from the existent English practice to appointment of counsel in a few states where needed counsel could not be retained.[261] Contemporaneously with the proposal and ratification of the Sixth Amendment, Congress enacted two statutory provisions that seemed to indicate an understanding that the Sixth Amendment guarantee was limited to retained counsel by a defendant wishing and able to afford assistance.[262]

By federal statute, an individual tried for a capital crime in a federal court was entitled to appointed counsel, and, by judicial practice, the federal courts came to appoint counsel frequently for indigents charged with noncapital crimes, although it may be assumed that the practice fell short at times of what is now constitutionally required.[263] State constitutions and statutes gradually ensured a defendant the right to appear in state trials with retained counsel, but the states were far less uniform on the existence and scope of a right to appointed counsel. It was in the context of a right to appointed counsel that the Supreme Court began to develop its modern jurisprudence on a constitutional right to counsel generally, first applying procedural due process analysis under the Fourteenth Amendment to state trials, also finding a Sixth Amendment based right to appointed counsel in federal prosecutions, and eventually applying this Sixth Amendment based right to the states.

Development of Right.—The development began in *Powell v. Alabama*,[264] in which the Court set aside the convictions of eight black youths sentenced to death in a hastily carried-out trial without benefit of counsel. Due process, Justice Sutherland said for the Court, always requires the observance of certain fundamental personal rights associated with a hearing, and "the right to the aid of counsel is of this fundamental character." This observation was about the right to retain counsel of one's choice and at one's expense, and included an eloquent statement of the necessity of counsel. "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crimes, he is incapable, generally, of deter-

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[261] W. Beaney, The Right to Counsel in American Courts 8–26 (1955).

[262] Section 35 of the Judiciary Act of 1789, ch. 20, 1 Stat. 73, provided that parties in federal courts could manage and plead their own causes personally or by the assistance of counsel as provided by the rules of court. The Act of April 30, 1790, ch. 9, 1 Stat. 118, provided: "Every person who is indicted of treason or other capital crime, shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel not exceeding two, as he may desire, and they shall have free access to him at all reasonable hours."

[263] W. Beaney, The Right to Counsel in American Courts 29–30 (1955).

[264] 287 U.S. 45 (1932).