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SENATE

REPORT
No. 91-790

AMENDING SECTION 3006A OF TITLE 18, UNITED STATES CODE

April 23, 1970.—Ordered to be printed

Mr. HRUSKA, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 1461]

The Committee on the Judiciary, to which was referred the bill (S. 1461) to amend section 3006A of title 18, United States Code, relating to representation of defendants who are financially unable to obtain an adequate defense in criminal cases in the courts of the United States, having considered the same, reports favorably thereon with amendment and recommends that the bill do pass.

PURPOSE

The purpose of the bill, S. 1461, as amended, is to improve the operation of the Criminal Justice Act of 1964.

COMMITTEE AMENDMENT

Because of the large number of technical or clarifying amendments necessary to the original bill, the committee believes it more convenient to report a clean bill. The important committee changes in S. 1461 are as follows:

1. Subsection 1(a) has been reworded to extend the coverage of the act to additional facets of the criminal trial process and related proceedings.

2. Subsection 1(g) has been reworded to conform with the changes made in subsection 1(a).

3. Subsection 1(h) has been changed to permit judicial districts in different circuits to establish joint defender plans, subject to the approval of the judicial councils of each circuit.

4. Subsection 1(h)(2)(B) has been amended to make clear that defender organizations receiving Federal "start-up" grants may have the option of relying on case-by-case payments thereafter rather than on Federal sustaining grants.

5. a new section 2 has been added to insure that U.S. commissioners not yet replaced by U.S. magistrates are not inadvertently given powers reserved for magistrates.

These changes are explained more fully in the body of the report.

LEGISLATIVE HISTORY

The Congress enacted the Criminal Justice Act of 1964, Public Law 88–455, to achieve more meaningful and effective representation for defendants in Federal criminal cases. Recognizing that defendants often did not have the resources to obtain counsel or defense services, the act provided compensation for appointed counsel and payment for necessary expert and investigative services. This compensation was intended to ease the financial burden on the attorney, who offers his services to a defendant as a professional public duty. The level of fees established under the act was intended to offer some but not full compensation for the appointed attorney and to provide adequate defense services for his client. In addition, the act defined a defendant's eligibility for appointment of compensated counsel in terms of financial inability to obtain adequate representation rather than in terms of indigency.

The act requires each U.S. district court, with the approval of the judicial council of the circuit, to place in operation a plan to furnish representation for defendants. Alternative plans are allowed, either through the private bar, or through bar associations or legal aid agencies, or a combination.

The Criminal Justice Act was first introduced in the Senate in 1963 as S. 1057 by Senator Hruska of Nebraska. Senator Cotton of New Hampshire, Senator Ervin of North Carolina, and then-Senator Keating of New York were cosponsors. When the act passed Congress in 1964, it had the support of both the President and a substantial majority in each House of Congress.

The original bill passed by the Senate in 1963 was broader than the final act in one important respect. The Senate bill had included a provision authorizing a Federal public defender system as well as a system of compensation for appointed private counsel. The House removed the public defender provision, and the conference committee resolved the difference in favor of the House position. The provision was deleted due to doubts raised in the House about the propriety of placing the defense of criminal suspects in the control of the Government since the Government was also responsible for prosecutions. The conference committee recognized the desirability of further study and recommended that the Department of Justice conduct a review of the need for a Federal public defender system as well as an evaluation of the operation of the act generally.

To give effect to this request of Congress, the Department of Justice, in 1967, through its Office of Criminal Justice, and the Judicial Conference of the United States, through its Committee to Implement the Criminal Justice Act, jointly commissioned Prof. Dallin H. Oaks of the University of Chicago Law School, to undertake a study of the operation of the Criminal Justice Act. Professor Oaks was asked to give particular attention to the question of a Federal public defender system.

Professor Oaks' study was conducted under the auspices of the National Legal Aid and Defender Association's national defender project and the University of Chicago's Center for the Studies in Criminal Justice. A comprehensive report was issued in 1968. The report, entitled "The Criminal Justice Act in the Federal District Courts," was published as a committee print by the Senate Committee on the Judiciary, and was widely circulated among Federal judges and the legal profession. The Oaks report praised the administration of the act but took note of several shortcomings and variations of practice in the working of the Criminal Justice Act. It also pointed out that recent developments in the sixth amendment right to counsel in criminal law justified an expansion of the act's coverage. As a result of these findings the Judicial Conference Committee to Implement the Criminal Justice Act, chaired by Judge John Hastings, chief judge of the Seventh Circuit Court of Appeals, recommended a series of amendments. These were adopted by the Judicial Conference during its meeting in September 1968.

On October 10, 1968, Senator Hruska and Senator Ervin introduced S. 4182, which embodied the recommendations of the Judicial Conference. However, it was not possible for the committee to act during the few months left in the 90th Congress.

On January 27, 1969, the bill was reintroduced as S. 650 in the 91st Congress. S. 650 was circulated among Federal judges, public defender organizations, and attorneys experienced with the Criminal Justice Act. Close consideration was also given to the recommendation in the Oaks report:

> That there is a demonstrated need for some type of full-time salaried Federal defender lawyers on an optional basis in certain districts, especially the large urban districts, and that measures should be taken to establish the federal defender as a financially stable option under the Criminal Justice Act.[1]

On the basis of suggestions received and further study, Senator Hruska, for himself and Senators Ervin, Goldwater, and Kennedy introduced a revised bill (S. 1461) on March 10, 1969. In addition to embodying the substance of S. 650, S. 1461 makes further refinements in the compensation and coverage provisions and allows the creation of Federal public defender and community defender organizations.

S. 1461 is expressly tailored to meet earlier objections to the concept of a Federal public defender system by making active and substantial participation by private attorneys basic to any district plan for representation. The use of appointed private counsel can be supplemented, but not replaced, in qualifying districts by either or both of two full-time defender organizations: a Federal public defender organization and a community defender organization. This insures a mixed defender system.

On June 24, 25, and 26, 1969, the Constitutional Rights Subcommittee held hearings on S. 1461. Among those who appeared at the hearings were Judge Harvey M. Johnsen, Senior Judge of the Eighth Circuit Court of Appeals, a key member of the U.S. Judicial Conference Committee To Implement the Criminal Justice Act; three

[1] Oaks, Dallin H., "The Criminal Justice Act in the Federal District Courts," (1969), p. 11.

other Federal court judges with broad experience under the act; Prof. Dallin Oaks of the University of Chicago Law School, who directed the extensive study of the act last year for the Judicial Conference Committee; Associate Deputy Attorney General Santerell; Maynard J. Toll, on behalf of the National Legal Aid and Defender Association; General Charles L. Decker, Director of the National Defender Project; and Robert J. Kutak, on behalf of the American Bar Association. The subcommittee also had the benefit of testimony from the directors of four major Federal defender programs which have been operating with the assistance of the National Legal Aid and Defender Association and the Department of Justice.

Each of the 18 witnesses appearing before the subcommittee either possessed a broad background of practical experience with the act or had extensively studied its operation since it took effect on August 20, 1965. While unanimously supporting the objectives of S. 1461, they submitted many suggestions for refining and perfecting the bill. The proposed changes embodied in S. 1461, as amended by this committee, are based on the sound suggestions of these knowledgeable witnesses, on an extensive study by the subcommittee, the American Bar Association, the Judicial Conference, and on Professor Oaks' report.

SECTION-BY-SECTION ANALYSIS

Section 1(a).—The Criminal Justice Act of 1964 provides that each district court shall adopt a plan for furnishing representation for financially disabled persons charged with felonies or misdemeanors, other than petty offenses, at every stage of the proceedings from initial appearance through appeal. Section 1(a) amends the act in two fundamental ways: First, by expanding coverage; and second, by authorizing representation by federal public defender and community defender organizations in addition to the present alternatives of the private bar, bar associations and legal aid agencies.

Expanded coverage

Section 1(a)(1) requires that each plan be expended to provide for appointment and compensation of counsel for defendants charged with a violation of probation. This addition recognizes the Supreme Court decision in *Mempa* v. *Rhay*, 389 U.S. 128 (1967), which held that the sixth amendment right to counsel applies in probation revocation hearings.

Section 1(a)(2) requires that each plan provide for appointment of counsel for any person under arrest. This requirement will bring the act into conformity with recent decisions of the Supreme Court which require counsel for arrested persons. *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *United States* v. *Wade*, 388 U.S. 218 (1967); and *Orozco* v. *Texas*, 394 U.S. 324 (1969). Since representation necessarily precedes the stage of formal appointment of counsel, it is not possible to determine whether the counsel will be eligible for compensation under the act until the arrested person appears before the United States magistrate or court. If the magistrate or court finds the person financially unable to obtain an adequate defense, compensation will be made retroactive to cover time expended by the attorney during the arrest period. If the person is found financially able to obtain an adequate defense, then the counsel is required to seek compensation from

his client. If the person never appears before the magistrate, the attorney may still submit his claim to the court for approval based on the arrestee's financial condition.

Although this procedure does not guarantee compensation for the attorney who represents an arrested person prior to a finding of financial inability to pay, the committee feels that it is consistent with the purpose of the act. The only financial risk of the attorney under this procedure is the risk of nonpayment by an individual who has resources. This is not an unfair burden; it is a normal professional risk now.

Section 1(a)(3) requires that each plan provide for the appointment of counsel, pursuant to the provisions of section 1(g), for individuals financially unable to secure adequate representation who are subject to revocation of parole, who are material witnesses in custody, or who are seeking collateral relief. Inasmuch as these proceedings have traditionally been regarded as technically civil in nature rather than criminal, no right to appointed counsel has as yet been recognized under the sixth amendment. The distinction between civil and criminal matters, however, has become increasingly obscure where deprivation of personal liberty is involved. See *In re Gault*, 387 U.S. 1 (1967), and *Johnson* v. *Avery*, 393 U.S. 483 (1969). The proceedings listed in subsection 1(a)(3) and 1(g) are intimately related to the criminal process. Counsel has often been appointed to represent persons in such proceedings, but compensation has not been available under the 1964 act. The committee believes that compensation should be available under the act whenever a judge determines that counsel must be appointed to safeguard the interests of justice.

Section 1(a)(4) extends coverage of the act to include those instances where judicial decisions or Federal statutes may require the appointment of counsel. This provision obviates the need to amend the act each time the right to counsel may be extended to new situations. It also eliminates any doubt as to the application of the Criminal Justice Act to juvenile proceedings where the right to counsel is now applicable (*In Re Gault*, supra), and to the Narcotic Addicts Rehabilitation Act of 1966, Public Law 89-793, which provides patients with the right to appointed counsel, if necessary, in judicial proceedings under title III (18 U.S.C. 4253). The committee believes that it is unnecessary to create another separate system when the Criminal Justice Act can serve these purposes without difficulty.

Defender organizations

Present provisions of the Criminal Justice Act allow the judicial district three alternatives in developing its plan for furnishing representation to financially disabled defendants: appointment of private attorneys; use of attorneys furnished by a bar association or legal aid agency; a combination of both.

Section 1(a) requires each plan to include a provision for participation by private attorneys and permits, in addition, attorneys furnished by a bar association or legal aid agency, or attorneys furnished by a Federal public defender or community defender organization, established in accordance with the provisions of subsection 1(h), or both. When either of these alternatives is chosen, participation by private attorneys is nonetheless mandatory "in a substantial proportion of cases." This mixed system insures the continuing active participa-

tion by the private bar in Federal criminal proceedings. Ideally, this participation will be in the range of between 25 percent and 50 percent of the appointments.

Section 1(a) does not alter the procedure presently set out in the 1964 act for establishing a plan to furnish representation. Formulation and institution of the plan remain the responsibilities of the district court subject to approval by the judicial council of the circuit. The council is to add provisions for representation at the appellate stage. The plan may be modified at any time, with the approval of, or at the direction of, the judicial council.

Section 1(b) outlines the procedure to be followed in appointing counsel for a financially disabled person qualified to receive appointment of compensated counsel under this act. The procedure for a defendant covered by section 1(a)(1) begins with initial appearance before the U.S. magistrate or court when he is charged with a felony or misdemeanor (other than a petty offense) or with violating probation. When he is informed of his right to counsel, he is also advised that counsel will be appointed for him if he is financially unable to obtain counsel. The procedure for persons seeking or subject to proceedings specified in section 1(a)(3) begins when the U.S. magistrate or the court advises the individual that the interests of justice allow him to be represented by counsel and that counsel may be appointed if he is financially unable to obtain an adequate defense. The procedure for persons under arrest in section 1(a)(2) shall be provided by the plan for that jurisdiction.

Section 1(b) expressly permits the U.S. magistrate or court to make appointment retroactive to include any representation furnished prior to appointment. Thus, an attorney who renders assistance at the time of arrest or at a lineup, or who renders assistance upon being hired by a defendant who subsequently becomes financially unable to pay hired counsel, would, if appointed, be eligible to receive compensation to the extent authorized by the act for all services rendered. In this way, the defendant will be better assured of uninterrupted representation by the same attorney.

Section 1(c) outlines the circumstances surrounding the initial appointment of counsel, the duration of such representation, and the procedure involved in the termination, substitution, and partial payment of appointed counsel. The differences between section 1(c) of the bill and the corresponding section of the present act are, with one exception, quite minor.

As amended by S. 1461, the act would not only provide for appointed counsel at every stage of the trial from initial appearance through appeal, but also for "ancillary matters appropriate to the proceedings." The committee considers this provision necessary to insure that the rights of the person are fully protected. Many times remedies technically outside the scope of the trial proper may be necessary, such as using a habeas corpus ad testificandum to secure the presence or testimony of witnesses, or filing an application under 18 U.S.C. 4244 regarding competency to stand trial. While the District of Columbia district court has ruled in favor of compensation under the present act in *U.S.* v. *Boney*, Crim. No. 822–65 (D.C. D.C. Sept. 28, 1966), and although there is no apparent ruling to the contrary, the express inclusion of "ancillary matters appropriate to the proceedings" will insure

that the attorney who spends time and effort to protect a right considered valuable in defending the principal criminal charge can be compensated under the act.

Section 1(d) establishes the maximum hourly rates and maximum total payments allowed for appointed counsel under the Criminal Justice Act. It also provides for waiver of the maximum amounts under certain circumstances and sets forth the procedure for filing claims. Finally, it defines "new case" for purposes of compensation and allows appellate proceedings without prepayment of fees and costs.

Section 1(d)(1).—The present act provides for compensation at a rate not to exceed $15 per hour for time spent in court and $10 per hour for time reasonably expended out of court. Section 1(d)(1) of the bill, however, does away with the distinction between time expended in and out of court, and increases the hourly rate to $30 for all time reasonably expended in the defense of a financially disabled person. Time expended outside the courtroom often requires greater effort and proficiency than that in court. Even as increased the new rates are well below those paid to privately retained counsel.

Section 1(d)(2) of the bill eliminates the existing per case basis for payment of fees and replaces it with a more flexible system of maximum payments for each attorney in each case. The act presently provides for a $500 maximum payment in a case in which one or more felonies are charged and $300 in a case in which one or more misdemeanors are charged. The maximum applies to each case irrespective of the number of attorneys appointed by the court. In practice, that requirement has brought harsh results where more than one attorney was appointed in a difficult case and the maximum case payment had to be fragmented. Section 1(d)(2) also increases the limit to $1,000 for each attorney in a case involving one or more alleged felonies and $400 for each attorney in a case in which one or more misdemeanors are charged.

In recognition of the frequently complex nature of appellate litigation, section 1(d)(2) also establishes a $1,000 maximum for each attorney in each court for cases on appeal. It also provides a $250 maximum for each attorney in each proceeding in each court in probation revocation proceedings and matters covered by subsection (g), such as parole revocation and collateral relief proceedings.

Section 1(d)(3) provides for waiver of maximum amounts and payment in excess of those amounts for extended or complex representation when necessary to provide fair compensation and upon approval of the chief judge of the circuit. This change from the 1964 act is based on the finding of the Oaks' report that the original language has been given too restricted an interpretation.

Section 1(d)(4) provides that separate claims for compensation and reimbursement, each supported by specific written statements, shall be submitted to the appropriate court. Where representation is furnished solely before a U.S. magistrate, he fixes compensation and reimbursement. When representation is furnished before an appellate court, that appellate court fixes them. In all other instances, claims are made to the district court, and compensation and reimbursement are determined by that court.

Section 1(d)(5) defines the term "new case" for purposes of compensation. A court order granting a new trial is deemed to initiate a

new case, and all the payment provisions of the bill, would, therefore, apply anew upon issuance of such an order. Obviously, succeeding orders for a new trial also are "new cases" for the purpose of the act.

Section 1(d)(6) facilitates appellate proceedings by allowing a defendant for whom counsel is appointed to appeal or petition for a writ of certiorari without prepayment of fees and cost of security therefor and without filing the affidavit required by section 28 U.S.C. 1915(a).

Section 1(e).—The provisions of section 1(e) are similar to those of the present act.

Section 1(e)(1) provides that funds be made available for investigative, expert, or other services necessary for an adequate defense upon request in advance in an *ex parte* application. There must be a finding that the services are necessary for an adequate defense and that the defendant is financially unable to secure them.

Section 1(e)(2) changes corresponding provisions of the 1964 act by allowing appointed counsel to obtain these services without prior authorization in an amount not exceeding $150, plus reasonable expenses, if the services and expenses are necessary for an adequate defense and circumstances prevent him from securing prior authorization from the court. Payment, however, is subject to later review and approval by the court.

Section 1(e)(3) maintains the existing limit on payment for such services to a person or an organization to a $300 maximum but includes a new provision for waiver of that maximum if the court certifies that payment in excess of that limit is necessary to provide fair compensation because of the unusual character or duration of the services. The amount of any excess payment must be approved by the chief judge of the circuit.

Section 1 (f) of the bill makes no significant changes from the 1964 act. This section provides that whenever the U.S. magistrate or the court finds that funds are available from or on behalf of a person for whom counsel has been appointed, it may authorize or direct the payment of such funds to the appropriate person or organization, or to the Treasury. Recoveries from clients of the Federal defender offices would, of course, go to the Treasury.

Section (1) (g) significantly expands the coverage of the 1964 act by authorizing the U.S. magistrate or the court, as appropriate, to appoint counsel in specifically designated proceedings, provided the interests of justice so require and the person involved is financially unable to obtain representation. Compensation for representation and payment for services other than counsel may be made in accordance with subsections (d) and (e) of section 1 of the bill.

The first of the new discretionary appointment provisions of subsection (g) allows appointment of counsel for a person subject to revocation of parole. While there is no present constitutional or statutory right to appointed counsel in such proceedings, the result of parole revocation is the abrupt loss of personal liberty. Allowing appointment of counsel in a proceeding with such a serious potential consequence is wholly consistent with the underlying philosophy of the Criminal Justice Act to assure representation for those threatened with deprivation of personal liberty who are financially unable to obtain counsel. A parole revocation proceeding has traditionally been

considered a civil, administrative matter rather than a criminal, judicial matter. Probation revocation proceedings were once also deemed civil, but the right to counsel in probation revocation proceedings has recently been recognized by the U.S. Supreme Court in *Mempa* v. *Rhay* 389 U.S. 128 (1967). The Court considered the consequences to the individual more significant than the characterization of the proceedings.

The *Mempa* case suggests a similar result with respect to parole revocation proceedings, which have the same possible consequences of loss of liberty. Indeed, the 10th Circuit Court of Appeals in *Earnest* v. *Willingham*, 406 F. 2d 681 (10th Circuit, 1969) has already moved in this direction. For these reasons, subsection (g) permits appointment of counsel in parole revocation proceedings where, in the court's judgment, the interests of justice require such appointment.

Section 1(g) also authorizes the discretionary appointment of an attorney for a material witness in custody who is financially unable to obtain counsel. In order to take advantage of the review procedures given material witnesses under provisions of the Bail Reform Act or to protect himself in connection with the taking of a deposition, the material witness may require the assistance of counsel. The consequences of incarceration of one not charged with a criminal offense call for this discretionary appointment provision when an individual is financially unable to obtain representation and the judge has determined that counsel is necessary.

Finally, section 1(g) provides for compensation of counsel appointed for persons seeking collateral relief under sections 2241, 2254, or 2255 of title 28, or section 4245 of title 18, where the interests of justice so require and the person is financially unable to obtain representation. Section 2241 of title 28 provides for habeas corpus for Federal prisoners convicted in Federal courts and section 2254 provides for habeas corpus for State prisoners convicted in State courts. Motions to vacate Federal sentences are allowed under section 2255 of that title and section 4245 of title 18 provides for a post-conviction hearing when there is probable cause to believe a person was mentally incompetent at the time of trial and the issue was not raised during the trial; 18 U.S.C. 4244, which provides for an ancillary motion on the issue of competency to stand trial, is not specifically mentioned in this subsection because it would be covered under section 1(c) as an "ancillary matter related to the (trial) proceeding."

Although there is currently no constitutional or statutory right to assigned counsel in any of these proceedings, each frequently raises serious and complex issues of law and fact. Where, in the judgment of the court, counsel is necessary to insure a fair hearing and where a person is financially unable to secure adequate representation, clearly counsel should be, and generally now is, appointed. In circumstances where the court deems it essential to appoint counsel, the attorney should be entitled to compensation and the benefit of other resources provided by the Criminal Justice Act.

Section 1(h)(1) sets forth qualifications and conditions for establishing Federal defender and community defender organizations. It provides that any district or part of a district, or two adjacent districts or parts of districts, whether or not in the same circuit, in which at least 200 appointments are required annually, may establish either

or both of the authorized defender organizations. Where more than one judicial circuit is involved in a plan using a defender organization, each judicial circuit council must approve the plan for it to be valid.

Section 1(h)(2)(A) authorizes the creation of a Federal Public Defender Organization which consists of regular salaried attorneys in the employ of the United States. It would operate under the supervision of a Federal Public Defender appointed by the judicial council of the circuit after recommendations from the district court or courts to be served. He could then appoint other full-time attorneys and peresonnel as necessary to assist him in the operation of the organization. The Federal Public Defender would be appointed for a term of 4 years, and could be removed only for incompetency, misconduct in office, or neglect of duty.

Compensation for the Federal Public Defender would be fixed by the judicial council of the circuit but could not exceed that of the U.S. attorney in the district in question. Other full-time attorneys and personnel appointed by the Federal Public Defender would be paid on the basis of the compensation of full-time attorneys and other personnel similarly qualified in the office of the U.S. attorney. Such full-time attorneys would, of course, be prohibited from engaging in the private practice of law during their tenure in the Federal Public Defender Office.

Reports on activities and financial position and a proposed budget of each organization are to be made to the Director of the Administrative Office of the U.S. Courts at the time and in the form prescribed by him. An annual budget for each organization shall be submitted to the President by the Director, and the Director shall make payments to and on behalf of each organization out of appropriations received. Payments under this section are made in lieu of payments under section 1(d) or (e).

Section 1(h)(2)(B) authorizes the second type of defender program, the community defender organization. This is defined as a nonprofit defense counsel service established and administered by any organization authorized by the plan to provide representation. Its bylaws must be set forth in the plan, and the organization must make annual reports on financial status, activities, anticipated caseload, and expenses to the Judicial Conference of the United States. With the approval of the Judicial Conference, such an organization would be eligible to receive an initial grant to cover organizational expenses. Thereafter, the organization would function on the basis of the hourly rates and maximum payments set forth in subsections (d) and (e) of section 1 or, in lieu of those payments, it could, to the extent approved by the Judicial Conference, receive periodic sustaining grants to cover the costs of providing representation and other expenses.

Section 2 is a technical amendment which is necessary because the Federal Magistrates Act of 1968 has not yet taken effect in all districts. This amendment makes it plain that S. 1461 does not confer any of the new powers of a U.S. magistrates on a U.S. commissioner until the Federal Magistrates Act takes effect in the particular judicial district.

DISCUSSION

The efficacy of the Criminal Justice Act of 1964 is unquestioned. Senator Hruska, primary sponsor of S. 1461, stated in the preface to the report of Prof. Dallin Oaks on the Criminal Justice Act in the Federal district courts:

> The Criminal Justice Act of 1964 marked a milestone in the effort to provide comprehensive defense services to financially disadvantaged persons at every stage of Federal criminal proceedings. The act's major goal was to insure that the quality of legal representation would no longer be dependent on the accused's financial resources. Compensation was provided for court-appointed counsel along with authority to retain expert services necessary to the defense.
>
> Since August 20, 1965, when the act became effective, more than 60,000 defendants have directly benefited from its provisions. Currently, about 24,000 defendants are represented annually by counsel appointed under the act. The total cost is about $3.5 million per year. The average cost is approximately $125 per case.[1]

A number of witnesses attested to the benefits afforded the administration of justice by the Criminal Justice Act. They were summarized as follows by Mr. Terrence MacCarthy, Director of the Federal Defender Program, Inc., in Chicago:

> (1) The number of frivolous trials and motions are substantially reduced by detailed and knowledgeable analysis and assessment of each case, while at the same time necessary motions, hearings, and trials are filed or conducted;
>
> (2) The advantages of pleas of guilty, where such a plea is made obvious by knowledgable assessment of the case are expressed to the defendants—i.e., the possibility they may perjure themselves at trial and the possibility the court will consider a plea as evidence of rehabilitation in mitigation of sentence;
>
> (3) Trials and hearings on motions, where required, are professionally conducted to the benefit of the court and the criminal justice system;
>
> (4) Trial issues or issues related to hearings on motions are, where appropriate, expedited by stipulations aimed at presenting to the court or jury only the necessary and significant issues to be received;
>
> (5) Records on appeal are complete and fair in presenting all relevant issues, issues which have already been considered by the trial court. (Parenthetically, seldom, if ever, has the much used and abused argument of incompetency or inadequacy of counsel been raised on appeal from cases defended by a FDP panel attorney.)

The Criminal Justice Act has also been beneficial in reducing the number of post-conviction petitions. Mr. MacCarthy attributed this to the fact that the act has improved the quality of defense. Defendants

[1] Oaks' Report, p. iii.

who have been initially represented by competent, experienced counsel are less likely to be dissatisfied with their trials. Testimony was received that most post-trial petitions are the result of failure of defense counsel properly to prepare or present a defense.

Despite the success of the 1964 act, it has also become increasingly apparent that it must be refined in certain respects, and new sources of legal assistance must be provided. S. 1461 offers the means for achieving the goal of the 1964 act. Coverage is expanded, rates of compensation are raised, and Federal or community defender organizations are authorized. Widespread support for these new features was manifest at the hearings on S. 1461 conducted on June 24, 25, and 26, 1969, by the Constitutional Rights Subcommittee.

Not one single witness criticized the purpose of the 1964 act or questioned the desirability of the amendments proposed by this bill.

EXPANDED COVERAGE

All witnesses agreed that the Criminal Justice Act had worked well within the narrow scope of representation in criminal proceedings that it covered. They also agreed, however, that judicial and legislative expansion of the right to counsel in the past 5 years required amendment of the act. Some witnesses testified that representation under the act should be coextensive with the sixth amendment and, in addition, be available whenever the right to counsel was extended by Federal statute. Some also said that the act should support, on a discretionary basis, representation in proceedings connected with the criminal trial and appeal but not, strictly speaking, part of those proceedings.

The issue of representation in proceedings other than trial was a major topic at the hearings. For instance, James F. Hewitt, attorney in charge of the Federal Defense Office in San Francisco, testified that legal services should extend to proceedings collateral to the criminal trial. He testified:

> We must accept the realization that post-conviction applications must be reviewed and acted upon by the court; they cannot simply be ignored, in the hope that they will go away. How much easier for all concerned if they are heard properly, with competent counsel controlling the presentation of issues, rather than depend upon the legal incantations of the well-known "jail-house counsel," always lurking in the background of most prisoner petitions.

The Department of Justice also supported broadening the coverage. Mr. Donald E. Santarelli, Associate Deputy Attorney General, testified that:

> Collateral proceedings such as habeas corpus and section 2255 motions frequently involve hearings and briefs and therefore appointment of counsel. The Criminal Justice Act does not now authorize compensation for counsel appointed for these proceedings. S. 1461 would permit compensation in the discretion of the court, not to exceed $250. Not every habeas corpus petition or section 2255 motion requires appointment of counsel since experience has shown that many of these motions are repetitive or frivolous. Compensation for counsel is there-

rore limited to those collateral proceedings in which the court in the exercise of its discretion, for instance where a hearing or legal memorandum is required, appoints counsel and determines that compensation is warranted. The Department of Justice supports this amendment.

Judge Walter E. Craig of the U.S. District Court, Phoenix, Ariz., advocated coverage of judicial determinations of mental incompetency under 18 U.S.C. 4251–4255 and 4245. The former proceedings are covered as ancillary proceedings to the trial itself. Section 4245 of title 18, respecting post-trial applications raising the issue of competency to stand trial, is not covered by the ancillary proceedings clause so that section was incorporated by committee amendment into section 1(g) of the bill.

Testimony was received in favor of covering parole revocation proceedings. It was pointed out that the reasoning in the Supreme Court decision of *Mempa* v. *Rhay*, 389 U.S. 128 (1967), extending the sixth amendment right to counsel to probation revocation proceedings was equally applicable to parole revocation. While parole revocation proceedings are technically distinguishable from probation revocation hearings, the question of equal protection under the fifth amendment could well be raised for indigent parolees. The case of *Earnest* v. *Willingham*, 406 F. 2d 681 (10th Cir. 1969) was cited during the hearings to indicate the direction of Federal courts in this matter.

Daniel J. Freed, former Director of the Office of Criminal Justice in the Department of Justice and now professor of law at Yale University, stated:

> "In February of this year, the 10th circuit, in a decision written by Chief Judge Murrah in *Earnest* v. *Willingham*, applied the rationale of the *Griffin* and other cases to say that because the board of parole permitted persons with money to hire attorneys in parole revocation proceedings, the Constitution, the 14th amendment, and the fifth amendment, justified giving equal protection to persons who could not afford counsel. Thus, the 10th circuit ruled that a financially disabled parolee in a parole revocation proceeding was entitled to assigned counsel.
>
> It is my understanding that the board of parole shortly thereafter went on record as favoring, in principle, the ruling in the *Willingham* case.

Professor Freed noted an additional benefit to be derived from including parole revocation proceedings. He felt that lawyers would gain an important insight into the operations of the board of parole and valuable additional information about its functions and problems.

Professor Freed saw a similar benefit that would stem from extending the act to include representation for material witnesses.

> Material witnesses represent a problem that is very little understood in the Federal system. Most prosecutors and most defense lawyers and judges will tell you there are no material witnesses, or virtually none, held in Federal detention in the United States. That happens to be wrong. The Office of Criminal Justice made a study 2 years ago, in February 1967, shortly after the Bail Reform Act was passed. We found that in a single 2-week period, 26 persons were held in deten-

> tion as material witnesses in the Federal system. Nine of them had been held for 10 days or less, eight had been held for between 11 and 30 days. Four had been held between 30 and 60 days. Three material witnesses had been in jail between 2 and 3 months and two witnesses had been in jail for between 3 months and 6 months.
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> It is very clear that if counsel were involved in these proceedings, the plight and the law and the developments of the law with respect to material witnesses, as well as persons up for parole revocation, would be a matter of much more knowledge and concern to people who make policy and pass laws and try to improve the operation of the system.

A number of witnesses, including Lawrence Speiser, director of the Washington office of the American Civil Liberties Union, suggested that the coverage portions of S. 1461 be broadened to take cognizance of possible future expansion of the right to counsel under the sixth amendment, either by court or legislative action. "That would take care," Mr. Speiser testified, "of changes in the law, the progression of the extension of the right of counsel that has been in a state of flux, in a very desirable state of flux, and in it is one that might be handled in this fashion in an amendment to S. 1461."

In that same connection, Prof. Dallin Oaks in his "Report on the Criminal Justice Act," pointed out that the fact that the statutory or constitutional right to counsel had, in 3 years, expanded far beyond the original coverage of the 1964 act. He generally favored extension of the act to include areas newly defined to be within the constitutional right to counsel and inclusion of areas where statutory right to counsel was newly granted.[1]

The committee after close examination of the hearing record and study of the various proposals to extend coverage adopted those contained in section 1(a) and 1(g). Coverage of these areas is wholly consonant with the purposes of the Criminal Justice Act, and necessary to make the sixth amendment right to counsel meaningful and effective in proceedings which substantially affect a person's liberty.

COMPENSATION

In light of the high cost of legal services today, the fees allowed under the 1964 act are far below those charged by privately retained counsel. Maynard J. Toll, president of the National Legal Aid and Defender Association, and Robert J. Kutak, appearing for the American Bar Association, said in a joint statement:

> Professor Oaks' report * * * estimated that the present rates amount to about 20 to 40 percent of the amount charged for similar services by retained counsel. It is submitted that even a cursory examination of the various bar association minimum fee schedules for criminal representation will bear out his conclusion.

Judge Walter Craig, a Federal district judge sitting in Phoenix and a former president of the American Bar Association, testified that the present rates are inadequate to maintain a Federal defender office. According to Judge Craig, a number of such offices have had

[1] Oaks, The Criminal Justice Act in the Federal District Courts, pp. 248–249.

to secure sustaining grants from the national defender project of the Ford Foundation.

The original proposal in S. 1461 called for an increase to $20 per hour from the existing limits of $10 per hour for preparatory work and $15 for trial work. However, many witnesses felt that $20 maximum to be inadequate. Gen. Charles L. Decker, director of the national defender project, told the subcommittee "the amount provided for in the bill, $20 an hour, represents roughly 60 percent of a reasonable and modest fee at this time." Subsequent to the hearings the American Bar Association House of Delegates passed a resolution seeking an increase to $35 per hour.

The committee recognized the clear need for an increase in the hourly rate to enable defender offices to be self-sustaining and to allow attorneys to receive a reasonable fee. The committee decided that a compromise figure of a maximum of $30 per hour would achieve those objectives even though it would still not provide full compensation.

A need was also established to raise the maximum available compensation in each case. One of the Federal defender programs which has operated primarily on grants from the national defender project is the Federal Criminal Defense Office in San Francisco. Speaking from his experience as Director of that Office, Mr. Hewitt supported the proposed increases in the maximum allowable limits for trials and appeals:

> The increase in compensation contemplated by the proposed amendments would more realistically meet rising costs, but they are still well below the most minimum fee schedules in use by urban bar associations. The new rates also come closer to meeting the needs in existing private defender offices, which must compete on the talent market for competent staff. It is essential that the maximum allowable amounts be raised, since only the simplest type of jury trial falls below existing maximums, and few appeals can be adequately presented within present limits.

The hearings further revealed a need to change the rules governing compensation for investigative, expert or other services necessary for an adequate defense. Prof. Dallin Oaks of the University of Chicago Law School, made this point when he stated to the subcommittee:

> Proposed changes in the terms for providing investigative, expert, or other services will be particularly helpful to defendants, defense counsel, and court administrators. My study found evidence that the need for advance judicial approval before making commitments for even small services of this character has been partly responsible for the fact that defense counsel have made relatively little use of these important provisions. Under the proposed amendments, counsel appointed under the act could obtain such services up to a maximum of $150 plus expenses without prior court approval, but subject to later review by the court. In another helpful change, the $300 maximum on payments for such services could be exceeded if approved by the district court or magistrate and by the chief judge of the circuit.

The committee found these recommendations to be persuasive.

DEFENDER ORGANIZATIONS

The option to create defender organizations within certain high-volume Federal districts represents the most significant change proposed by S. 1461. It was supported by all witnesses. Permitting Federal public defender or community defender systems to provide representation will give the qualifying districts meaningful advantages in defense services. Some of the advantages are a reduction in the administrative burden on court personnel; a more efficient, more experienced defense counsel service; and, a defense counsel service capable of furnishing more complete representation. The nature of these systems is set forth in subsection 1(h).

Commenting on this feature in his testimony, Associate Deputy Attorney General Santarelli, said:

> Over 30 years ago, in 1937, the Judicial Conference of the United States commended the enactment of a public defender system in those districts with a high volume of criminal cases. In 1963 the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice (Allen committee) recommended that a Federal public defender system be included among the options available to individual districts. As introduced in 1963 by Senator Hruska, S. 1057, which became the Criminal Justice Act of 1964, provided for a public defender. Although this provision was deleted in the legislative process, the Conference report strongly urged the Department of Justice to "revive its recent study on the need for a Federal public defender system throughout the entire Federal judicial system."
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> The Oaks report contained such a study and, noting that the overwhelming majority of Federal district court judges and U.S. attorneys favored a public defender system option, concluded. "There is a demonstrated need for full-time salaried Federal defender lawyers on an operational basis in certain districts, and that measure should be taken to establish the full-time Federal defender as a financially stable option under the Criminal Justice Act."
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> This conclusion is consistent with both the 1967 recommendation of the American Bar Association Project on Minimum Standards for Criminal Justice contained in its publication "Providing Defense Services" and the President's Commission on Law Enforcement and Administration of Justice, "The Challenge of Crime in a Free Society," 151–153. Finally, President Nixon, in his January 31, 1969, message on crime in the District of Columbia, endorsed one of the earliest Federal defender programs, the Legal Aid Agency for the District of Columbia. The President took note of the early success of this Agency and supported its expansion to a full-fledged Defender office.

The committee has carefully considered the objections raised 6 years ago that a Government financed or operated defender system might be improper and present possible conflicts. It has concluded that S. 1461 satisfactorily answers the questions raised to the original proposal and all witnesses who testified supported the system established by the bill.

On the other hand, the hearing demonstrated a strong sentiment for assuring joint participation by the private bar whenever a Federal defender system was created. Accordingly, S. 1461 requires that whenever a defender organization is utilized in a plan for furnishing representation, a substantial proportion of cases must still be handled by a private panel counsel. This so-called mixed defender system has been applauded by witnesses as an especially valuable means for retaining active participation by the private bar in Federal criminal law. When Professor Oaks appeared before the subcommittee, he said:

> Districts that elect to use salaried defense counsel to take Criminal Justice Act appointments should be required to continue to make no less than 25 percent (and preferably about 50 percent) of the total Criminal Justice Act appointments to private panel counsel. This sharing of the appointment load with private panel counsel—the so-called mixed system—will maximize the advantages and minimize the disadvantages of representation by full-time salaried defender lawyers * * *.
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> If private panel counsel handled only 25 percent of the appointments, which I consider the bare minimum for an effective mixed system, the minimum number of Criminal Justice Act defendants to qualify a district for a defender organization would be 200. That is the figure specified in the proposed legislation.

Judge Craig also felt that ample participation by the private bar would continue, and stated:

> In my opinion subsection (h) of S. 1461 is the vital portion of the bill. The flexibility of the proposal, I believe, is such as to adequately provide the solution to the defender problem in all of our districts.
>
> I do not believe the adoption of a defender plan, as provided in the bill will detract from the participation of the local bar in the program. Today the organized bar is generally fully aware of its professional responsibility, and no matter what plan is adopted back-up panels from the private bar will be needed.

Mrs. Barbara Bowman, Director of the Legal Aid Agency for the District of Columbia, testified that an advantage of the mixed system was that the full-time defender would serve as an information and training center for the private bar, keeping it abreast of the development of issues in the criminal law speciality.

Mr. Toll and Mr. Kutak indicated strong support from their respective organizations for both the Federal Public Defender Organization and the Community Defender Organizations. They said:

> Clearly, the defender office is an established, tried and proven method of defending persons unable to employ counsel; and experience in State courts establishes that it is indeed a truly satisfactory method. It is our experience that public defenders have had no difficulty in maintaining their integrity and independence (even though they are compensated by State or local governments), and render to their clients the same degree of professional service, on a consistent and professional basis, that the retained lawyer provides.

In some instances, the public defender has been able to render even greater assistance than the ordinary private practitioner because of his greater experience, everyday communication with the court and prosecution, his immediate availability to his potential client, and his constant practice in the particular jurisdiction. In the larger and busier judicial districts, mere assignment of individual counsel may prove to be inefficient and undesirable. Such districts should have the right to choose a Federal Public Defender * * *.

We also support the community defender organization option provided for in this legislation. This again gives the larger districts an additional option which they should have. It permits them to set up a federally supported local defender grantee agency, established and administered by the private bar, with all of the other advantages that a full-time public defender office provides. Even more importantly, by providing that such organizations may, to the extent approved by the Judicial Conference of the United States, receive in lieu of payments at an hourly fee scale, an initial grant to establish the organization and periodic sustaining grants to keep the organization operating, this legislation liberates such programs from the precarious financial position they would face when relying upon Criminal Justice Act fee scale payments in order to pay an experienced defender and staff a decent salary and support a full-time office.

The committee recognizes the desirability of eventual creation of a strong, independent office to administer the Federal defender program. It considered as a possibility the immediate establishment of a new, independent official—a "Defender General of the United States." It also considered establishing a special directorate for defender programs within the Administrative Office of the U.S. Courts.

The committee, however, does not recommend founding an independent official at this initial stage. Such a step would be premature until Congress has had an opportunity to review the operations of the defender program over the course of a few years. Nor does it recommend placing the overall direction of these programs in the administrative office. Clearly, the defense function must always be adversary in nature as well as high in quality. It would be just as inappropriate to place direction of the defender system in the judicial arm of the U.S. Government as it would be in the prosecutorial arm. Consequently, the committee recommends that the need for a strong independent administrative leadership be the subject of continuing congressional review until the time is ripe to take this final step.

CONCLUSION

The June hearings demonstrated a pressing need for the changes proposed by S. 1461. They reflect the collective judgment of the experienced and able witnesses who appeared that enactment of S. 1461 would constitute substantial progress in making the right to meaningful and effective assistance of counsel a realized goal rather than an unattainable ideal. As Judge Craig said:

We have had approximately 4 years to observe the operation of the Criminal Justice Act of 1964; to observe its good points and its bad ones.

The stated and obvious purpose of the act was to give a very real meaning to the constitutional requirement of assistance of counsel, and quite understandingly that requirement has been interpreted as meaning the effective assistance of competent counsel. It seems to me, and quite obviously to the Congress of the United States, that the effective assistance of competent counsel cannot be secured wholly from the *pro bono publico* good will of the members of the legal profession.

It is my opinion that the amendments to the Criminal Justice Act embodied in S. 1461 are needed amendments; that they will accomplish the results for which they are intended; that the bill should receive the favorable consideration of the Congress without delay.

In light of his experience with the San Francisco Federal Criminal Defense Office, Mr. Hewitt cited the need for new legislation in this manner:

S. 1461, a bill to amend the Criminal Justice Act of 1964, is long past due. Its provisions are necessary ones, and the speedy, fair, and final administration of justice in the Federal courts will greatly be enhanced should the Federal districts throughout the country be afforded the opportunity to implement organized defender offices pursuant thereto.

The legal community has long looked toward the Congress and the Federal judicial system for guidance and aid in advancing new concepts in criminal justice. It is said that we have lagged behind many of the States in providing compensated counsel to those unable to afford adequate representation. It is hoped that the amended act will afford guidelines to meet the pressing needs, not only in our courts within the Federal system, but throughout the Nation. It is enough that we waited so long; these amendments will give us the tools to do a better job, and forge stronger the weakest link in the chain of criminal justice.

The great flexibility of S. 1461 has been widely commended and is no doubt largely responsible for the unanimous support the bill has received. Lawrence Speiser, director of the Washington office of the American Civil Liberties Union, said:

Provision for adequate legal representation for the poor in criminal cases under the Federal system is still in its experimental stages. We should not write into law anything which will tend to freeze or discourage experimentation and we should keep our minds open to ways in which the act can be strengthened and improved. The amendments now under consideration are consistent with this principle. For this reason, they have our wholehearted support.

Chief Judge William H. Hastie, U.S. Court of Appeals for the Third Circuit, also strongly endorsed the flexibility of the bill:

To me the greatest single virtue of S. 1461 is its flexibility and adaptability which makes it possible for each

> district to plan and organize the type of program for representation of indigent defendants which seems most appropriate and congenial to the bench and bar in that district * * * I do not believe it can fairly be said that anyone is obviously or clearly better than another. Certainly, the circumstances of a particular district, the inclination of the bar in that district may create, and usually does create a local preference for one type of program over the other, and in that, as in many other matters, I think the sponsors of this bill are wise in providing to respect that local preference.

The committee considers the Criminal Justice Act of 1964 to be a milestone in making more effective the constitutional guarantee of right to counsel in Federal criminal cases. As Senator Hruska remarked in 1964:

> The case for this legislation is easy to state. We are a Nation dedicated to the precept of equal justice for all. Experience has abundantly demonstrated that, if this rule of law will hold out more than an illusion of justice for the indigent, we must have the means to insure adequate representation that the bill before us provides.

The committee considers S. 1461 to be another such step toward achieving the goal of equal justice. S. 1461 brings us closer to the ideal of assuring to every citizen the full benefits of the sixth amendment. The committee recommends its passage.

In the opinion of the committee it is necessary to dispense with the requirements of subsection (4) of rule XXIX of the Standing Rules of the Senate in order to expedite the business of the Senate.

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