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Federal Legislative Proposals To Supply Paid Counsel To Indigent Persons Accused Of Crime

Emanuel Celler*

I. THE PROBLEM IN COMPASS

Although Anglo-American criminal jurisprudence contemplates an adversarial proceeding, with each party adequately equipped to elicit the facts and to advance its cause, this ideal often goes unrealized in the case of accused persons who are indigent. A major weakness of the administration of justice in our federal courts is the lack of any form of public defender system to represent persons charged with serious crime who cannot afford to pay for legal representation. Not only is there no provision to compensate such counsel, but there is virtually no provision for defrayal of expenses incurred in investigating facts and preparing for trial. As a result, many persons genuinely unable to afford an attorney are indicted and prosecuted with only minimal, voluntary-type representation. When contrasted with the skilled and experienced prosecutors, investigators, experts, and expense money available to the Government, voluntary, uncompensated counsel often provides representation in form only.

That a person accused of crime has a right to be represented by counsel is affirmed by the Constitution of the United States. The sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

Whatever might be thought to have been the intent of this provision, were that question now open, a series of decisions of the Supreme Court has made clear that the right to counsel provided by the sixth amendment of the Constitution includes the right to have counsel assigned when the accused cannot, because of poverty, obtain legal representation for himself, and that the grant of this right is a prerequisite to the jurisdiction of the court.¹

*Representative in Congress from New York; Chairman, House Committee on the Judiciary.

1. Von Moltke v. Gillies, 332 U.S. 708 (1947); Johnson v. Zerbst, 304 U.S. 458 (1938). Cf. Tomkins v. Missouri, 323 U.S. 485 (1945).

Implementation of the right to counsel is found in Rule 44 of the Federal Rules of Criminal Procedure, which reads:

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.

But the ability of the federal courts to comply with the constitutional requirement which Rule 44 is designed to meet is sharply circumscribed. A court can assign a member of the bar to serve as defendant's counsel but cannot make provision for his compensation or for defrayal of expenses incurred. This is true irrespective of the gravity of the accusation and irrespective of the amount of time and the amount of out-of-pocket expenditures necessarily devoted to the defense. It is true even in the prosecution of capital crimes.²

A most anomalous situation has thus arisen. With at least one in four of the 35,000 persons annually accused of crime before the federal courts represented by assigned counsel, the very jurisdiction of the courts to try these thousands of indigent defendants must hinge upon the availability of voluntary, unpaid advocacy.

It is a tradition of the bar that poverty shall deprive no accused person of legal representation in his own defense. Greatly to the honor of the profession, members of the bar do regularly respond to the call of the courts for representation of impoverished defendants. But the large number of cases in which poor persons require defense renders reliance on uncompensated services of counsel unsafe. To call on the same lawyers repeatedly for unpaid services is both unfair and impractical. On the other hand, in these days of specialization, a wide distribution of assignments would result in entrusting the rights of defendants to attorneys unfamiliar with criminal trials. The increasing pressure of these demands on members of the bar must result in assignments that are onerous, at best, and which, at worst, repose the fate of the accused in the hands of inexperienced counsel, reluctant counsel, or harassed counsel unable to devote adequate attention to the case. Our present federal court system of vindicating constitutional rights by re-

2. There are three minor exceptions with respect to the expenses of indigent defendants accused of federal crimes: (1) a transcript of the proceedings is furnished the defendant at Government expense, 28 U.S.C. § 753 (1958); (2) subpoena and witness fees incurred for the defense are paid by the Government, FED. R. CRIM. P. 17(b); and (3) the court may direct that the defense attorney's travel and subsistence in attending an examination to take a deposition for the defense shall be paid by the Government, FED. R. CRIM. P. 15(c).

sort to private charity is thus unfair to both the benefactors and the beneficiaries.

The foregoing observations reflect no discredit on private defender organizations, such as those in Boston, New York, and Philadelphia, which provide competent paid counsel out of funds collected from the public. These groups do excellent and vital work, but they are handicapped in raising funds by the competition of causes whose immediacy has greater appeal. Their resources are simply inadequate to their needs.

Until the enactment, last year, of the District of Columbia Legal Aid Act,³ the legislatures of a number of the states were far ahead of the federal government in coping with the problem of legal representation for indigent defendants in criminal cases. Public defender systems, ranging from county-wide to state-wide in scope, are in operation in thirteen states.⁴ All states make provision either for public defenders or for assigned counsel in capital cases. Thirty-nine states provide for compensation of counsel in capital cases and thirty states provide such compensation even in noncapital cases.

The failure of Congress (to date) to enact suitable over-all legislation for the provision of counsel to indigent defendants in federal criminal cases cannot be laid to inaction on the part of the judicial or the executive branch. Nearly a quarter of a century ago, at its September 1937 meeting, the Judicial Conference of the United States adopted a resolution which stated:

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.⁵

In the following year the Supreme Court, in *Johnson v. Zerbst*,⁶ made clear that the right to counsel—at least in the federal courts

3. 74 Stat. 229 (1960), 43 U.S.C.A., § 620(d) (Supp. 1960). This measure is discussed at p. — *infra*.

4. According to statistics of the Committee on Legal Aid Work of the American Bar Association, there are 87 defender organizations in the United States, of which 77 are public defender offices supported by public funds and 10 are voluntary offices. See *Hearings Before the Subcommittee No. 2 on Representation for Indigent Defendants in the Federal Courts of the House Committee on the Judiciary*, 86th Cong., 1st Sess., ser. 13, at 30–31 (1959) [hereinafter cited as *Hearings*].

5. Report of the Judicial Conference, Sept. Sess. 1937, pp. 8–9.

6. 304 U.S. 458 (1938).

—is essential to due process in criminal cases. According to the testimony of Warren Olney III, Director of the Administrative Office of the United States Courts, before Subcommittee Number 2 of the House Committee on the Judiciary in 1959, the Judicial Conference has reaffirmed its 1937 recommendations for legislation establishing a public defender and, in the alternative, providing for assignment of counsel on not less than 17 separate occasions.⁷ On 13 of these occasions, moreover, the Judicial Conference addressed itself to the specific terms and provisions of legislation that had been introduced in Congress to effectuate the indicated reforms.

Similarly, the Department of Justice, which confronts the problem of indigent criminal defendants from the prosecutor's point of view, has consistently interested itself in the search for a legislative solution. It was Attorney General Cummings who suggested the action taken by the Judicial Conference in 1937, and every Attorney General from that time through 1961 has articulately favored some provision of paid counsel for indigent defendants before the federal criminal courts. These include Frank Murphy, Robert H. Jackson, Francis Biddle, Tom C. Clark, J. Howard McGrath, James P. McGranery, Herbert Brownell, Jr., William P. Rogers, and Robert F. Kennedy.

Nor have the bar associations been slow to assume their legislative responsibilities in this area. Beginning in 1936, the American Bar Association has expressed its interest in the defense of indigent persons charged with crime. It has on various occasions recommended enactment of legislative proposals to compensate counsel, as have the Association of the Bar of the City of New York, the Junior Bar Conference, and the Ohio State Bar Association, to name a few.

Congress has had no lack of bills on the subject. Measures to establish public defenders or to compensate assigned counsel, or both, were introduced at least as early as the 76th Congress (1939-1940), and in at least eight sessions of Congress since. Yet, aside from the somewhat special District of Columbia Legal Aid Act of 1960,⁸ no comprehensive legislation has resulted.

In order to enable evaluation of the arguments that have been advanced for and against each proposal, and to afford a perspective for legislation in the current session, this Article reviews the bills to provide paid legal services for indigent defendants in federal criminal proceedings that were introduced during the 86th Congress and a revised bill introduced by this writer in the 87th Congress.

7. *Hearings, supra* note 4, at 23-26.

8. See note 3 *supra*.

II. PROPOSALS ADVANCED IN THE 86TH CONGRESS

At hearings held on May 8 and 14, 1959, Subcommittee No. 2 of the House Committee on the Judiciary considered a group of four bills designed to provide paid legal counsel to indigent defendants accused of Federal crimes: H.R. 4185;⁹ H.R. 4609;¹⁰ H.R. 6864;¹¹ and H.R. 2271.¹² Six days later, on May 20, 1959, the Senate passed S. 895,¹³ identical with H.R. 4185. Also introduced in the Senate in 1959 was S. 1079.¹⁴

For purposes of discussion, these measures may be placed in three categories: (1) H.R. 4185, H.R. 6864, and S. 895, which were identical, and H.R. 4609, which differed only slightly, proposed as optional alternatives the discretionary establishment of a public defender system or of a paid assigned counsel system in each federal judicial district. (2) H.R. 2271 provided simply that assigned counsel in criminal cases would be entitled to reasonable compensation. (3) S. 1079, in addition to adopting the basic approach of the H.R. 4185 group of bills, permitted outright grants of funds to Legal Aid and Bar Associations providing free counsel to indigent defendants in criminal proceedings.

There follows a description of the provisions of these legislative proposals and also a description of the District of Columbia Legal Aid Act of 1960.

A. OPTIONAL AND ALTERNATIVE SYSTEMS (H.R. 4185, H.R. 6864, S. 895, AND H.R. 4609)

These bills were permissive; not mandatory. Bearing the affirmative recommendation of the Department of Justice and of the Judicial Conference of the United States, they would have permitted, but not required, each United States district court to appoint a salaried public defender and assistant public defenders, who may be full-time or part-time, for the defense of indigent defendants in criminal cases. In the alternative, each district court would have been authorized to employ counsel on a case-by-case basis to represent such indigent defendants, at compensation not to exceed \$35 a day¹⁵ plus reasonable expenses.

In greater detail, these bills would have amended section 3006, Title 18 of the *United States Code* by enacting positive statutory

9. 86th Cong., 1st Sess. (1959) (introduced by the author).

10. 86th Cong., 1st Sess. (1959) (introduced by Representative Udall).

11. 86th Cong., 1st Sess. (1959) (introduced by Representative McDowell).

12. 86th Cong., 1st Sess. (1959) (introduced by Representative White-

ner).

13. 86th Cong., 1st Sess. (1959) (introduced by Senator Wiley).

14. 86th Cong., 1st Sess. (1959) (introduced by Senator Javits).

15. \$50 a day in H.R. 4609.

machinery for the appointment and payment of counsel, providing as follows:

(1) Each United States district court may appoint a public defender at each place where terms of court are held;

(2) Whenever the court is satisfied that the caseload requires it, it may appoint one or more assistant public defenders;

(3) With the approval of the court and the Director of the Administrative Office of the United States Courts, the public defender may appoint necessary clerks;

(4) As the volume of work in the judgment of the court requires, public defenders or assistant public defenders may be full-time or part-time officers;

(5) When a court in which there is a public defender is satisfied that a person charged with a felony or with a misdemeanor for which the penalty exceeds 6 months' imprisonment or a fine of \$500, or both, is unable to employ counsel, the court shall assign the public defender to act as counsel;

(6) When the interests of indigent defendants conflict so that they cannot properly be represented by the same counsel, the court may appoint counsel separate from the public defender and provide for compensation and reimbursement of expense as in (10) below;

(7) The public defender shall act as counsel for each defendant to whom he is assigned at every stage of the prosecution, unless after the assignment the court is satisfied that the defendant is able to employ other counsel;

(8) Subject to general regulations which may be adopted by the Judicial Conference, each district court may adopt appropriate rules to govern the conduct of public defenders;

(9) The salaries of public defenders and assistant public defenders are to be fixed by the Judicial Conference at sums not to exceed \$10,000 per annum. They shall also be reimbursed for necessary expenses approved by the court.

(10) If a district court considers that the representation of indigent defendants in criminal cases can be provided far more economically by the appointment of counsel on a case-by-case basis than by the appointment of a salaried public defender, it may appoint such counsel, *provided* that if the district has a city of more than 500,000 population, the judicial council of the circuit must approve this choice. Counsel so appointed are to be compensated in amounts determined by the court upon conclusion of the service, at a rate not in excess of \$35¹⁶ a day of preparation and trial, plus reasonable expenses incurred. However, the aggregate amount

16. \$50 a day in H.R. 4609.

expended for compensation and reimbursement of such counsel in any district may not exceed \$5,000;

(11) A public defender or appointed counsel who represents a defendant in the district court shall also represent him on appeal if the trial or appellate court considers that there is reasonable ground for appeal and so directs. A public defender so acting is not entitled to compensation beyond his salary; assigned counsel may be compensated and reimbursed as in (10) above, but sums so paid are included in the \$5,000 per annum limit for each district.

(12) Sums necessary to effectuation of the legislation are authorized to be appropriated to the United States Courts and are to be paid under the supervision of the Director of the Administrative Office of the Courts.

Perhaps the salient feature of these proposals is their flexibility—a flexibility that is reflected in the cost estimate presented to the Subcommittee by the Director of the Administrative Office of the United States Courts.¹⁷ That estimate called for a total cost of operation (including the District of Columbia) of \$1,295,700 in the first year and \$1,102,600 in each succeeding year.

A breakdown of these over-all figures is informative. Only the larger twenty of 91 judicial districts were expected to resort to the public defender system. The cost estimate envisaged resort to the assigned counsel system by the remaining 71 smaller districts. On these assumptions, the cost of operation would have broken down as follows:

	First Year	Succeeding Year
Offices in Washington, D.C. and New York, N.Y.	\$ 220,978	\$ 188,306
Offices in 8 large districts	545,208	452,904
Offices in 10 sublarge districts	258,320	190,750
Assigned counsel in 35 Medium- large districts	175,000	175,000
Assigned counsel in 26 submedium districts	65,000	65,000
Assigned counsel in 10 small dis- tricts	12,500	12,500
Administration	18,694	18,140
TOTAL	\$1,295,700	\$1,102,600

17. *Hearings, supra* note 4, at 165-66.

Further detailed with respect to personnel, which is, of course, the principal cost element, the estimate for the 20 larger districts included:

Washington, D.C., and New York, N.Y. (each):	
1 Public Defender and 4 Assistant Public Defenders	\$50,000
5 Clerks	19,060
	<hr/>
	\$69,060 (times 2) \$138,120
Each of 8 large districts:	
1 Public Defender and 2 Assistant Public Defenders	\$30,000
3 Clerks	\$11,550
	<hr/>
	\$41,550 (times 8) \$332,400
Each of 10 sublarge districts:	
1 Public Defender	\$10,000
1 Clerk	4,040
	<hr/>
	\$14,040 (times 10) \$140,400

In addition, 35 medium-sized districts were expected to utilize the full authorized amount of \$5,000 per year for fees and expenses, for a total of \$175,000; 26 submedium districts were expected to spend only \$2,500 per year, for a total of \$65,000; and 10 small districts were expected to use only \$1,250 each, for a total of \$12,500 per year.

An outstanding virtue of these bills lay in the discretion they reposed in the judiciary to minimize the cost of the program by tailoring local solutions to local conditions and needs. Districts with concentrated populations and large caseloads can most economically employ salaried defense attorneys, while smaller districts will minimize costs by compensating counsel assigned on a case-by-case basis. Under the bills, each district court would base its choice on economy of operations. The sole proviso was a presumption in favor of public defenders in large metropolitan centers, where assigned counsel might have been used only if the judicial conference of the circuit approved.

On October 1, 1959, after the hearings before Subcommittee Number 2 had recessed, and after the Senate had passed S. 895, the present writer addressed to a number of persons well qualified to express opinions on the matter an inquiry concerning the suitability of H.R. 4185. The inquiry was sent to all members of the federal judiciary, to law school deans and criminal law professors,

and to officers and members of the American Bar Association. This was done in order that Congress might have the benefit of a searching examination of the proposed legislation by the most knowledgeable and experienced persons in the legal profession. The letter of inquiry read, in part:

I am enclosing a bill which would provide a public defender system for the district courts of the United States. It is identical to the bill introduced in the Senate by Senators Wiley and Kefauver, passed by that body, and presently under consideration in the House Committee on the Judiciary. Inasmuch as you are intimately familiar with the shortcomings and strengths of our legal system, our committee would appreciate your opinion on this proposal Primarily we would like to know whether the system embodied in my bill has merit, whether you prefer an alternative system, or whether it is your opinion that the present system of court-appointed, unpaid counsel for indigent defendants in our Federal courts provides fair and adequate representation.

A total of 545 responses was received—164 from federal judges, 80 from deans and professors in law schools, and 301 from members of the American Bar Association. A report summarizing and digesting these replies was transmitted by the present writer to the members of the House Committee on the Judiciary on February 1, 1960.¹⁸

Over-all and in each category, the responses overwhelmingly endorsed H.R. 4185. Eighty-nine per cent of all replies were of this character, with six per cent preferring a different approach in solution of the problem, and five per cent expressing opposition to new legislation of any kind. By categories, the replies were classified as follows:

	Total	Favoring H.R. 4185		Favoring Other Approach		Opposed to Any Legislation	
		No.	%	No.	%	No.	%
Federal Judges . . .	164	145	89	9	5	10	6
Deans and Professors	80	76	95	3	4	1	1
ABA Members . . .	301	267	88	20	7	14	5
TOTAL	545	488	89	32	6	25	5

It should be noted in connection with the foregoing table that 188 of the 488 responses favoring the enactment of H.R. 4185

18. SENATE COMMITTEE ON THE JUDICIARY, 86TH CONG., 2D SESS., REPORT ON REPRESENTATION FOR INDIGENT DEFENDANTS IN FEDERAL CRIMINAL CASES (Comm. Print 1960).

also offered suggestions for improving the language or adding further provisions to the bill.¹⁹ The majority of these (106 in all) favored an increase in one or more of the money limitations of the bill, that is, the \$10,000 per annum limit on public defenders' salaries, the \$35 per day limit on compensation of assigned counsel, and the \$5,000 per annum limit on expenditures by any district for compensation and reimbursement of assigned counsel. The 32 replies preferring a different legislative approach to the problem almost uniformly favored some form of compensation and reimbursement of assigned counsel, but opposed the establishment of a system of salaried public defenders. Finally, the 25 responses opposing any legislation primarily expressed the view that the present system of unpaid assigned counsel works adequately. Some additional comments of those who replied will be considered in part III of this Article.

B. A SYSTEM LIMITED TO COMPENSATION OF ASSIGNED COUNSEL (H.R. 2271)

The legislative rallying point in the 86th Congress of those who favored compensation of counsel assigned to the defense of indigents but opposed the establishment of salaried public defenders was Representative Whitener's bill, H.R. 2271, which provided that:

Counsel assigned by the court in any criminal case shall be entitled to reasonable compensation, in an amount to be determined by the court. Such compensation shall be paid, upon order of the court, out of such funds as may be provided by law.

According to the testimony of this bill's author,²⁰ the purpose of the measure was to apply in the federal courts the system now in force in the courts of his state of North Carolina. Although H.R. 2271 contained no express requirement of indigence, such a requirement, to be met to the satisfaction of the court, was clearly implied in Representative Whitener's testimony.²¹ Similarly, although no express provision was made for reimbursement of expenses, it was apparently intended that such reimbursement, within reasonable limits, be included in the compensation allowed by the court.²²

The bill's omission of any maximum rate of compensation for services was deliberate. In this connection, Representative Whitener testified:

19. Forty from judges; 40 from deans and professors; and 108 from members of the ABA.

20. *Hearings, supra* note 4, at 12.

21. *Id.* at 14.

22. *Id.* at 15.

I think if you get inflexible figures in your statute, that you will eliminate local conditions. It may be that in a particular State, indigent prisoners are not furnished counsel in noncapital cases, that is, counsel who are paid by the court. By following the Federal system it might disturb conditions in the local area. I think it certainly should be left to the discretion of the judge in the Federal court who, in the course of events, will be apt to develop some standards of compensation, but at the same time that judge will not be bound by the standards in New York City as he is down in South Carolina or North Carolina or California, where the situation is different.²³

Nevertheless, the witness stated that a bill providing a maximum was preferable to no bill at all.²⁴

Outlining the reasons for his objection to a public defender system, Mr. Whitener stated in effect that in his opinion (1) the full-time United States attorneys in his area are not as skilled as those in office when it was permissible for such officers to engage in private practice, (2) the public defender would become unduly friendly or unduly hostile to the prosecutor to the detriment of the defendant or to the detriment of justice.²⁵

Another vigorous supporter of H.R. 2271 and forthright opponent of public defender legislation, District Judge E. J. Dimock, of the Southern District of New York, summed up his objections in the following words:

It departs from our adversary system. It forces the accused to accept a lawyer appointed and paid by his opponent. It involves invasion of the lawyer's duty to represent the poor. And finally, it gives the Government which prosecutes power over the defense of those whom it accuses.²⁶

Judge Dimock, like Representative Whitener, believes, however, that assigned counsel should be compensated for their services.

C. A SYSTEM ENABLING FEDERAL SUBSIDY OF LEGAL AID ORGANIZATIONS (S. 1079)

None of the bills discussed above expressly authorized the courts to use and compensate voluntary private organizations, like the Legal Aid Society of New York, which are engaged in providing counsel to indigent persons. With respect to the power of district courts, under H.R. 4185, 86th Congress, as written, to assign cases to attorneys employed by such organizations, Mr. Orison Marden, President of the National Legal Aid and Defender Association, testified at the 1959 hearings as follows:

23. *Ibid.*

24. *Id.* at 20.

25. *Id.* at 12.

26. *Id.* at 43.

A question has been raised about the appointment of legal aid or defender attorneys under this provision [for compensating assigned counsel]. It has been our view, in New York, that under this legislation, as drawn, the district judges could appoint the attorneys on the legal aid staff, and it has been our further thought that any compensation allowed to them would be turned over to the Legal Aid Society.²⁷

It is clear, however, that no such indirect subsidization of legal aid groups would have been possible under H.R. 4185 in districts in which a public defender had been appointed.²⁸ As to this, Mr. Marden further testified:

[T]he matter of optional provisions which would permit a district court in a particular district to utilize the services of an existing or future legal aid society or defender service has also been mentioned. Ideally, I think it would be an excellent provision.

This legislation will be nationwide. There are some sections of the country which, for ideological reasons, perhaps, or because of local conditions, or because they are well satisfied, as we are in New York, with the services of a voluntary association, would prefer not to have the public defender.

In those instances, it seems to me entirely logical that the district court or the administrative office [of the United States Courts] should have the option to contract with a private group or organization to supply the services that would otherwise be rendered by a public defender if appointed. I do not look on it as a grant or a handout by the Federal Government. It would simply be payment for services rendered in the same way that there would be payment for services rendered in the case of individual counsel or in the case of a public defender.²⁹

Along these lines, S. 1079, 86th Congress, introduced by Senator Javits, made provision for direct grants to legal aid and similar groups.³⁰ The structure of this bill is the same as that of H.R. 4185 from which it differed in only three significant particulars: (1) instead of the flat \$10,000 per annum limit prescribed by H.R. 4185, S. 1079 provided for public defenders' salaries "in no case exceeding \$16,000 per annum or an amount \$2,500 less than the salary of the United States district attorney for [the] . . . district"; (2) the maximum compensation for assigned counsel was set at \$100 (instead of \$35) per day; and (3) the bill contained the following additional subsection:

(e) Upon the recommendation of the Judicial Conference of the United States, the Director of the Administrative Office of the United States Courts may make grants to legal aid societies, bar associations,

27. *Id.* at 56-57.

28. See, e.g., *Hearings, supra* note 4, at 191.

29. *Id.* at 57.

30. No similar bill was introduced in the House in the 86th Congress.

or other similar groups providing free legal services to indigent defendants in criminal proceedings in the district courts of the United States. Such grants shall be made in those districts where the need for the appointment of assistant public defenders or, in districts where counsel in particular cases is utilized in lieu of public defenders, the need for the appointment of such counsel is lessened by reason of the volume and quality of the legal services provided by such groups in behalf of indigent defendants in criminal proceedings. The aggregate amount of any such grants made annually in any judicial district shall not exceed \$30,000.

A number of witnesses at the 1959 hearings and a number of persons who replied to the letter of inquiry concerning H.R. 4185 expressed a preference for some such provision in support of existing legal aid organizations. However, the Director of the Administrative Office of the United States Courts, Mr. Olney, testified that in his opinion administration of such a provision would be most difficult. He stated a preference for a period of experimentation under the system proposed by H.R. 4185 "before we inject the private organizations into the picture."³¹

D. A MIXED PUBLIC AND PRIVATE SYSTEM FOR THE DISTRICT OF COLUMBIA (PUBLIC LAW 531, 86TH CONGRESS)

The first comprehensive congressional break-through in the matter of providing paid counsel to indigent defendants in criminal cases came with the enactment in 1960 of the District of Columbia Legal Aid Act.³² Problems of the District of Columbia with respect to the representation of indigent defendants in criminal cases were thought to warrant separate and special treatment. The jurisdiction of its court is very much broader than that of federal courts in other districts, including as it does both local and federal jurisdiction. In addition, the District has other courts—a municipal court of appeals, a municipal court, and a juvenile court, which, although they deal with local cases, are federal in that they are created and governed by statutes enacted by Congress. In consequence, the number of cases in which indigents must be represented in District of Columbia courts exceeds that in any other federal district and involves approximately 7,500 assignments annually. The Judicial Conference of the United States Courts which approved H.R. 4185 passed a separate resolution stating that the problem of the representation of indigents in the District of Columbia had reached a critical state and urging the preparation and enactment of legislation dealing with this problem.³³

31. *Hearings, supra* note 4, at 33.

32. 74 Stat. 229 (1960), 43 U.S.C.A. § 620(d) (Supp. 1960).

33. See Letter From Hon. E. Barrett Prettyman (Chief Judge of the United States Court of Appeals for the District of Columbia Circuit) to

The District of Columbia Legal Aid Act utilizes the public defender concept and at the same time preserves the use of volunteers. It creates a "Legal Aid Agency" which is to provide legal representation of indigents in "judicial proceedings"³⁴ in the District of Columbia.

The Agency is to advise the tribunals of the names of attorneys available to accept assignments and the tribunals are authorized to make assignments to indigents and are enjoined to provide such assigned counsel "as early in the proceeding as is practicable."

Except in proceedings initiating before the Commission on Mental Health, eligibility to have counsel assigned is conditioned on execution of a written statement under oath, subject to criminal penalty for falsification, asserting inability to hire an attorney and inability to pay a modest attorney's fee.

Powers of the Agency are vested in a board of seven trustees, to be appointed by a six member panel comprising the Chief Judge of each of four District of Columbia courts, the president of the Board of Commissioners, and the judge of the Juvenile Court. The trustees are to appoint a director at an annual salary of \$16,000, to serve at their pleasure. With the approval of the trustees, the director is to employ "such professional and office staff as may be necessary properly to conduct the business of the Agency, subject to the availability of appropriated funds," and to make assignments of the professional personnel so as to provide the best practicable handling of the caseload of the tribunals to be served. He may also, with approval of the trustees, employ volunteer attorneys, without salary, to be reimbursed their out-of-pocket expenses. Salaried employees are to be full-time and are not to practice law.

The salient respect in which the District of Columbia Legal Aid Act differs from the various legislative proposals applicable to federal district courts generally which have been discussed above is that it makes no provision for the compensation of assigned counsel other than salaried full-time employees of the Legal Aid Agency. Volunteers may be assigned to defend indigents, in which

Hon. Thomas J. Lane (Chairman of Subcommittee No. 2, House Committee on the Judiciary), May 1, 1959, reprinted in *Hearings, supra* note 4, at 52.

34. That is, in

criminal proceedings in the United States District Court for the District of Columbia and in preliminary hearings in felony cases, and in cases involving offenses against the United States in which imprisonment may be for one year or more in the Municipal Court for the District of Columbia, in proceedings before the Coroner for the District of Columbia and the United States Commissioner, in proceedings before the juvenile court of the District of Columbia, and in proceedings before the Commission on Mental Health of the District of Columbia and proceedings in the courts arising therefrom.

case they may be reimbursed for expenses, but they cannot be compensated for services.

III. PROSPECTS IN THE 87TH CONGRESS (H.R. 2696)

Against the background of these developments in the 86th Congress, the writer has reviewed the differences of opinion which have thus far stood in the way of general public defender legislation, and has introduced a new bill, H.R. 2696³⁵, to provide a basis for further legislative consideration of the problem in the present Congress.

The writer cannot agree with the objections that have been levelled at a public defender system. It is contended that such a system departs from the tradition of adversarial proceedings, that it forces a defendant to accept representation at the hands of one who is in the pay of his adversary. These objections break down on analysis. It is already true, for example, that the judge and jury, sworn to impartial performance of their respective roles in a criminal trial, are in the pay of the Government. No one suggests that this circumstance *per se* prevents the achievement of substantial justice in criminal trials. Moreover, it is generally understood that even the public prosecutor, though hired and paid and sworn to prosecute, is expected to place honor above zeal. He must bend every effort to see that the facts are developed before the court—whether those facts are helpful or hurtful to his case.

What is actually going on in the conduct of criminal jurisprudence is that we are modifying the traditional concept of the trial as an out-and-out combat. Emphasis is no longer exclusively on the vindication of society through retribution but is being increasingly placed on the identification and removal of the causes of crime and on the rehabilitation of criminals.

As Mr. James V. Bennett, the Director of Federal Prisons, has said:

[M]y strongest reason for advocating the public defender is because I believe that he can be of untold value in shaping the attitudes of the prisoner. The correctional process cannot begin to operate until somehow the bitterness and antagonisms which are more often than not engendered by the legal process are overcome. Men approach the ordeal of a battle in the criminal court, stirred and bewildered by a deep and undefinable fear, and despite outward appearances they go through it in a chaos of torment. It is in this hour of a man's greatest weakness, his greatest fear, and greatest need for honest guidance and counsel that the law submits him to a legal duel and to vilification of himself which might well appall the strongest mind. It is small wonder then that frequently the prisoner leaves the courtroom with his heart pouring forth hate and venom. Since rehabilitation to be

35. 87th Cong., 1st Sess. (1961).

true and lasting must come from within, nothing can be done with him until he has been purged of this rancor.³⁶

Agreeing with this approach, the present writer continues to hold to the view that a public defender system ought at least to be available to the judiciary in every federal district. Further, the permissive character of the recommended legislation would seem to obviate the danger that significant regional differences will be disregarded.

Similarly, the writer continues to agree with what appears to be the overwhelming consensus—namely, that some provision should be made for the compensation of counsel, other than public defenders, who are assigned to represent indigent defendants accused of crime. The new bill, accordingly, retains the general approach of H.R. 4185, 86th Congress, but it adds what are thought to be strengthening features.

A number of changes have been made in H.R. 2696 to improve the provisions relative to public defenders. In connection with H.R. 4185, the suggestion was made that in the interest of their independence of operation public defenders ought not to be appointed by the district court before which it would be their duty to practice. It was further suggested that in districts in which the Public Defender will have one or more assistants, these should be appointed by the Public Defender rather than by the court. On reflection, the first of these proposals appears to have some merit. It is thought preferable, however, to repose power of the appointment of Public Defenders and their assistants in the judiciary. H.R. 2696 accordingly provides that appointment of these officers shall be made by the district court "with the approval of the judicial council of the circuit."

Further, in order to place a floor under the qualifications of persons appointed as Public Defenders, the bill limits appointments to attorneys who have practiced not less than five years before the bar of the state or territory in which the appointing district court is located. Appointments would be for a term of four years. In addition to clerks, the Public Defender would have authority to appoint necessary investigators as approved by the Director of the Administrative Office of the United States Courts. Availability of free legal services, it has been pointed out, will be an inadequate protection to an impoverished defendant whose proper defense requires investigative services which he is unable to obtain.

A great deal of criticism was leveled at H.R. 4185 on account

36. Bennett, *To Secure the Right to Counsel*, 32 J. AM. JUD. Soc'Y 177, 181 (1949).

of its limitations on compensation and reimbursement. Many commentators regarded the \$10,000 maximum on salaries of Public Defenders, the \$35 per day limit on compensation of assigned counsel, and the \$5,000 per annum limit on expenditures of any district for compensation and reimbursement of assigned counsel as wholly unrealistic in light of present day economic conditions. Upward revision has therefore been incorporated in H.R. 2696 with respect to each of these elements. Under the new bill the salary of a public defender shall not exceed the salary paid to the United States Attorney and the salary of an assistant public defender shall not exceed that paid the Assistant United States Attorney in the same district. Under existing law, United States Attorneys are paid salaries ranging from \$12,000 to \$20,000 per annum, and Assistant United States Attorneys are limited to a maximum of \$15,000 per annum.³⁷

Further, under H.R. 2696, the maximum daily compensation of assigned counsel is increased from \$35 to \$50 and the annual limitation on each district with respect to expenditures for compensating and reimbursing assigned counsel is increased from \$5,000 to \$10,000.

These proposed increases in maxima seem fully warranted if the compensation of those who represent indigent defendants is to be more than a token. It is estimated that their adoption will not quite double the relatively modest cost of the program proposed in H.R. 4185, 86th Congress. In many smaller districts the increased maxima will have little effect on cost. In order, however, to allay fears of excessive expenditures, the new bill for the first time imposes a limit on the appropriations that may be made to carry out its provisions. It declares that:

The annual appropriations for these purposes shall not exceed the fines, penalties, and forfeitures collected by the courts during the most recently completed fiscal year; provided that the Director of the Administrative Office of the United States Courts may allocate the appropriation to individual courts without reference to the fines, penalties, and forfeitures collected by a particular court.

Such collections of fines, penalties, and forfeitures aggregate about \$2,500,000 annually.

Many commentators on H.R. 4185, 86th Congress, expressed the view that the services of employees of Legal Aid organizations ought to be compensable. It was noted that this would be impossible under H.R. 4185 in any district in which a public defender had been appointed. To obviate this difficulty the new bill provides that in districts where a public defender has been appointed, the

37. 28 U.S.C. § 508 (1958).

court may nevertheless provide counsel, not only where the interests of indigent defendants conflict, but also "where the court deems the appointment of a counsel separate from or supplementary to the public defender is in the best interest of an individual defendant or defendants." In addition, the bill expressly provides that the court may, in its discretion, assign a legal aid society to provide such counsel. The result, with respect to legal aid organizations, is that they would be eligible to receive compensation for the services of assigned counsel provided by them even in districts in which a public defender has been appointed. This solution is thought to be preferable to one in which the Government would make outright grants to these societies, as was proposed in S. 1079, 86th Congress.

Because fatal missteps may occur at virtually any stage of the proceedings, the new bill also makes clear that counsel should be made available to indigent defendants as early as arraignment or preliminary examination. Finally, provisions for representation of indigent defendants on appeal are somewhat liberalized. The comment was made that the language of H.R. 4185 governing such representation was open to objection. That bill provided for representation on appeal if either the district or the appellate court "considers that there is reasonable ground for appeal and so directs." It was pointed out that this might be interpreted as placing on the courts the responsibility of determining whether or not a convicted defendant should appeal. Further, it was noted that the test to be applied in determining whether to provide representation on appeal might not comport with the test applied under the *forma pauperis* statute,³⁸ as interpreted in *Farley v. United States*³⁹ and *Ellis v. United States*.⁴⁰ In response to this criticism, the new bill provides that representation on appeal may be provided if either the district or the appellate court determines that "there is no evident improper motive in taking the appeal and that an issue is presented which is not plainly frivolous."

The foregoing changes should go far to eliminate valid criticisms of H.R. 4185, 86th Congress. Without claiming perfection for H.R. 2696, the writer believes that no more time should be lost in enacting positive legislation in this field. The problem of the indigent criminal defendant has been allowed to go unsolved too long. It is therefore to be hoped that H.R. 2696 will receive favorable consideration during the 87th Congress and that the long-postponed fulfillment of the guarantee of the sixth amendment will become a reality.

38. 28 U.S.C. § 1915 (1958).

39. 354 U.S. 521 (1957).

40. 356 U.S. 674 (1958).