ESSAY

THE FORGOTTEN SIXTH AMENDMENT: THE FEDERAL JUDICIARY'S RIGHT TO COUNSEL

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The conventional view of the Sixth Amendment right to counsel for indigent defendants is that its enforcement depends on the political branches to implement the right by appropriating the money to enforce it. But that's not how enforcement of the modern version of the right started. For more than twenty-five years, between 1938, when Johnson v. Zerbst *established a right to appointed counsel for federal defendants, and 1964, when Congress began to fund indigent defense services, the judiciary implemented the new right by itself.*

Based on original archival research, this Essay recovers the judiciary's efforts to go it alone in trying to implement the right to counsel in between Johnson*'s establishment of the right and the start of Congressional funding. District court judges used their inherent authority to appoint thousands of lawyers to represent poor defendants without pay. Supplying these lawyers led judges and judicial administrators to innovate with new appointment systems and to require the participation of a wide cross section of the bar. For indigent defendants, the unfunded version of the right was limited and often inconsistent. For the judiciary, enforcing the right entailed a judiciary-wide project to fulfill the counsel requirement. This project shifted the political economy surrounding indigent defense, leading the judiciary*

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and the lawyers it relied on to become vital actors in an ultimately successful push for funding.

The judiciary's inward turn demonstrates a model of judicial action that relies not on directing the other branches but on flexing the institutional capacity of the federal judiciary. This model invites its own questions—for example, about the nature of wide-reaching judicial projects—but it also suggests possibilities for renewed judicial efforts to improve adjudication.

INTRODUCTION

One of the prevailing accounts of the federal judiciary's efforts to achieve change through rights enforcement might be summed up in a word: dependence.[1] When it comes to judicial efforts across the twentieth century to expand Equal Protection Clause protections to eradicate segregation and race-based discrimination, extend the Eighth Amendment to improve prison conditions, or introduce new criminal procedural rights to make the criminal legal system fairer, the judiciary is reliant on the political branches of government. Absent circumstances beyond the judiciary's control, it cannot order its way to its desired ends.

1. For a classic account of how existing constraints on the courts hinder their ability to independently effectuate significant social reforms, see generally Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? (1st ed. 1991).

Because political actors rarely voluntarily comply, schools remain segregated in practice, prison conditions improve only marginally, and our criminal legal system stays unfair—or worse.

This Essay complicates aspects of that account by focusing on one of the judiciary's earliest sustained attempts at rights enforcement—the Sixth Amendment right to counsel. The right to counsel is the centerpiece of many of the most compelling critiques of judicial rights enforcement, because of the stark gap between right and reality.[2] It is a paradigmatic positive right.[3] In criminal cases, the Supreme Court explained in *Gideon v. Wainwright*, "lawyers . . . are necessities, not luxuries."[4] As the Indiana Supreme Court asked, however, in one of the first decisions to consider the "defense of the poor": "[W]ho shall pay?"[5] The conventional view is that the obligation is the state's, typically in the form of legislative appropriations. But the state inevitably falls short; legislatures almost universally do not fund indigent defense at anywhere near the levels necessary to secure adequate representation for indigent defendants.[6] The result, as Professor William Stuntz famously put it, is that "the broad structure of constitutional regulation of criminal justice has it backward, that courts have been not too activist, but activist in the wrong places."[7]

That's not how enforcement of the right to counsel began. The Sixth Amendment's version of the right to counsel as we currently understand it did not exist at the Founding;[8] nor, for that matter, did it come to life

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2. See William J. Stuntz, The Uneasy Relationship Between Criminal Procedure and Criminal Justice, 107 Yale L.J. 1, 5 (1997) [hereinafter Stuntz, Uneasy Relationship] ("[J]udge-made procedural rights are bound to have some perverse effects . . . [that] are impossible to measure . . . .").

3. See David P. Currie, Positive and Negative Constitutional Rights, 53 U. Chi. L. Rev. 864, 873–74 (1986) ("The due process clauses explicitly require government deprivation, the first amendment requires government abridgement; the 'right' to assistance of counsel is not so negatively phrased.").

4. 372 U.S. 335, 344 (1963).

5. Webb v. Baird, 6 Ind. 13, 18 (1854).

6. See Sara Mayeux, What *Gideon* Did, 116 Colum. L. Rev. 15, 70 (2016) [hereinafter Mayeux, What *Gideon* Did] (listing "funding at the mercy of the state legislature" as a symptom of *Gideon*'s neglect); Marc L. Miller, Wise Masters, 51 Stan. L. Rev. 1751, 1788 (1999) ("One of the central claims in the literature is that . . . the other branches of government have failed to address the problem [of defense services for poor defendants] and, given the nature of the problem, may be unable to do so.").

7. Stuntz, Uneasy Relationship, supra note 2, at 6. That failure leads to another—criminal procedural rights' inability to achieve anything resembling substantive justice. As Professor Paul Butler titled his compelling critique of *Gideon*, *Poor People Lose*. Paul D. Butler, Poor People Lose: *Gideon* and the Critique of Rights, 122 Yale L.J. 2176 (2013). Butler's point is that *Gideon*'s failure reflects a deeper problem with rights than courts' inability to effect social change. See id. at 2202–03 ("*Gideon* has not, and will not, change the fact that in American criminal justice, poor people are losers.").

8. See Pamela R. Metzger, Beyond the Bright Line: A Contemporary Right-to-Counsel Doctrine, 97 Nw. U. L. Rev. 1635, 1637–57 (2003) (tracing the doctrinal evolution of the right to counsel).

with *Gideon*'s lofty language in 1963.[9] The modern instantiation of the right dates to 1938, with Justice Hugo Black's majority opinion in *Johnson v. Zerbst*.[10] *Johnson*, which read the Sixth Amendment as providing a right to counsel for all defendants in federal court, required nothing of either political branch of the federal government.[11] Its directives were instead to the federal district courts to use their longstanding inherent powers[12] to guarantee that otherwise unrepresented defendants under "the protection of a trial court" knew they had the right to a lawyer and to appoint lawyers for those who wanted representation.[13] The failure to do so, *Johnson* concluded, represented the "failure to complete the court—as the Sixth Amendment requires—by providing counsel," such that the district court would lack jurisdiction over the proceedings and be subject to subsequent habeas review.[14]

Johnson's unfunded counsel mandate lasted for more than two and a half decades, until Congress passed the Criminal Justice Act of 1964 (CJA), which began to provide the structure and funding necessary to compensate lawyers appointed to represent federal criminal defendants.[15] Until then, the judiciary enforced and implemented the right by itself.

This Essay recovers how the judiciary fared based on original archival sources[16] from judges and judicial actors, like the Administrative Office

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9. See *Gideon*, 372 U.S. at 344 ("From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.").

10. 304 U.S. 458 (1938).

11. See id. at 467.

12. See infra notes 89–93 and accompanying text (discussing the historical development of judicial power to appoint attorneys for indigent defendants).

13. See *Johnson*, 304 U.S. at 465.

14. Id. at 468.

15. See infra section III.B (discussing the enactment of the District of Columbia Legal Aid Act of 1960 and the CJA).

16. This Essay draws on a variety of original archival sources from judicial administrative agencies, administrators, and individual judges. Two sets of archival sources offered particularly rich seams of information. The first is the National Archive's Record Group 116, which holds the records of the Administrative Office of the United States Courts. These records include reports and memoranda prepared by Judicial Conference committees as well as materials from the Administrative Office and its first director, Henry Chandler. The second is the John F. Kennedy Library's James V. Bennett Personal Papers, which holds many letters exchanged between Representative Emanuel Celler and federal judges across the country discussing how the courts were approaching indigent defense in the years leading up to the passage of the Criminal Justice Act.

Throughout the Essay, these sources are cited directly, followed by a parenthetical noting that scans of the sources are on file with the *Columbia Law Review*. Because these letters and reports sometimes had important information—such as the date or the author name—omitted on the individual source, this Essay has at times used contextual information from other sources and the archives to complete citations. Scans for all archival sources will remain on file with the *Columbia Law Review*.

and the Judicial Conference.[17] During what this Essay labels the inter-right period, the time between *Johnson*'s establishment of a formal version of a right to counsel and funding for that right, the federal judiciary engaged in a judiciary-wide project to secure a version of the right to counsel in courtrooms across the country. Supreme Court and lower court decisions affixed some meaning to the right to counsel.[18] The judiciary exercised new administrative powers to promulgate rules governing the treatment of poor defendants,[19] to study the issue, and, ultimately, to lobby Congress to appropriate funds.[20] Most importantly, district court judges used their inherent authority to appoint thousands of lawyers to represent poor defendants across the country, usually without offering those lawyers either a choice or compensation.[21] Supplying these lawyers forced federal judges to innovate with new appointment systems—from simple lists or panels of available attorneys to more formalized programs—and to require the participation of a wide cross section of the bar.[22]

There is extensive literature on the doctrinal origins and evolution of the right to counsel,[23] the design of indigent defense services,[24] and the endemic state failure adequately to fund those services.[25] And yet, likely because federal criminal cases today make up only a fraction of overall criminal cases,[26] and perhaps because federal defense services are

17. From its creation in 1922 until 1948, today's Judicial Conference was known as the Conference of Senior Circuit Judges. See Act of Sep. 14, 1922, ch. 306, § 2, 42 Stat. 837, 838. For simplicity, this Essay refers to the Conference as "the Judicial Conference" throughout.

18. See infra section II.A.

19. See infra section II.B.

20. See infra section III.B.

21. See infra section III.A.

22. See infra sections III.A–.B.

23. See, e.g., Michael J. Klarman, The Racial Origins of Modern Criminal Procedure, 99 Mich. L. Rev. 48, 52–65 (2000); Shaun Ossei-Owusu, The Sixth Amendment Façade: The Racial Evolution of the Right to Counsel, 167 U. Pa. L. Rev. 1161, 1168–211 (2019) [hereinafter Ossei-Owusu, The Sixth Amendment Façade].

24. See, e.g., Sara Mayeux, Free Justice: A History of the Public Defender in Twentieth-Century America 22–23 (2020) [hereinafter Mayeux, Free Justice]; Chester L. Mirsky, The Political Economy and Indigent Defense: New York City, 1917–1998, 1997 N.Y.U. Ann. Surv. Am. L. 891, 902–08 (1997); Eve Brensike Primus, The Problematic Structure of Indigent Defense Delivery, 122 Mich. L. Rev. 205, 207 (2023) [hereinafter Primus, Problematic Structure]. For an example of the robust empirical literature on different models of defense services, see Radha Iyengar, An Analysis of the Performance of Federal Indigent Defense Counsel 4–5 (Nat'l Bureau of Econ. Rsch., Working Paper No. 13187, 2007).

25. See infra notes 50–73 and accompanying text.

26. Mayeux, Free Justice, supra note 24, at 153. For the entirety of the inter-right period, however, federal criminal adjudication contributed to a higher proportion of the overall share of the prison population than it does today. Compare Patrick A. Langan, U.S. Dep't of Just., Race of Prisoners Admitted to State and Federal Institutions, 1926–86, at 5 (1991), https://bjs.ojp.gov/content/pub/pdf/rpasfi2686.pdf [https://perma.cc/H22M-9ZB4] (showing that in each year during the inter-right period, individuals admitted to federal incarceration never made up less than 16% of all individuals admitted to

relatively well funded,[27] there is no account of the role federal judges played in enforcing the unfunded right to counsel in their own courtrooms.[28]

By supplying this account, this Essay yields three contributions related to the judiciary's power and interest in enforcing the right to counsel. First, it clarifies the institutional components of the right to counsel. Supreme Court decisions like *Powell v. Alabama*,[29] *Johnson*, and *Gideon* sound in the high ideals of individual rights leveling an adversarial process in which lay defendants are pitted against professional prosecutors.[30] But, from the outset, the right to counsel federal judges worked to secure was both a

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incarceration), with E. Ann Carson & Rich Kluckow, U.S. Dep't of Just., Prisoners in 2022—Statistical Tables 17 (2025), https://bjs.ojp.gov/document/p22st.pdf [https://perma.cc/V5AC-KPS6] (showing that in 2021 and 2022, individuals admitted to federal incarceration made up approximately 10.0% and 9.5%, respectively, of all individuals admitted to incarceration).

27. See infra notes 75–77 and accompanying text.

28. Contemporaneous work and two survey-based studies from the end of the inter-right period provide useful reviews of some aspects of the right to counsel in federal court. See William M. Beaney, The Right to Counsel in American Courts 44–79 (1955) (discussing the development of the right to counsel in federal courts from 1938 to 1955 post-*Johnson v. Zerbst*); John Bodner, Jr., Joseph Goldstein, John F. Grady, Walter E. Hoffman, James M. Marsh, George Nye, Herbert L. Packer, Walter V. Schaefer & Francis A. Allen, Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice 12–57 (1963) [hereinafter Allen Report] (explaining that "the present practices in the federal courts significantly fail to achieve a system of adequate representation"); Bruce J. Havighurst & Peter MacDougall, Note, The Representation of Indigent Criminal Defendants in the Federal District Courts, 76 Harv. L. Rev. 579, 579–80 (1963) ("The federal government, in the absence of a waiver of the right to counsel, must thus furnish counsel for the indigent or forgo prosecuting [them]. As of today, however, the Government has no attorneys in its employ who provide this service . . . ."). More recently, Professor Shaun Ossei-Owusu argues that the "differential use of [courts'] inherent authority" to appoint counsel in criminal but not civil cases from the end of the nineteenth through the middle of the twentieth century contributed to the gap between the representation available to indigent criminal defendants and that available to indigent civil litigants. Shaun Ossei-Owusu, Civil vs. Criminal Legal Aid, 94 S. Cal. L. Rev. 1561, 1593 (2020) [hereinafter Ossei-Owusu, Civil vs. Criminal Legal Aid]. Ossei-Owusu's focus, however, is on the existence of these appointments during this time period in general, not the specific ways in which federal judges enforced the right to counsel in their courtrooms.

29. 287 U.S. 45 (1932).

30. See Miller, supra note 6, at 1788 ("[T]he passionate language of *Gideon*, and *Powell* well before, suggests a strong social morality among judges and lawyers supporting the provision of competent lawyers to criminal defendants." (footnote omitted)). Critics, by contrast, have long argued that the right to counsel is simply a means to process indigent defendants more efficiently. See, e.g., Abraham S. Blumberg, Covert Contingencies in the Right to the Assistance of Counsel, 20 Vand. L. Rev. 581, 603–05 (1967) (arguing that because courts prioritize production and efficiency over the adversary ideal, adding counsel and other resources mainly increases system efficiency and guilty-plea output rather than meaningfully changing outcomes); Mike McConville & Chester Mirsky, The Rise of Guilty Pleas: New York, 1800–1865, 22 J.L. & Soc'y 443, 444–45 (1995) (explaining the traditional view that "jury trials . . . were unwitting and reflexive, generally wasteful of public resources and, because of the absence of trained professionals, little more than slow guilty pleas themselves").

resource for the judiciary, in the form of a more lawyerly criminal process, and a costly service to supply, because judges themselves had to impose on the lawyers before them to provide representation. As much as right to counsel doctrine or judicial ideology, the costs and benefits to the judiciary of the new right limited the scope of its unfunded version.

Second, the judiciary's actions during this period demonstrate how the judiciary created resources for the right to counsel. The judiciary received more than it paid for in the form of the free lawyers it conscripted[31]: Judicial appointments of lawyers and efforts to develop new appointment systems raised the amount of defense litigation resources available to poor defendants, at least to an extent.[32] At the same time, the fragile equilibrium judges created to secure these elevated, but unpaid, services generated interest alignment between judges, lawyers, and poor defendants over indigent defense funding, helping to build the groundwork for the ultimate enactment of the CJA.[33]

Third, reconstructing the right across early judicial decisions, through the rules the judiciary created and into the nascent administrative efforts and appointment systems judges developed, captures an institutional dynamism not typically attributed to the federal judiciary. Before the civil rights injunction accustomed the judiciary to enforcing constitutional rights by ordering and, sometimes, restructuring other actors,[34] judges flexed and shifted their own institution to provide counsel. They did so not as "activists"[35] but rather as administrators attempting to secure adequate hearings in their own courtrooms.

The right to counsel the judiciary enforced without funding was not a better version of the right than the one congressional funding affords today. Most defendants likely received very limited representation.[36] But the judiciary's efforts to implement this version of the right deepen our analytic account of the judiciary's power and position when it comes to

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31. Cf. Frank H. Easterbrook, Plea Bargaining as Compromise, 101 Yale L.J. 1969, 1973–74 (1992) ("[T]he first step is ending the conscription of defense counsel . . . . You get what you pay for.").

32. See infra section III.A.

33. See infra section III.B.

34. See Abraham Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1284 (1976) ("[T]he trial judge has increasingly become the creator and manager of complex forms of ongoing relief . . . ."); Owen Fiss, Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 2–3 (1978) (discussing large-scale restructuring efforts undertaken by courts to enforce civil rights and constitutional protections in the last half of the twentieth century).

35. Perhaps fittingly, one of the earliest uses of the term "judicial activism"—in Arthur Schlesinger's 1947 *Fortune* magazine article, *The Supreme Court: 1947*—identified Justice Black as a part of a new group of judicial activists on the Court. See Keenan D. Kmiec, Comment, The Origin and Current Meanings of "Judicial Activism", 92 Calif. L. Rev. 1441, 1445–47 (2004) (discussing Schlesinger's portrayal of Justices Hugo Black, William Douglas, Frank Murphy, and Wiley Rutledge as activists).

36. See infra section III.A.

certain instances of rights enforcement and, more broadly, to judicial efforts to effectuate change. To reframe Stuntz, the inter-right period shows how federal courts have been and can be active in some of the *right* places within the current structure of our system of criminal procedure.[37]

To be sure, establishing the right to counsel in federal courts involved a less "dramatic stand[]" than other instances of rights enforcement.[38] Rather than reforming institutions beyond the courthouse, like schools, prisons, or police stations, the judiciary's efforts were trained inwards.[39] There were no federalism concerns, like those that trailed concurrent efforts to rein in state criminal adjudications by incorporating the Bill of Rights.[40] The judicial goal was more modest: to put its own house in order.

Still, in enforcing and implementing the unfunded version of the right to counsel in its own courtrooms, and ultimately helping to secure the funded version, the judiciary engaged in a significant effort at judicial statecraft.[41] The federal judiciary helped to transform the process of criminal adjudication in federal court by making criminal cases more legible to judges and to the federal courts more broadly. Versions of this form of court-building might today offer additional ways for the judiciary to strengthen indigent defense services, at a time when funding continues to be precarious, and the judiciary confronts a variety of institutional challenges.

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37. See supra note 7 and accompanying text.

38. See Stuntz, Uneasy Relationship, supra note 2, at 76 (noting that defendants' interests may be better protected by judicial efforts aimed at "funding, the definition of crime, and sentencing" rather than procedural rights).

39. The qualified success of the inter-right period largely maps Rosenberg's description of the constraints on judicially driven change and the conditions that can facilitate that change. Rosenberg, supra note 1, at 86 (describing "constraints built into the structure of the American judicial system . . . that made courts singularly ineffective institutions for successfully producing direct change in civil rights").

40. See, e.g., Henry J. Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif. L. Rev. 929, 954 (1965) (warning that applying the Bill of Rights to the states risks a federally imposed "uniform code" of criminal procedure with no room for reasonable state variation).

41. For a variety of different examples of forms of "judicial statecraft," see, e.g., Farah Peterson, Interpretation as Statecraft: Chancellor Kent and the Collaborative Era of American Statutory Interpretation, 77 Md. L. Rev. 712, 713–15 (2018) (recovering early nineteenth century "power sharing" efforts that centered judges' "equitable interpretation" as "the jurisprudential response" to irresponsible legislation); Judith Resnik, Seeing "the Courts": Managerial Judges, Empty Courtrooms, Chaotic Courthouses, and Judicial Legitimacy From the 1980s to the 2020s, 43 Rev. Litig. 193, 199 (2024) [hereinafter Resnik, Seeing "the Courts"] (describing American adjudication as an "experiment in statecraft"); Karen M. Tani, Constitutionalization as Statecraft: *Vagrant Nation* and the Modern American State, 43 Law & Soc. Inquiry 1646, 1652 (2018) (describing "the possibility of constitutionalization as a powerful tool of the modern American state, even as it was also a strategy of savvy social movement activists and a product of sincere federal court judges"); see also James C. Scott, Seeing Like a State 1–11 (1998) (offering a classic, highly contested account of "tragic episodes of state-initiated social engineering").

The Essay proceeds as follows. Part I describes the account of the dependent judiciary. Parts II and III chart the inter-right rules and the systems of enforcement and assess their effects. Part IV situates the means and ends of the judiciary's project within the broader landscape of judicial institution building and considers ways in which the judiciary might continue to work "to complete the court."[42]

A note: An institutional account like this tends to exclude any sustained analysis of the stories of the people who came before the federal courts, the defendants and habeas petitioners who were new and tenuous rightsholders. It misses the "carton[s] of cigarettes" that, as Judge Rufus Foster of the Fifth Circuit complained at a meeting of the Judicial Conference in 1937, were the sole costs an incarcerated individual needed to pay for the legal advice from a fellow incarcerated individual to file a habeas petition that would yield "a day out of the walls."[43] Of course, in the hands of individuals who believed they'd been unfairly treated, those cartons of cigarettes also brought about the constitutional doctrine at issue during this period. That, in fact, seems to have been the genesis of a habeas petition that Foster himself wrote the Fifth Circuit panel opinion denying only a few months after the Judicial Conference meeting. The case was named *Johnson v. Zerbst*.[44]

I. THE RIGHT TO COUNSEL AND JUDICIAL DEPENDENCE

As decades of rights scholarship have made clear, it is one thing for the judiciary to declare that there is such a thing as a right; it is another to make that thing meaningful beyond the pages of a court opinion.[45] Regardless of what the judiciary puts on paper, to get what it wants in the world, it must order some other actor—a coordinate branch, a state agency, a private person—to act. The action is the remedy, with the

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42. See Johnson v. Zerbst, 304 U.S. 458, 468 (1938).

43. Minutes of the Judicial Conference of the United States 9–10 (Sep. 23, 1937) (on file with the *Columbia Law Review*) [hereinafter 1937 Judicial Conference Minutes].

44. 92 F.2d 748 (5th Cir. 1937). According to Elbert Tuttle, Johnson's lawyer in his Fifth Circuit appeal and before the Supreme Court (and later a legendary federal appellate judge), Johnson's habeas petition was the result of advice Johnson received from "fellow inmates":

> [A]t the Atlanta Penitentiary [Johnson] found all kinds of free legal advice from fellow inmates. Someone told him that he had been deprived of a constitutional right to counsel at his trial. He filed a petition for habeas corpus which [the district court judge] thought of sufficient gravity to appoint counsel to represent him.

Elbert P. Tuttle, Reflections on the Law of Habeas Corpus, 22 J. Pub. L. 325, 331 (1973).

45. See, e.g., John C. Jeffries, Jr., The Right–Remedy Gap in Constitutional Law, 109 Yale L.J. 87, 144 (1999) (arguing that courts exerting executive control both reduces democratic accountability and produces inefficient, top-down rules).

shortfall between right and remedy serving as a constant source of evidence that judicial talk of rights is cheap.[46]

The same basic dynamic animates the conventional account of the right to counsel. There is the ideal version that emerges from the notions that the Supreme Court, scholars, and the public have, at times, embraced of the role of the right in principle.[47] Access to effective counsel is, as *Powell v. Alabama* first framed it in 1932, the touchstone of a fair criminal process: "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."[48] Since *Powell*, the Court has repeatedly emphasized that, absent counsel, the criminal adjudicatory process loses any claim not only to fairness but to being adversarial in the first place.[49]

The problem, of course, is that lawyers cost money. So, unlike most other criminal procedural rights that the Court has recognized, which (theoretically[50]) raise the costs of prosecuting a defendant without affirmatively obligating the government to give that defendant anything of substance,[51] the right to counsel is a direct entitlement to a substantive good.[52] The more counsel is required—the more courts might insist that the principles of the right to counsel become reality—the more the right costs.

In theory, federal courts possess a variety of means of insisting on funding. They could, for example, make certain funding levels or proxies for funding levels, like public defender caseloads, part and parcel of Sixth Amendment right to counsel doctrine; they could throw out individual

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46. See Daryl J. Levinson, Rights Essentialism and Remedial Equilibration, 99 Colum. L. Rev. 857, 858 (1999) ("Rights are dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence.").

47. For a description of the ways in which rights become and operate as myth, including as a rhetorical device, see Stuart A. Scheingold, The Politics of Rights: Lawyers, Public Policy, and Political Change 13–82 (2d ed. 2004).

48. 287 U.S. 45, 68–69 (1932).

49. See, e.g., United States v. Cronic, 466 U.S. 648, 656–57 (1984) ("The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing . . . . [I]f the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.").

50. See Stuntz, Uneasy Relationship, supra note 2 (arguing that procedural entitlements have perverse effects because increasing trial costs leads other governmental actors to limit the impact of those entitlements, primarily by seeking plea deals).

51. For example, the Fourth Amendment right to be free from unreasonable searches may make convicting a specific defendant harder and costlier, but it does not affirmatively require the government to give that defendant a specific good. See David A. Sklansky, Quasi-Affirmative Rights in Constitutional Criminal Procedure, 88 Va. L. Rev. 1229, 1230, 1284 (2002) (arguing in general that "constitutional criminal procedure is replete with . . . constitutional conditions on actions that government cannot realistically be expected to forego," but noting that "[f]inancing of indigent defense does not require spending money, it is spending money" (emphasis omitted)).

52. See Darryl K. Brown, Rationing Criminal Defense Entitlements: An Argument From Institutional Design, 104 Colum. L. Rev. 801, 806–09 (2004).

prosecutions for lack of funding for expensive defense services like a lengthy investigation or trial. But moves like these put the courts in direct conflict with a coordinate branch or a state government,[53] require judges to make a difficult-to-justify determination of how much money is necessary for adequate representation,[54] and potentially erode the finality of countless cases, because the right to counsel stands alone as a "watershed" right that merits retroactive application.[55]

So, in practice, federal courts barely insist on funding at all for the defense lawyers in their own courts or for those in state courts.[56] As the concurrences in *Argersinger v. Hamlin* began to acknowledge,[57] and the majority opinions in *United States v. Cronic*[58] and *Strickland v. Washington*[59] made more explicit, the Sixth Amendment right to counsel doctrine does not necessarily tether the fulfillment of the constitutional right to any amount of funding.[60] Despite now-longstanding calls to set funding

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53. See, e.g., Miller, supra note 6, at 1807 (explaining that, even in the few state court cases in which courts felt compelled to declare funding levels unconstitutional, "[j]udges in the counsel system cases expressed concern for the separation of powers, emphasizing that it was for the legislature to select policies and the executive branch to implement policies").

54. See Stuntz, Uneasy Relationship, supra note 2, at 73 ("There is no analytic structure that allows one to specify the right dollar amount."); but see Sklansky, supra note 51, at 1284 n.212 ("There is . . . an obvious benchmark: parity with compensation for local prosecutors.").

55. Teague v. Lane, 489 U.S. 288, 311 (1989); Levinson, supra note 46, at 889–90.

56. State courts have at times more actively attempted to police state funding deficiencies. See, e.g., Comm. for Pub. Couns. Servs. v. Middlesex & Suffolk Cnty. Dist. Cts., No. SJ-2025-0244, 2025 WL 2048501, at *1 (Mass. July 3, 2025) ("[T]his order imposes the Lavallee protocol on the Courts and provides conditions for the ongoing monitoring of the shortage of counsel."); Lavallee v. Justs. in Hampden Superior Ct., 812 N.E.2d 895, 903–05 (Mass. 2004) (holding that individuals' "constitutional right to the assistance of counsel [was] not being honored" when counsel did not enter appearances at the initial stages of a case). The Ninth Circuit recently upheld an injunction in *Betschart v. Oregon*, 103 F.4th 607, 628 (9th Cir. 2024), requiring Oregon either to provide counsel to defendants in pretrial detention within seven days of those defendants' initial appearance or release those defendants from pretrial detention. Id. at 614. The court concluded that further delay in appointing counsel interfered with and delayed the indigent criminal defendants' progression to critical stages of their prosecution, "prevent[ing] any meaningful advocacy." Id. at 620. As the opinion emphasized, the core problem was "an 'ongoing public defense crisis' of [Oregon's] own creation," id. at 612, driven by Oregon's failure to adequately compensate defense lawyers, see id. at 628.

57. 407 U.S. 25, 41–44 (1972) (Burger, J., concurring in the result) (discussing "burdens" on both the state and the bar of providing counsel to misdemeanor defendants); id. at 56–62 (Powell, J., concurring) (describing "chaos" related to "availability of counsel, of costs, and especially of intolerable delay in an already overburdened system").

58. 466 U.S. 648 (1984).

59. 466 U.S. 668 (1984).

60. See Ossei-Owusu, The Sixth Amendment Façade, supra note 23, at 1215 ("*Argersinger* marked the beginning of a right to counsel jurisprudence that emphasized austerity."); Stuntz, Uneasy Relationship, supra note 2, at 20–21 (offering a general

minimums or go further and require something like parity with prosecution funding,[61] federal judges have been unwilling—or unable—to set baseline funding requirements.[62] With limited exceptions,[63] federal courts have not proactively thrown out indictments because defense counsel lacks funds.

The upshot is that the judiciary depends on the political branches to fund the right at the levels determined by those branches[64]—or as those branches find expedient.[65] In general, under any variant of interest group or public choice theory that explains the political process, criminal defendants tend to lose.[66] None of the actors that have incentives for greater defense funding wield much political power. Criminal defendants are "among the most politically anemic groups in the legislative process."[67] Judges fare no better.[68] By contrast, prosecutors wield considerable power

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explanation for how *Strickland* limits Sixth Amendment right to counsel challenges involving structurally inadequate funding). But see Eve Brensike Primus, Disaggregating Ineffective Assistance of Counsel Doctrine: Four Forms of Constitutional Ineffectiveness, 72 Stan. L. Rev. 1581, 1601–02, 1613–15 (2020) [hereinafter Primus, Disaggregating Ineffective Assistance of Counsel Doctrine] (explaining how both *Strickland* and *Cronic* recognize the "possibility of pervasive structural ineffectiveness," such as that arising from systematic underfunding).

61. See, e.g., Donald A. Dripps, Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard, 88 J. Crim. L. & Criminology 242, 245–51 (1997).

62. See, e.g., Primus, Disaggregating Ineffective Assistance of Counsel Doctrine, supra note 60, at 1615 (describing recent civil litigation involving *Cronic*-based claims); Sklansky, supra note 51, at 1284 (explaining judicial reluctance to set funding requirements for effective assistance of counsel).

63. See United States v. Germany, 32 F.R.D. 421, 424 (M.D. Ala. 1963); United States v. Monroy, 2025 WL 3687645, at *2–3 (E.D. Cal. 2025).

64. See, e.g., Garza v. Idaho, 139 S. Ct. 738, 758–59 (2019) (Thomas, J., dissenting) ("History proves that the States and the Federal Government are capable of making the policy determinations necessary to assign public resources for appointed counsel.").

65. Brown, supra note 52, at 802 ("[H]iring private actors costs money, and courts don't set budgets . . . . [But,] [i]t is a well-known problem that legislatures often don't provide funding for criminal defense services at levels fair observers would consider adequate.").

66. Suspects might do better but are generally hard to identify as a bloc. See William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L.J. 331, 362 (1991) ("[S]tate and federal law enforcement officials are powerful interests that can command congressional attention, while criminal defendants and suspects are more diffuse, marginalized, and less sympathetic groups.").

67. Rachel E. Barkow, Separation of Powers and the Criminal Law, 58 Stan. L. Rev. 989, 995, 1029–30 (2006); see also Sklansky, supra note 51, at 1290 ("[T]he political process does a notoriously bad job protecting the rights of criminal defendants."); William J. Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505, 555 (2001) [hereinafter Stuntz, Pathological Politics] ("[I]f being charged with crime is stigmatizing, it is difficult for interest groups opposed to criminal statutes to organize.").

68. See Rachel E. Barkow, Administering Crime, 52 UCLA L. Rev. 715, 723–25 (2005) (describing factors that limit judges' power as an interest group in the context of sentencing reform); Stuntz, Pathological Politics, supra note 67, at 510 (discussing the "growing

because of legislatures' concerns about appearing soft on crime.[69] Prosecutors may have some preferences for funding indigent defense services; for instance, they, too, can benefit from the more orderly process that increasing the quantity and quality of lawyers provides.[70] But those preferences are unlikely to be particularly strong, especially if overall government expenditures are constrained.[71] And funding for indigent defense not only competes with other criminal justice priorities, like money for law enforcement, but also with all the many other demands of society.[72] In other words, at least in theory, the deck is stacked.[73]

Although the result for many state defense systems has been a series of decades-long, rolling crises of unsustainable caseloads and low pay for indigent defense lawyers,[74] federal defense litigation funding has generally

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marginalization of judges" in this regard). Despite descriptive studies of judicial lobbying, there is almost no empirical work considering under what circumstances judges achieve their goals in the legislative process.

69. See Carissa Byrne Hessick, Ronald F. Wright & Jessica Pishko, The Prosecutor Lobby, 80 Wash. & Lee L. Rev. 143, 150–53 (2023) (analyzing the empirics behind the "partial success for the prosecutor lobby" in states); Shon Hopwood, The Misplaced Trust in the DOJ's Expertise on Criminal Justice Policy, 118 Mich. L. Rev. 1181, 1184–85 (2020) (describing influence of federal prosecutors in policymaking efforts); Stuntz, Pathological Politics, supra note 67, at 545 ("Congress is likely to give great weight to the demands of federal prosecutors, even though those demands may not advance goals the public cares about.").

70. See Ronald F. Wright, Parity of Resources for Defense Counsel and the Reach of Public Choice Theory, 90 Iowa L. Rev. 219, 260 (2004) [hereinafter Wright, Parity of Resources] ("Prosecutors in some jurisdictions might actually favor increased funding for defense attorneys to promote the reliability and predictability of the criminal process."). In at least some instances, prosecutors may prioritize longer-term goals related to the functioning of the adjudication system over the immediate advantage of the prosecution. See Bruce A. Green, *Gideon*'s Amici: Why Do Prosecutors So Rarely Defend the Rights of the Accused?, 122 Yale L.J. 2336, 2343–44 (2013) ("[P]rosecutors can also contribute to the Supreme Court's deliberations when they think it is fair and just to recognize the procedural right in question, even if there are countervailing law enforcement interests.").

71. A number of attorneys general supported the judiciary's push to secure funding after *Johnson*. See infra section III.B. Yet there is no indication that any federal prosecutor declined to bring charges on the grounds that defense funding was inadequate. See, e.g., United States v. Germany, 32 F.R.D. 421, 424 (M.D. Ala. 1963) (dismissing an indictment brought by federal prosecutors for "the failure and refusal on the part of the United States" to reimburse funds "necessarily expended" by appointed counsel).

72. See Carol S. Steiker, *Gideon* at Fifty: A Problem of Political Will, 122 Yale L.J. 2694, 2700 (2013) ("With clamoring demand for dwindling public funds for schools, hospitals, roads and bridges, public transportation, firefighters, and police officers, it is not surprising that more money for lawyers representing alleged criminals is not high on anyone's list.").

73. This is the standard view in the literature, but, as Professor Sara Mayeux points out, "[t]here is surprisingly little empirical literature testing . . . assumptions about the politics of indigent defense; to the contrary, state-by-state comparisons of indigent defense funding raise questions about how universally the assumptions apply." Mayeux, What *Gideon* Did, supra note 6, at 89; see also Wright, Parity of Resources, supra note 70, at 259–61 (arguing that the standard implications of public choice theory may be inapplicable to criminal defense funding).

74. See Mayeux, What *Gideon* Did, supra note 6, at 78–85 ("From that [1983] report on, advocates have described indigent defense in a language of 'crisis' that has never abated.").

fared better than theory might predict (a point this Essay returns to in Part IV). The federal defense function is, as a comparative matter, almost gold-plated.[75] Congress has in recent years appropriated nearly $1.5 billion annually for federal defense services, including federal defender budgets and panel attorneys.[76] These services comprise the second largest annual line-item budget appropriation the judiciary receives, paying for nearly four thousand lawyers and staff who work for federal defender organizations and the appointment of more than eight thousand CJA panel attorneys (private attorneys who receive what are now paid appointments).[77]

Nonetheless, the federal judiciary generally treats CJA funding as a matter of legislative beneficence, not something the right to counsel requires or that the judiciary should try to secure on its own.[78] Federal funding for indigent defense faces recurring shortfalls, to which the judiciary usually responds by pausing payments to panel attorneys or cutting federal defense staff.[79] In July 2025, for instance, the judiciary

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75. See Donald A. Dripps, Why *Gideon* Failed: Politics and Feedback Loops in the Reform of Criminal Justice, 70 Wash. & Lee L. Rev. 883, 908–11 (2013) (discussing the comparatively favorable conditions of federal indigent defense relative to states); Richard A. Posner & Albert H. Yoon, What Judges Think of the Quality of Legal Representation, 63 Stan. L. Rev. 317, 320, 326–27 & tbl.4 (2011) (reporting survey results showing that federal judges rated federal defenders higher than retained counsel).

76. Admin. Off. of the U.S. Cts., The Judiciary Fiscal Year 2026 Congressional Budget Summary, at ii (2025), https://www.uscourts.gov/sites/default/files/document/fy-2026-congressional-budget-summary.pdf [https://perma.cc/JJ89-FDU7].

77. Barry J. McMillion, Cong. Rsch. Serv., R48077, Judiciary Appropriations, FY2024, at 7, 15–16 (2024), https://www.congress.gov/crs-product/R48077 [https://perma.cc/8EZP-PW4Y].

78. See Kathleen Cardone et al., 2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act, at xviii (2017), https://www.uscourts.gov/sites/default/files/2017_report_of_the_ad_hoc_committee_to_review_the_criminal_justice_act-revised_2811.9.17.29_0.pdf [https://perma.cc/9XKB-VXNR] [hereinafter Cardone Report] (noting that despite the need for "a sizable increase in compensation" for CJA panel attorneys, "the judiciary has typically requested only minor increases that are less than the authorized amount as a way to limit its overall budget request to Congress"). Individual judges have also long maintained a practice of cutting the amount of funding private attorneys receive in specific cases. See Margaret S. Williams, Barbara S. Meierhoefer, Carly Giffin, Jana Laks, Leeann W. Bass, Laural Hooper & S. Kenneth Lee, Fed. Jud. Ctr., Evaluation of the Interim Recommendations From the Cardone Report 39 (2023), https://cjastudy.fd.org/sites/default/files/Evaluation-of-the-Interim-Recommendations-from-the-Cardone-Report_9.7.23_NoID.pdf [https://perma.cc/VL46-QXR6] [hereinafter Fed. Jud. Ctr., Interim Recommendations] ("The Committee heard testimony suggesting individual presiding judges or other voucher reviewers reduced payment at disparate rates because of their different approaches to panel attorney compensation . . . .").

79. For 1990s funding shortfalls, see Edward C. Prado et al., Report of the Committee to Review the Criminal Justice Act 22–23 (1993), https://cjastudy.fd.org/sites/default/files/public-resources/previous-cja-studies/1993.01.29-prado-committee-report-book-version_1.pdf (on file with the *Columbia Law Review*) [hereinafter Prado Report]. In 2013, Congress slashed federal defense funding by 10%, as part of the broader federal budget sequester.

announced that congressional underfunding had again led to a "funding crisis" that threatened defendants' right to adequate assistance of counsel.[80] As a result, CJA panel attorneys went months without pay.[81] In short, the judiciary generally makes formal budget requests and hopes that Congress complies.[82]

The conventional view of judicial dependence goes one step further: Judicial dependency on the political branches to fulfill the right to counsel is both symbolic of and a contributor to the broader surrender of the judicial role in the criminal adjudicatory process. Because the judiciary does not determine the value of the right to counsel, the criminal procedural regulatory system is incomplete. Rationing defense litigation allows political actors not only to devalue court-created criminal procedural rules but to nullify their effects altogether.[83] Cheaper forms of litigation—for example, cookie-cutter motions to exclude—predominate over more costly ones—for example, lengthy investigations.[84] And guilty

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That cut led to a 10% reduction in federal defender staff, a $15 per hour drop in CJA panel attorney pay, and the equivalent of twenty-thousand workdays of furloughs. The Department of Justice's prosecution budget was largely spared. See Ron Nixon, Public Defenders Are Tightening Belts Because of Steep Federal Budget Cuts, N.Y. Times (Aug. 23, 2013), https://www.nytimes.com/2013/08/24/us/public-defenders-are-tightening-belts-because-of-steep-federal-budget-cuts.html (on file with the *Columbia Law Review*).

80. See Nate Raymond, US House Budget Threatens Over 600 Public Defender Jobs, Judiciary Warns, Reuters (July 30, 2025), https://www.reuters.com/legal/government/us-house-budget-threatens-over-600-public-defender-jobs-judiciary-warns-2025-07-30/ (on file with the *Columbia Law Review*) (internal quotation marks omitted) (arguing that lack of funding from a Republican budget plan would lead to a substantial reduction in the number of federal public defenders).

81. See Letter From Amy J. St. Eve & Robert J. Conrad, Jr. to House Appropriations Comm. (Apr. 10, 2025), https://www.uscourts.gov/sites/default/files/document/fy-2025-funding-request-letters-to-congress.pdf [https://perma.cc/MF8A-79J9] ("These are payments for constitutionally required legal work that has already been performed but that will be left unpaid for months simply because we cannot afford to make the payments."). In response to the monthslong lapse in funding for panel attorney pay and expenses, some defendants represented by CJA attorneys challenged their indictments on the ground that the total lack of funding for their representation violated their Sixth Amendment right to effective assistance of counsel. Despite the extremity of the circumstances, district courts were largely reluctant to dismiss cases. See, e.g., United States v. Monroy, 2025 WL 3687645, at *2–3 (E.D. Cal. 2025) (collecting cases).

82. See Andrew Cohen, How the Sequester Is Holding Up Our Legal System, Atlantic (July 12, 2013), https://www.theatlantic.com/national/archive/2013/07/how-the-sequester-is-holding-up-our-legal-system/277704/ (on file with the *Columbia Law Review*) (discussing how federal judges are raising alarm over the potential for a "constitutional crisis" due to lack of public defense funding).

83. See Stuntz, Uneasy Relationship, supra note 2, at 12 ("By buying less criminal defense, the state can buy less enforcement of constitutional criminal procedure. It can, to some degree, trump the trump.").

84. See id. at 38–39 (suggesting that "the current system encourages" appointed counsel to raise "boilerplate" Fourth Amendment claims, but not those that require substantial investigation); but see Stephen J. Schulhofer, Criminal Justice, Local Democracy, and Constitutional Rights, 111 Mich. L. Rev. 1045, 1075 (2013) (challenging the argument that criminal procedural protections lead to fewer actual innocence claims).

pleas may predominate over any litigation at all.[85] The result is that, alongside other factors like the trial penalty, under which defendants face the prospect of significantly longer sentences for fighting their prosecution instead of pleading,[86] judicial dependency contributes to "a system of pleas, not a system of trials," as the Supreme Court recognized more than a decade ago.[87] In that system, the prosecutor, not the judge, is "leviathan."[88]

II. THE INTER-RIGHT REGULATORY REGIME

This Part traces the regulatory system surrounding the version of the right to counsel that *Johnson* established. First, it describes many district court judges' pre-*Johnson* practice of exercising their inherent powers discretionarily to appoint counsel for some otherwise unrepresented defendants. Then, it describes *Johnson*'s transformation of the district courts' discretionary practice into a requirement for federal criminal cases. Finally, it describes the additional right to counsel rules the judiciary created during the inter-right period in the form of subsequent judicial decisions and the first version of the Federal Rules of Criminal Procedure.

A. *The "Humanity of the Law" and the Appointment of Defense Counsel*

Appointing counsel for indigent criminal defendants has long been a central function of American courts.[89] Early appointments, including pre-

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85. According to Stuntz, the rise in guilty pleas may be one of the consequences of undervalued constitutional rights, even as compared to a no-rights situation. See Stuntz, Uneasy Relationship, supra note 2, at 60 ("The courts see no sharp rise in defense victories, and hence see the relevant constitutional rules as cheap."); cf. Donald A. Dripps, Does Liberal Procedure Cause Punitive Substance? Preliminary Evidence From Some Natural Experiments, 87 S. Cal. L. Rev. 459, 492 (2014) (concluding that there is "no consistent pattern of procedurally conservative jurisdictions becoming more punitive than procedurally liberal jurisdictions"); but see Schulhofer, supra note 84, at 1063–65 (challenging Stuntz's guilty plea empirics).

86. See Nancy J. King, David A. Soulé, Sara Steen & Robert R. Weidner, When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guideline States, 105 Colum. L. Rev. 959, 962 (2005) ("We found that a significant plea discount—the difference between the average sentence given after a guilty verdict and the average sentence given after a guilty plea for the same offense—is evident for most offenses in all five states . . . ."); see also Bordenkircher v. Hayes, 434 U.S. 357, 362–64 (1978) ("[I]n the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer."); infra note 366.

87. Lafler v. Cooper, 566 U.S. 156, 170 (2012).

88. Rachel E. Barkow, Institutional Design and the Policing of Prosecutors: Lessons From Administrative Law, 61 Stan. L. Rev. 869, 874 (2009) [hereinafter Barkow, Institutional Design].

89. See, e.g., Zephaniah Swift, A System of the Laws of the State of Connecticut 392 (1796) (discussing early Connecticut statutes and practice); see also McConville & Mirsky,

Founding, reflected the broader rejection of English common law rules that generally barred lawyers from representing defendants facing felony charges until the middle of the eighteenth century.[90] Formal authorities like the Sixth Amendment and similar provisions in early state constitutions directly responded to the English rule by prohibiting any action that would interfere with defendants' right to retain counsel to represent them.[91] Even before the ratification of the Sixth Amendment, the Crimes Act of 1790 required federal judges to appoint lawyers for defendants facing capital charges.[92]

When no formal authority was at hand, judges often relied on their inherent authority over the lawyers who appeared before them to appoint those lawyers to represent indigent defendants as a part of lawyers' obligations as officers of the courts.[93] "Throughout the mid-nineteenth century," for instance, "state supreme courts affirmed trial courts' inherent power to appoint attorneys" for poor criminal defendants.[94] As one constitutional treatise summarized federal and state practice at the start of the twentieth century, "With us . . . generally it will be found that the humanity of the law has provided that, if the prisoner is unable to employ counsel, the court may designate some one to defend him . . . ."[95]

By *Johnson*, "[a]cting on their inherent power over their own procedure and officers, the federal courts, apart from constitutional or statutory

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supra note 30, at 454 ("[A]t least from 1810 onwards, almost every defendant in General Sessions exercised the right to be represented by a lawyer at trial irrespective of his or her standing in society or ability to pay a fee.").

90. See J.M. Beattie, Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries, 9 Law & Hist. Rev. 221, 223 (1991) ("At the trial itself, accused felons had to speak in their own defense . . . . If they did not or could not defend themselves, no one would do it for them."); John H. Langbein, The Historical Origins of the Privilege Against Self-Incrimination at Common Law, 92 Mich. L. Rev. 1047, 1050–52 (1994). For an overview of the historical development of the adversarial criminal trials that came to define the Anglo-American system, see generally John H. Langbein, The Origins of the Adversary Criminal Trial (2003) (noting that the "bedrock principle of criminal procedure" had been that the accused was "forbidden to have defense counsel").

91. See Carlton F.W. Larson, The Origins of Adversary Criminal Trial in America, 57 U.C. Davis L. Rev. 1, 17–19, 31–32 (2023) (discussing the emergence of defendants' right to defense counsel in early eighteenth-century colonies).

92. An Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 29, 1 Stat. 112, 118–19 (1790). The Act both "authorized and required" a judge hearing a capital case "to assign" a defendant counsel, but it made no mention of paying assigned lawyers. Id.; see also Nabb v. United States, 1 Ct. Cl. 173, 174 (1864) (rejecting petitioners' argument that the Sixth Amendment required government to compensate assigned counsel).

93. See David L. Shapiro, The Enigma of the Lawyer's Duty to Serve, 55 N.Y.U. L. Rev. 735, 749–56 (1980) (explaining the history of early mandatory appointments and the doctrinal basis for these appointments); infra section IV.A (considering the legality of unpaid appointments).

94. Ossei-Owusu, Civil vs. Criminal Legal Aid, supra note 28, at 1589–90.

95. Thomas M. Cooley & Walter Carrington, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 700 (8th ed. 1927).

requirements, [had] developed a practice of making appointments of counsel in serious cases."[96] Many federal district courts had local rules that expressly required lawyers to consent to accepting appointments as a condition of lawyers' bar memberships in those districts; other judges had more informal practices of requiring lawyer participation.[97] Immediately before *Johnson*, at the 1937 Judicial Conference meeting, then-Attorney General Homer Cummings told the gathered judges that, according to a nationwide review by his office, "[i]n most of the Districts it is customary to assign counsel in each case in which the defendant has not retained counsel, unless he expresses that he wishes to conduct his own defense."[98]

In all likelihood, however, pre-right appointment practices varied judge by judge and defendant by defendant. It's impossible to determine with any certainty for whom or under what circumstances judges offered to appoint counsel, because district court judges generally had no reason to make a record of whether they had offered or appointed counsel for a particular defendant.[99] Developments and source material from after *Johnson* all point to a relatively narrow sense of when defendants would receive a lawyer. A "flood" of habeas petitions, for instance, that followed *Johnson* involved conflicting accounts over the extent and coverage of many judges' appointment practices.[100] Additionally, judges likely only rarely offered to appoint counsel for defendants who intended to plead guilty.[101]

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96. Beaney, supra note 28, at 29.

97. Id. at 32.

98. 1937 Judicial Conference Minutes, supra note 43, at 5. In *Johnson* itself, the Justice Department "concede[d] that the better practice is to assign counsel in the absence of an express waiver." Brief for the United States at 26–27, Johnson v. Zerbst, 304 U.S. 458 (1938) (No. 699), 1938 WL 63891.

99. See Deborah Rhode, Access to Justice 50–51 (2004) (discussing the overall difficulties in determining appointments); cf. Johnson v. Zerbst, 304 U.S. 458, 465 (1938) ("[I]t would be fitting and appropriate for that determination [of waiver] to appear upon the record."). Varying assessments of the breadth of judicial appointment practice in the middle of the twentieth century animate John Hart Ely's argument against "tradition" as being sufficient to illuminate "fundamental values" that merit legal protection. John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 214 n.80 (1980) ("Thus, for example, in Betts v. Brady, 316 U.S. 455 (1942), the majority and dissenting opinions reached diametrically opposed conclusions on whether American traditions required the appointment of counsel for those who could not afford it.").

100. The petitioners in these cases almost universally claimed that they had either not been informed of the availability of counsel or requested a lawyer but had their request denied by the judge. In response, the federal government often marshalled affidavits and even testimony from judges or court staff claiming that there was a "uniform practice" of offering defendants representation. See, e.g., Holiday v. Johnston, 313 U.S. 342, 347 (1941) (noting that after a defendant challenged his detention due to lack of counsel, the government responded with documents from both the sentencing judge stating that he had asked the defendant if the defendant had wanted counsel and a deputy marshal stating that the defendant "did not desire counsel").

101. See, e.g., 1937 Judicial Conference Minutes, supra note 43, at 10 ("[I]t is utterly impossible to assign counsel to the men who are going to plead guilty, except in exceptional

Race almost certainly also played a role in who received representation. There were no Black federal judges until Judge William Hastie's appointment in 1949,[102] and, in many Southern states in the years leading up to *Johnson*, there were only a few Black lawyers.[103] Black criminal defendants would have been forced to rely entirely on the whims of white judges to appoint white members of the bar to represent them; many white lawyers likely refused to represent or provided more limited representation to Black defendants.[104]

The variation reflects a point worth underscoring: Whatever the judicial practice, it was only vaguely defined. Some district courts may have exercised their authority to offer to appoint lawyers for many or even all the defendants who appeared before them, as a number of judges claimed to have done after *Johnson*.[105] But, except for capital cases, nothing formally required them to do so. At a minimum, cases involving guilty pleas—the vast majority of federal criminal cases—likely had no defined custom whatsoever.

B. Johnson*'s Rules*

Johnson was decided on May 23, 1938, toward the end of a momentous period for the Supreme Court.[106] With the aftershocks of President Roosevelt's attempt to pack the Court in the winter of 1937 still rippling outward, the Court had begun the year by transmitting the Federal Rules of Civil Procedure to Congress.[107] At the end of April, the Court handed down *United States v. Carolene Products Co.*[108] and *Erie v. Tompkins*.[109] In the weeks between those cases and *Johnson*, a controversy roiled the Court surrounding its newest member: Newspaper articles reported, based on

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cases . . . ."); Alexander Holtzoff, Right to Counsel Under the Sixth Amendment, 20 N.Y.U. L.Q. Rev. 1, 8 (1944) ("It was common practice not to assign counsel for a defendant desiring to plead guilty."); see also infra section II.B (discussing the extension of right to counsel to guilty pleas following *Johnson*).

102. See J. Clay Smith, Emancipation: The Making of the Black Lawyer, 1844–1944, at 51 (1993) ("This . . . made Hastie President Roosevelt's choice to fill the U.S. District Court vacancy . . . a first at the federal level for any black lawyer in America. Hastie served with distinction . . . until he was appointed dean of Howard University's law school." (footnote omitted) (citing Gilbert Ware, William Hastie: Grace Under Pressure 81–85 (1984))).

103. See Kenneth W. Mack, Representing the Race: The Creation of the Civil Rights Lawyer 28 (2012) (noting the scarcity of Black lawyers in the South during the early 1900s).

104. Klarman, supra note 23, at 80 (documenting white lawyers' reluctance to adequately represent Black defendants).

105. Court Officers and Staff: Federal Public Defenders, Fed. Jud. Ctr., https://www.fjc.gov/history/administration/court-officers-and-staff-federal-public-defenders (on file with the *Columbia Law Review*) (last visited Jan. 22, 2026) (noting that courts that interpreted *Johnson* "generally appointed attorneys for indigent defendants on an ad hoc basis").

106. Johnson v. Zerbst, 304 U.S. 458 (1938).

107. See Stephen B. Burbank, The Rules Enabling Act of 1934, 130 U. Pa. L. Rev. 1015, 1028 (1982).

108. 304 U.S. 144 (1938).

109. 304 U.S. 64 (1938).

comments purportedly made by anonymous Justices, that the other members of the Court believed Justice Hugo Black unfit to sit on the bench.[110]

Black received the assignment to write the opinion in *Johnson* at the Justices' conference after argument at the start of April. At issue in the case was the habeas petition of John A. Johnson, a marine who, alongside Monroe C. Bridwell,[111] had been "arraigned, tried, convicted, and sentenced [on a single] day" in 1935 to "four and one-half years in the penitentiary" for passing counterfeit notes.[112] Johnson and Bridwell had retained a lawyer for their preliminary hearings, but he'd encouraged them to plead guilty, and they hadn't been able to afford him for trial.[113] Both men testified at the hearing on their subsequent habeas petitions that Bridwell had "asked the United States Attorney if he could be represented by Counsel";[114] the prosecutor "replied that in [South Carolina] the court did not appoint counsel unless the defendant was charged with a capital crime."[115] When the trial judge asked if they were ready to proceed with their case, the two men nonetheless stated they were. Bridwell spoke on behalf of both men at their trial. As he later testified, "I only said fifteen or twenty words. I said I didn't think I was a hoodlum and could not have been one of very long standing because they didn't keep them in the Marine Corps."[116]

Johnson involved a relatively ordinary prosecution, but it arose against the backdrop of growing attention by the public and the Court to deeply unjust criminal adjudications. Prohibition, which was repealed in 1933, injected law enforcement into American life and generated staggeringly high numbers of arrests and prosecutions.[117] A 1931 report by the Wickersham Committee, which President Herbert Hoover set up to assess Prohibition's effects, had concluded that "the third degree—that is, the

110. See, e.g., Raymond Clapper, Black on the Grill?, Wash. Daily News 15 (May 10, 1938) (discussing a recent article questioning the ability of Justice Black and noting that other members of the Court seemed to contribute to and support the article). This was probably the least notable controversy of Black's nomination and early tenure. During the nomination process the year before, reports surfaced that Black had previously been a member of the Ku Klux Klan; once he was appointed, he faced a legal challenge to the constitutionality of his appointment. See William Baude, The Unconstitutionality of Justice Black, 98 Tex. L. Rev. 327, 353 (2019) (noting that during Senate debates there was speculation about Justice Black's association with the Ku Klux Klan).

111. See Johnson v. Zerbst, 92 F.2d 748, 749 (5th Cir. 1937). By the time the case reached the Supreme Court, Bridwell was no longer a party to the petition, because he had been released on parole. See Brief for the United States at 9, Johnson v. Zerbst, 304 U.S. 458 (1938) (No. 699), 1938 WL 63891.

112. Johnson v. Zerbst, 304 U.S. 458, 460 (1938).

113. Id.

114. Brief for the United States at 8, *Johnson*, 304 U.S. 458 (No. 699), 1938 WL 63891.

115. *Johnson*, 304 U.S. at 460–61.

116. Id. at 461 (internal quotation marks omitted) (quoting testimony of Monroe Bridwell).

117. See John F. Padgett, Plea Bargaining and Prohibition in the Federal Courts, 1908–1934, 24 Law & Soc'y Rev. 413, 440 (1990) (presenting data cataloging the post-Prohibition effect).

use of physical brutality, or other forms of cruelty, to obtain involuntary confessions or admissions—is widespread."[118] And, across the inter-war period, efforts to bring to light the racist legal system that underlay Supreme Court cases like *Moore v. Dempsey*,[119] *Powell v. Alabama*,[120] and *Brown v. Mississippi*[121] had captivated wide swaths of the country; the landmark decisions in these cases sketched the bare minimum due process requirements for a fair hearing in the context of torture and mob justice.[122] *Powell*, for instance, had established a limited due process right to effective appointed counsel in the context of a case in which:

> The defendants . . . surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime regarded with especial horror in the community where they were to be tried, were thus put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them.[123]

According to Judge Foster's opinion for the Fifth Circuit affirming the denial of Johnson and Bridwell's habeas petitions, their cases did "not present extraordinary features" of the type that had previously required judicial intervention.[124] Unlike the two state due process cases the men relied on—*Powell* and the Fifth Circuit's decision in *Downer v. Dunaway*, which both involved instances in which white mobs resorted to the legal system in an effort to lynch Black defendants accused of raping white women—the defendants were white, a fact that the appellate court opinion referred to repeatedly.[125] And the proceedings themselves reflected an ordinary court process: "There was no undue haste in bringing them to trial, there was no popular feeling against them, and the

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118. Nat'l Comm'n on L. Observance & Enf't, Report on Lawlessness in Law Enforcement 4 (1931); see also Franklin E. Zimring, The Accidental Crime Commission: Its Legacies and Lessons, 96 Marq. L. Rev. 995, 1000 (2013) ("The two reports on Prohibition that were separately issued in January 1931 . . . combined extensive and powerfully written observations of the costs and ineffectiveness of Prohibition in the 1920s with a rather unenthusiastic endorsement of continued efforts to modify and improve Prohibition itself.").

119. 261 U.S. 86 (1923).

120. 287 U.S. 45 (1932).

121. 297 U.S. 278 (1936).

122. See Klarman, supra note 23, at 49 (arguing that the cases in which the Supreme Court was thought to be correcting "flagrant injustices . . . in the South" may have resulted in minimal corrective impact).

123. *Powell*, 287 U.S. at 57–58.

124. Johnson v. Zerbst, 92 F.2d 748, 750 (5th Cir. 1937).

125. See id. at 749 ("Appellants are white men."); id. at 750 ("In Downer . . . the defendant was a negro charged with raping a white woman."); id. ("In [Powell] the defendants were also negroes charged with raping white women."); see also Ossei-Owusu, The Sixth Amendment Façade, supra note 23, at 1190–92 ("*Powell v. Alabama* entailed more issues than a criminal procedure final exam. Nine black boys in the Depression-era South . . . were rushed through trials that were dominated by mobs, entailed minimal counsel, and were decided by all-white juries.").

trial was quiet and orderly."[126] So, although "[p]erhaps it would have been better if," as a matter of practice, the trial judge had appointed counsel for the petitioners "of his own motion," the Fifth Circuit was more persuaded by the absence "of any decision of a court of last resort, state or federal, holding that in a noncapital case he was bound to do so."[127]

Black's terse opinion for a majority of the Court in *Johnson* turned the case's relative ordinariness into three interlocking and, on paper, uniformly applicable requirements directed at the district courts: a poor defendant had a right to appointed counsel under the Sixth Amendment; the district court had an obligation not only to supply that lawyer but also to confirm that the defendant understood that there was such a right; and if the trial court failed either to ensure that the defendant had counsel or appropriately waived the right to counsel, the court would be deprived of jurisdiction over the case.[128]

On its face, *Johnson*'s transformation of the Sixth Amendment right from a negative restriction on the federal government's ability to prohibit retained lawyers into a positive grant for poor defendants was the most significant part of the decision. It was also the least contested. As Judge Henry Friendly later wrote, "the Government made only the scantiest reference to the history and purpose of the [S]ixth Amendment."[129]

The decision dealt with the right in two paragraphs. Black, who is today considered by many a proto-textualist and originalist, barely reviewed either the text or the original meaning of the Amendment. Instead, he relied on *Powell*'s due process reasoning to explicate a purpose-driven view of counsel, one seemingly informed by his sense of the widespread availability of appointed counsel for poor defendants.[130] "The Sixth Amendment," he wrote, "stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'"[131] According to Black:

> [The right to counsel] embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer, to the

126. *Johnson*, 92 F.2d at 751.

127. Id.

128. Johnson v. Zerbst, 304 U.S. 458, 467–68 (1938).

129. Friendly, supra note 40, at 945; see also Beaney, supra note 28, at 41–42 ("One would not have to be unduly acute to conclude from a survey of the government's briefs that the Department of Justice was quite willing to see the petitioners succeed.").

130. *Johnson*, 304 U.S. at 463 ("[T]his Court has pointed to ' . . . the humane policy of the modern criminal law . . . ' which now provides that a defendant ' . . . if he be poor, . . . may have counsel furnished him by the state . . . .'" (quoting Patton v. United States, 281 U.S. 276, 308 (1930))).

131. Id. at 462.

> untrained layman, may appear intricate, complex and mysterious.[132]

So, *Johnson* concluded, "[t]he Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel."[133]

The other two issues—what obligations a trial court judge shouldered to determine whether a defendant waived the right and what the consequence of failing to secure the right would be—were more complicated.[134] On waiver, the Department of Justice had argued in over thirty pages of briefing and across a similarly lengthy appendix collecting court decisions that Johnson and Bridwell had waived whatever right they may have had and that no authority supported the argument that the trial court judge was required to appoint counsel without a specific request from them.[135] In a creative leap, Elbert Tuttle, Johnson's lawyer before the Fifth Circuit and Supreme Court, argued that the lack of any Supreme Court case on point only served to demonstrate how deeply embedded the appointment practice was as a matter of customary right.[136]

As *Johnson* established, "[t]he constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel."[137] That "protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether" there was a waiver, which could only follow from "an intentional relinquishment or abandonment of a known right or privilege."[138] District courts should "indulge every reasonable presumption against waiver."[139] And proper waiver would "depend, in each case, upon the particular facts and circumstances

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132. Id. at 462–63. Black quoted at length from *Powell*, the Court's 1932 invalidation of the convictions of the Scottsboro defendants under the Due Process Clause, to make the same point: "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 defence, even though he have a perfect one." Id. (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932)).

133. Id. at 463 (footnote omitted).

134. For more on the linkages between waiver and jurisdiction in the context of criminal procedural rights, see Emma Kaufman, The First Criminal Procedure Revolution, 139 Harv. L. Rev. 543, 582–83 (2025) (explaining that, although "[o]ne can read *Zerbst* primarily as a habeas case," it also "marked the tail end of the waiver revolution, the moment when a criminal defendant could voluntarily waive a right and a court could retain jurisdiction over a criminal case").

135. Brief for the United States at 35–65, *Johnson*, 304 U.S. 458 (No. 699), 1938 WL 63891.

136. Brief for Petitioner at 12, *Johnson*, 304 U.S. 458 (No. 699), 1999 WL 34591024.

137. *Johnson*, 304 U.S. at 465.

138. Id. at 464.

139. Id. (internal quotation marks omitted) (quoting Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937)).

surrounding that case, including the background, experience, and conduct of the accused."[140]

Whether the denial of the right to counsel could provide a basis for a writ of habeas corpus was ultimately the closest question, as the Court had only begun to expand habeas protections. As Black's file on the case reveals, the Justices initially voted at conference to deny the habeas petition, on the ground that those "deprived of this constitutional right could not raise the question by habeas corpus proceedings."[141] But, by the time Black circulated his first draft of the opinion on May 14, he'd reversed course. "[H]abeas corpus," he wrote his colleagues in a short memorandum appended to the draft opinion, "should be a proper remedy" for the violation.[142]

Black's opinion for the Court contended that habeas had to be available for the same reason trial courts needed to guarantee that defendants understood they had the right to have counsel appointed for them: to ensure that defendants actually learned of and had a chance to exercise their rights. "The purpose of the constitutional guaranty of a right to counsel," *Johnson* declared, "is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights."[143] That "guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution."[144] As *Johnson* underscored, "[t]o deprive a citizen of his only effective remedy would not only be contrary to the 'rudimentary demands of justice' but destructive of a constitutional guaranty specifically designed to prevent injustice."[145]

Johnson concluded that securing the right was a jurisdictional matter, which could therefore be attacked collaterally. "A court's jurisdiction at the hearing of trial may be lost 'in the course of the proceedings' due to failure to complete the court—as the Sixth Amendment requires—by providing counsel for an accused who is unable to obtain counsel . . . ."[146] In other words, if a district court proceeded without either appointing counsel for defendant or confirming that the defendant had waived the

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140. Id.

141. Memorandum From Justice Hugo L. Black (May 14, 1938) (on file with the *Columbia Law Review*). Johnson's and Bridwell's appeals of their convictions "were denied because [they] filed too late." *Johnson*, 304 U.S. at 462 (internal quotation marks omitted) (quoting Bridwell v. Aderhold, 13 F. Supp. 253, 254 (N.D. Ga. 1935)). At the time, they had only a few days to take an appeal. See id. "[A]s is the custom, they were placed in isolation" after their convictions "and so kept for sixteen days without being permitted to communicate with any one except the officers of the institution . . . ." Id. (quoting *Bridwell*, 13 F. Supp. at 254). Habeas, therefore, was their only available remedy.

142. Memorandum From Justice Hugo L. Black, supra note 141.

143. *Johnson*, 304 U.S. at 465.

144. Id. at 465.

145. Id. at 467 (footnote omitted) (quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935)).

146. Id. at 468 (quoting Frank v. Mangum, 237 U.S. 309, 327 (1915)).

right, then the proceedings and any subsequent conviction were "void, and one imprisoned thereunder may obtain release by habeas corpus."[147]

As William Beaney, a law professor at the University of Michigan, put it a decade later in his early study of the right to counsel in American courts, "[t]hus was announced the rule which raised the right to counsel to a level not attained during the previous one hundred and forty-nine years."[148] Perhaps Justice Black and the rest of the majority believed that the conversion of the district courts' discretionary practice of appointments into a set of mandatory requirements to secure the rights of criminal defendants in criminal adjudications would have effects only on the margins—a few more lawyers would need to be appointed for criminal defendants who might otherwise not have known that counsel was available to them. But, as Beaney noted, the "problems raised by this newly announced doctrine were destined to plague the federal courts in the years immediately ahead."[149]

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147. Id. (emphasis omitted).

148. Beaney, supra note 28, at 43.

149. Id. at 44. *Johnson* caused the federal courts to be "flooded" with habeas petitions from individuals in federal and state penitentiaries who—seemingly justifiably—believed that they could not have "intelligently waived" a Sixth Amendment right that they did not know they enjoyed when they pled guilty or were convicted years, and sometimes decades, before *Johnson*. See David Fellman, The Constitutional Right to Counsel in Federal Courts, 30 Neb. L. Rev. 559, 571 (1951) ("The Supreme Court's decision in the [*Johnson*] case promptly led to the filing of a flood of applications for writs of habeas corpus in the judicial districts containing federal penal institutions."); John J. Parker, Limiting the Abuse of Habeas Corpus, 8 F.R.D. 171, 171–72 (1948) ("[U]nder recent decisions of the Supreme Court [(including *Johnson*)], it has been possible for prisoners to use [habeas corpus] to attack the procedure of the courts under whose judgments they are imprisoned . . . . The federal courts were almost immediately deluged with a flood of groundless applications for habeas corpus." (footnote omitted)); cf. Marin K. Levy, Judging the Flood of Litigation, 80 U. Chi. L. Rev. 1007, 1043–49 (2013) (evaluating different types of "floodgates" arguments and noting the Supreme Court's "willing[ness] to turn to floodgates reasoning" in recent habeas decisions); Judith Resnik, Tiers, 57 S. Cal L. Rev. 837, 942–43 (1984) (criticizing the tendency of judges to invoke a potential "flood of prisoners' cases" as a ground to curtail legal rights). According to data from the Administrative Office, habeas petitions filed in federal district courts more than doubled in the years after the decision, from an average of 186 petitions in 1936 and 1937 to an average of 380 petitions from 1943 to 1945. Memorandum From Elmore Whitehurst to Henry P. Chandler (Apr. 13, 1948) (on file with the *Columbia Law Review*). But yearly grants of federal habeas petitions increased on average by only two—from an average of sixteen between 1936 and 1937 to an average of eighteen between 1943 and 1945. Id. For the most part, judges reviewing Sixth Amendment habeas petitions brushed them away with a mere "ritual of words," and as this was prior to the introduction of federal court reporters, the habeas petitioners—with no transcripts of their arraignments—faced a nearly insurmountable burden. Fellman, supra, at 572; see, e.g., McCoy v. Hudspeth, 106 F.2d 810, 811 (10th Cir. 1939) ("Waiver of the right will ordinarily be implied where the accused appears without counsel and fails to request that counsel be assigned to him."). This period of habeas history, which involved federal district court judges testifying before other district court judges and culminated in the judiciary playing a driving role in reforming the habeas statute in 1948, merits further study—not least for the light it shines on judges' ability to find workarounds to limit the retroactive impact of right to counsel rulings, which remain the sole "watershed" right under *Teague*.

C. *The Inter-Right Regulatory Scheme*

Johnson quickly became "cause célèbre." Over the course of the inter-right period, the judiciary forged ahead with crafting its own protective rules for the right to counsel through judicial decisions and the first version of the Federal Rules of Criminal Procedure, which went into effect in 1946. These efforts at implementing the right to counsel are far less notable than the Court's concurrent struggle over whether to incorporate the Sixth Amendment's right to counsel protections against the states.[150] But, without expressly mentioning how, or whether, to pay for the right to counsel, the Supreme Court and the judiciary's new procedural rules made right to counsel doctrine in federal court more intensive—and expensive—along two dimensions: when judges were required to appoint lawyers for indigent defendants and what those lawyers were required to provide these defendants.

The end of the inter-right period saw the Warren Court extend the right to counsel from the courthouse to the police station in some of its more famous criminal procedural decisions,[151] but decisions from the beginning of the period set the stage for the widespread applicability of the right to counsel in federal court proceedings. In 1941, for instance, in *Walker v. Johnston*, the Court concluded that defendants who pled guilty had a right to counsel.[152] Over the Department of Justice's objection that extending the right to guilty pleas would dramatically extend the reach of the right,[153] *Walker* made clear that if a defendant "did not voluntarily waive his right to counsel [when pleading guilty], or if he was deceived or coerced by the prosecutor into entering a guilty plea, he was deprived of a constitutional right."[154] And, in subsequent cases, the Court clarified what

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150. See, e.g., Betts v. Brady, 316 U.S. 455, 461–62 (1942) (addressing whether "the petitioner's conviction and sentence [was] . . . without due process of law, in violation of the Fourteenth Amendment, because of the [state] court's refusal to appoint counsel at this request").

151. See Escobedo v. Illinois, 378 U.S. 478, 488 (1964) (holding that the Sixth Amendment right to counsel attaches when police focus on a suspect, the suspect is in custody, and custodial interrogation has commenced); Massiah v. United States, 377 U.S. 201, 207 (1964) (holding that the government may not elicit incriminating statements from a defendant after the Sixth Amendment right to counsel has attached). The Supreme Court decided both cases, precursors to Miranda v. Arizona, 384 U.S. 436 (1966), months before Congress finally enacted the CJA. See Pub. L. No. 455, 78 Stat. 552 (1964).

152. 312 U.S. 275, 286–87 (1941); cf. Cooke v. Swope, 28 F. Supp. 492, 494 (W.D. Wa. 1939) ("There is no requirement that counsel represent a defendant when he intends to enter a plea of guilty . . . . [The plea] is tantamount to a waiver . . . .").

153. Brief for the United States at 48, *Walker*, 312 U.S. 275 (No. 173), 1941 WL 53297 (noting that "in 1938 and 1939 more than 70,000 pleas of guilty were filed in federal courts and 38,000 for the year ending June 30, 1940").

154. *Walker*, 312 U.S. at 286 (footnotes omitted); see also Williams v. Kaiser, 323 U.S. 471, 475–76 (1945) (explaining in the context of habeas petition challenging state conviction that Powell's "observations" about the difficulty an unrepresented defendant faces "are as pertinent in connection with the accused's plea as they are in the conduct of a trial").

the "protecting duty" *Johnson* had located in the district courts required of these courts in order for a defendant to waive the right.[155] In *Von Moltke v. Gillies*,[156] a high-profile espionage case, Justice Black authored an opinion for a plurality of the Court introducing an early version of today's *Faretta* hearing,[157] establishing that "[t]o discharge this [protecting] duty . . . a judge must investigate as long and as thoroughly as the circumstances of the case before him demand."[158]

The Court's expansion of early effective assistance of counsel doctrine—what the Court at times referred to as "effective appointment of counsel"[159]—also suggested that district courts needed to ensure that appointed counsel spent more time on increasingly required representation. Building on *Powell*,[160] the Supreme Court emphasized across a series of cases involving state and federal defendants in the 1940s that trial courts had to do more than provide a "mere formal appointment" of counsel.[161] Appointed lawyers needed to be able to "confer, . . . consult with the accused and . . . prepare his defense."[162] That meant both opportunity[163] and time[164] for appointed lawyers to provide clients with some measure of representation. Although the Court established no clear test against which to determine when anything other than the most clearly inadequate appointments might fall short,[165] this early doctrine still gave district courts

155. The Court did, however, reject a rule that would have altogether prohibited defendants from waiving their right to an attorney. See Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942).

156. 332 U.S. 708 (1948).

157. A Faretta hearing is a criminal proceeding to determine whether a defendant can waive the right to counsel. The requirements for waiver were established in Faretta v. California, 422 U.S. 806, 835–36 (1975).

158. *Von Moltke*, 332 U.S. at 723–24.

159. Glasser v. United States, 315 U.S. 60, 70 (1942) (citing Powell v. Alabama, 287 U.S. 45, 71 (1932)).

160. For a consideration of pre-*Powell* effective assistance of counsel doctrine in the state courts, see generally Sara Mayeux, Ineffective Assistance of Counsel Before *Powell v. Alabama*: Lessons From History for the Future of the Right to Counsel, 99 Iowa L. Rev. 2161 (2014).

161. Avery v. Alabama, 308 U.S. 444, 446 (1940); see also Hawk v. Olson, 326 U.S. 271, 277–78 (1945) (holding that "denial of opportunity to consult with counsel on any material step . . . violates the Fourteenth Amendment").

162. *Avery*, 308 U.S. at 446.

163. See, e.g., *Glasser*, 315 U.S. at 70 ("[W]e [are] clear that the 'Assistance of Counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests."); Mitchell v. United States, 259 F.2d 787, 790 (D.C. Cir. 1958) (summarizing effective assistance case law at the time).

164. See, e.g., Von Moltke v. Gillies, 332 U.S. 708, 722 (1948) (rejecting an argument that the trial court's appointment at arraignment of a "reluctant" lawyer in the courtroom "when promised by the judge that it would take only two or three minutes to perform his duty" made defendant's waiver of right to counsel constitutionally sound).

165. See, e.g., *Mitchell*, 259 F.2d at 790–92 (describing appellate court tests for inadequate assistance of counsel).

the impression that some actual representation was expected of the lawyers they appointed, as the next Part discusses.

The Federal Rules of Criminal Procedure, which went into effect in 1946, supplemented the Court's right to counsel decisions.[166] Four of the new rules directly related to trial courts' responsibilities vis-à-vis indigent defendants. Rules 5 and 44 sought to implement the right to counsel doctrine established by *Johnson* and the Court's subsequent decisions, requiring district court judges to "advise [a defendant without a lawyer] 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."[167] Rules 15(c) and 17(b) extended the limited statutory provisions by which indigent defendants and their lawyers could depose or subpoena witnesses at government expense,[168] providing the only mechanisms under which defense counsel could be reimbursed for some costs of representation.

Together, the cases and the federal rules of criminal procedure filled in the regulatory outline *Johnson* had traced for the federal courts. One target was clearly federal law enforcement and federal prosecutors. *Johnson* had noted the presence of the professional prosecutor;[169] in *Walker*, *Von Moltke*, and a number of other decisions, the Court directly pushed back against undue coercion by prosecutors or federal law enforcement that the Court believed had undermined the integrity of the judicial process.[170] But

166. See George H. Dession, The New Federal Rules of Criminal Procedure: I, 55 Yale L.J. 694, 714 (1946) (discussing the right to counsel as codified in Rule 5(b)–(c)).

167. Fed. R. Crim. P. 44; see also Fed. Fr. Crim. P. 5; Fed. R. Crim. P. 44 advisory committee's note on 1944 rules ("This rule is a restatement of existing law in regard to the defendant's constitutional right of counsel as defined in recent judicial decisions.").

168. Fed. R. Crim. P. 15(c) ("If it appears that a defendant at whose instance a deposition is to be taken cannot bear the expense thereof, the court may direct that the expenses of travel and subsistence of the defendant's attorney for attendance at the examination shall be paid by the government."); Fed. R. Crim. P. 17(b) ("The court or a judge thereof may order at any time that a subpoena be issued upon motion or request of an indigent defendant."); see also Greenwell v. United States, 317 F.2d 108, 111–13 (D.C. Cir. 1963) (Reed, J., dissenting) (discussing the origin of the rules and Congress's and the federal courts' sympathy with the financial burden imposed on counsel preparing for indigent defense).

169. See Nicholas R. Parrillo, Against the Profit Motive: The Salary Revolution in American Government, 1780–1940, at 255–94 (2013) (describing the history of the rise of salaried prosecutors and Congress's decision to convert the U.S. attorneys to a salary model in 1896).

170. The most notable case during the early inter-right period involving the Supreme Court's efforts to check Executive Branch coercion was *McNabb v. United States*, in which the Court exercised "its supervisory authority over the administration of criminal justice in the federal courts" to bar district courts from admitting improperly obtained evidence. 318 U.S. 332, 341 (1943); see also Waley v. Johnston, 316 U.S. 101, 104–05 (1942) (ordering habeas hearing to consider allegations that intimidation and threats from an FBI agent led to coerced confession); Sara Sun Beale, Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts, 84 Colum. L.

the primary targets of the regulatory regime were the district courts themselves, which actually had to provide the counsel to fulfill *Johnson*'s mandate.

III. THE VALUE OF THE INTER-RIGHT ENFORCEMENT REGIME

This Part considers the resources the judiciary created for the right to counsel without funding—and without issuing an order mandating funding or, with one exception from the very end of the inter-right period,[171] throwing out indictments for lack of funding. It does so across two dimensions: first, the actual defense litigation resources the judiciary and the bar generated for representation and, second, the contribution that the judiciary, through its enforcement efforts and growing administrative power, made to secure funding for the right to counsel through an appropriation.

A. *Adjudication Value*

Across the inter-right period, federal district court judges appointed lawyers for tens of thousands, and perhaps even hundreds of thousands, of individual defendants.[172] For many of the individual defendants who came before the federal courts, the right to counsel may have been "merely an empty gesture," as James Bennett, the longtime director of the Bureau of Prisons, charged in 1949.[173] But for district court judges, who were enforcing the right through individual appointments of unpaid lawyers and devising new systems to facilitate those appointments, the right to counsel added up.

1. *Value of an Individual Right.* — For the poor defendants who were newly minted rightsholders, the results of the judiciary's efforts across the inter-right period were mixed. Judges retained a high degree of discretion, and unfunded appointments only went so far, as the lack of funding imposed a set of significant, and unsurprising, constraints on whether defendants even got a lawyer in the first place, the quality of representation defendants received, and the effects of appointed counsel on guilty pleas.

Take, for instance, whether defendants received representation at all. *Johnson* and its progeny sought to ensure poor defendants who wanted a lawyer could have one; out was the old discretionary practice, in were increasingly stringent waiver rules designed to guarantee that defendants knew of their new right. In theory, the higher the bar for waiver, the more

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Rev. 1433, 1445 (1984) ("[T]he *McNabb* Court sought to disassociate the federal courts from the unlawful investigative techniques that have been employed in that case and many others.").

171. See United States v. Germany, 32 F.R.D. 421 (M.D. Ala. 1963) (dismissing an indictment for lack of funding for defense counsel expenses).

172. See infra notes 222–224 and accompanying text.

173. James V. Bennett, To Secure the Right to Counsel, 32 J. Am. Jud. Soc'y 177, 177 (1949).

frequently district court judges would need to appoint counsel. But, in practice, judges adopted their own forms of foot-dragging. Early in the inter-right period, for example, some judges only begrudgingly moved toward affirmatively advising defendants about the right to counsel to the same extent Supreme Court cases indicated they should.[174]

Throughout the inter-right period, many judges likely used waiver to modulate when they appointed counsel. The most comprehensive evidence comes from two prominent surveys of district court judges' appointment of counsel from the end of the inter-right period—one prepared by Attorney General Robert Kennedy's Committee on Poverty and the Administration of Federal Criminal Justice under the leadership of Francis Allen, a law professor at the time at the University of Michigan (the Allen Report); the other by student editors of the *Harvard Law Review* based on surveys and interviews of federal district court judges.[175] Both found stark disparities in waiver rates across districts. According to the *Harvard Law Review* survey, for instance, district courts in the District of Wyoming and the Eastern and Southern Districts of Texas reported that between 81 and 100% of all indigent defendants *waived* the right to counsel;[176] by contrast, "in about half the districts," and especially in districts with higher volumes of criminal cases in which judges were likely to have developed more formal appointment mechanisms,[177] "less than twenty per cent waive[d]."[178]

Or consider the quality of representation indigent defendants received from the lawyers appointed to represent them. Some defendants received high-quality representation from their appointed counsel.[179] After *Johnson*, a number of judges described instances of experienced lawyers providing high-quality services to the poor defendants they represented. Indeed, 90% of the judges who responded to the *Harvard*

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174. See, e.g., United States v. Christakos, 83 F. Supp. 521, 524–26 (N.D. Ala. 1949) (resisting the Supreme Court's "'judge as lawyer' test" that would make it "the responsibility of the judge, before approving a waiver of counsel, to advise the accused" about factors like the nature of the charges, the sentencing range, and possible defenses).

175. See supra note 28.

176. Havighurst & MacDougall, supra note 28, at 584 n.17 (1963). Beyond limited access to lawyers in rural stretches of Wyoming or Texas, an additional factor may have contributed to low appointment rates in the Eastern and Southern Districts of Texas: These districts handled a disproportionately high number of cases involving defendants charged with immigration related offenses, which district court judges may well have treated as the type of dead-to-rights case in which there was no need to appoint a lawyer. See Charles L. Zelden, Justice Lies in the District 192–93 (1993) (documenting the significant number of illegal immigration suits brought in the early 1950s).

177. See Havighurst & MacDougall, supra note 28, at 584 ("[T]he percentage [of defendants who waive the right to counsel] tends to be low in districts with a very large volume of criminal business.").

178. Id. at 584 & n.17.

179. See Holtzoff, supra note 101, at 17 ("There is a growing salutary tendency to appoint experienced lawyers to represent impecunious prisoners, especially in . . . grave offenses . . . .").

Law Review's 1963 survey reported that they thought the representation provided by appointed counsel was at least "adequate."[180]

But adequacy was also almost certainly in the eye of the beholder. Judges had strong incentives to believe that the lawyers they appointed served defendants well. The representation reflected the judge who had secured the lawyers' services. As Judge Bolitha Laws told a congressional committee, "I get any number of complaints, as the chief judge of the court, about the services of some of these appointed counsel, and that poses a problem because we feel quite loyal to those young men. They have worked hard. Some of them have done very well."[181] And, as effective assistance doctrine evolved during the inter-right period, inadequacy in a constitutional sense threatened the soundness of the pleas and convictions these same judges presided over.[182]

In practice, high-quality representation was probably the exception, especially for defendants who pleaded guilty.[183] As the *Harvard Law Review* noted in assessing judges' self-reported satisfaction with the quality of representation, "there were indications in the interviews [of judges and assigned lawyers] that . . . a hurried ten-minute conference in a corner of the courtroom is often the sole prelude to a guilty plea."[184] Judges and commentators contemporaneously recognized that the quality of representation supplied by unpaid appointments often resembled something much closer to a "mere formal appointment"[185] than even the then-inchoate views of what qualified as "effective" assistance of counsel. As Warren Olney III, Chandler's successor as director of the Administrative Office, bluntly put it in written testimony on behalf of the Judicial

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180. Havighurst & MacDougall, supra note 28, at 582–83.

181. Representation of Indigent Defendants in Federal Criminal Cases: Hearing on H.R. 398 and H.R. 2091 Before Subcomm. No. 4 of the Comm. on the Judiciary, 83d Cong. 60 (1954) [hereinafter 1954 Hearing on H.R. 398 and H.R. 2091] (statement of Bolitha Laws, Chief Judge, U.S. Dist. Ct. for the Dist. of D.C.).

182. See Letter From Eugene Rice to Orie L. Phillips (Feb. 14, 1948) (on file with the *Columbia Law Review*) [hereinafter Rice to Phillips, Feb. 14, 1948] (expressing concern that claims of ineffective assistance of counsel were growing yet judges did not have adequate appointment systems or resources).

183. See, e.g., J. Edward Lumbard, Better Lawyers for Our Criminal Courts, The Atlantic (June 1964), https://www.theatlantic.com/magazine/archive/1964/06/better-lawyers-for-our-criminal-courts/658718/ (on file with the *Columbia Law Review*) ("All too seldom are first-rate lawyers assigned in important cases. . . . I know of no such assignments since 1942."). In general, the proper comparator for appointed counsel probably wasn't the best lawyer money could buy but the quality of the lawyer someone just above indigency could secure with funds. See Allen Report, supra note 28, at 22 (describing interview results suggesting "that the representation afforded by [an] assigned lawyer is of considerably higher quality than that which the accused with some, but limited, means [could] obtain from privately employed counsel," but noting that "only on rare occasions do assigned counsel . . . contest the guilt of their clients").

184. Havighurst & MacDougall, supra note 28, at 588–89.

185. Avery v. Alabama, 308 U.S. 444, 446 (1940).

Conference in 1959, "the voluntary, uncompensated counsel is representation in form only—barely more than window dressing."[186]

Across the board, judges tended to appoint young and inexperienced lawyers, generally on the grounds that newer lawyers would benefit from the practice opportunity and had less to lose from time spent on the representation, because they were likely to have less remunerative legal practices.[187] "[A] few districts," the *Harvard Law Review* reported, "use primarily persons admitted within the past year."[188] Most districts did not require "experience in criminal law" or "trial experience of any kind."[189]

There was, however, a "[m]ore fundamental" structural limitation than the quality of the lawyer appointed: "the conditions under which assigned counsel are required to operate, for these limit the effectiveness of the most proficient and experienced lawyers who participate in the defense of financially disadvantaged persons."[190] Whoever they were, appointed lawyers would suffer the opportunity cost of the time not representing their paying clients *and* have to pay for expenses they incurred.[191] As a result, trial preparation and long trials alike were onerous. The standard fare of investigating and preparing cases, like traveling to witnesses, retaining experts, and reviewing documents, were all out-of-pocket expenses for which lawyers would not be reimbursed.[192]

Judges, prosecutors, and appointed lawyers sought workarounds. As the Allen Report noted, for instance, "[w]e have encountered numerous examples of assistance and co-operation extended to appointed counsel."[193] In some circumstances, judges tried to help secure resources

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186. Representation for Indigent Defendants in the Federal Courts: Hearings on H.R. 4185, H.R. 4609, H.R. 6864, and H.R. 2271 Before Subcomm. No. 2 of the H. Comm. on the Judiciary, 86th Cong. 163 (1959).

187. See Havighurst & MacDougall, supra note 28, at 596 ("A prominent defect is the dependence upon young, inexperienced lawyers for all but the most difficult or serious cases."); Letter From T. Blake Kennedy to Henry P. Chandler (Nov. 17, 1944) (on file with the *Columbia Law Review*) [hereinafter Kennedy to Chandler, Nov. 17, 1944] (explaining a Wyoming district court judge's description of the practice of appointing experienced members of the bar "in some important cases" but relying on new lawyers for less serious cases, in part so that they "get[] familiar with Federal practice").

188. Havighurst & MacDougall, supra note 28, at 583.

189. Id.; see also Allen Report, supra note 28, at 25–26 (describing how young lawyers and law students volunteered in the D.C. legal aid program).

190. Allen Report, supra note 28, at 30–31.

191. Some experienced lawyers reported that they were unwilling to rely on Federal Rule of Criminal Procedure 17 to issue court-funded subpoenas, "since it forces a form of discovery of the defendant's case" by requiring a motion "show[ing] that the evidence of the witness is material to the defense." Id. at 32.

192. See, e.g., United States v. Germany, 32 F.R.D. 421, 424 (M.D. Ala. 1963) (noting "the failure and refusal on the part of the United States to . . . reimburse court-appointed defense counsel for the reasonable and necessary expenses").

193. Allen Report, supra note 28, at 33.

for lawyers.[194] In a case that made immediate waves in 1963,[195] from the very end of the inter-right period, Judge Frank Johnson, then a district court judge in the Middle District of Alabama, went so far as to throw out an indictment after the Department of Justice refused to comply with the Court's order that the government provide the defendant's appointed counsel with the funds necessary to travel to interview a witness.[196] "[W]hat constitutes effective assistance of counsel," Johnson wrote, "implies something more than 'time.' . . . [It requires] funds to pay the necessary and essential expenses of interviewing the material witnesses and in viewing the scene of the alleged crime."[197] Johnson concluded his opinion by quoting a letter to the Department of Justice from Warren Olney, the director of the Administrative Office at the time, in which Olney wrote that he "agree[d] with Judge Johnson that the 'effective assistance of counsel' mandate of the Constitution would require that the United States reimburse a court-appointed attorney for expenses incurred in the representation of an indigent."[198]

But Johnson's decision was unusual. Appointed lawyers often simply did not—or could not—meaningfully prepare or investigate their cases.[199] And judges expressed significant reservations about compelling them to do so. As Curtis Waller, a district court judge in Florida, described in a letter to Alexander Holtzoff in 1942,

> It frequently happens that the Court will appoint the same attorney to look after half a dozen different defendants in a session of the Court and within the space of a week's time . . . . It is too much to ask uncompensated counsel, particularly in these days of rationing, to visit a prisoner across the State. The results, therefore, are: (a) The defendant is inadequately represented.

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194. See infra note 255 (describing efforts by Judge Charles J. McNamee to secure resources for a lengthy trial); see also Letter From Charles E. Wyzanski, Jr. to La Rue Brown (Oct. 21, 1955) (on file with the *Columbia Law Review*) (noting that when some lawyers were appointed as counsel, they believe themselves to be "entitled to some reciprocal favor from the judge, particularly in connection with appointments to receiverships or other lucrative positions").

195. Within months of the decision, Attorney General Robert Kennedy warned the congressional committee marking up the draft Criminal Justice Act that "[t]here are going to be cases thrown out all over the country if [*Johnson*'s decision] is followed and it makes a good deal of sense, I must admit." Geoffrey T. Cheshire, A History of the Criminal Justice Act of 1964, Fed. Law., Oct.–Nov. 2015, at 69, https://www.fedbar.org/wp-content/uploads/2015/10/CJA-History-pdf-1.pdf [https://perma.cc/WFH6-XNJT] (quoting Criminal Justice Act: Hearing on H.R. 1027, H.R. 3446, H.R. 3504, H.R. 4156, H.R. 4461, H.R. 4816, H.R. 5330, H.R. 5545, H.R. 5881, H.R. 5889, H.R. 6235, H.R. 6250, H.R. 6499, and H.R. 6765 Before Subcomm. No. 5 of the H. Comm. on the Judiciary, 88th Cong. 42 (1963) (statement of Robert F. Kennedy, Att'y. Gen.)).

196. *Germany*, 32 F.R.D. at 424–25.

197. Id. at 423.

198. Id. at 423 n.2 (internal quotation marks omitted) (quoting Letter From Warren Olney III to U.S. Dep't of Just. (Apr. 12, 1963)).

199. As Bennett asked, "[h]ow often can counsel with no funds . . . make the necessary investigations . . . ?" Bennett, supra note 173, at 178.

> (b) Material witnesses are not produced. (c) Attorneys are imposed on. (d) Trials are delayed or sessions of the Court unduly prolonged.[200]

Judge James F. T. O'Connor, of the Southern District of California, described the challenge in similar terms in 1944: "Counsel appointed by the court, in addition to donating their time to the actual trial, sometimes lasting more than several days, cannot reasonably be expected to spend additional time and their own money in the preparation of the trial . . . ."[201] So, O'Connor concluded, district court judges adopted "expedients . . . to afford indigent defendants in criminal cases adequate protection—and I use the word 'adequate' advisedly—in the defense of their rights."[202]

At the end of the inter-right period, according to the *Harvard Law Review*, the "speedy disposition of the case seems a prime objective of many [appointed] panel attorneys, who want to confine their services to arraignment day and to avoid spending additional time in investigation, consultation with the defendant, or trial."[203] The Allen Report further notes that, if a defendant went to trial, then "the absence of such resources handicaps conduct of the defense."[204] Perhaps more damning, "in some cases assigned counsel is induced to advise a plea of guilty because he is aware that the resources adequate to challenge abuse of authority or the government's accusation are lacking."[205]

That appointed counsel would induce their clients to plead guilty rather than press potentially meritorious claims raised a particularly serious challenge to the unfunded nature of the appointments, suggesting that, in some instances, defendants might have been better off without their unpaid lawyers.[206] Based on a review of four districts' criminal dockets, the Allen Report concluded that "in all the districts studied, pleas of guilty are entered much more frequently by defendants with assigned counsel, than those represented by private counsel."[207] The most extreme disparity was in the Northern District of Illinois, where, in 1961, "75% of

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200. Letter From Curtis L. Waller to Alexander Holtzoff (July 29, 1942) (on file with the *Columbia Law Review*).

201. Letter From J.F.T. O'Connor to Henry P. Chandler (Dec. 13, 1944) (on file with the *Columbia Law Review*) [hereinafter O'Connor to Chandler, Dec. 13, 1944].

202. Id.

203. Havighurst & MacDougall, supra note 28, at 582.

204. Allen Report, supra note 28, at 31.

205. Id.

206. For a more detailed description of efforts by underpaid lawyers to use plea deals in the Massachusetts state court system in the 1970s, see Mayeux, What *Gideon* Did, supra note 6, at 69–72 (noting the "constant administrative turmoil within the Massachusetts Defenders Committee" and the "basic instability of the legal profession's efforts to graft longstanding charitable understandings of indigent defense").

207. Allen Report, supra note 28, at 34. The *Harvard Law Review* survey reported similar findings based on self-reported responses. See Havighurst & MacDougall, supra note 28, at 583 ("Thirty-eight per cent of those responding to the questionnaire indicated that assigned counsel entered proportionately more guilty pleas than retained counsel . . . .").

all defendants represented by assigned counsel" pleaded guilty compared to "20% in cases represented by private counsel."[208]

The limited data from the period don't allow for systematic comparisons based on counsel status,[209] but a variety of factors likely caused these disparities. Much of the gap may have had less to do with the lack of funding or the quality of representation and more with selection effects based on the types of charges poor defendants tended to face.[210] Indeed, unrepresented defendants, who likely had a similar case profile to those with appointed counsel, virtually always pleaded guilty. Defendants in immigration-related offenses, which, at their peak between 1951 and 1954, made up more than a third of the federal courts' criminal docket, rarely had appointed counsel—likely in part because of the racism of the judges in those districts[211]—and had far and away the highest plea rates among reported federal case types.[212] As immigration cases fell, overall plea rates fell across the end of the inter-right period.[213]

But lawyers also had strong incentives to avoid time-intensive cases. As an American Bar Association committee report from the early 1940s stated in support of early legislative efforts to fund defense counsel, "[s]ince

208. Allen Report, supra note 28, at 34. A contemporaneous study of state appointments found similar disparities between assigned and retained counsel. Lee Silverstein, 1 Defense of the Poor in Criminal Cases in American State Courts: A Field Study and Report 22–24 (1965) (reporting plea rate disparities based on a docket analysis across a sample of eighty-one counties that used various assignment schemes).

209. Ideally, for instance, data would allow for comparisons in plea rates between defendants who waived counsel and those with appointed counsel, as well as between defendants with appointed counsel and defendants who were just above indigency and had purchased low-cost counsel. Unfortunately, the Administrative Office appears to have only begun trying to estimate the number of appointments during the 1940s, and then only sporadically. See W. H. Speck, Admin. Off., U.S. Cts., Bills to Improve Representation by Counsel for Indigent Defendants in the Federal Courts 8 (Aug. 26, 1949) (on file with the *Columbia Law Review*) (using survey responses from only twenty-five district court clerks to predict appointment needs for budget estimates); see also 1954 Hearing on H.R. 398 and H.R. 2091, supra note 181, at 23 (statement of Herbert Brownell, Jr., Att'y Gen.) ("We haven't any up-to-date figures, I am sorry to say, on the number of assignments."). Plea data was also generally not compiled systematically until the 1960s. See Schulhofer, supra note 84, at 1063 (noting that "statistics prior to [the 1960s] were not compiled systematically").

210. See Allen Report, supra note 28, at 33 ("[F]inancial status may determine in large measure what sorts of offenses an individual will commit and the circumstances in which he will commit them."); Havighurst & MacDougall, supra note 28, at 583 ("The variation [in plea rates] rests in part on the fact that many indigents are involved in such crimes as violation of the Dyer Act, forgery of signatures on government checks, and illegal use of narcotics . . . ." (footnote omitted)).

211. See Havighurst & MacDougall, supra note 28, at 584 & n.17 (noting high waiver rates in the Eastern and Southern Districts of Texas).

212. See Ronald F. Wright, Federal Criminal Workload, Guilty Pleas, and Acquittals: Statistical Background 10 (2005), https://ssrn.com/abstract=809124 [https://perma.cc/WB4H-9FG5] [hereinafter Wright, Federal Criminal Workload].

213. Ronald F. Wright, Trial Distortion and the End of Innocence in Federal Criminal Justice, 154 U. Pa. L. Rev. 79, 122–23 (2005) [hereinafter Wright, Trial Distortion] ("The longest sustained rise in federal criminal trial rates happened between 1951 and 1971.").

Shakespeare's time[,] 'the breath of an unfee'd lawyer' has been notorious as a depreciated commodity"—not because of "the profession," the ABA charitably noted of its own members, "but merely due [to the] recognition of harsh realities" of the lack of compensation.[214] If minimizing time investigating or preparing for a case offered a means to cap a lawyer's losses from an uncompensated appointment, pleas offered a possible release valve. In a broadside against the deficiencies of unfunded appointments, James Bennett, the Bureau of Prisons director, quoted a letter he'd received recounting the experience of a defendant with four years of schooling who claimed to have pleaded guilty based on the advice of counsel "to something that I was not aware of": "When I was judged," the incarcerated man recounted, "I was asked by my attorney to plead guilty. Please believe me. I didn't know, nor did anyone explain to me, the meaning of pleading guilty."[215]

2. *Value of the Right in the Aggregate.* — The quality of unfunded counsel was often quite poor, but the volume of appointments—including meaningful appointments—compounded over time. Judicial appointments of counsel were not one-off events but a matter of scale. Despite the variable quality of the representation those lawyers provided, the judiciary's efforts to enforce the right meant that more defendants received representation than they otherwise would have, and there was more defense litigation than there otherwise would have been.

The inter-right period began shortly after the repeal of prohibition, which had radically transformed the federal judiciary[216] and the scope of federal criminal adjudications. Between 1917 and 1932, the annual number of criminal cases terminated in federal courts increased by 845%, from 11,335 cases to more than 95,000 cases,[217] causing judges to complain that their courtrooms had become "police courts."[218] Although federal criminal caseloads fell following repeal, they never returned to pre-prohibition numbers, as Congress expanded federal criminal jurisdiction over crimes like bank robbery, robbery affecting interstate commerce, and newly created regulatory offenses.[219] In 1940, for example, there were 33,401 cases

214. Letter From Harrison Tweed to Henry P. Chandler (Dec. 15, 1944) (on file with the *Columbia Law Review*).

215. Bennett, supra note 173, at 178 (internal quotation marks omitted).

216. In response to spiking caseloads, Congress added more than one hundred federal judges between 1920 and 1940. Maggie Gardner, District Court En Bancs, 90 Fordham L. Rev. 1541, 1561–62 (2022).

217. Wright, Federal Criminal Workload, supra note 212, at 6.

218. Henry P. Chandler, Some Major Advances in the Federal Judicial System 1922–1947, 31 F.R.D. 307, 341 (1962); see also John C. Knox, A Judge Comes of Age 157 (1940) ("The courts came to be so overwhelmed with [prohibition] work that we were forced, in order to clear the dockets of the enormous accumulation, to hold 'bargain days' in which almost any one who would plead guilty would be let off with some trifling fine.").

219. Sara Sun Beale, Federalizing Crime: Assessing the Impact on the Federal Courts, 543 Annals Am. Acad. Pol. & Soc. Sci. 39, 42 (1996). Throughout the inter-right period, federal criminal cases also likely comprised a larger share of overall (federal and state)

commenced in federal court; in 1964, there were just over 28,000.[220] Additionally, at least some of the overall decline in caseloads was offset by an increase in the intensiveness of most cases. As more complicated offenses like auto-theft replaced alcohol-related cases, and as the federal judiciary imposed more criminal procedural protections, fewer cases plead, more cases went to trial, and trials lasted longer.[221]

The combination of case volume and *Johnson*'s creation of the right—and the extension of the requirements surrounding the right—meant that the judiciary had to supply lawyers for a significant number of defendants. In 1958, for instance, the Administrative Office estimated that by then roughly 20% of all federal defendants, or around seven thousand defendants, were receiving appointed counsel per year.[222] By the end of the inter-right period, the best estimates suggested that the judiciary was appointing lawyers for nearly a third of all federal defendants, or ten thousand defendants, every year.[223] Even that may have understated the scale of appointments—in a number of districts, more than half of all defendants received unpaid, court-appointed counsel.[224]

How much of that volume to attribute to the judiciary's efforts to enforce the right, rather than to other developments during the period, is difficult to pin down with any precision.[225] But a variety of factors suggest that some, if

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criminal cases than today. See supra note 26. Between 1938 and 1964, for instance, admissions to federal penitentiaries accounted for around 20% of all prison sentences—and peaked at over 33%. Langan, supra note 26, at 5. Over the past few years, admissions to federal prisons have made up around 10% of overall prison admissions in the United States. Carson & Kluckow, supra note 26, at 17.

220. Susan R. Klein & Ingrid B. Grobey, Debunking Claims of Over-Federalization of Criminal Law, 62 Emory L.J. 1 app. tbl.1-B at 82 (2012). Until 1980, Administrative Office-compiled case totals included petty offenses. Id.

221. See Wright, Trial Distortion, supra note 213, at 122–23 (discussing an increase in trial rate, an increase in trial length, and a decrease in guilty pleas between 1951 and 1971).

222. Letter From Will Shafroth to John Biggs (June 23, 1958) (on file with the *Columbia Law Review*).

223. See Allen Report, supra note 28, at 19 (noting that in 1961, counsel was assigned to 29.3% of criminal defendants whose cases were disposed of in federal courts that year); see also David E. Patton, Federal Public Defense in an Age of Inquisition, 122 Yale L.J. 2578, 2586 (2013) [hereinafter Patton, Federal Public Defense] (explaining that around 30% of defendants, or about 10,000 people per year, received appointed counsel at this time). Today, the judiciary provides representation to nearly 90% of all federal defendants. Defender Services—Annual Report 2024, U.S. Cts., https://www.uscourts.gov/data-news/reports/annual-reports/directors-annual-report/annual-report-2024/defender-services-annual-report-2024 [https://perma.cc/2QHJ-KJN4] (last visited Feb. 28, 2026).

224. See, e.g., Robert J. Kutak, The Criminal Justice Act of 1964, 44 Neb. L. Rev. 703, 706 n.12 (1965) (giving statistics from the District of Nebraska showing that the rate of defendants with appointed counsel grew from under 40% in 1960 to over 50% in 1961 and 1962).

225. A variety of concurrent developments may have contributed to an increase in representation. As Sara Mayeux has documented, for example, the middle of the twentieth century was marked by a growing consensus within elite legal circles that greater provisions

not most, was the result of the shift from judges discretionarily determining when a combination of defendant-specific characteristics—like indigency, worthiness, and the gravity of the case—meant that counsel might be beneficial to indigency as the sole trigger for the counsel requirement.

Judges said as much.[226] For example, in 1948, Judge Eugene Rice of the Eastern District of Oklahoma wrote to Henry Chandler that "the Chief Justice . . . ought to realize that the decisions of [the Supreme Court] are the cause of the constant necessity of calling upon the legal profession to assist indigent litigants."[227] So, according to Rice, "I believe that it is now necessary to call upon attorneys from three to five times as frequently as I formerly did," even though "the number of criminal cases now handled is about one-third of what it was formerly."[228] In a separate letter to Eighth Circuit Judge Orie Phillips, Rice wrote:

> The more opinions of the Supreme Court that I read stressing the importance of the appointment of counsel in criminal cases has about convinced me that the judge who wants to be safe should appoint counsel to represent every man charged with a felony, and appoint in ample time to advise with the defendant and in ample time to make whatever preparation for trial is necessary. More and more the term "effective counsel" is finding its way in the opinions and is being used by those seeking relief under writs of habeas corpus.[229]

Judge Fred Wham, of the Eastern District of Illinois, expressed a similar view to Chandler a year later, writing that "[t]he emphasis laid by the . . . Supreme Court upon the importance of competent representation and the utter invalidity of sentences imposed without such representation, unless competently waived, makes it plain that some provision better than we now have should be made to achieve" effective representation.[230]

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needed to be made for criminal defense. See Mayeux, Free Justice, supra note 24, at 80–85 (discussing the Warren Court's "special concern for criminal defendants" alongside efforts by donors and lawyers to fund provision of counsel). Additionally, the end of World War II heightened the prominence of individual rights, as did the successes of the Civil Rights Movement. For an overview of evolving conception of rights in that period, see generally Richard A. Primus, The American Language of Rights (1999).

226. See James M. Proctor, E. Barrett Prettyman, James A. Cobb, James R. Kirkland & Frederick A. Ballard, Third Report of the Committee on Assignment of Counsel to the Judicial Conference of 1943, at 1 (on file with the *Columbia Law Review*) [hereinafter Proctor 1943 Report] (describing an increase in appointment rates "from 26% to 41% of persons indicted" in the District of Columbia as arising from "the greater care of judges, due to recent decisions of the Supreme Court" and the "favorable impression of the prisoners" of appointed counsel).

227. Letter From Eugene Rice to Henry P. Chandler (Mar. 20, 1948) (on file with the *Columbia Law Review*).

228. Id. "No doubt the answer of the Supreme Court to that is that I should have been using attorneys all the time, but District Judges generally, I think, were not impressed with the necessity of appointing a lawyer in every case." Id.

229. Rice to Phillips, Feb. 14, 1948, supra note 182.

230. Letter From Fred L. Wham to Henry P. Chandler (May 9, 1949) (on file with the *Columbia Law Review*). Wham went on to write that "[s]everal appearances on the part of the attorney representing the defendant may be necessary, even in a case disposed of on a plea of guilty." Id.

There were also signals from the bar. Elite views were coalescing around the need to provide services to indigent defendants,[231] but, at the same time, the federal judiciary pressed more lawyers, and more out of those lawyers, than the bar would freely have given. As noted, judges worked to limit the demands made of uncompensated lawyers. But they still often required lawyers to serve in circumstances well beyond those which the lawyers would otherwise have volunteered their time and resources.[232] Judges routinely noted the hardship to the bar occasioned by the unfunded appointments.[233] Some even registered the bar's displeasure with the burden being placed upon it. As Judge O'Connor noted of the lawyers in the Southern District of California whom he appointed, "[w]hile counsel . . . have usually accepted their gratuitous appointments graciously, it seems the majority of lawyers have been secretly reluctant to accept their appointments."[234]

3. *Value of the Appointment System.* — The challenge of supplying counsel to so many defendants led judges to generate another form of value: As the judiciary internalized the project of adjudicating criminal cases with newly established counsel requirements, judges helped to develop systems to do so more efficiently and effectively, which in turn contributed to more resources for defense litigation. These new methods tended to better distribute the burdens of representing defendants and to better involve more experienced attorneys; sometimes they even involved attorneys paid by charitable funds.

There was no universal, "organized method of assigning indigent's counsel" in federal district courts across the country.[235] Instead, appointments varied by district and judge. Many districts relied on an informal "catch-as-catch-can" model, in which judges simply assigned

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231. See Mayeux, Free Justice, supra note 24, at 88–89 (noting "a growing acceptance, among the highest echelon of the corporate bar, of public funding for criminal defense").

232. See, e.g., Letter From Ernest W. Gibson to Emanuel Celler (Oct. 13, 1959) (on file with the *Columbia Law Review*) [hereinafter Gibson to Celler, Oct. 13, 1959] ("I try not to just assign young, new lawyers but to assign . . . older and experienced trial lawyers. It is tough on them and . . . on the court. In many cases they have not been able to be reimbursed a considerable amount of expense money in investigating the charges.").

233. See, e.g., Letter From Henry P. Chandler to Augustus N. Hand (Feb. 17, 1944) (on file with the *Columbia Law Review*) (mentioning that judges raised "special hardships occasioned to attorneys, whom they had appointed to represent poor defendants, by their need to incur substantial expenses"); Rice to Phillips, Feb. 14, 1948, supra note 182 ("It is becoming a burden upon the members of the Bar here in Muskogee to respond to the request being made upon them by the court to act as attorney for an indigent defendant in a criminal case.").

234. O'Connor to Chandler, Dec. 13, 1944, supra note 201; see also Letter From J. Waties Waring to Henry P. Chandler (Nov. 29, 1944) (on file with the *Columbia Law Review*) ("I have rather frequent occasions to appoint attorneys to represent indigent parties in criminal cases and some times it is a great hardship on members of the bar. . . . I feel that some times I have imposed upon them.").

235. See A.A. DiS. & I.P.T., Legal Aid to Indigent Criminal Defendants in Philadelphia and New Jersey, 107 U. Pa. L. Rev. 812, 813 (1959).

lawyers who happened to be present in the courtroom to represent defendants.[236]

But, in a number of districts, the press of cases led judges to establish more systematic appointment schemes.[237] The simplest mechanism was to develop a list of all barred lawyers to make sure that defendants were at least somewhat evenly distributed across the local bar;[238] slightly more intensively, the district could maintain a "panel of volunteer[]" lawyers to ensure that enough lawyers were present at a given time.[239] In some jurisdictions, the lists or panels were maintained by the bar; in others, by judges or their clerks.[240] In the early 1950s in San Francisco and Des Moines, for example, district court judges developed panel systems to provide better lawyer coverage and more experienced attorneys.[241]

In some large cities, where there were more criminal defendants who needed counsel, judges developed particularly robust appointment systems. Judges in the District of Columbia moved especially quickly. As of the early 1940s, the district had a system in place that was providing appointed counsel to upwards of seven hundred defendants a year.[242] Under the leadership of Judge James M. Proctor, a committee of judges worked with the bar association to develop a list of lawyers—more than five hundred in 1943[243]—with the "dual aim to improve the service rendered an unfortunate class of our citizens, and to spread the duty of service more broadly and evenly among the members of our bar."[244] As Proctor reported to the D.C. Circuit's annual

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236. Id. at 817 (internal quotation marks omitted); see also id. at 818 n.51 (describing methods used in the District of New Jersey).

237. Federal prosecutors stepped in too. See Havighurst & MacDougall, supra note 28, at 582 ("In the Western District of Texas the panel seems to be informally organized by the United States Attorney . . . .").

238. See, e.g., Gibson to Celler, Oct. 13, 1959, supra note 232 ("What I try to do in this district is to run something akin to a K.P. record we used to have in the Army. I keep a sort of record of the assignment of lawyers to defend indigent criminals so that this duty will be apportioned fairly reasonably.").

239. Havighurst & MacDougall, supra note 28, at 582.

240. See, e.g., Letter from Will Shafroth to Sigmund J. Beck (Apr. 22, 1957) (on file with the *Columbia Law Review*) ("Each court has its own system and usually it is a simple one of maintaining a list of lawyers selected by the judge and then just going down the list. The judge may include all lawyers admitted to the federal district court or he may have a selected list.").

241. See George B. Harris, Lawyers Aid Criminal Indigents, *in* The Brief Case 21, 21 (Bar Ass'n of S.F. 1952) ("Such panel would consist of new and untried attorneys in large numbers and experienced attorneys in small numbers."); Charles Darlington, Acts to Assure Needy 'Experienced' Counsel, Des Moines Trib. (1951) (describing efforts by Judge William F. Riley in Des Moines, Idaho, to enlist experienced lawyers to provide representation to indigent defendants after state habeas petitioners "question[ed] the adequacy of their court-appointed counsel").

242. See Proctor 1943 Report, supra note 226, at 1 ("[A]ppointments were made by the District Court for 784 defendants in criminal cases.").

243. See id. ("Assignments were made from a prepared list of 703 active practitioners . . . . War conditions have reduced the list to 520.").

244. James M. Proctor, Appointment of Attorneys in Criminal and Civil Cases: Report by Justice Proctor for Joint Committee of Bar Associations to Judicial Conference, 1942, at 1 (on file with the *Columbia Law Review*) [hereinafter Proctor 1942 Report].

judicial conference, judges took pains "to assure selections in keeping with the nature of each case" and to "time appointments to suit the convenience of attorneys."[245] In particularly demanding cases, judges appointed multiple lawyers.[246] And the court maintained a "corps of leading lawyers with special qualifications" who "acted as consultants."[247] Proctor and his colleagues relied on a law clerk to manage "a program of this magnitude."[248]

In some cities that had voluntary defender or legal aid associations providing representation to state or local defendants, judges worked with the associations to offer services to federal criminal defendants. In 1947, for instance, federal judges in the Eastern District of Pennsylvania asked the Philadelphia Voluntary Defender Association to "extend[] its activities to the representation of destitute persons awaiting trial in the Federal court."[249]

During that same year, Chief Judge John Knox of the Southern District of New York appeared at the annual fundraiser of New York's Legal Aid Society to appeal for funds so that his district court could compensate appointed counsel.[250] Knox noted that the Society was asking for $250,000; with an extra $50,000, he told those gathered, the Society could also supply the defendants in his court with paid representation.[251] As he explained, without a lawyer, defendants who lost their cases "[would] henceforth condemn the courts, doubt their integrity and, generally speaking, be a disgruntled citizen."[252] But unpaid lawyers would not cure the problem, because defendants would often "have an apprehension that from the outset, the judicial cards are stacked against them."[253] As Orison Marden, the director of the Society, wrote later: "Spurred on by the authority and eloquence of Chief Judge Knox, lawyers and laymen alike co-operated to supply the organized facilities needed in his court."[254]

The result was a patchwork of systems.[255] But the presence of better and more formal appointment systems didn't simply improve the functioning of

245. Proctor 1943 Report, supra note 226, at 1.

246. See id. at 1 ("In some cases of unusual difficulty or importance, associate counsel have been appointed.").

247. Id.

248. Proctor 1942 Report, supra note 244, at 2; cf. Letter From Justin Miller to Henry P. Chandler (Mar. 26, 1943) (on file with the *Columbia Law Review*) (noting that "[t]he good lawyers" were "begin[ning] to protest against assignment" in the District of Columbia).

249. DiS & I.P.T., supra note 235, at 836–37 (internal quotation marks omitted) (quoting Phila. Voluntary Def. Ass'n, Statement for Community Chest (Jan. 15, 1955)).

250. See Excerpts From Address by Hon. John C. Knox, Legal Aid Rev., Apr. 1947 (on file with the *Columbia Law Review*).

251. Id.

252. Id.

253. Id.

254. Orison S. Marden, The Legal Aid Program: Help Must Come From the Judiciary, 42 ABA J. 141, 143 (1956).

255. As an example of more ad hoc judicial innovation: In 1953, at the height of the Cold War, federal prosecutors indicted eleven defendants in the Northern District of Ohio for violating the

the process; it also likely resulted in defendants receiving more and higher-quality representation.[256] And even in jurisdictions with informal systems, judges regularly triaged cases, appointing more experienced counsel to assist in complicated or serious matters that might involve long or intensive trials.[257]

Not all judicially created systems survived over the duration of the inter-right period. The D.C. system, for example, appears to have been largely defunct by 1954.[258] After Henry Chandler read a newspaper article celebrating Judge William F. Riley's organization of the Des Moines bar to provide more experienced lawyers to represent criminal defendants in his court, Chandler warned in correspondence he exchanged with Riley in 1951 that "in a number of large cities . . . [the] zeal [of the bar] sooner or later has waned and the service has deteriorated."[259] Perhaps, Chandler noted to Riley, the caseloads in Des Moines would not prove "so large," and the enthusiasm Riley had marshalled would be able to persist.[260] But, Chandler wrote in an earlier letter to Riley, instead of unpaid representation, "Sometime I hope that we can secure legislation which will provide for the payment of moderate compensation and reimbursement of expenses of lawyers rendering such service."[261]

B. *Advocacy Value*

Chandler's basic premise—that whatever equilibrium judges and the bar might be able to establish in a specific jurisdiction to supply defendants with counsel would be tested by time and by caseloads—animated broader

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Smith Act by conspiring to overthrow the government as communist agents. Most of the defendants proved unable to retain counsel on their own, so Judge Charles J. McNamee worked directly with the Cleveland Bar Association to secure representation for them for the lengthy pretrial process and trial. Ultimately, the five leading firms in Cleveland each supplied a lawyer, and the Bar Association raised the funds to cover the costs of a sixth. After a multi-month trial, Judge McNamee threw out the charges against one of the defendants, and four of the eleven defendants were acquitted by the jury. See Alan Kopit, In the Finest Tradition of American Democracy a Moral Force to Preserve the Right to Counsel, Cleveland Metro Bar Ass'n (May 17, 2023), https://www.clemetrobar.org/?pg=CMBABlog&blAction=showEntry&blogEntry=91541 [https://perma.cc/EG8R-9NZP].

256. See Havighurst & MacDougall, supra note 28, at 584 (noting that in several cities, including New York, "counsel [was] appointed in virtually every case"); supra notes 243–247 and accompanying text.

257. See Harris, supra note 241, at 44 (noting that experienced lawyers represent defendants in "complex matters and are always available to guide young attorneys in simpler cases").

258. See 1954 Hearing on H.R. 398 and H.R. 2091, supra note 181, at 66–70 (statement of James R. Kirkland, Judge, U.S. Dist. Ct. for D.C.) (describing the initial system as "ponderous" and discussing other efforts to provide counsel in district). An additional factor may have been the appointment of Judge Proctor to the D.C. Circuit in 1948, as Proctor had earlier taken the lead in organizing the District's counsel system. See supra notes 242–248 and accompanying text.

259. Letter From Henry P. Chandler to William F. Riley (Dec. 14, 1951) (on file with the *Columbia Law Review*).

260. Id.

261. Letter From Henry P. Chandler to William F. Riley (Nov. 30, 1951) (on file with the *Columbia Law Review*).

efforts by the judiciary during the inter-right period. While district court judges enforced the right to counsel to varying degrees in their own courtrooms, the judiciary as a whole organized itself to secure the power to pay the lawyers providing services, in the form of congressional legislation that would eventually become the landmark CJA.

The history of the CJA is generally told as the product of Executive Branch intervention, first in the form of then-Attorney General Robert Kennedy's efforts to establish the Allen Committee, which drafted the CJA, and later, the lobbying of the Attorney General and the White House to get the bill the Allen Committee proposed passed and signed.[262] Economic forces loomed large, too, as the post-War boom carried the United States to the cusp of President Johnson's Great Society programs.[263] As American wealth increased, so did funding for indigent services.[264] If the judiciary factors in at all, it is in a brief mention of the many Judicial Conference resolutions supporting funding and perhaps a sidenote on *Gideon*, which was decided the year before the passage of the CJA and helped to signal the CJA's convergence with the growing rights consciousness of the moment.[265]

But, throughout the period, and especially as the unfunded appointments mounted, the judiciary worked intensively to get funding for defense services.[266] Under the auspices of the Judicial Conference, judges and administrators studied how best to meet the demands of supplying counsel to poor defendants, organized around specific reforms, and engaged in extensive lobbying efforts.[267] Perhaps more importantly, through appointing so many lawyers, including elite members of the bar, district court judges fundamentally altered the political economy surrounding defense litigation funding.[268] Instead of presenting the issue as one of poor defendants' rights—a consistent loser from a political standpoint—judges and these new defense lawyers related funding to the functioning of the courts and the unfairness to the bar.[269]

At the start of the inter-right period, the judiciary largely played a secondary role to the Department of Justice in advocating for funds for

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262. See Cheshire, supra note 195, at 71–72 (describing the passage of the CJA).

263. See generally James T. Patterson, Grand Expectations: The United States, 1945–1974 (1996) (charting the progression from the post-war economic boom to President Johnson's eventual Great Society programs).

264. See Lisa J. McIntyre, The Public Defender: The Practice of Law in the Shadows of Repute 29 (1987) ("In 1951 a national survey counted only seven public defender organizations; by 1964 (a year after *Gideon*) the total had risen to 136 . . . .").

265. See Ossei-Owusu, Civil vs. Criminal Legal Aid, supra note 28, at 1582 (describing growing "warmness to social welfare" and "[a] Robert Kennedy–endorsed Department of Justice–sponsored report" as factors contributing to CJA enactment); Primus, Problematic Structure, supra note 24, at 212 ("Congress responded to *Gideon*'s judicial mandate by passing the Criminal Justice Act of 1964 . . . .").

266. See infra notes 273–295 and accompanying text.

267. See infra notes 270–299 and accompanying text.

268. See infra notes 301–312 and accompanying text.

269. See infra notes 283, 307–312 and accompanying text.

counsel. The first judicial effort to secure funding occurred just before *Johnson*, when, in 1937, the Judicial Conference adopted a resolution in favor of draft legislation that would create a public defender in some districts "with the provision [that] in exceptional cases," such as those involving a great amount of time and effort, "the Judge can make allowances."[270] The effort was halfhearted: It was then-Attorney General Homer Cummings who raised the issue and the pending legislation to the judges—in fact, Chief Justice Hughes had to ask Cummings to share the draft bill with the Conference.[271] And, in the first years after *Johnson*, even as the Judicial Conference continued to adopt resolutions supporting legislation, it was the Department of Justice, under Cummings and his successor as Attorney General, Robert Jackson, that led early advocacy efforts.[272]

But *Johnson* ratcheted up the urgency of securing funding and thrust the judiciary into a far more central role. In 1943, with the judiciary beginning to take advantage of its new administrative capacity[273]—and, in particular, the Administrative Office, which had been created in 1939—the Judicial Conference established a special committee "to consider the adequacy of existing provisions for the protection of the rights of indigent litigants in the federal courts" after *Johnson*.[274] Chaired by Second Circuit Judge Augustus Hand, and with heavy involvement from Henry Chandler, the Administrative Office's first director, in the spring and summer of 1944 the Committee surveyed district court judges, met with prominent members of the bar,[275] and prepared a report and draft legislation for the Judicial Conference's consideration.[276]

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270. 1937 Judicial Conference Minutes, supra note 43, at 255. Chief Justice Hughes initially suggested that the district court judges might already have the power to order some form of compensation. See id. at 253. ("Well, isn't there power? . . . Isn't there power?"). But his colleagues quickly corrected him. Id. ("Judge Groner: You have got to get the appropriation.").

271. Id. at 249.

272. See Fellman, supra note 149, at 597 (describing the 1941 Attorney General report as stating that "the office of public defender should be established in the federal courts" (internal quotation marks omitted) (quoting a 1941 Attorney General report)). As an additional indication of the lack of initial judicial input: In his early participation in drafting legislation, Chandler made clear that he was participating only in his personal capacity, not his official capacity. See Letter From Henry P. Chandler to Harrison Tweed (Jan. 12, 1942) (on file with the *Columbia Law Review*) ("I participated only personally . . . .").

273. For a description of the early ambitions of judicial administration, see Edward A. Purcell, Jr., Reconsidering the Frankfurterian Paradigm: Reflections on Histories of Lower Federal Courts, 24 Law & Soc. Inquiry 679, 684–85 (1999).

274. Augustus N. Hand, Otto Kerner, Guy K. Bard & Eugene Rice, Report of the Committee to Consider the Adequacy of Existing Provisions for the Protection of the Rights of Indigent Litigants in the Federal Courts 1 (1944) (on file with the *Columbia Law Review*). The other members of the committee were Judge Otto Kerner Jr. of the Seventh Circuit, Judge Guy K. Bard of the Eastern District of Pennsylvania, and Judge Eugene Rice of the Eastern District of Oklahoma. Id. at 10.

275. See id. at 5 (listing attendees of the April 1944 meeting and including Harrison Tweed, who served as the chairman of the American Bar Association's Committee on Legal Aid Work).

276. Id. at 1–10.

The Committee's report acknowledged the central challenge facing the judiciary with respect to enforcing the Sixth Amendment.[277] As the report put it,

> [W]hen the cases of poor persons needing defense become numerous and occur repeatedly, the voluntary and uncompensated services of counsel are not an adequate means of providing representation. To call on lawyers constantly for unpaid service is unfair to them, and any attempt to do so is almost bound to break down after a time.[278]

There would, the Report noted, "[p]robably always . . . be occasions to assign counsel to represent otherwise defenseless persons without compensation."[279] But, to provide representation effectively over time and at scale, the Committee's draft legislation provided for a "two-fold plan": the option for each district to appoint a salaried public defender, and, for districts in which no city had more than 500,000 inhabitants, the option to compensate appointed counsel instead.[280] After Chandler circulated a draft of the report to judges across the country, and the Committee received a mostly positive but "really very meagre" response from the judges,[281] the Judicial Conference voted to transmit the draft legislation to Congress.[282] The hope, Hand wrote in a private letter to Chandler in 1945, was "to put the thing"—the representation of indigent defendants—"on some sort of orderly basis."[283]

The judiciary's efforts initially yielded limited progress. As Hand and Chandler noted to each other, the immediate post-War period was an inauspicious moment for new funding legislation as austerity measures kicked in.[284] Additionally, the Committee's draft bill initially generated unexpected internal opposition: According to Hand, by the end of the decade, most district court judges had started to oppose having a public defender, preferring instead to be able to appoint attorneys of their choosing.[285] Still, throughout the 1940s and early 1950s, members of the

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277. Id. at 1–2.

278. Id. at 2.

279. Id.

280. Id. at 6–7.

281. Letter From Augustus N. Hand to Otto Kerner, Guy K. Bard & Eugene Rice (Sep. 8, 1945) (on file with the *Columbia Law Review*).

282. See Report of the Judicial Conference of the United States 21 (Sep. 1945), https://www.uscourts.gov/file/1571/download [https://perma.cc/VU69-Q52Y] (noting that the prior year, the Conference had "approved the bill recommended by the committee" with minor changes).

283. Letter From Augustus N. Hand to Henry P. Chandler (Nov. 15, 1945) (on file with the *Columbia Law Review*) [hereinafter Hand to Chandler, Nov. 15, 1945].

284. Letter From Henry P. Chandler to Augustus N. Hand (Aug. 14, 1946) (on file with the *Columbia Law Review*) ("I cannot be too sanguine [about enactment] because of the cost involved.").

285. See Hand to Chandler, Nov. 15, 1945, supra note 283 ("[D]istrict judges feel they are being deprived of a prerogative where they do not have the power to assign counsel.").

committee worked to shore up support within judicial ranks and more broadly, including with members of the bar, congressional representatives, and a series of attorneys general.[286]

Over time, judicial efforts gained traction. In 1952, the Judicial Conference "directed that every effort be made to procure from the next Congress remedial legislation" along the lines of what the Hand Committee had proposed because "the lack of any provision at the present time for compensating or even reimbursing the expenses of counsel appointed by the court to defend poor persons accused of crime, was a serious defect in the Federal judicial system."[287] In January and February of 1954, although the Committee's work had effectively lapsed with the deaths of half of its members,[288] Chandler organized an entire House Judiciary subcommittee hearing on the issue after he learned that the House had again taken up legislation that would provide funding.[289] Chandler and his aides developed, vetted, and invited a list of judges and members of the bar to testify in support of funding; as their "first witness," they secured then-Attorney General Herbert Brownell, Jr.,[290] who had become "interested in the matter at the Judicial Conference of the Fourth Circuit" in 1953.[291]

As Chandler's efforts suggested, advances in administrative capacity increased the judiciary's influence in the legislative process. In 1937, when

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286. See, e.g., Letter From Henry P. Chandler to Otto Kerner, Guy K. Bard & Eugene Rice (Mar. 30, 1949) (on file with the *Columbia Law Review*) (describing a proposed bill that Chandler drafted and Hand approved regarding the public defender mandate). After learning in 1950 that a committee of the New York City Bar Association had drafted what Chandler considered a "manifestly biased" report disapproving of the creation of public defenders for federal courts, Chandler sought Hand's help to rally opposition to the report and correct its misunderstandings. Letter From Henry P. Chandler to Augustus N. Hand (Nov. 20, 1950) (on file with the *Columbia Law Review*).

287. Report of the Judicial Conference of the United States 22 (Sep. 1952), https://www.uscourts.gov/sites/default/files/1952-09_0.pdf [https://perma.cc/6LMU-5KVX]; see also Letter From Henry P. Chandler to Augustus N. Hand (Dec. 8, 1952) (on file with the *Columbia Law Review*) (relaying Chief Justice Vinson's statement to the Conference "that a vigorous effort should be made to procure action in this matter from the coming Congress" and proposing outreach to a House member Chandler knew and correctly assumed would be the next chair of the House Judiciary Committee).

288. Hand would die in October 1954. Extol Augustus Hand, N.Y. Times (May 5, 1955), https://www.nytimes.com/1955/05/05/archives/extol-augustus-hand-two-bar-groups-eulogize-his-work-and-character.html (on file with the *Columbia Law Review*).

289. See Letter From Henry P. Chandler to John A. Danaher (Jan. 28, 1954) (on file with the *Columbia Law Review*) [hereinafter Chandler to Danaher, Jan. 28, 1954] ("I interviewed Representative William M. McCulloch . . . and asked him to accord a hearing.").

290. Letter From Henry P. Chandler to Emery A. Brownell (Feb. 1, 1954) (on file with the *Columbia Law Review*).

291. See Chandler to Danaher, Jan. 28, 1954, supra note 289. Brownell, echoing the equilibrium concern that Hand and Chandler had noted at the outset of the inter-right period, testified that he "agree[d] entirely with the judges of the Judicial Conference that the burden has become entirely too big for the voluntary uncompensated system." 1954 Hearing on H.R. 398 and H.R. 2091, supra note 181, at 23 (statement of Herbert Brownell, Jr., Att'y Gen.).

the Judicial Conference first resolved to support legislation creating some form of public defender, a "committee" of judges to consider the issue was set up on one day of the conference and "reported" back the next, in the form of a few-sentence resolution the Conference adopted after just minutes of discussion.[292] Six years later, the Hand Committee received assistance from Chandler and Chandler's assistants, which allowed the Committee to poll district court judges, compile preliminary data on the state of play in a variety of districts, and draft a report and proposed legislation.[293] In the mid-1940s and throughout the 1950s, it was the judiciary—guided by Chandler and, when he stepped down in 1955, his successor Warren Olney III—that approached the Department of Justice and other key actors to secure support for legislation.[294] In the late 1940s and early 1950s, the Administrative Office began to develop the statistical methods needed to make more specific budget proposals.[295] Over the course of the inter-right period, basically every group of judges or form of judicial administration—including the Judicial Conference, circuit judicial conferences, the Administrative Office, and tens of individual judges—demonstrated support for external funding.

The judiciary's strategic efforts at the administrative level were aided by an additional factor: As the period progressed, the recognition of the right—and judicial efforts to enforce it—helped shift the political economy surrounding the payment of criminal defense lawyers, at least in the federal courts. District court judges themselves, for instance, gradually became much stronger advocates for at least some form of funding. In 1959, Representative Emanuel Celler, a longtime proponent of early funding legislation, sent a letter to judges around the country asking for their view on a version of the legislation that had long percolated in Congress.[296] Unlike the "meagre" response the Hand Committee had initially received to their survey of district court judges,[297] over one hundred judges wrote back to endorse legislation.[298] As one of them put

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292. See 1937 Judicial Conference Minutes, supra note 43, at 256 ("[W]e might appoint a committee to take up this subject and frame a resolution and bring it in tomorrow morning."); Report of the Judicial Conference of the United States 8–9 (Sep. 1937), https://www.uscourts.gov/file/1558/download [https://perma.cc/8WWH-D6N5] (listing the resolution and noting its adoption by the Conference).

293. See Letter from Henry P. Chandler to Augustus N. Hand (Dec. 21, 1944) (on file with the *Columbia Law Review*) (compiling federal judges' responses to the report).

294. See supra notes 286–291 and accompanying text.

295. See Speck, supra note 209, at 8 (using appointment rates and typical counsel fees to estimate overall costs for providing a system of counsel).

296. See Emanuel Celler, Federal Legislative Proposals to Supply Paid Counsel to Indigent Persons Accused of Crime, 45 Minn. L. Rev. 697, 704–05 (1961) ("The inquiry [regarding the legislation] was sent to all members of the federal judiciary . . . .").

297. See supra note 281 and accompanying text.

298. See Celler, supra note 296, at 705 (noting that 164 judges responded to the inquiry and 89% of such judges supported the bill).

it, "I constantly find myself embarrassed by having, by force of arms, to assign counsel to indigent criminal defendants."[299]

Throughout the period, the views of the organized bar similarly consolidated around the benefits of the public defender model, as opposed to defense services based on donation of lawyers' time.[300] The fragile equilibrium that Hand and others after him kept playing up—that relying on unpaid lawyers raised legitimacy concerns for the judiciary, would break down in the long run, and unfairly taxed uncompensated lawyers—served as a potent rallying cry.

The appointments themselves helped to change both the perception about and the reality of who these criminal defense lawyers were. At a time of growing specialization across the legal field,[301] the volume of appointments meant that criminal defense could no longer be described as an "outlaw field which [a] . . . lawyer avoids as he avoids the slums of the city," as reports directed by Roscoe Pound and Felix Frankfurter described criminal defense work in 1921.[302] Instead, in jurisdictions ranging from Washington, D.C., to Des Moines to San Francisco, judges distributed, and often felt that they were forced to distribute, appointments across a relatively wide cross section of the bar.[303] In general, appointed counsel tended to be young, but the demand was such that judges enlisted more experienced lawyers to improve representation,[304] or at least made sure that serious cases had more experienced lawyers.[305] Even the inexperienced lawyers that judges tended to appoint were themselves sympathetic figures—hard working new lawyers who were being forced to give up valuable time in which they could otherwise build their practices.[306]

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299. Gibson to Celler, Oct. 13, 1959, supra note 232; see also Letter From Frank L. Kloeb to Emanuel Celler (Oct. 26, 1959) (on file with the *Columbia Law Review*) ("I know of no duty that I have to perform as a District Judge that is more embarrassing to me than that of calling upon members of the Bar to represent indigent defendants in criminal cases.").

300. See Mayeux, Free Justice, supra note 24, at 57–87 (describing how lawyers moved away from the view that charitable donations would be sufficient to provide for the right).

301. See Robert W. Gordon, The American Legal Profession 1870–2000, *in* The Cambridge History of Law in America 73, 104–06 (Michael Grossberg & Christopher Tomlins eds., 2008) (noting that from 1930 to 1970, the New Deal and post-War economy brought "new specialties" and made corporate practice even "more technical and specialized").

302. Alfred Bettman & Howard F. Burns, Part II: Prosecution, *in* Criminal Justice in Cleveland: Reports of the Cleveland Foundation Survey of the Administration of Criminal Justice in Cleveland, Ohio, 83, 218–19 (Roscoe Pound & Felix Frankfurter dirs. & eds., 1922).

303. See supra notes 241–248 and accompanying text.

304. See supra notes 257–261 and accompanying text.

305. See Kennedy to Chandler, Nov. 17, 1944, supra note 187 ("In some important cases I have appointed older members of the bar to perform this service and, while they have accepted it as a matter of duty, it is unfair to require them to devote a considerable portion of their time to these duties without remuneration.").

306. See Justice for the Needy: Junior Bar Group Supports Bill to Provide Paid Lawyers for Those Who Cannot Afford Counsel, St. Louis Post-Dispatch, Aug. 26, 1963, at C2 (on

The result was that efforts to enforce the right to counsel over the inter-right period created a form of Derrick Bell's classic account of interest convergence,[307] in which the interests of a wide swath of the bar aligned not only with those of federal judges, who wanted funding to "put the thing on some sort of orderly basis,"[308] but also with those of the impoverished criminal defendants who were coming before the courts. Across the inter-right period, a number of bar associations came out in support of either a federal public defender system or, at minimum, compensation for appointed lawyers. Nearly thirty bar associations ultimately submitted resolutions endorsing the CJA.[309] Those resolutions spoke in terms of fairness to the defendant and—maybe even more so—fairness to the bar.[310] Although a variety of factors played a role in the general shift by the organized bar away from a "charity" service model toward one that embraced compensation,[311] actually providing that service was galvanizing. As the Los Angeles Bar Association expressed in a resolution in 1949 requesting that Congress fund appointments, the costs of providing counsel, which were now a constitutional requirement, should be the "cost of the administration of justice rather than of the individual lawyer or lawyers appointed."[312]

Ultimately, judicial appointments helped lay the groundwork for appropriated funding. In 1960, Congress enacted the first funding legislation for indigent defense services—the D.C. Legal Aid Act.[313] That Congress began by funding a defense service in D.C. was no accident: As described, the right to counsel had for years forced the District's bar to

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file with the *Columbia Law Review*) (describing the ABA Junior Bar Conference's support for the CJA and relaying a story of a new lawyer who had to borrow money to keep his law practice afloat after representing an indigent defendant).

307. See Derrick A. Bell, Jr., Comment, *Brown v. Board of Education* and the Interest Convergence Dilemma, 93 Harv. L. Rev. 518, 523 (1980) ("The interest of [Black people] in achieving racial equality will be accommodated only when it converges with the interests of [white people].").

308. See supra note 283 and accompanying text.

309. See Criminal Justice Act of 1963 (Public Defender): Hearings on S. 63 and S. 1057 Before the S. Comm. on the Judiciary, 88th Cong. 60–70 (1963) (including resolutions from thirty different bar associations).

310. See, e.g., id. at 60 (relaying the resolution from the Arkansas Bar Association, which discussed the "burden" on lawyers); id. at 62 (relaying the resolution from the San Francisco Bar Association, which stated that the "unfairness of [the current system] to the lawyer needs no elaboration"); see also id. at 67 (including a letter from Robert G. Bowers stating that "all of us avoid the Federal court like the plague when defendants are being arraigned, unless we are perfectly willing to be out of the office for a week without compensation").

311. See Mayeux, What *Gideon* Did, supra note 6, at 47–51, 57–58 (describing the limits of representation that is based on charitable fundraising).

312. Resolution of Board of Trustees of Los Angeles Bar Association (Feb. 11, 1949) (on file with the *Columbia Law Review*).

313. See Cheshire, supra note 195, at 70 ("While public defender legislation for the district courts stalled again, Congress passed the District of Columbia Legal Aid Act of 1960.").

shoulder a heavy caseload to represent indigent defendants. The toll on those lawyers formed the centerpiece of the bar and judge-led efforts to secure funding. Testifying in support of the legislation, Judge E. Barrett Prettyman, the Chief Judge of the D.C. Circuit at the time, stated that providing counsel "is a necessity, rather than just some sort of gratuity or thing that might be good."[314] "That necessity," Prettyman continued, "has created a problem of enormous proportions . . . . The entire burden is borne by the members of our bar upon a volunteer, unpaid basis."[315]

Four years later, in 1964, prodded by Attorney General Kennedy and with significant backing from the judiciary and the bar, Congress enacted the first version of the CJA.[316] Within months of the bill's signing, the judiciary convened a rare special session of the Judicial Conference—to determine how to implement the new Act and assess what additional funding the right would require.[317]

IV. TO COMPLETE THE COURT

Johnson began a project through which providing counsel to poor people became a central responsibility of the federal judiciary. That project, and the model of judicial action that undergirded it, might be artifacts of history—a different federal judiciary, a different bar, a different time. In this final Part, however, this Essay suggests that judicial efforts "to complete the court,"[318] as Justice Black framed *Johnson*'s counsel requirements, are part of broader traditions of judicial efforts to create the conditions for informed judging and that these efforts open possibilities for continued experiments in completing unfinished courts.

A. *Court-Building and Completing the Court*

As Justice Black's opinion in *Johnson* recognized, providing for the right to counsel was rights enforcement by means of a version of judicial statecraft: Only representation would guarantee that the district court could adequately adjudicate in proceedings that "to the untrained layman may appear intricate, complex and mysterious"[319]—and allow the

314. Providing for the Representation of Indigents in Judicial Proceedings in the District of Columbia: Hearing on S. 1867 and H.R. 10761 Before Subcomm. on the Judiciary of the S. Comm. on the D.C., 86th Cong. 34 (1960) (statement of E. Barrett Prettyman, Chief Judge, D.C. Cir.).

315. Id.

316. See Cheshire, supra note 195, at 72 ("Now passed by both bodies, the [Criminal Justice Act] was signed into law by President Lyndon Johnson on Aug. 20, 1964.").

317. See Report of the Judicial Conference of the United States 1 (Jan. 1965), https://www.uscourts.gov/file/2106/download [https://perma.cc/PC9D-D8P2] ("A special session of the Judicial Conference of the United States to consider the problems arising under the Criminal Justice Act of 1964 was convened . . . on January 13, 1965, and continued in session 1 day.").

318. Johnson v. Zerbst, 304 U.S. 458, 468 (1938).

319. Id. at 463.

appellate court to know that the trial court had discharged its obligation to ensure that the defendant had been heard. Put differently, the project *Johnson* started, and that the judiciary subsequently pursued through "embarrassing" appointments[320] and efforts to seek funding for representation, aimed to develop the baseline conditions necessary, as Lon Fuller famously put it, for "proofs and reasoned arguments" in federal criminal cases.[321]

Perhaps because the judiciary is so fundamentally responsive to the cases it hears, judicial efforts to secure the facts, narratives, and legal arguments—in short, a version of the information—necessary for informed judging are commonplace.[322] Some of these efforts, like providing counsel for indigent defendants or, more discretionarily, pro se civil litigants, involve changing the circumstances in which litigants find themselves when in court, so that they may make claims based on information courts believe relevant.[323] Well-established equitable powers similarly allow judges to appoint adjuncts to help gather and process information provided by the parties.[324] Other efforts appear more purely institutional. A district court's investigation of a possible contempt recognizes the dependency of the judicial process on the information that enters it; so do internal, administrative efforts by the judiciary to reconfigure how it decides cases.[325]

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320. See supra note 299 and accompanying text.

321. Lon L. Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 364 (1978) ("[T]he distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor.").

322. See generally Daniel Epps & Marin K. Levy, Judicial Reform From the Inside Out, 101 Notre Dame L. Rev. (forthcoming 2026), https://ssrn.com/abstract=5136328 [https://perma.cc/25DX-FTG2] (discussing the various ways in which federal judges have engaged in efforts to ensure a functional and fair court system).

323. See William Wayne Justice, The Origins of *Estelle v. Ruiz*, 43 Stan. L. Rev. 1, 2–3 (1990) (recounting that the unrepresented prisoners in *Estelle* "simply could not effectively present their grievances," because they "knew nothing of the Federal Rules of Civil Procedure or the Federal Rules of Evidence . . . . It would have been difficult, if not impossible, for them to engage in any discovery . . . ."); Resnik, Seeing "the Courts", supra note 41, at 253–54, 271–72 ("[A] few federal courts have relied on the statute authorizing filings *in forma pauperis* to enlist counsel when individuals lack competency to litigate and therefore cannot supply information adequate for decision-making."); see also Estelle v. Gamble, 429 U.S. 97, 106 (1976) ("The handwritten pro se document is to be liberally construed."). For an argument that the judicial oath "to do equal right to the poor and to the rich" provides one basis for judges to take some of these actions, see Richard M. Re, "Equal Right to the Poor", 84 U. Chi. L. Rev. 1149, 1152, 1166, 1194–97 (2017) (examining the lower court's argument in *Gideon* that the federal judicial oath is violated if a defendant is permitted to buy his way out of detention).

324. See Ex parte Peterson, 253 U.S. 300, 312–14 (1920) (noting that courts sitting in equity have the inherent authority to appoint special masters and similar officers to gather evidence, resolve factual disputes, and clarify issues when records are complex or voluminous).

325. See, e.g., Andrew D. Bradt, "A Radical Proposal": The Multidistrict Litigation Act of 1968, 165 U. Pa. L. Rev. 831, 849–51 (2017) (describing successful federal judicial efforts to develop multidistrict litigation); Gardner, supra note 216, at 1602 (discussing variations of "district judges' use of voluntary collective proceedings").

Each develops, in its own way, the conditions that one set of judges believes are necessary for a court to perform its task.

Not all judicial efforts manifest as attempts to increase the resources available to the judiciary. Courts can try to add through subtraction, as the federal judiciary did, for instance, when it imposed rules limiting the length of oral arguments.[326] A rival version of what it might mean for the judiciary to complete the court focuses on preserving federal court adjudication for specific purposes.[327] For example, in response to the increase in habeas petitions *Johnson* caused, and, more recently, under Chief Justice Rehnquist's leadership, the federal judiciary has strenuously advocated for reforms intended to limit access to habeas. The argument has been that the federal courts need to be closed, at least in part, for the judiciary to perform its distinctive duties.[328]

Without seeking to resolve the merits of these different possible versions of "judicial reform from the inside out" here,[329] it is enough to note the variations of and possibilities for judicial institution-building of the sort that the judiciary engaged in *Johnson* and its aftermath. Courts can change what they see in cases through granting rights and procedural entitlements to litigants. They can also do so through internal, administrative changes to how they adjudicate those litigants' cases. Efforts from the latter category inevitably interact with the doctrine the judiciary establishes; at times, they may surpass it. In the right to counsel context, for instance, the establishment of the formal right led the judiciary to supervise the provision of counsel to indigent defendants. Over time, that supervision often expanded beyond what the right itself formally required.

Indeed, the federal judiciary's continued embrace of its role in providing representation to poor defendants today offers a vital demonstration of some of the possible benefits of judicial statecraft on this

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326. See Epps & Levy, supra note 322 ("Without many tools in its toolkit at the time, in 1849, the Court created a rule that limited oral arguments to two hours per side.").

327. See, e.g., Judith Resnik, Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III, 113 Harv. L. Rev. 924, 994 n.285 (2000) [hereinafter Resnik, Trial as Error] ("Chief Justice Rehnquist praised restrictions on habeas corpus jurisdiction and on prisoners' civil rights actions, both termed 'promising examples of how Congress can reduce the disparity between resources and workload in the federal Judiciary without endangering its distinctive character.'" (quoting William H. Rehnquist, The 1997 Year-End Report of the Federal Judiciary, Third Branch, Jan. 1998, at 2)).

328. See, e.g., Epps & Levy, supra note 322 ("As the caseload of the lower courts grew precipitously in the second half of the last century, more judges weighed in with suggestions for limiting their jurisdiction."); Parker, supra note 149, at 172 (discussing how an influx of applications for habeas corpus strains federal courts).

329. See Epps & Levy, supra note 322 ("[O]ur view [is] that it is impossible to reach a bottom-line normative judgment on judicial reform from the inside out as a general matter . . . ."). Professors Daniel Epps and Marin Levy, for instance, focus on the process by which the judiciary seeks reform, rather than the ends the judiciary seeks. Id. at 31–35 ("[I]nside-out judicial reform presents both risks and benefits, and how the relative balance works out will be highly context-dependent."). Id. Other scholars of judicial administration, like Judith Resnik, squarely criticize certain judicial aims. See Resnik, Trial as Error, supra note 327, at 1021–24.

scale. Since the 1970s, right to counsel doctrine has, as others have noted, become increasingly grounded in austerity.[330] And yet, federal judicial involvement in the provision of counsel to indigent defendants has deepened and helped to increase the resources available to indigent defense counsel and their clients.[331] Today, more than a tenth of the federal judiciary's budget is dedicated to overseeing and providing services to people who cannot afford a lawyer in federal criminal prosecutions, post-conviction relief, or parole or probation hearings.[332] Judicially overseen defense services supply more than 200,000 representations[333] every year, and over 90% of all federal defendants receive representation from these lawyers.[334] The ad hoc panels and appointments that judges and their clerks administered before funding have become an organized defense apparatus that stretches from top to bottom of the federal judiciary.

If anything, a static account of judicial oversight of defense services may underestimate the judiciary's efforts. Between 2001 and 2024, inflation adjusted spending on these services nearly doubled.[335] Moreover, defense funding has increased as overall caseloads have fallen. These increases, as well as a variety of other institutional design reforms to improve the quality of representation, were at least partially the result of judiciary-led reform efforts.[336]

Other judicial budgetary priorities, like funding for security or clerks, may trump defense representation,[337] and aspects of judicial control over federal defense services raise serious structural challenges.[338] But there are

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330. See supra note 60 and accompanying text; see also Zohra Ahmed, The Right to Counsel in a Neo-Liberal Age, 69 UCLA L. Rev. 442, 518 (2022).

331. This was not the intent of the drafters of the CJA. See Prado Report, supra note 79, at 9–10 (noting the congressional consideration of long-term independence of the defense function).

332. See McMillion, supra note 77, at 7 (showing that money for indigent defense services made up 16.8% of the federal judiciary's budget request in 2024).

333. Cardone Report, supra note 78, at xxvi.

334. See supra note 223.

335. Compare Cong. Rsch. Serv., RL31009, Appropriations for FY2002: Commerce, Justice, and State, the Judiciary, and Related Agencies 28 (2002), https://www.congress.gov/crs_external_products/RA/PDF/RL31009/RL31009.2.pdf (on file with the *Columbia Law Review*) (showing $434 million for defender services in fiscal year 2001), with Nate Raymond, US Judiciary Set to Receive Modest Spending Boost From Congress, Reuters (Mar. 21, 2024), https://www.reuters.com/legal/government/us-judiciary-set-receive-modest-spending-boost-congress-2024-03-21/ (on file with the *Columbia Law Review*) ("The $1.451 billion provided for federal public defenders [in the 2024 bipartisan spending package] is an increase of $68 million above fiscal year 2023, though it still falls short of the $1.5 billion funding that the judiciary argued was needed.").

336. See Fed. Jud. Ctr., Interim Recommendations, supra note 78, at 25 (describing successful efforts to increase funding).

337. See Cardone Report, supra note 78, at 41 ("Because the judiciary's primary mission is to support the courts as a branch of the government, the defender program, which is not a core function of the judiciary, particularly in an adversarial system, is at a disadvantage in obtaining the funding it requires.").

338. Judges in the Fifth Circuit, for instance, regularly cut appointed CJA panel attorney pay as a part of informal "caps" to conserve money in ways that federal judicial studies have suggested is deleterious to the quality of representation. See Fed. Jud. Ctr., Interim Recommendations, supra note 78, at 142–43.

also thousands of pages of reports from the judiciary from the past decade documenting these challenges, suggesting reforms, and demonstrating early returns on the implementation of those reforms.[339] Nor, for that matter, does this account of the judiciary's continued embrace of its responsibility to provide representation require the judiciary's actions to be what its institutional representatives publicly say they are: solely or even primarily motivated by helping poor defendants who are tried in federal courts. Instead, as with the inter-right period, the liberal values that the provision of counsel to indigent defendants aims to secure continue to converge, at least for the time being, with the judiciary's self-conception of what resources it needs to adjudicate its criminal docket.[340]

B. *Versions of Completing the Court*

This category of judicial statecraft, institutionally motivated and constrained as it is, is a second-best option for increasing the resources available for indigent defense litigation. The point of adequately funding that litigation is to produce a combination of procedural fairness and accuracy that goes beyond the limits other actors in the process of enforcing criminal law, including judges, are interested in setting when left to their own devices.[341] In the context of severe underfunding like that experienced in many states, direct interventions—perhaps especially robust enforcement of ineffective assistance of counsel doctrine to

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339. The judiciary has not formally supported the most significant recommendation from these reports: "that Congress create an independent Federal Defender Commission within the judicial branch of government, but outside the oversight of the Judicial Conference." Cardone Report, supra note 78, at xxxvi; see also Fed. Jud. Ctr., Interim Recommendations, supra note 78, at 18–22 (proposing and assessing the implementation of institutional design reforms to minimize tensions between defense representation and other judicial priorities).

340. This may be a benefit of the judiciary's own internalization of versions of the myth of non-parity, by which the federal judiciary actively seeks to differentiate itself by virtue of its institutional prestige. See Burt Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105, 1105 (1977) ("[P]arity is, at best a dangerous myth, fostering forum allocation decisions which channel constitutional adjudication under the illusion that state courts will vindicate federally secured constitutional rights as forcefully as would the lower federal courts.").

341. See, e.g., Principle 1: Independence, ABA (Aug. 23, 2023), https://www.americanbar.org/groups/legal_aid_indigent_defense/indigent_defense_systems_improvement/standards-and-policies/ten-principles-pub-def/principle-1/ [https://perma.cc/G96K-558E] ("Public Defense Providers and their lawyers should be independent of political influence and subject to judicial authority and review only in the same manner and to the same extent as retained counsel and the prosecuting agency and its lawyers."); see also David E. Patton, The Structure of Federal Public Defense: A Call for Independence, 102 Corn. L. Rev. 335, 337 (2017) [hereinafter Patton, A Call for Independence]. Many individual CJA plans outsource control over the provision of services to the federal defender in the district. See U.S. Dist. Ct. S.D. Ill., Criminal Justice Act Plan 2 (Nov. 15, 2023), https://www.ilsd.uscourts.gov/sites/ilsd/files/CriminalJusticeActPlan.pdf [https://perma.cc/ZM49-BV9M] ("Administration of the CJA Panel, as set forth in this Plan, is hereby delegated and assigned to the Federal Public Defender.").

encompass structural underfunding[342]—would do more to safeguard funding for an unpopular set of funding recipients than trying to work through the institutional powers available to state courts.[343] But, in the federal courts, which are relatively well funded, and at a time when the Supreme Court is unlikely to welcome expansions of Sixth Amendment protections, the more modest forms of institution building the judiciary demonstrated during the inter-right period still suggest possibilities by which the judiciary might increase, or channel, defense litigation funding to generate greater resources and improve the information criminal adjudication produces.

Not everyone will agree that the judiciary's first efforts to implement the right to counsel were successful at all, or that these efforts meaningfully helped ultimately to achieve funding. Rather than determining "whether the defendant is innocent or guilty of the offenses charged," as Malcolm Feeley once put it, judges, prosecutors, and defense counsel probably spent more of their time asking "[w]hat is this case worth?"[344] In practice, the representation judges secured may often have served as another means of helping them to process cases effectively.[345]

Even without funding, however, judges established an imperfect but nonetheless complete, or nearly complete,[346] regulatory system of the then-existent criminal procedural rights. To the extent judges worried that the court risked adjudicating based on limited information because, for

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342. See Primus, Disaggregating Ineffective Assistance of Counsel Doctrine, supra note 60, at 1613–18 (listing examples of lower courts entertaining structural ineffectiveness challenges in instances in which the system of indigent defense makes effective representation near-impossible); Stuntz, Uneasy Relationship, supra note 2, at 69–74 (noting that "[i]nstead of seizing on counsel's performance in the ineffective assistance cases of the 1970s, courts might have sought to enforce minimum levels of funding for public defenders' offices and minimum levels of pay . . . for separately appointed counsel"). To make a more robust version of ineffective assistance of counsel doctrine less likely to receive pushback from political actors, Stuntz has proposed conditioning the intensity of judicial review of ineffective assistance of counsel claims on whether a jurisdiction funds defense services at levels suggested by independent experts. Id. at 20–22.

343. State courts have at times tried to use their inherent powers in different fashions, including compelling lawyer participation and directly ordering appropriations. See Miller, supra note 6, at 1793 ("The trial judge ordered short and long term relief . . . . For the long term, he ordered that the legislature provide funds to [the Orleans Indigent Defender Program] to pay additional attorneys, secretaries, paralegals, law clerks, investigators, and expert witnesses." (internal quotation marks omitted) (quoting State v. Peart, 621 So.2d 780, 784–85 (La. 1993)); Shapiro, supra note 93, at 735 ("[C]ourts have often required lawyers to represent indigents or other litigants for little or no pay.").

344. Malcolm M. Feeley, The Process Is the Punishment: Handling Cases in a Lower Criminal Court 273 (1979) (internal quotation marks omitted).

345. See Blumberg, supra note 30, at 586 ("All the court personnel, including the accused's own lawyer, are co-opted to become agent-mediators who help the accused redefine his situation and restructure his perceptions concomitant with a plea of guilty." (footnote omitted)).

346. As described, there were congressional expenditures for subpoenas and limited witness-related expenses. See supra section II.C.

example, a defendant's case was particularly serious or complicated, judges often appointed more experienced counsel or even multiple lawyers.[347] Trials, as a percentage of the criminal docket, generally rose during the period.[348] Even conversations in the courtroom in advance of pleas were likely better at elucidating information than the prosecutorial efforts to secure plea deals that preceded them.[349] Put simply, the judiciary demonstrated some capacity to create defense litigation funding and some ability to ensure that judicially imposed criminal priorities were enforced, even if that enforcement was far more selective than anything we would consider adequate today.

This older, relatively weak model of enforcement is, of course, outdated. The bar and bench are far different today than they were in the 1950s; courtrooms are no longer places where lawyers congregate. Criminal procedure has become significantly more complicated,[350] and prosecutorial power over plea bargaining has grown. As importantly, the federal defense function is generally well-funded.[351] The combination of today's high baseline of defense litigation funding and the low, pre-CJA baseline of unfunded litigation suggests that the model of enforcement and implementation of the inter-right period might be more vestigial than valuable—the ruins beneath a congressionally funded system of indigent defense services.

Still, the creative use of the judiciary's supervision[352] over the provision of defense representation during the inter-right period offers a template for how judges could channel resources today to alter some of the dynamics of criminal adjudication.[353] Versions of the inter-right model

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347. Some type of triage is endemic to all funding-constrained defense systems. See Brown, supra note 52, at 821 n.78 ("'Triage' is a common description of indigent defense practices.").

348. See Wright, Trial Distortion, supra note 213, at 122 (noting "*rising* trial rates" in the 1950s and 1960s).

349. See, e.g., Von Moltke v. Gillies, 332 U.S. 708, 714–18 (1948) (noting that the defendant's "only legal counsel" prior to pleading guilty "had come from FBI agents" and explaining the misleading advice provided by those agents); McNabb v. United States, 318 U.S. 332, 344–45 (1943) (describing a confession secured after "unremitting questioning by numerous officers . . . without the aid of friends or the benefit of counsel").

350. See Primus, Problematic Structure, supra note 24, at 262 (noting that criminal defense work now includes "complicated motions practices" and "more complex sentencing policies," among other things).

351. See supra notes 75–77 and accompanying text.

352. Despite emphasizing judicial involvement, none of the possibilities sketched below would necessarily cut against continued efforts to develop institutional reforms designed to increase counsel independence and resources, by, for instance, limiting the direct involvement of judges in selecting individual attorneys or determining whether to approve those attorneys' pay. See, e.g., Cardone Report, supra note 78, at 38–40 (describing the judiciary's role in the obtainment of CJA panel funding and expressing concern that this results in "none of the people with the subject matter expertise," including defenders, being involved in the process).

353. Some of the aspects of the inter-right model are features of the system. For instance, the CJA mandates the broad involvement of the bar, despite consistent empirical evidence that public defenders significantly outperform private attorneys. See Iyengar, supra

may be a better complement to existing dynamics than they were first mover. Consider, for instance, the funding shortfall for indigent defense services that the federal judiciary confronts again today.[354] Rather than jeopardize representation by cutting defender staff and asking CJA panel attorneys to go months without receiving pay,[355] judges could, at least in some locations, once more distribute the burden of unpaid appointments across a wider subset of the federal bar. Since funding crises occur with some regularity,[356] judges could also emulate their predecessors and develop what amounts to resiliency stores for future lags in funding.[357]

The judiciary or individual judges might also mold the inter-right model toward more ambitious efforts to supplement litigation resources and potentially counter some of the "overwhelming movement toward prosecutorial power."[358] For instance, as others have suggested,[359] and as one of the judiciary-initiated reviews of federal defense services proposed in the early 1990s,[360] judges could experiment on their own with counsel of choice

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note 24, at 28 ("It appears that public defenders outperform CJA panel attorneys in all outcomes that were considered."); Primus, Problematic Structure, supra note 24, at 260–63 (describing problems of continuing to rely on private bar).

354. See supra notes 79–81 and accompanying text.

355. See Funding Crisis Leaves Defense Lawyers Working Without Pay, U.S. Cts. (July 15, 2025), https://www.uscourts.gov/data-news/judiciary-news/2025/07/15/funding-crisis-leaves-defense-lawyers-working-without-pay [https://perma.cc/3AF2-XW4H] (noting that the funding crisis has started "a painful three-month delay in paying" defenders).

356. See Cardone Report, supra note 78, at 59–62 (describing budget management strategies used in "past funding crises"); Prado Report, supra note 79, at 37 ("[T]he financial sacrifices imposed upon panel attorneys are becoming more than many are willing or able to bear."); Patton, A Call for Independence, supra note 341, at 374 (describing the "largest budget crisis to face the CJA program").

357. The CJA gives district courts wide latitude to design a "plan for furnishing representation" in the district. 18 U.S.C. § 3006A(a) (2018). District court judges might create a broader lawyer base to shoulder appointments in more constrained periods by, for instance, requiring newly admitted lawyers to assist defender offices or CJA panel attorneys for a limited number of hours as a requirement of admission to the bar.

358. Patton, Federal Public Defense, supra note 223, at 2582. Some judges are currently experimenting with other efforts. See United States v. Tavberidze, 769 F. Supp. 3d 264, 267–68 (S.D.N.Y. 2025) ("In a small effort to try to mitigate the trial penalty, this Court, where appropriate . . . , typically informs an accused that if he goes to trial and is convicted, the Court will not impose a greater sentence than if he pleads guilty to the same activity.").

359. See David D. Friedman & Stephen J. Schulhofer, Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants, 31 Am. Crim. L. Rev. 73, 102–03 (1993) (recommending that American jurisdictions allow indigent defendants to choose their attorneys from a "pool" of eligible and willing attorneys); Alexis Hoag, Black on Black Representation, 96 N.Y.U. L. Rev. 1493, 1532–42 (2021) (exploring the benefits of counsel of choice for Black defendants); see also John Rappaport, The Structural Function of the Sixth Amendment Right to Counsel of Choice, 2016 Sup. Ct. Rev. 117, 118 (considering possible structural purposes of counsel of choice).

360. Comm. to Review the Criminal Justice Act, Report of the Judicial Conference of the United States on the Federal Defender Program 34 (1993) (calling for an "experimental program . . . to give certain CJA eligible defendants a limited choice of counsel").

and allow indigent defendants to pick from a pool of possible lawyers.[361] At least in theory,[362] a version of counsel of choice might further values related to fairness and autonomy, as it is assumed to do for defendants who can pay for representation,[363] and give defendants more control over the direction and purpose of their representation, including how they want to engage in plea bargaining.[364]

Judges might also create a trial or investigation incentive to "deal" themselves back into the regulation of criminal law.[365] The trial penalty available to prosecutors makes it extremely challenging for potentially innocent defendants to develop their innocence claims.[366] To counteract some of the threat of this penalty, judges could create and announce a litigation bounty for defendants who might want to go to trial. Building on more limited recommendations the Judicial Conference already makes for how judges should structure defense counsel appointments and existing practices surrounding multiple appointments, especially in complicated cases,[367] districts could create bonus trial teams for any defendant who wants

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361. Rappaport, supra note 359, at 141 ("Effectuating an indigent defendant's right to counsel of choice could mean . . . letting him choose a public defender or panel attorney who is available and willing to represent him—perhaps an attorney with whom he is familiar from a prior case, or one a friend has recommended.").

362. The empirical support for counsel of choice programs remains extremely limited. See Janet Moore, Isonomy, Austerity, and the Right to Choose Counsel, 51 Ind. L. Rev. 167, 168 (2018) (describing austerity-based limitations on a study of a pilot program in Comal County, Texas).

363. See Rappaport, supra note 359, at 118 (noting the existence of counsel-of-choice theories based in "individual fairness or autonomy" but also putting forth a theory based on the "antisocialization" of the criminal defense bar).

364. One of the major risks of counsel of choice is that defendants will choose based on highly imperfect information. The judiciary would be well suited to try to create the data necessary to give defendants much greater information about their options. See Friedman & Schulhofer, supra note 359, at 79 ("In order for anyone . . . to choose the best provider of defense services, he must have information on what will be provided. This is a particularly serious problem for the defendant . . . . The information problem is less serious if the attorney is chosen by a judge . . . .").

365. See Stuntz, Pathological Politics, supra note 67, at 567 ("In most [non-criminal law] regulatory settings, . . . courts can combat th[e] tendency to deal them out.").

366. For dueling empirical assessments of the extent of the trial penalty, compare David S. Abrams, Is Pleading Really a Bargain?, 8 J. Empirical Legal Stud. (Special Issue) 200, 218 (2011) ("Thus far, the empirical comparison of sentences after plea bargain and after trial has shown no evidence of a 'trial penalty.'"), with Andrew Chongseh Kim, Underestimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty and Critique of the Abrams Study, 84 Miss. L.J. 1195, 1246 (2015) ("[T]his study demonstrates that the vast majority of federal defendants, including those who *did* go to trial, would have been significantly better off pleading guilty, even after accounting for their chances for acquittal.").

367. For instance, under the Judicial Conference's model plan for CJA appointments, judges should appoint multiple lawyers "in any case determined by the court to be extremely difficult" and, to a degree, triage appointments of more experienced counsel based on case complexity. Jud. Conf. of the U.S., Guide to Judiciary Policy: Volume 7A (Defender Services) app. 2A at 11 (2025), https://www.uscourts.gov/file/vol07a-ch02-appx2apdf [https://

to try their case. Borrowing from the various appointment structures judges used during the inter-right period, they could recruit a roster of junior lawyers to provide additional services in exchange for trial-related experience or reserve more experienced attorneys exclusively for trial.[368] Of course, as a variety of scholars have noted, judges facilitated the rise of plea deals in the first place and continue to be key players in their use;[369] many, but not all, federal judges likely view the ratio of pleas to trials as desirable.[370] But an incentive might still be attractive to some judges, because it would not substitute judge for prosecutor[371] or require judges to intensify their scrutiny of each plea deal[372]—the incentive helps to sort. Even a relatively minimal uptick in trials could mark a significant shift in a system in which, over the last two years, around 2% of defendants' cases—fewer than three cases per active judge per year—have gone to trial.[373] Judges who believe the

perma.cc/BM4Y-B3LY]. Judges may also appoint non-CJA panel attorneys "[u]nder special circumstances," such as "cases in which the court determines that the appointment of a particular attorney is in the interests of justice." Id. at 21.

368. Some CJA plans include training possibilities and obligations. See, e.g., id. at 13, 21.

369. See George Fisher, Plea Bargaining's Triumph: A History of Plea Bargaining in America 111–36 (2003) (exploring the central role that judges played in the proliferation of plea bargaining at the end of the nineteenth century).

370. But see United States v. Tavberidze, 769 F. Supp. 3d 264, 267 (S.D.N.Y. 2025) ("In a small effort to try to mitigate the trial penalty, this Court, where appropriate . . . , typically informs an accused that if he goes to trial and is convicted, the Court will not impose a greater sentence than if he pleads guilty to the same activity.").

371. See United States v. Armstrong, 517 U.S. 456, 465 (1996) ("[F]actors [such] as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." (internal quotation marks omitted) (quoting Wayte v. United States, 470 U.S. 598, 607 (1985))).

372. See Barkow, Institutional Design, supra note 88, at 908 ("[S]crutinizing each criminal plea and cooperation agreement would place an enormous strain on already thin [judicial] resources.").

373. See Table D-4: U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and Offense, U.S. Cts. (Mar. 31, 2025), https://www.uscourts.gov/data-table-numbers/d-4 (on file with the *Columbia Law Review*) (reporting 1,656 trials in the past year); Table D-4: U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and Offense, U.S. Cts. (Dec. 31, 2024), https://www.uscourts.gov/data-table-numbers/d-4 (on file with the *Columbia Law Review*) (reporting 1,779 trials in the past year). The data are in keeping with the distribution of caseloads since the COVID-driven dip in 2021. Table D-4: U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and Offense, U.S. Cts. (Sep. 30, 2021), https://www.uscourts.gov/sites/default/files/data_tables/jb_d4_0930.2021.pdf (on file with the *Columbia Law Review*) (reporting 1,081 trials in the past year); Table D-4: U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and Offense, U.S. Cts. (Sep. 30, 2022), https://www.uscourts.gov/sites/default/files/data_tables/jb_d4_0930.2022.pdf (on file with the *Columbia Law Review*) (reporting 1,669 trials in the past year); Table D-4: U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and Offense, U.S. Cts. (Sep. 30, 2023), https://www.uscourts.gov/sites/default/files/data_tables/jb_d4_0930.2023.pdf (on file with the *Columbia Law Review*) (reporting 1,840 trials in the past year).

plea rate is optimal might still choose to channel resources toward investigations,[374] in the interests of improving pretrial resolutions,[375] or toward mitigation preparation.

CONCLUSION

A few months after *Johnson*, on September 29, 1938, the Judicial Conference gathered again in the Supreme Court conference room. Attorney General Cummings began the Conference by inviting the judges to "indulge in a little self-congratulation" over what they had accomplished in the preceding year.[376] Together, they had "achiev[ed]" the new rules of civil procedure, helped pass legislation adding twenty-two new judges, and made inter-circuit assignments of judges easier.[377] Their next task, Cummings proposed, was to secure legislation that would establish judicial control over the "great administrative side to the machinery of justice": The creation of "an administrative office for the Judiciary," which would free the judiciary from executive "control of the financing, the budget, the accounting and all of the other details which are so intimately a part of the life of the Judiciary" and advance "the best possible administration of the Judiciary that human ingenuity can supply."[378]

The full-throated endorsement of this form of judicial independence from Cummings, one of the chief architects of President Roosevelt's efforts to pack the Court the year before, might have caused the judges in the room some consternation. His profound ambitions for administration—a reflection of the high-managerialism that had taken hold in the early twentieth century[379]—are perhaps equally perplexing in today's light. Yet, as the judiciary's efforts to implement the unfunded version of the right to counsel help to demonstrate, the "great administrative side" of courts may at times offer as much as judicial doctrine or decrees.

"[Doing] justice in criminal prosecutions" is, in the words of the Supreme Court, "the primary constitutional duty of the Judicial

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374. See Stuntz, Uneasy Relationship, supra note 2, at 4 (describing the costs of investigations).

375. See Chesa Boudin & Eric S. Fish, Towards Pretrial Criminal Adjudication, 66 B.C. L. Rev. 1135, 1195–98 (2025) (arguing for a system with enhanced pretrial adjudication).

376. Minutes of the Judicial Conference of the United States 4 (Sep. 29, 1938) (on file with the *Columbia Law Review*).

377. Id. at 5.

378. Id. at 6–7. Congress enacted legislation creating the Administrative Office less than a year later. See Administrative Office of United States Courts Act, Pub. L. No. 76-299, 53 Stat. 1223 (1939) (codified as amended at 28 U.S.C. §§ 601–613 (2018)).

379. See Purcell, supra note 273, at 684–85; see also Robert C. Post, The Taft Court: Making Law for a Divided Nation, 1921–1930, *in* 10 The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States 448–75 (separately paginated work) (Maeva Marcus ed., 2023).

Branch."[380] How the judiciary performs that duty is a task outlined by a few hundred words of constitutional text, filled in by the statutes Congress passes, and given life by the parties and lawyers who come before the judiciary, the judges who adjudicate their cases, and the institution in which that adjudication takes place.

380. United States v. Nixon, 418 U.S. 683, 707 (1974).