by Geoffrey Cheshire

Celebrating 50 Years of the Right to Counsel in Federal Court

The right to competent counsel must be assured to every man, regardless of his means." This call to action by President John F. Kennedy in his Jan. 14, 1963, State of the Union Address came after decades of failed attempts to pass legislation remedying a defect in the administration of federal criminal justice. Despite the Sixth Amendment's promise that an accused shall "have the assistance of counsel for his defense," those too poor to afford an attorney were denied representation.

This defect existed despite the deeply rooted tradition of the right to counsel in the American legal system. The British Colonies in America explicitly guaranteed the right to defense counsel to every accused, rejecting then-prevailing English common law rules refusing such assistance in felony cases. The early American right to counsel was, at least in part, intended to protect the entire community and designed to strengthen confidence in the administration of justice and fledgling legal institutions.[1]

Following the Declaration of Independence, the first session of the first Congress of the United States adopted the Judiciary Act of 1789.[2] The Assistance of Counsel Clause was included in this landmark statute establishing the federal judiciary. In 1791, the Sixth Amendment elevated the right to counsel in criminal cases to Constitutional status.[3]

For almost 150 years, however, the problem of financial inability of many accused to retain competent defense counsel or to fund adequate investigations or the use of experts at trial resulted in a serious imbalance in the criminal adversarial system. While the federal government employed skilled lawyers and professional criminal investigators to conduct prosecutions, the accused without substantial financial resources were required to defend themselves.

In 1938, the Supreme Court held in *Johnson v. Zerbst* that such an imbalance was constitutionally impermissible.[4] Justice Hugo Black, writing for the Court, held that "[s]ince the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty." Following *Zerbst*, the federal courts began assigning counsel to defendants lacking resources to hire defense counsel.

Under the assigned counsel system, such lawyers would not be paid for their services and had no funding for investigators, experts, travel, court transcripts, or other out-of-pocket expenses. The results were not impressive.[5] Many such assigned counsel conducted no investigation and met with their client only briefly before trial.[6] The director of the Bureau of Prisons received numerous letters from his inmates indicating that they had received desultory representation at best and often refused assigned counsel, believing it "would do more harm than good."[7]

At the suggestion of the attorney general, the Judicial Conference of the United States had already, in 1937, adopted a resolution supporting the establishment of a federal public defender system.[8] Legislation was introduced in 1939[9] and supported by the Department of Justice, legal scholars, bar associations, and prominent attorneys. However, roadblocks and disagreements stymied passage.

At the opening of the 1960s, a quartet of political leaders continued to push for legislative reform: Rep. Emmanuel Celler (D-N.Y.), Sen. Roman Hruska (R-Neb.), Attorney General Robert Kennedy, and President Kennedy.

President Kennedy, in his 1963 State of the Union Address, issued a call to action:

> [W]e need to strengthen our Nation by protecting the basic rights of its citizens:
> —The right to competent counsel must be assured to every man accused of crime in Federal court, regardless of his means.[10]

Attorney General Kennedy testified before Congress shortly thereafter:

> The poor man charged with crime has no lobby. Legislation to guarantee him an adequate defense is the product of no faction, no section, no political party. It has been sponsored

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or supported for 25 years by Democratic and Republican administrations, by prosecutors, defense lawyers, and judges, and by Members of Congress from all parts of the country.[11]

Sens. Hruska and James Eastland (R-Miss.) introduced the bill that became the Criminal Justice Act (CJA) on March 11, 1963.[12] Rep. Cellr introduced companion legislation in the House on March 13, 1963.[13] The Senate passed its bill in July of 1963, and the House passed its measure, stripped of the Federal Public Defender Provision, in early 1964. The differing bills were referred to conference for resolution of the differences, but no action was taken until after consideration of the Civil Rights Act of 1964.

The CJA passed both houses of Congress on Aug. 6, 1963, just one day after Clarence Earl Gideon was acquitted with the assistance of his appointed lawyer after remand from the Supreme Court's landmark right to counsel decision in *Gideon v. Wainwright*.[14] President Johnson signed the CJA into law on Aug. 20, 1964.

The passage of the CJA was a significant step toward securing a meaningful right to counsel in the nation's federal courts and an important milestone in the struggle toward the noble ideal inscribed on the West Pediment of the U.S. Supreme Court — *Equal Justice Under Law*. ⊙

Endnotes

[1]*See, e.g.*, Laura I. Appleman, *The Community Right to Counsel,* Berkeley Journal of Criminal Law, Vol. 17 (2012).

[2]1 Stat. 73 (September 24, 1789).

[3]U.S. Const. amend. VI (Dec. 15, 1791).

[4]304 U.S. 458 (1938).

[5]See, e.g., Francis A. Allen, chairman, *Report of the Attorney General's Commission on Poverty and the Administration of Federal Criminal Justice 29–34* (February 25, 1963).

[6]Hearing Before the Subcommittee on S. 1845 and S. 2871 of the Committee on the Judiciary, U.S. Senate, 76th Cong. 25–28 (March 28, 1940) (testimony of James V. Bennett, Director, U.S. Bureau of Prisons).

[7]*Id. See also* James V. Bennett, *To Secure the Right to Counsel*, 32 J. Am. Jud. Soc'y 177 (1949).

[8]Report of the Judicial Conference, 8–10 (September Session, 1937).

[9]S. 1845, 76th Cong., 1st sess. (1939).

[10]John F. Kennedy, State of the Union Address, Jan. 14, 1963.

[11]Hearing Before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 88th Cong. 32 (May 22, 1963) (testimony of Kennedy, Hon. Robert F., the attorney general of the United States).

[12]S. 1057.

[13]H.R. 4816.

[14]*Gideon v. Wainwright*, 372 U.S. 335 (1963).