Department of Justice

STATEMENT

BY

ATTORNEY GENERAL ROBERT F. KENNEDY

BEFORE THE

SENATE COMMITTEE ON THE JUDICIARY

REGARDING

S. 1057, THE PROPOSED CRIMINAL JUSTICE ACT

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To a serious extent, the scales of justice in this country are weighted against the poor. Each year, thousands are confronted with obstacles to obtaining justice because they are financially unable to obtain adequate defense.

The Administration's proposed Criminal Justice Act of 1963, S. 1057, seeks to redress the balance. It seeks to guarantee competent legal representation and services to every accused person whose lack of funds prevents him from providing for his own defense. In so doing, it seeks to insure that the scales measure truth, not legal fees.

I am particularly pleased to testify about this problem and this bill before you today because members of this committee have been deeply concerned about the problem and sympathetic to efforts toward solution. Indeed, Senator Hruska's bill, containing many of the same provisions, passed the Senate last year. Senator Kefauver, Senator Ervin and others have sought similar measures in the past.

Federal courts today are troubled by the same impediments to justice which existed in 1937 when the Judicial Conference of the United States and the Department of Justice first proposed legislation to set up a public defender system.

Our courts are continuing to delegate the defense of the underprivileged to assigned counsel -- lawyers who will not be paid for their services. They will not be reimbursed for even their out-of-pocket costs. They will not receive a shred of investigative or expert help. They will not be appointed until long after arrest when witnesses may have disappeared and leads grown stale.

Every year, nearly 10,000 persons -- 30 percent of all the defendants in federal criminal cases -- receive court-appointed attorneys because they

cannot afford to pay for their own. A great many more, while able to hire a lawyer, cannot then pay for the investigations or expert witnesses which can make the difference between conviction and acquittal.

The services of the defense lawyer are vast. They permeate all proceedings. Whether they are timely or late and vigorous or perfunctory may spell the difference between acquittal and conviction, or jail and probation.

Only when we have trials with skilled counsel can we be sure we understand the lesson plainly stated by Mr. Justice Sutherland more than 30 years ago in Powell v. Alabama:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

To date we have responded to the need for representation by assigning private lawyers to take such cases free. We have proceeded on the assumption that society's obligation to the accused can be redeemed not by society or by the Government, but simply by telling private lawyers: "Defend this man. Give him your time and your advice. Protect his rights -- and then pay for it out of your own pocket."

How wrong this system is was pointed up by a recent study conducted for the Department of Justice. The study concluded, (1) that "present practices sometimes induce a plea of guilty because appointed counsel

recognize the futility of electing a contest in the absence of resources to litigate effectively;" and (2) that "the deficiencies of the present system adversely affect the quality of the defense made."

The study showed that pleas of guilty are entered much more frequently--in some areas three times as often -- by defendants with assigned counsel than those represented by paid private counsel -- who have both the facilities and the incentive to make independent investigations. Defendants with appointed counsel, the study also showed, had less chance to get charges against them dismissed, less chance of acquittal when they went to trial, and greater chance, if convicted, of being sent to jail instead of being placed on probation.

A system which lets the lack of resources make such a difference is unfair to defendants. It places an oppressive burden on private lawyers. It denies equal justice. It needs correction.

This Criminal Justice Act, S. 1057, is designed to remedy the problem.

Allen Committee

In April, 1961 I appointed the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice. Its chairman, Francis A. Allen, is a distinguished scholar and Professor of Law at the University of Michigan School of Law. Its members include eminent judges, lawyers and professors from all over the country.

Advance copies of the Allen Report were sent to the members of this Committee, so you are by now familiar with the extraordinary contribution these men have made.

After two years of study they formulated and submitted to me, as part of their work, a new bill, embodying the best features of past proposals, and adding some new ones. We carefully reviewed the Allen Committee bill,

submitted it to judges and lawyers for comments and suggestions, and incorporated a number of improvements.

The result is the Criminal Justice Act. We believe it is the most comprehensive, yet flexible solution ever devised to meet the representation problem in the federal system.

Counsel Options

The Criminal Justice Act would require, for the first time, that a system of adequate representation must be established in every federal district. Each district has freedom to devise the plan best suited to its local needs and the choice of how to do it is wide, but a choice must be made. There is no option to do nothing, to permit inadequate representation to continue in any federal court.

Responsibility for choosing or devising systems is vested in the judiciary of each circuit. The bill provides a number of alternatives.

1. Private Counsel

The first option is to appoint counsel from the private bar. This has been our traditional solution and it has the great advantage of spreading the defense of criminal cases broadly among the bar, fostering wide participation and interest in the administration of criminal justice.

Under the Criminal Justice measure, districts choosing this option would, for the first time, be able to pay lawyers up to $15 an hour for their services and reimburse them for necessary expenses. This amount is substantially less than the minimum recommended by bar associations for charges to private clients with similar cases. We believe, however, that the $15 figure is fair, and the fairness of reimbursing appointed counsel for out-of-pocket expenses is clear.

2. Federal Public Defender

The second option, establishment of federal public defenders, has long been advocated. A public defender office can provide the skill, experience and availability so essential to an adequate and timely defense. The Criminal Justice Act would authorize the creation of such an office, with the necessary assistants and staff. It would permit salaries equivalent to those which the United States Attorney and his assistants receive in the same district.

As for selection of public defenders while district courts could make recommendations to the judicial council of the circuit, the appointing power would rest exclusively with the judicial council. In this way, the federal public defender would maintain independent of both the trial court and the executive branch.

3. Local Defender Organizations

The third option provides for participation by bar associations or selection of local legal aid or defender organizations to furnish attorneys for court appointment. This provision recognizes the valuable role which such organizations have played in various parts of our country.

S. 1057 leaves open the possibility that state and local defender organizations, public and private, may be designated to participate in this vital area of federal justice. The decision would be up to the judges.

4. Combination

Finally, the Criminal Justice Act for the first time would authorize each district to adopt a system containing any combination of the first three options. The Allen Committee considered a hybrid system to be a highly desirable choice for a large metropolitan district.

The District of Columbia provides a good example of the reason for this conclusion. In 1960 Congress created the Legal Aid Agency for the District of Columbia, and in its first two years, this agency has won a reputation for skilled and dedicated service to needy defendants.

But the agency handles by no means all of the nearly 700 cases assigned annually. A great many private attorneys supplement the agency staff. Appointments in appellate cases are handled exclusively by the private bar.

The Agency thus has given the District of Columbia a combination of a strong central defender office augmented by the individual efforts of numerous volunteer attorneys.

Trial Preparation

Providing for experienced, paid counsel is fundamental. But the phrase "adequate defense" means more than counsel. Equally important to a defense are defense services. For example, the poor man cannot hire an investigator to find the witnesses and evidence which may be indispensable to his case. He cannot retain a physician, psychiatrist or handwriting expert. The importance of skilled investigation is underscored in police work every day. It works the same way for the defense.

Not long ago, here in the District, an appointed defense attorney--through the investigative facilities of the Legal Aid Agency--was able to expose facts damaging to the Government's principal witnesses. These were facts the Government previously did not know, and the case, as a result, was dismissed.

Counsel and services may, but need not, go together. An accused who is destitute may obtain appointed counsel but have no need for the services of an investigator. Another defendant, who uses up his funds to hire a lawyer and thus is unable to hire a needed expert, could qualify to have such

a defense service furnished.

In short, a man may be able to pay part but not all of his expenses. It is for this reason that S. 1057 studiously avoids the term "indigent." Instead, it adopts the test of financial inability to secure a necessary part of adequate representation.

Administration

We recognize that suitable plans to effectuate the Criminal Justice Act could not be accomplished overnight. The bill gives districts and circuits a year to do so. I am confident that the organized bar in each community will work closely with the courts to devise an appropriate plan.

This act places a great responsibility on judges and on the bar. I have advised the Chief Justice and leaders of the bar that the Department of Justice will offer whatever assistance it can toward fulfilling the objectives of this statute.

With respect to the question of administration the lesson of the District of Columbia is worth considering. The Legal Aid Agency is administered by a private board of trustees appointed by the chief judges of the various local courts. Responsibility thus is vested in an autonomous group of citizens independent of the judiciary, the prosecutor and politics.

The District of Columbia, while a model at present, is included in this measure so that it would not be left behind by passage of S. 1057. The provision for the District would authorize the same level of compensation for counsel and the furnishing of expert services which are set out for other districts.

Conclusion

Last March 18, a unanimous Supreme Court held, in Gideon v. Wainwright, that the states must provide counsel for impoverished defendants in criminal cases, just as it ruled 25 years ago that federal courts must do so.

Let me suggest that because of this decision, Congress now has the opportunity--and, indeed, the responsibility--to do more even than enact a comprehensive solution to the federal problem. Congress now both can and should provide such a solution as a model for the states to follow.

I believe the Department of Justice shares responsibility for the administration of justice in our courts. This responsibility is not to see that the prosecutor prevails, but that justice does. In the words of the epigram on a wall of my office: "The United States wins its point whenever justice is done its citizens in its courts."

These responsibilities are not new. Legislation to guarantee equal justice to rich and poor has been sponsored or supported for years by Democratic and Republican administrations, by prosecutors and defense lawyers, by the Judicial Conference of the United States, by members of Congress from all parts of the country.

There is wide support, as well, for this particular measure, the Criminal Justice Act. It was submitted to Congress by the President. It is co-sponsored by your Chairman and Senator Hruska. We have given it the highest priority in our legislative program at the Department of Justice. It has been received most favorably by the judiciary, by the American Bar Association, by my predecessor, Attorney General Rogers, and many others.

Such support demonstrates the wide recognition of the need to make equal justice reality and not only rhetoric. This is not a welfare matter, nor a petition for charity. Insuring the poor man of a proper defense will

not give him anything to relieve him of his poverty. It will simply recognize his right to equal justice. In Griffin v. Illinois /351 U.S. 12 (1955)/ Mr. Justice Black wrote: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."

That is why we need this bill.