1964

Constitutional Law: Constitutional Basis for Requiring Compensation of Court-Appointed Attorney Representing an Indigent Criminal Defendant - A Taking of Private Property for Public Use

Minn. L. Rev. Editorial Board

Case Comments

Constitutional Law: Constitutional Basis for Requiring Compensation of Court-Appointed Attorney Representing an Indigent Criminal Defendant—A "Taking" of Private Property for Public Use?

The federal district court for the District of Oregon, appointed an attorney to represent Edward Dillon, an indigent criminal defendant, upon a motion to set aside his prior conviction and sentence.[1] Upon completing his services, and pursuant to the suggestion of the court appointing him,[2] the attorney petitioned for compensation for his expenses and services. The court gave judgment for the attorney against the Government, *holding* that the appropriation of expenses and services from a court-appointed attorney constituted a taking of private property for public use for which the fifth amendment of the federal constitution requires the payment of just compensation. *Dillon v. United States*, 230 F. Supp. 487 (D. Ore. 1964).

At present most states have enacted statutes specifically authorizing payment to court-appointed attorneys.[3] In states without such statutes, the great majority of courts asked to order

1. Represented by his own counsel, Dillon initially pleaded guilty to an armed robbery charge and was sentenced to 18 years imprisonment. He moved for a new sentence under FED. R. CRIM. P. 35, alleging that the prosecutor had promised to recommend a ten-year sentence if he pleaded guilty. This was denied and Dillon, now without counsel, moved to set aside the judgment of conviction and sentence pursuant to 28 U.S.C. § 2255 (1958). Dillon was again denied relief and his request for court-appointed counsel at the hearing was refused, but on appeal the case was remanded with directions to appoint counsel. Dillon v. United States, 307 F.2d 445 (9th Cir. 1962). On remand, now represented by court-appointed counsel, Dillon was resentenced to 18 years imprisonment. Dillon v. United States, 218 F. Supp. 948 (D. Ore. 1963), 230 F. Supp. 487, 489 & n.1 (D. Ore. 1964).

2. Dillon v. United States, 230 F. Supp. 487, 494–97, app. A (transcript of appointment proceeding).

3. As of 1961, 39 states had statutes authorizing payment to attorneys appointed to defend indigents in capital cases, while 30 states had such statutes for less than capital cases. Celler, *Federal Legislative Proposals to Supply Paid Counsel to Indigent Persons Accused of Crime*, 45 MINN. L. REV. 697, 699 (1961). See also BROWNELL, LEGAL AID IN THE UNITED STATES, app. C. (1951).

payment to an attorney appointed to defend an indigent have refused to do so.[4] This result has been justified on the grounds that an attorney, as a member of the bar and an officer of the court, has a duty to give freely of his services when so requested,[5] and that the expenditure of government funds to pay court-appointed counsel is a legislative function with which the courts should not interfere.[6]

The *Dillon* decision is the first to apply the eminent domain clause of the Constitution in determining whether court-appointed attorneys are entitled to compensation.[7] In examining the Attorney General's contention that only Congress can authorize the expenditure of public money to compensate members of the bar called upon to represent indigent criminal defendants, the court held that it had the power to order the United States to comply with the dictates of the fifth amendment.[8]

4. See Annot., 144 A.L.R. 847 (1943); Annot., 130 A.L.R. 1439 (1941).

Indiana, Wisconsin, and Iowa have awarded compensation to court-appointed attorneys without statutory direction. The Indiana constitution dictates: "No man's particular services shall be demanded, without just compensation." IND. CONST. art. 1, § 21. Since the accused has the right to counsel, IND. CONST. art. 1, § 13, the Indiana courts hold that a contract for compensation must be implied. See Knox County Council v. State *ex rel.* McCormick, 217 Ind. 493, 29 N.E.2d 405 (1940). See also Webb v. Baird, 6 Ind. 13 (1854), often cited for its dictum to the effect that an attorney has no obligation to serve gratuitously as counsel for an indigent. A similar argument prevailed in Wisconsin. See County of Dane v. Smith, 13 Wis. 585 (1861). In Iowa the court reached the same result by an opposite approach, holding that since an attorney has an obligation to serve, he has a right to be compensated. See Hall v. Washington County, 2 Greene 473 (Iowa 1850).

5. *E.g.*, Whedon v. Board of Supervisors, 192 App. Div. 705, 183 N.Y. Supp. 438 (Sup. Ct. 1920); Wayne County v. Waller, 90 Pa. 99 (1879); Ruckenbrod v. Mullins, 102 Utah 548, 133 P.2d 325 (1943); Presby v. Klickitat County, 5 Wash. 329, 31 Pac. 876 (1892).

6. See, *e.g.*, Wayne County v. Waller, *supra* note 5; Presby v. Klickitat County, *supra* note 5. A further argument advanced is that a court may not order payment from the county treasury to discharge a state function. See Rowe v. Yuba County, 17 Cal. 62 (1860); Board of Comm'rs v. Mowbray, 160 Ind. 10, 66 N.E. 46 (1903); Pardee v. Salt Lake County, 39 Utah 482, 118 Pac. 122 (1911). Because of statutory provisions calling for payment of other officials of the court and omitting compensation to attorneys, courts have refused to find that the legislature impliedly intended to compensate appointed counsel. See Arkansas County v. Freeman & Johnson, 31 Ark. 266 (1876); Yates v. Taylor County Court, 47 W. Va. 736, 35 S.E. 24 (1900).

7. In Hall v. Washington County, 2 Greene 473 (Iowa 1850), the fifth amendment protection against taking private property for public use without just compensation was used by analogy in support of a decision allowing compensation to a court-appointed attorney.

8. 230 F. Supp. at 491.

Although the *Dillon* result is certainly desirable, the court's extension of the eminent domain clause to reach it seems unwarranted. To appropriate the services of an attorney for the defense of a criminally accused indigent may well constitute a "public use" within the meaning of the fifth amendment. The sixth amendment of the Constitution guarantees to the criminally accused the right to counsel. To implement this mandate the Federal Rules of Criminal Procedure require federal courts to assign counsel to the indigent accused,[9] and recent pronouncements by the Supreme Court have established the indigent defendant's right to court-appointed counsel at both trial[10] and appellate[11] levels as an indispensable element in furthering the public interest of according justice to everyone accused of crime.

It is not clear, however, that a court-appointed attorney's services constitute compensable "property" within the meaning of the fifth amendment. The framers of the Constitution probably envisioned the eminent domain clause as applying primarily to real property.[12] "Property" has been extended to apply to some relatively intangible personal property interests such as patent rights[13] and lienholders' rights,[14] but there are apparently no reported decisions holding personal services to be compensable property interests. Nevertheless, since an attorney's services represent his earning power and have an ascertainable value, the instant court may have been justified in determining the services to be compensable property.

A more serious problem concerns the court's finding that the appointment of an attorney constitutes a "taking" of his services within the meaning accorded that term in the fifth amendment. Reasonable qualifications may be required of a prospective attorney before he is permitted to practice law.[15] Typical legitimate requirements are that the applicant must have graduated from

9. FED. R. CRIM. P. 44 provides:

> If the defendant appears in court without counsel, the court shall advise him 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 retain counsel.

See also 78 Stat. 552 (1964), 18 U.S.C.A. § 3006A (Supp. 1964).

10. Gideon v. Wainwright, 372 U.S. 335 (1963).

11. Douglas v. California, 372 U.S. 353 (1963).

12. See 1 ANNALS OF CONGRESS 660–65, 703, 717, 729, 757 (1791–1793).

13. See United States v. Berdan Fire-Arms Mfg. Co., 156 U.S. 552 (1895); United States v. Palmer, 128 U.S. 262 (1888).

14. See Armstrong v. United States, 364 U.S. 40 (1960).

15. 230 F. Supp. at 493, citing Schware v. Board of Bar Examiners, 353 U.S. 232 (1957), and Konigsberg v. State Bar, 353 U.S. 252 (1957).

an accredited law school[16] and that he must become a member of an integrated bar.[17] The service of indigent criminal defendants by court-appointed attorneys has been regarded as "one of the obligations incident to [an attorney's] professional status and privileges."[18] The long history of this practice makes it reasonable to conclude that attorneys must obligate themselves to so serve upon request as a prerequisite to admission to the bar. Having thus entered this profession, an attorney does not suffer a fifth amendment "taking" when his services are subsequently appropriated.[19] Focusing on the nature of the attorney's service as an essential governmental function, the propriety of holding performance of this function a "taking" is doubtful, particularly in view of decisions holding performance of other essential governmental functions such as jury duty[20] and military service[21] are not compensable.

Compensation for court-appointed attorneys is a desirable aim. The attorney performs services having recognized commercial value and thereby aids in promoting the public interest in equal justice. Since a benefit is conferred on the public, the public as a whole should bear the expense rather than impose it upon the individual attorney. Compensating court-appointed

16. See Hennington v. State Bd. of Bar Examiners, 60 N.M. 393, 291 P.2d 1108 (1956).

17. See Lathrop v. Donohue, 367 U.S. 820 (1961).

18. DRINKER, LEGAL ETHICS 62 (1953).

19. Similarly, enforcement of an appointment should not constitute "involuntary servitude" as proscribed by the thirteenth amendment. *Cf.* Butler v. Perry, 240 U.S. 328 (1916); Arins, *Freedom of Choice in Personal Service Occupations: Thirteenth Amendment Limitations on Antidiscrimination Legislation*, 49 CORNELL L.Q. 228, 237 (1964). The Court in *Butler* said the thirteenth amendment "introduced no novel doctrine with respect of services always treated as exceptional . . . ." 240 U.S. at 333.

For authority for the proposition that a court may compel an attorney to serve his appointment, see Powell v. Alabama, 287 U.S. 45, 73 (1932). 1 COOLEY, CONSTITUTIONAL LIMITATIONS 700 n.4 (8th ed. 1927) contains the following: "Said Chief Justice *Hale* in one case . . . 'if we were to assign one of them as counsel, and he was to refuse to act, we should make bold to commit him to prison.' Life of Chief Justice Hale, in Campbell's Lives of the Chief Justices, Vol. II." See also Note, 76 HARV. L. REV. 579 (1962), in which a survey conducted by the authors indicates that 90% of the federal district judges feel they have the power to compel an attorney to defend a prisoner who could not, by himself, obtain counsel.

20. See Commers v. United States, 66 F. Supp. 943 (D. Mont.), *aff'd*, 159 F.2d 248 (9th Cir.), *cert. denied*, 331 U.S. 807 (1947).

21. *Cf.* Neely v. State, 63 Tenn. (4 Baxt.) 174 (1874), construing the clause of the Tennessee constitution providing for just compensation for taking of property or services.

attorneys would also make it more likely that indigent defendants would have competent counsel. Even without consciously slighting his indigent client, an appointed attorney cannot ignore demands made on his time by paying clients.[22] Further, an attorney giving his time, whether compensated for it or not, is not likely to make the additional out-of-pocket expenditures on investigation of facts often necessary to a thorough defense.[23]

Shortly after the instant decision Congress enacted the Criminal Justice Act,[24] which requires each United States district court to implement a plan providing representation for criminally accused indigents by private attorneys, attorneys furnished by a bar association or legal aid agency, or some combination of these plans.[25] Attorneys appointed pursuant to the plan are to be compensated for expenses incurred and services rendered incident to the defense. Compensation is to be a maximum of 15 dollars per hour for time spent in court and 10 dollars per hour for time spent out of court, the total not to exceed 500 dollars in felony cases nor 300 dollars in misdemeanor cases. In extraordinary cases additional compensation for protracted representation may be paid.[26] The statute also provides compensation for persons other than counsel who render services on the defendant's behalf.[27]

If the eminent domain approach in the instant case is correct, then the fee schedules set forth in the Criminal Justice Act are beyond the power of Congress. It is well recognized in eminent domain cases that only the judiciary may determine what compensation is just.[28] Thus the legislative and constitutional approaches would be inconsistent since Congress is not empowered to determine compensation rates under the fifth amendment. The *Dillon* decision was motivated, at least in part, by impatience resulting from the failure of Congress to act.[29] The implicit recog-

22. *Cf.* Celler, *supra* note 3, at 698; Note, 76 HARV. L. REV. 579, 589 (1962).

23. See 230 F. Supp. at 491; S. REP. No. 2261, 87th Cong., 2d Sess. (1962); Celler, *supra* note 3, at 712; Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 MINN. L. REV. 1, 8 (1964); Note, 76 HARV. L. REV. 579, 589 (1962).

24. 78 Stat. 552 (1964), 18 U.S.C.A. § 3006A (Supp. 1964), amending 18 U.S.C. § 3006 (1958).

25. 18 U.S.C.A. § 3006A(a) (Supp. 1964).

26. 18 U.S.C.A. § 3006A(d) (Supp. 1964).

27. 18 U.S.C.A. § 3006A(e) (Supp. 1964).

28. Monangahela Nav. Co. v. United States, 148 U.S. 312, 327–28 (1893) ("when the taking has been ordered, then the question of compensation is judicial").

29. 230 F. Supp. at 491 n.3 and accompanying text.

nition of the *Dillon* court that Congress could properly enact the proposals that became the present Criminal Justice Act — including the fee schedules[30] — indicates the court's own insecurity about the applicability of the fifth amendment to attorney's services.

Aside from the constitutional infirmities of the *Dillon* decision, the Criminal Justice Act appears to be the better solution for the admitted problem on practical grounds. The bar does not view the statutory rates as unreasonable[31] and since the rates are lower than the market rate,[32] less strain would be imposed on the treasury. Furthermore, the fixed statutory rates make the Criminal Justice Act much easier to administer than the eminent domain approach, which requires an ad hoc determination of the value of each attorney's services.

Administrative Law—Contempt: Federal Agent Convicted of Contempt for Following Agency Head's Instructions Not To Testify

Plaintiff brought an action in a federal district court to enjoin the agent in charge of the Chicago office of the Federal Bureau of Investigation[1] from keeping the plaintiff under a harassing surveillance. During a hearing on plaintiff's motion for a preliminary injunction, the plaintiff's attorney called the agent as an adverse

30. *Ibid.* In criticizing the pending bill the court noted only that it did not appear to cover post-conviction and collateral proceedings such as in *Dillon*. The act could be so construed if the representation from time of initial appearance through appeal provided by the act is viewed as a time span applying only to the trial proper. In view of the act's purpose to provide paid counsel whenever needed, it would seem more appropriate to read it as applying to representation through appeal in the case of any proceeding. See Letter from Attorney General Robert F. Kennedy to The President, March 6, 1963, in 13 U.S. CODE CONG. & AD. NEWS 3048, 3049 (1964) emphasizing that counsel is guaranteed "at every stage of the proceedings, commencing with the initial appearance . . . ." However, the Judicial Conference takes the position that the act does not cover habeas corpus or § 2255 proceedings. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT ON THE CRIMINAL JUSTICE ACT 11 (1965), in 85 Sup. Ct. No. 10.

31. See AMERICAN BAR ASS'N STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS AND THE NAT'L LEGAL AID AND DEFENDER ASS'N, GUIDELINES FOR ADEQUATE DEFENSE SYSTEMS 11 (1964) (model legislation).

32. Dillon's counsel was awarded $35 per hour. 230 F. Supp. at 494.

1. J. Edgar Hoover, Director, Federal Bureau of Investigation, was also named in the complaint as a defendant, Appendix for Appellant, p. 1, Giancana v. Johnson, 335 F.2d 372 (7th Cir. 1964), but the complaint against him was dismissed for lack of personal jurisdiction. *Id.* p. 284.