may employ assistant federal public defenders at salaries not to exceed the highest salary authorized to be paid to an assistant United States attorney in the same district, and part-time assistants at salaries adjusted accordingly. The federal public defender may also employ full-time or part-time investigative, expert, clerical, and other personnel necessary to the efficient performance of the duties of his office.

****

Given the problems created by competing professional opportunities for capable attorneys, it is important that compensation authorized for the public defender and assistant public defender be at levels equivalent to those paid other government lawyers performing duties requiring comparable skills and experience. It appears desirable not to freeze the maximum salary payable the public defender at some specific figure but to relate it by formula to the salary paid the United States attorney in the same district. The subsection, however, states only the maximum limits for the salaries of public defender and assistant public defender; the salaries may be set at appropriate levels within those limits. In order to insure the public defender independence of action, power of appointment is vested in the judicial council after receiving recommendations from the district court. Further assurances are provided by appointments to a four-year term with earlier termination within the powers of the judicial council only for the causes specified in the sub-section. Power of appointment of assistant public defenders and other staff is vested in the public defender.

(g) *Local Defenders.* A bar association, or legal aid society or other local defender organization which furnishes attorneys pursuant to this section shall at the conclusion of each representation or any segment thereof be compensated at a rate not exceeding $15 per hour for time reasonably expended by its attorneys and 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 or that court, and to each appellate court before which the organization's attorneys represented the defend-

ant. The claim shall be supported by an affidavit specifying the time expended, services rendered, and expenses incurred while the case was pending before the United States commissioner of 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 organization.

****

This subsection governs the mode and amount of compensation paid to legal aid associations, local private or public defender groups, or other organizations providing representation under plans making use of their services. These provisions conform to those governing compensation and reimbursement of private attorneys in subsection (e).

****

(h) *Receipt of Other Payments.* Whenever the court is satisfied that money is available for payment from or on behalf of a defendant, he may authorize or direct that it be paid to appointed counsel, to any person authorized pursuant to subsection (d) to assist in the representation, or to a fund established under the plan to carry out the purposes of this section. Except as so authorized or directed, no such person may request or accept any payment or promise of payment for assisting in the representation of a defendant.

****

This subsection deals with the situation involving an accused for whom counsel has been appointed or who has received other services under this legislation and who is subsequently discovered to be able to pay for these services. The court is authorized to direct the defendant to make payment in any of the various ways specified. The language also establishes the principle that only in these circumstances may counsel or other person performing defense services under this act receive payment or promise of payment from defendant in connection with the representation.

****

(i) *Penalties.* False affidavits filed pursuant to subsections (d), (e), or (g), and false statements made by defendants in

the course of inquiries conducted under subsections (b) or (d) for the purpose of securing counsel or services, shall subject the persons making such affidavits or statements to the penalties prescribed by law.

****

The provisions of this subsection are self-explanatory.

****

(j) *Reports.* Each district court and judicial council shall submit a report on the operation of the plan within its jurisdiction to the Director of 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 subsection makes provision for reporting, which is essential for budgetary purposes and for intelligent evaluation of the operation of the system of adequate representation created by this legislation.

****

(k) *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. Payments from such appropriations shall be made under the supervision of the Director of the Administrative Office of the United States Courts.

****

The purposes and effect of this provision are clear.

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(l) *Districts Included.* The term "district court" as used in this section includes the District Court of the Virgin Islands, the District of Guam, and the district courts of the United States created by chapter 5 of title 28, United States Code.

Sec. 3. The analysis of chapter 201 of title 18, United States Code, is amended by adding immediately after section 3006 the following new item:

3006A. Adequate representation of defendants.

Section 4. Each district court shall within six months from the date of this enactment submit to the judicial council of the circuit a plan formulated in accordance with section 2. Each judicial council shall within nine months from the date of this enactment approve and transmit to the Administrative Office of the United States Courts a plan for each district in its circuit. Each district court and court of appeals shall place its approved plan in operation within one year from the date of this enactment.

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