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# The Criminal Justice Act — 1964 To 1976

JUDGE DUDLEY B. BONSAI\*

Under the Criminal Justice Act of 1964,<sup>1</sup> the federal government compensates attorneys for services rendered to certain federal criminal defendants who are “financially unable to obtain adequate representation.”<sup>2</sup> The Act is the culmination of years of study by Congress, the Judiciary, and groups of the organized bar; it is based largely on the Report of the Attorney General’s Committee on Poverty and the Administration of Federal Criminal Justice, known as the *Allen Report*.<sup>3</sup>

Supreme Court decisions have established the principle that in both federal and state courts the right to be represented by an attorney is a “fundamental right essential to a fair trial” under the sixth and fourteenth amendments to the Constitution.<sup>4</sup> Before the Act was passed, court-assigned attorneys, who usually rendered their legal services *pro bono publico*, provided the only representation for needy defendants. This assignment system had proven inadequate to handle the increasing demand for attorneys for those who could not afford to pay for such services.

Representation under the Act is provided to persons “financially unable to obtain adequate representation”<sup>5</sup> or “financially unable to obtain investigative, expert, or other services necessary for an adequate defense.”<sup>6</sup> The defendant, therefore, need not be “indigent.” Accordingly, the Act meets the realistic problem, sometimes overlooked, that even defendants

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<sup>1</sup>18 U.S.C. §3006A (1970 & Supp. V. 1975) (originally enacted as Pub. L. No. 84-455, 78 Stat. 552 (1964)) [hereinafter cited as the Act].

<sup>2</sup>18 U.S.C. §3006A(a) (1970). Special appreciation is extended to Mr. William E. Foley, Deputy Director of the Administrative Office of the United States Courts. This article is derived in large part from data supplied over the years by Mr. Foley and his staff to the Judicial Conference of the United States and to the Judicial Conference Committee to Implement the Criminal Justice Act. In addition, Mr. Foley’s article, *The Criminal Justice Act - Ten Years Later*, was of great assistance. Special appreciation is also extended to my law clerk Nancy E. Friedman for her invaluable assistance in the preparation of this article.

Other articles written about the Criminal Justice Act are: Hastings, *The Criminal Justice Act of 1964*, 57 J. Crim. L.C. & P.S. 426 (1966); Kutak, *The Criminal Justice Act of 1964*, 44 NEB. L. REV. 703 (1965); Woods, *The Criminal Justice Act of 1964: A Study in Administrative Death*, AM. CRIM. L.Q. 54 (Winter 1967); Note, *Judicial Perspectives on the Operation of the Criminal Justice Act of 1964*, 42 N.Y.U. L. REV. 55 (1967).

<sup>3</sup>ATTORNEY GENERALS COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE, F. A. ALLEN, CHAIRMAN, POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE (1963) [hereinafter cited as ALLEN REPORT].

<sup>4</sup>See *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Powell v. Alabama*, 287 U.S. 45 (1932).

<sup>5</sup>18 U.S.C. §3006A(a) (1970).

<sup>6</sup>18 U.S.C. §3006A(e)(1) (1970).

with jobs and steady incomes may have fixed, unavoidable expenses which make payment for an attorney or other legal assistance required in connection with a trial impossible.

The 1967 *Oaks Report*<sup>7</sup> recommended a number of amendments to the Act. Some of these recommendations, which greatly broadened the scope and application of the Act, were adopted by Congress in amending the Act in 1970.<sup>8</sup>

For instance, the Act originally provided that attorneys could be appointed from panels of private attorneys or attorneys "furnished" by a local bar association or legal aid agency.<sup>9</sup> One of the significant provisions of the 1970 amendment was the creation of federal legal services offices structured either as Federal Public Defenders offices, which were to be organizationally patterned on the United States Attorneys Offices, or as Community Defenders' offices, which are "non-profit defense counsel services established and administered by any group authorized by the [district court] plan to provide representation."<sup>10</sup>

Furthermore, the 1970 amendment substantially enlarged the coverage of the Act. While the Act originally provided for appointment of attorneys only for "defendants charged with felonies or misdemeanors, other than petty offenses," the 1970 amendment incorporated the concept that counsel should be provided whenever a person was faced with the possibility of a loss of liberty. Coverage was thereby extended to pre-arraignment proceedings subsequent to arrest, many juvenile delinquency proceedings, probation violation proceedings, and generally to persons "for whom the Sixth Amendment to the Constitution requires the appointment of counsel, or in a case in which he faces loss of liberty, any Federal law requires the

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<sup>7</sup>D.H. OAKS, *THE CRIMINAL JUSTICE ACT IN THE FEDERAL DISTRICT COURTS*, a study published by the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 91st Cong., 1st Sess. (1969) (hereinafter referred to as the OAKS REPORT). See also Oaks, *Improving the Criminal Justice Act*, 55 A.B.A.J. 217 (1969).

<sup>8</sup>See Pub. L. No. 91-447, 84 Stat. 916 (Oct. 14, 1970).

<sup>9</sup>The Senate version of the Act (S. 1057) was passed on August 6, 1963 in substantially the same form proposed by the ALLEN REPORT, see note 3 *supra*, which was the form in which it was introduced. On January 15, 1964, the House of Representatives passed its version of the bill. On August 7, 1964, the conferees of the Senate and the House agreed on a bill which did not contain any provision for public defenders as provided in the Senate bill, but rather placed primary reliance on a system of private counsel to be assigned on a case-by-case basis. This system was to be supplemented by authorization of services furnished by attorneys voluntarily through bar associations and legal aid agencies. The Act went into effect on August 20, 1965, one year after its enactment.

Pursuant to the provision for the establishment of panels of attorneys to render assistance under the Act, district courts adopted various procedures for selecting and maintaining their panels. Some districts, such as the Northern District of Illinois, have relied on the Federal Public Defender (since their creation pursuant to the 1970 amendment of the Act, see notes 46-55 *infra*, & text accompanying, while other districts, such as the Southern District of New York, use a committee of attorneys. Most plans seek to distribute appointments equitably and use some form of a rotation system.

<sup>10</sup>18 U.S.C. §3006A(h)(2)(B) (1970).

appointment of counsel."<sup>11</sup> In addition, district court judges are authorized to appoint an attorney when the "interests of justice so require" for persons who are subject to revocation of parole, in custody as a material witness, seeking collateral relief (*e.g.* habeas corpus<sup>12</sup> or section 2255 relief<sup>13</sup>), or seeking findings subsequent to trial relating to their mental competency at the time of trial.<sup>14</sup>

The Act has now been in force for eleven years. The dramatic expansion of its coverage is demonstrated by the growth in the number of appointments and in the increase in its costs. For example, during fiscal year 1967, the first full fiscal year of the Act's operation, 21,593 defendants in the district courts and 1,008 appellants were assigned attorneys under the Act. In fiscal year 1976, authorization for the appointment of attorneys has been granted for more than 47,000 persons, and the records are not yet complete.<sup>15</sup> For fiscal year 1966, Congress appropriated \$3 million for implementation and operation of the Act, and this sum proved to be more than adequate. During fiscal year 1967, the average cost per case in the district courts was \$131, and per appeal was \$384.<sup>16</sup> In contrast, by fiscal year 1976, Congress appropriated a total of \$19,046,000 for operation of the Act.<sup>17</sup> As of July 31, 1976, payments per case for district court representation for fiscal year 1975 averaged \$326, and in the Courts of Appeals averaged \$712.<sup>18</sup>

#### ADMINISTRATION OF THE ACT

While the Act is administered by the Courts,<sup>19</sup> the Judicial Conference of the United States has continuing supervision over its operation and has

<sup>11</sup>18 U.S.C. §3006A(a) (1970).

<sup>12</sup>28 U.S.C. §§2241, 2254 (1970).

<sup>13</sup>28 U.S.C. §2255 (1970) (federal prisoner's petition to vacate sentence).

<sup>14</sup>18 U.S.C. §4245 (1970).

The Act was amended in 1974 to terminate coverage in the local courts in the District of Columbia for the reason that Congress had enacted a separate bill providing for the equivalent services in these courts. *See* U.S.C. §3006A (l) (Supp. V. 1975).

Further changes in the Act may come about as a result of the proposed recodification of the federal criminal code, Title 18 of the United States Code, in a bill referred to as S.1. *See* S.1, 94th Cong., 1st Sess. (1973). However, as S.1 is presently drafted, the provisions for appointment of attorneys and other services for persons financially unable to obtain adequate representation are substantially the same as the provisions now in effect. *See* S.1, 94th Cong., 1st Sess. §§101-05 (1973).

<sup>15</sup>As of July 31, 1976, the Administrative Office records reveal that in fiscal year 1975 (ending June 30, 1975), appointment of counsel was made for 47,039 persons.

<sup>16</sup>In addition, studies of attorneys' services rendered in fiscal year 1966 indicate that the average time spent per case in the district court was nine hours, and 36 hours per appeal.

<sup>17</sup>This sum understates the costs of providing services under the Act since it does not reflect the \$3 million appropriated separately for certain assigned attorneys in the District of Columbia (which costs were paid under the Act until the 1974 amendment). *See* note 14, *supra*, & text accompanying.

<sup>18</sup>The fiscal year 1975 figures are based on payment of claims in 83% of the cases in the district courts and 66% of the cases in the courts of appeals.

<sup>19</sup>*See* 18 U.S.C. §3006A(g) (1970).

promulgated national *Guidelines* to be followed by the courts.<sup>20</sup> The *Guidelines* deal with matters such as determination of eligibility, issues regarding appointment of attorneys, contents of district court plans, and forms which are to be used in administering the Act. A committee of the Judicial Conference, known as the Committee to Implement the Criminal Justice Act, makes recommendations to the Conference regarding changes in the *Guidelines* and other issues which might arise in the operation of the Act.

As provided in the Act, each of the ninety district courts, with the approval of the appropriate circuit judicial council, placed in operation a "plan" implementing the Act.<sup>21</sup> Each circuit judicial council has supplemented the district court plans with provisions for representation for needy defendants on appeal.

Funds for operation of the Act are appropriated yearly by Congress. Payments are authorized by the courts and made by the Administrative Office of the United States.<sup>22</sup>

As a result, the Act has undergone some notable changes in its eleven years of operation, largely seeking more effectively to protect the rights of defendants and other persons in the federal criminal justice system. Moreover, the district courts, by their interpretation of the Act as originally passed, have created standards under which the Act operates. The remainder of the article focuses in greater depth on the statutory and judicial standards for the operation of the Act.

#### COVERAGE OF THE ACT: FINANCIAL ELIGIBILITY

From its inception, the Act has provided for assignment of counsel for defendants who are "financially unable to obtain adequate representation." There is, therefore, no requirement that a defendant be "indigent."<sup>23</sup> As set forth by the Judicial Conference in its *Guidelines* for administration of the Act, this test is met when a person's

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<sup>20</sup>JUDICIAL CONFERENCE OF THE UNITED STATES, JUDICIAL CONFERENCE COMMITTEE TO IMPLEMENT THE CRIMINAL JUSTICE ACT, *GUIDELINES* (Revised as of Sept. 16, 1974) (hereinafter cited as *GUIDELINES*).

<sup>21</sup>These plans may be modified by the district court, subject to the approval of the appropriate circuit judicial council. 18 U.S.C. §3006A(a) (1970).

<sup>22</sup>18 U.S.C. §3006A(j) (1970).

<sup>23</sup>The determination of a defendant's financial need for an attorney or other services is made by a magistrate or a district judge on the basis of affidavits submitted by the defendant. This determination may be made at any stage in the proceedings, including on appeal, or after the defendant has retained an attorney. Where necessary, a hearing may be held. 18 U.S.C. §3006A(b) (1970). Conversely, if it is determined at any stage that the person for whom an attorney was appointed or other services provided is financially able to obtain counsel or to make partial payment for such representation or other services, the court may terminate the appointment and/or direct payment of the fees by that person to the attorney, or, if payment has been received by the attorney already, order repayment to the entity which made said payments in the first instance. 18 U.S.C. §§3006A(c), (f) (1970).

net financial resources and income are insufficient to enable him to obtain qualified counsel. In determining whether such insufficiency exists, consideration should be given to (a) the cost of providing the person and his dependents with the necessities of life, and (b) the cost of a defendant's bail bond if financial conditions are imposed, or the amount of the cash deposit defendant is required to make to secure his release on bond.<sup>24</sup>

The *Guidelines* further provide that:

Any doubts as to a person's eligibility should be resolved in his favor; erroneous determinations of eligibility may be corrected at a later time.<sup>25</sup>

In practice, this test of financial inability, rather than "indigency," has been reflected in the defendants for whom the Act has provided counsel. For example, of the 20,222 defendants who executed financial affidavits in fiscal year 1967, 32% were employed and 45 of the defendants reported weekly earnings of \$200 or more.<sup>26</sup>

#### COVERAGE OF THE ACT: TYPES OF PROCEEDINGS

In passing the Act originally, Congress did not intend that appointment of attorneys at government expense should extend to all defendants for whom the Supreme Court had ruled the Constitution requires the assistance of counsel.<sup>27</sup> In cases not covered by the Act, legal services were provided by attorneys who performed the work *pro bono publico* or by legal aid agencies. The Act covered representation of defendants "in every criminal case in which the defendant is charged with a felony or a misdemeanor, other than a petty offense"<sup>28</sup> at every stage of the proceedings from "his initial appearance before the [magistrate] or court through appeal."<sup>29</sup>

The 1970 amendment expanded the Act's coverage in a number of respects, making it coincide substantially with a person's constitutional and statutory right to counsel. First, it expanded the time period for which an attorney could be provided, extending the right to persons "under arrest, when such representation is required by law."<sup>30</sup> In addition, under the Act as amended in 1970, needy juveniles are entitled to appointed attorneys

<sup>24</sup>GUIDELINES, *supra* note 20, at Ch. II. A.4.

<sup>25</sup>*Id.*

<sup>26</sup>In order to insure continuous representation of defendants, most plans provide that an attorney shall serve until relieved; shall advise a defendant of his right to appeal and to an attorney on appeal, to be paid by the government, when necessary; and shall, if requested, file a timely notice of appeal. 18 U.S.C. § 3006A(c) (1964).

<sup>27</sup>See *James v. Headley*, 410 F.2d 325, 330-31 (5th Cir. 1969—; CONF. REP. NO. 1709, 88th Cong., 2d Sess., reprinted in [1964] U.S. CODE CONG. & AD. NEWS 3000.

<sup>28</sup>In the federal criminal code, as currently drafted, a "petty offense" is a subcategory of misdemeanor and is defined as an offense carrying a potential penalty of imprisonment of not more than six months or a fine of not more than \$500, or both. 18 U.S.C. § 1(3) (1970).

<sup>29</sup>18 U.S.C. § 3006A(c) (1970).

<sup>30</sup>See generally *Orozco v. Texas*, 394 U.S. 324 (1969); *United States v. Wade*, 388 U.S. 218 (1967); *Miranda v. Arizona*, 385 U.S. 436 (1966).

when a right to counsel exists in those juvenile delinquency proceedings which involve alleged commission of acts which, if committed by an adult, would entitle that adult to the protection of the Act.<sup>31</sup>

The 1970 amendment to the Act included a catch-all provision that an attorney may be appointed for needy persons for whom "the Sixth Amendment to the Constitution requires the appointment of counsel<sup>32</sup> or for whom, in a case in which he faces loss of liberty, any Federal law requires the appointment of counsel."<sup>33</sup> Since *Argersinger v. Hamlin*,<sup>34</sup> a 1972 Supreme Court case, this provision has had the effect of modifying the restriction in the Act which precluded appointment of attorneys in petty offense cases where the trial judge or magistrate leaves open the possibility of imposition of a sentence of imprisonment.<sup>35</sup> This provision also permits appointment of attorneys in probation violation proceedings since the Supreme Court has ruled in *Mempa v. Rhay*<sup>36</sup> that there is a constitutional right to counsel in such proceedings.

The 1970 amendment also gives the courts discretion, when the "interests of justice" so require and a financial need is shown, to appoint attorneys for persons subject to revocation of parole,<sup>37</sup> in custody as a material witness, or seeking collateral relief, including writs of habeas corpus and Section 2255<sup>38</sup> proceedings. Even though there is no constitutional right to counsel under the sixth amendment in these civil proceedings, this provision was included because there is substantial potential for the deprivation of liberty.<sup>39</sup>

The Judicial Conference has determined that counsel may be appointed for a person charged with civil contempt, or for a witness before a grand jury who faces loss of liberty for failure to comply with an order of the court.<sup>40</sup> Payment of counsel under the Act, however, has not been allowed in prisoner civil rights cases brought under Section 1983 of Title 42 of the United States Code.<sup>41</sup>

<sup>31</sup>See generally *In re Gault*, 387 U.S. 1 (1967).

<sup>32</sup>See generally *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

<sup>33</sup>See generally Narcotic Addict Rehabilitation Act of 1966, 18 U.S.C. § 4253 (1970).

<sup>34</sup>407 U.S. 25 (1972).

<sup>35</sup>See 18 U.S.C. § 3006A(a)(1) (1970); text accompanying note 28, *supra*.

The proposed provisions as to appointment of counsel in S.1, 94th Cong., 1st Sess. (1973), largely retain these concepts but adopt new terminology for classification of offenses.

<sup>36</sup>389 U.S. 128 (1967).

<sup>37</sup>See also notes 42-44, *infra* & text accompanying as to modification of the Act by the Parole Commission & Reorganization Act of 1975.

<sup>38</sup>28 U.S.C. § 2255 (1970) (petition by federal prisoner to vacate sentence).

<sup>39</sup>See generally *Johnson v. Avery*, 393 U.S. 483 (1969). These provisions are also incorporated in the proposed bill S.1, 94th Cong., 1st Sess. (1973).

<sup>40</sup>See generally *United States v. Sun Kung Kang*, 468 F.2d 1368 (9th Cir. 1972); GUIDELINES, *supra* note 20, at Ch. II.A.1.d(1), (2).

<sup>41</sup>GUIDELINES, *supra* note 20, at Ch. II.A.1.c(4). However it is possible that a prisoner in custody may qualify for an appointed attorney if the court is satisfied that he erroneously and out of ignorance brought the proceeding under section 1983. See *Foley*, *supra* note 2, at 16. In addition, corporate defendants are not covered by the Act. GUIDELINES, *supra* note 20, at Ch. II.A.1.c(2).

As a result of the Parole Commission and Reorganization Act of 1975,<sup>42</sup> which makes appointment of counsel mandatory in parole revocation proceedings and detainer review or dispositional hearings and appeals,<sup>43</sup> the Judicial Conference will consider an amendment to the *Guidelines* to provide for coverage of the Act in these proceedings when the parolee desires legal assistance and is financially eligible.<sup>44</sup>

With the expanded coverage of the Act, the number of defendants for whom counsel was appointed more than doubled between fiscal year 1967, the first full fiscal year of the Act's operation, and fiscal year 1975, the last full fiscal year for which statistics are available.<sup>45</sup>

APPOINTMENT OF ATTORNEYS:  
PANELS OF ATTORNEYS, FEDERAL PUBLIC DEFENDERS,  
AND COMMUNITY DEFENDERS

As the Act was originally enacted, attorneys appointed for needy defendants were either private attorneys or attorneys furnished by a bar association or a legal aid agency. These arrangements satisfied the statutory provision that "[c]ounsel shall be selected from a panel of attorneys designated or approved by the district court."<sup>46</sup>

After several years of operation of the Act, Professor Oaks concluded in his report to Congress that some districts did not have sufficient numbers of lawyers able, willing, and experienced to provide adequate representation.<sup>47</sup> The *Oaks Report* strongly recommended "some type of full-time salaried Federal defender lawyers [to be available for appointment as counsel] on an optional basis, . . . especially in large urban districts."<sup>48</sup> Following publication of the *Oaks Report*, Congress, by the 1970 amendment, provided for establishment of Federal Public Defender and Community Defender offices.

The Act continues to encourage substantial use of private attorneys.<sup>49</sup>

<sup>42</sup>Pub. L. No. 94-233, 90 Stat. 219 (Mar. 15, 1976), recodifying 18 U.S.C. §§4201 *et seq.* & 5005 *et seq.* (1970).

<sup>43</sup>Pub. L. No. 94-233, § 2, 90 Stat. 228 (Mar. 15, 1976) (to be codified at 18 U.S.C. §§ 4214(a)(2)(B), 4214(b) & 4214(c)).

<sup>44</sup>See REPORT TO THE JUDICIAL CONFERENCE OF THE UNITED STATES OF THE COMMITTEE TO IMPLEMENT THE CRIMINAL JUSTICE ACT (Sept. 1976). Appointment of counsel in parole termination proceedings under the Parole Commission and Reorganization Act of 1975, however, is still thought to be discretionary, but the opinion of the Comptroller General is being sought. See Pub. L. No. 94-233, § 2.90 Stat. 227 (Mar. 15, 1976) (to be codified at 18 U.S.C. § 4211(c)).

<sup>45</sup>See note 15, *supra*, & text accompanying.

<sup>46</sup>18 U.S.C. 3006A(b) (1970). The Congressional conferees compromised in passing the original Act by deleting from the Senate version of the bill the provision for a system of public defenders. See note 9 *supra*.

<sup>47</sup>*Oaks Report* note 7, at 11, 117-57.

<sup>48</sup>*Id.* at 11.

<sup>49</sup>18 U.S.C. § 3006A(a) (1970). The Judicial Conference has directed that in those districts having defender organizations of any type, private counsel shall be assigned to at least twenty-five percent of the persons annually requiring representation under the Act.



However, the courts have also been empowered to establish defender organizations in districts where at least 200 persons annually require the appointment of counsel.<sup>50</sup> The defender organization may consist of a "Federal Public Defender" who would be a full-time salaried attorney appointed for a four year term by the judicial council of the circuit as a non-civil service appointee. The "Federal Public Defender" would have an office of full-time attorneys organizationally modeled after the United States Attorneys' offices.<sup>51</sup> Alternatively, the defender organization may consist of a "Community Defender" office operated by a non-profit group recognized by the court and financed either through initial and/or sustaining grants as approved by the Judicial Conference. A district may have either a Federal Public Defender or a Community Defender office, or both.<sup>52</sup> There are presently twenty-two Federal Public Defender offices<sup>53</sup> and nine Community Defender offices<sup>54</sup> operating around the country.

In fiscal year 1976, approximately thirty-five percent of the 47,000 persons represented in the United States courts under the Act were represented by attorneys from Federal Public Defenders or Community Defenders offices.<sup>55</sup>

#### PAYMENT OF ATTORNEYS UNDER THE ACT

The Act originally provided for a maximum hourly rate of \$15 for attorneys' time expended in court and a maximum of \$10 per hour for time "reasonably" expended out of court.<sup>56</sup> These maxima were set in conformity with the 1963 *Allen Report* recommendations as rates which were the "lowest statutory limit[s] consistent with the objectives of reasonable compensation for the assigned lawyer and adequate representation."<sup>57</sup> Compensation for attorneys' services under the Act was not

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<sup>50</sup>18 U.S.C. §3006A(h)(1) (1970). Alternatively, two adjacent districts or parts of districts may aggregate the number of persons represented. However, no district or portion thereof has availed itself of the benefits of this provision.

<sup>51</sup>18 U.S.C. § 3006A(h)(2)(A) (1970).

<sup>52</sup>18 U.S.C. § 3006A(h)(2)(B) (1970).

<sup>53</sup>The Federal Public Defenders offices are located in the districts of: Arizona; California (Northern, Eastern & Central); Colorado; Connecticut; Florida; Kansas; Kentucky (Eastern); Louisiana (Eastern); Maryland; Missouri; Nevada; New Jersey; New Mexico; Ohio; Pennsylvania (Western); Tennessee (Western); Texas (Southern & Western); Virgin Islands; and Washington (Western).

<sup>54</sup>The Community Defenders offices are located in Georgia (Northern); Illinois (Northern); Michigan (Eastern); Minnesota; New York (Southern & Eastern); Oregon; Pennsylvania (Eastern); California (Southern).

<sup>55</sup>These figures are from Administrative Office Reports made to the Judicial Conference Committee to Implement the Criminal Justice Act and have been updated by the Administration Office Staff, James E. Macklin, Jr., Chief Criminal Justice Act Division, Administrative Office of the United States Courts.

<sup>56</sup>See Pub. L. No. 84-455, 78 Stat. 553 (1964) (current version at 18 U.S.C. § 3006A(d)(1) (1970). An award of compensation is to be made by the court on the basis of a written statement by the attorney "specifying the time expended, services rendered, and expenses incurred."

<sup>57</sup>ALLEN REPORT, *supra* note 3, at 42. See OAKS REPORT, *supra* note 7, at 170.

intended to be at a rate comparable to fees charged in private practice. Rather, the theory under the Act was to provide modest reimbursement for professional services rendered by lawyers dedicated to serving the public interest.

In amending the Act in 1970, Congress adhered to this philosophy,<sup>58</sup> but raised the maximum rates to \$30 per hour for an attorney's in-court time and \$20 per hour for out-of-court time.<sup>59</sup>

#### COMPENSATION IN EXCESS OF THE STATUTORY MAXIMA

In addition to the maximum hourly rates established by the Act, Congress set overall maximum amounts which may be paid on behalf of a defendant in a single case. The maximum compensation for a case involving one or more felonies was originally set at \$500.<sup>60</sup>

In the 1970 amendment to the Act, in accordance with the *Oaks Report* recommendations, Congress raised the total maximum compensation for representation of a defendant at the district court level to \$1,000 "for each attorney" per case in which one or more felonies are charged, and \$400 for each attorney per case in which only misdemeanors are charged. For appellate work, the maximum was set at \$1,000 for each attorney per case. On post-trial motions, which only came within the Act by reason of the 1970 amendment, the maximum was set at \$250 for each attorney in each proceeding in each court.<sup>61</sup>

The Act, both as originally passed and as amended, has provided for payments to attorneys in excess of these statutory maxima in specified circumstances.<sup>62</sup> Originally, the Act provided that in "extraordinary circumstances," "payment in excess of the limits stated . . . could be made [for services rendered in the district court] if the district court certified that such payment [was] necessary to provide fair compensation for protracted representation, and the amount [was] approved by the chief judge of the circuit."<sup>63</sup> A determination of what constituted "extraordinary circumstances" was left to the various judges at both the district and appellate court levels. Some courts found guidance in the legislative history of the

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<sup>58</sup>See S. REP. NO. 91-790, 91st Cong., 2d Sess. (1970).

<sup>59</sup>18 U.S.C. § 3006A(d)(1) (1970).

<sup>60</sup>See Pub. L. No. 84-455, 78 Stat. 553 (1964) (current version at 18 U.S.C. § 3006A(d)(2) (1970)). When the case involved only misdemeanors, the maximum was \$300. Moreover, for services rendered in an appellate court, an attorney's compensation could "in no event exceed \$500 in a felony case and \$300 in a case involving only misdemeanors." 18 U.S.C. § 3006A(d) (1964).

<sup>61</sup>18 U.S.C. § 3006A(d)(2) (1970).

<sup>62</sup>18 U.S.C. § 3006A(d)(3) (1970).

<sup>63</sup>Pub. L. No. 84-455, 70 Stat. 553 (1964). The standard was changed by the 1970 amendment; excess compensation can now be awarded when the district court finds the representation to have been "extended or complex" and the amount of the excess payment "is necessary to provide fair compensation." Then, as before the amendment, the payment must be approved by the chief judge of the circuit. See 18 U.S.C. § 3006A(d)(3) (1970).

Act. In the House version, recovery in excess of \$500 was not allowed under any circumstances,<sup>64</sup> while in the Senate version<sup>65</sup> no limit on an attorney's compensation was imposed. In the Conference Committee, in exchange for inclusion of the \$500 limit per case, it was agreed that appeals would be treated as separate cases from proceedings in the district courts, and that exceptions to the maximum compensation provisions could be made in cases involving "protracted representation" in the "cases of extremely long duration."<sup>66</sup> Notwithstanding, many of the chief judges of the circuits in ruling on specific applications noted that they lacked guidance in interpreting the terms "extraordinary circumstances" and "protracted representation." From the few written decisions addressing the issue, the judges appear to have used a variety of factors, such as the nature of the case, the length of trial, and the amount and purpose of time spent both in and out of court. For example, some of the applications were rejected because the trials were less than six days long and therefore did not satisfy the "protracted representation" requirement.<sup>67</sup>

In passing the 1970 amendment, Congress changed the standard for excess compensation. The district judge now must find that the representation was "extended or complex" and that the amount of excess compensation awarded is "necessary to provide fair compensation."<sup>68</sup> Accordingly, by eliminating the finding of "extraordinary circumstances," Congress simplified the eligibility requirements for making excess compensation awards.<sup>69</sup> Nevertheless, the courts have encountered some difficulty in determining what criteria are to be used for evaluation of applications.

<sup>64</sup>H.R. 7457, 88th Cong., 2d Sess. (1964).

<sup>65</sup>S.1057, 88th Cong., 1st Sess. (1963).

<sup>66</sup>See CONF. REP. NO. 1709, 88th Cong., 2d Sess., reprinted in [1964] U.S. CODE CONG. & AD. NEWS 3002.

<sup>67</sup>See, e.g., *United States v. Harper*, 311 F. Supp. 1072, 1073 (D.D.C. 1970) (Bazelon, C.J.); *United States v. Hanrahan*, 260 F. Supp. 728 (D.D.C. 1966) (Bazelon, C.J.); *United States v. Owens*, 66 Cr. 48 (W.D. Pa., filed July 25, 1966) (Staley, C.J.); *United States v. Moore*, 258 F. Supp. 790 (D.D.C. 1966) (Bazelon, C.J.); *United States v. Whitney*, 65 Cr. 160 (S.D.N.Y., filed Mar. 30, 1966) (Lumbard, C.J.); *United States v. Dodge*, 260 F. Supp. 929 (S.D.N.Y. 1966) (Lumbard, C.J.); *United States v. Pope*, 251 F. Supp. 234 (D. Neb. 1966).

In fiscal year 1966, 128 claims for excess compensation were approved, with an average payment of \$1,204 per case. In fiscal year 1970, 152 claims for excess compensation were approved and the payments averaged \$1,368. In that year, 356 claims were denied in the district courts. These figures are from Administrative Office Reports made to the Judicial Conference Committee to Implement the Criminal Justice Act and have been updated by the Administration Office Staff, James E. Macklin, Jr., Chief, Criminal Justice Act Division, Administrative Office of the United States Courts. There were no statistics available on the number of applications certified by the district courts to the chief judge of the circuits and then denied by the latter. Note also that each of the claims reported here involved representation of a defendant on felony charges. There appear to have been no claims for excess compensation on misdemeanor cases.

<sup>68</sup>See, e.g., *United States v. Hunter*, 394 F. Supp. 997 (D.D.C. 1975) (Brazelon, C.J.).

In addition, each payment of excess compensation, must, as before the amendment, be approved by the chief judge of the circuit.

<sup>69</sup>See S. REP. NO. 91-790, 91st Cong., 2d Sess., 7, 14-15 (1970); H.R. REP. NO. 91-1546, 91st Cong., 2d Sess., 10-11, reprinted in [1970] U.S. CODE CONG. & AD. NEWS 3982.

There is some desire among certain judges and administrators to establish guidelines to afford greater uniformity among districts and judges' rulings on applications. Others strongly argue, on the other hand, that no guidelines could be devised which would take into account the multitude of variables involved in these decisions.

Notwithstanding the theory of compensation under the Act, that the fees awarded are not intended to fully compensate attorneys for the time devoted, there is a growing opinion, as expressed by Chief Judge Bazelon, that the awards are inadequate. The failure to award adequate compensation to experienced and competent counsel in appropriate cases is "deter[ring] competent counsel from accepting appointments in extended or complex criminal cases, lower[ing] the quality of the defense services provided to individual defendants, and run[ning] a risk of driving the experienced practitioner from the criminal courts while discouraging young attorneys from pursuing a career in criminal litigation."<sup>70</sup>

In addition to the necessary finding that the representation was "extended or complex," the district court, subject to the approval of the chief judge of the circuit, must determine what would be "fair compensation" for the services rendered. There appear to be basically three approaches taken by the chief judges of the circuits in making this determination: some apply the statutory maximum hourly rates to the times "reasonably expended;"<sup>71</sup> others use a schedule of payments often based at least in part on the quality of the attorney's performance;<sup>72</sup> and one circuit applies an automatic reduction of ten percent or more to the claimed compensation, attributing the cut to "public service."<sup>73</sup>

Another issue being raised in connection with application for compensation under the Act is the definition of time "reasonably expended." There is difficulty in making consistent awards when a lawyer unfamiliar with criminal practice expends significantly more hours than an experienced practitioner would need to complete a given task. One approach is to use as a yardstick the lawyer of "ordinary competence,"<sup>74</sup> but even that is only a subjective standard which affords minimal guidance.

The standard for granting excess compensation adopted in the 1970 amendment appears to have enabled more attorneys to qualify for such

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<sup>70</sup>United States v. Hunter, 394 F. Supp. 997, 1000 (D.D.C. 1975).

<sup>71</sup>District of Columbia, Fourth, Sixth, Seventh, Ninth and Tenth Circuits. Chief Judge Bazelon of the District of Columbia Circuit has referred to the concept of "reasonable attorneys' fees" in civil cases. The information contained in this note and notes 72, 73, and 74, *infra*, is based on correspondence between the author and judges of the other circuits. Copies of these letters are on file with the INDIANA LAW JOURNAL.

<sup>72</sup>First, Second, Fifth and Eighth Circuits. See note 71 *supra*.

<sup>73</sup>Third Circuit. The Second Circuit approach is similar in the sense that when considering applications for excess compensation, the hourly compensation rate is decreased by one-third from the maximum permissible per hour until the total compensation reaches the normal maximum permitted (*e.g.*, \$1,000 for a felony trial). Above that level, the attorney may be compensated at the maximum hourly rates. See note 71 *supra*.

<sup>74</sup>District of Columbia Circuit. See note 71 *supra*.

treatment. As compared to 128 claims approved in fiscal year 1966 and 152 claims approved in fiscal year 1970,<sup>75</sup> in fiscal year 1975, 372 claims for excess compensation were approved in felony cases alone. These awards averaged about \$2,881 per case. In addition, in fiscal year 1975, there were 115 claims approved for compensation in excess of \$250 which were for services rendered pursuant to discretionary appointments.<sup>76</sup>

#### INVESTIGATIVE, EXPERT AND OTHER SERVICES

In addition to services by counsel, the Act provides that an attorney for a person "who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request them in an ex parte application."<sup>77</sup> These services may be obtained under the Act upon a showing of financial need without regard to a person's ability to afford an attorney.

In the Act as originally drafted, these services were available upon application prior to making the expenditure. Ratification by the court of the expenditure after it was made was also possible upon application by defendant if the court found "that timely procurement of necessary services could not await prior authorization." The Act authorized payment of "reasonable compensation" for such services, but a maximum was imposed of \$300, exclusive of expenses "reasonably incurred." There was no provision for payment in excess of the \$300 maximum.

The 1970 amendment to the Act clarified the procedures for obtaining other services and changed the maximum payments permitted. If the request is made prior to the expenditure, then compensation of up to \$300, exclusive of expenses "reasonably incurred," is authorized by the Act upon approval by the court.<sup>78</sup> Payment in excess of that limit may be made if certified to the court as being necessary to provide fair compensation for services of an unusual character of duration, and the amount of the excess payment is approved by the chief judge of the circuit.<sup>79</sup> If no prior request is made for such services, payment nevertheless may be made as compensation in an amount up to \$150 plus reasonable expenses. The Act does not include a requirement that there be any special showing in order to utilize this provision.

Careful guidelines have been prescribed by the Judicial Conference establishing what expenditures may be charged under this provision of the Act. Compensation has been provided under this provision for services rendered by investigators, appraisers, interpreters, doctors, psychiatrists,

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<sup>75</sup>See note 67 *supra*.

<sup>76</sup>See 18 U.S.C. § 3006A(g) (1970).

<sup>77</sup>18 U.S.C. § 3006A(e) (1970).

<sup>78</sup>18 U.S.C. § 3006A(e)(1) (1970).

<sup>79</sup>18 U.S.C. § 3006A(e)(3) (1970).

handwriting and fingerprint experts, among others. However, the appointed attorney's office overhead, and clothing and transportation for the defendant, for example, are not reimbursable under the Act.

Certain specific expenses are not covered by the Act since they are already provided for by other statutes. For example, payment of witness fees and costs of subpoenas for a witness "necessary to an adequate defense" of a defendant "financially unable to pay the fees" is to be borne by the Department of Justice under Rule 17(b) of the Federal Rules of Criminal Procedure. However, payment of expenses of depositions is to be made out of funds appropriated for the Act, at least insofar as expert witnesses are deposed by a financially needy defendant.

The costs of other services have risen dramatically since the Act was passed. For instance, payments for these services for fiscal years 1966, 1967, and 1968 aggregated \$25,786, \$46,017 and \$58,500, respectively, as compared to approximately \$408,800 for fiscal year 1975 and an estimated \$550,000 for the fiscal year 1976. Transcripts, not included in the foregoing figures, have become the single most expensive item furnished under the Act. Payments for transcripts authorized for fiscal years 1966, 1967 and 1968 aggregated \$190,317, \$270,703 and \$397,552, respectively. In fiscal year 1975, transcript costs were \$1,353,993 and they are expected to show an increase of another 40 percent, thus reaching \$1.9 million in fiscal year 1976.<sup>80</sup>

Another current concern is the increase in the cost of interpreters for defendants during trials. These costs have risen 147 percent between fiscal years 1975 and 1976. There is also a question as to whether the provision for interpreters included simultaneous "United Nations-type" translation. This type of translation will be more expensive in single-defendant trials, but possibly less expensive than numerous individual interpreters in an extended multi-defendant trial where a number of defendants need translation services.

#### CONCLUSION

In a democracy such as the United States, every criminal defendant is entitled to a fair trial and protection of his constitutional rights. Prior to passage of the Criminal Justice Act, the devices used to guarantee representation were simply inadequate for the proper representation of needy defendants. While the ideal of fair representation for all defendants has not been fully achieved, the Criminal Justice Act constitutes a significant step forward by making attorneys and other services available for defendants otherwise unable to obtain them. Although the administration of the Act is an expensive proposition, the expense is necessary to provide competent legal assistance to the large group of needy, though not

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<sup>80</sup>See note 67 *supra*.

necessarily indigent defendants who are unable to afford the cost of an adequate defense. The Act is therefore one step toward "that great day when the kind of trial a person gets will not depend on the amount of money he has, or the accident of birth."<sup>81</sup>

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<sup>81</sup>Address by Chief Judge Bazelon, "The Realities of *Gideon* and *Argersinger*," Annual Conference, National Legal Aid and Defender Association (Nov. 13, 1975), reprinted in 33 NLADA BRIEFCASE 57 (1976).

