The Court-Appointed Attorney's Right to Compensation

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formly to the incumbent, who is clearly under the rule, and to his opposition. Similarly, it would not be a difficult step to apply the test to past official misconduct of one no longer in office.[53] To apply this test to other important, controversial figures in our society, such as leaders of national labor unions or presidents of large corporations, seems a much larger step.

Frequently, protection of statements made against controversial public figures is more important than protection of those made against public officials. Discussion concerning particular minor officials is much less significant than discussion concerning important public figures, such as corporation executives. Thus, protection of statements against all public officials, whatever the echelon, seems unnecessary, while protection of statements against some controversial public figures seems highly desirable. Thus, a rule strictly applicable only to defamation against public officials seems unwise. A more appropriate solution would be to apply the rule when the public interest in the dissemination of truth requires it, whether the individual is a public official or a private citizen. The public interest is the correct test, not the popularity or notoriety of the individual involved. The social utility in protecting statements made against popular entertainers would be very slight. On the other hand, there would seem to be a great utility in protecting statements made against labor leaders, who, though not so well known, are closely connected with governmental affairs.

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A federal district court appointed an attorney to represent an indigent defendant who had been convicted of armed robbery without benefit of counsel.[1] The assigned attorney petitioned for reasonable compensation for services performed and for expenses in-

[53] Pauling v. News Syndicate Co., 335 F.2d 659, 671 (2d Cir. 1964).

[1] The present suit evolved as a result of rather protracted litigation. The defendant, represented by counsel, was convicted of armed bank robbery in a federal district court. A motion was then filed to vacate the sentence alleging that the defendant was induced to plead guilty by the misrepresentations of an Assistant United States Attorney. On retrial, he was convicted again of the crime. However, at the second hearing the defendant was not aided by counsel although at midhearing he had requested an attorney. The court of appeals reversed saying: "it was clear error to refuse defendant, an indigent prisoner, request for a lawyer." 307 F.2d 445, 451 (9th Cir. 1962). The district court, upon remand, appointed counsel to represent defendant, and as a result of this appointment the present suit ensued.

curred as court appointed counsel for the indigent defendant. *Held:* (1) When a court orders a member of its bar to give of his services, office facilities, and money, this is an appropriation of his services and property and a "taking" of those compensable property interests; and (2) since the constitutional right to legal counsel now requires representation for the criminal indigent through all phases of litigation,[2] the cost and expense of this organic obligation of the sovereign no longer should be borne by the legal profession alone but in all fairness should be sustained by the public as a whole. *Dillon v. United States*, 230 F. Supp. 487 (D. Ore. 1964).

The duty to furnish counsel to indigents in all criminal proceedings in the United States is the cumulation of the interpretation of the sixth amendment and the due process clauses of the fifth and fourteenth amendments of the United States Constitution.[3] This inviolate right of the accused criminal was confirmed in the federal courts by *Johnson v. Zerbst*,[4] wherein the Supreme Court enunciated the principle that the sixth amendment compelled provision of counsel for indigent defendants in criminal proceedings in the federal courts unless the right is competently and intelligently waived. This same prerequisite now exists in the state courts although this result was reached in a somewhat circuitous manner. *Powell v. Alabama*,[5] the first case to require the assignment of counsel in state proceedings, announced that if the defendant in a *capital case* was unable to employ an attorney or was incapable of adequately making his own defense because of ignorance, feeble-mindedness, or the like, it was the duty of the state court to provide counsel for him as a necessary requisite of due process. Ten years later, in *Betts v. Brady*,[6] the Supreme Court limited its decision in *Powell* by stating that failure to appoint counsel in state noncapital cases did not necessarily violate the due process clause of the fourteenth amendment.[7] The right of an indigent defendant to counsel, however, was definitely broadened in *Rice v. Olsen*,[8] in which the Court held that even in a *noncapital* case the states are required to afford the assistance of counsel if the

[2] Douglas v. California, 372 U.S. 353 (1962).

[3] U.S. Const. amend. VI: "In all criminal prosecutions the Accused shall enjoy . . . the Assistance of Counsel for his defense." See generally The Association of the Bar of the City of New York and The National Legal Aid and Defender Association, Equal Justice For The Accused 40 (1959) (cited hereinafter as "Equal Justice").

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

[5] 287 U.S. 45 (1932).

[6] 316 U.S. 455 (1942).

[7] However, the Court did indicate in dicta that due process would require a state court to appoint counsel under special circumstances in which the defendant was incapable of adequately defending himself. *Id.* at 462.

[8] 324 U.S. 786 (1945).

defendant is incapable of making his defense, or is unable to obtain counsel, or does not intelligently waive counsel. The last and final assault upon the *Betts* doctrine, the landmark case of *Gideon v. Wainwright*,[9] proclaimed that counsel must be assigned at least in all felony cases[10] before state tribunals. It is now the constitutional right of every accused criminal in the United States to have the assistance of counsel whether he be tried in a state or federal court.

Presently, three basic forms of defender systems are employed to protect the rights of an accused criminal.[11] The most widely used practice is the *assigned counsel* procedure wherein the court appoints a lawyer using any manner of selection it deems appropriate. New Jersey has added a twist to the usual arbitrary mode of selection by providing for the rotation of attorneys on an alphabetical basis in an attempt to even the caseload among members of the bar.[12] Another method used in defending an indigent accused is the *public defender* system. The public defender, like the public prosecutor, is a state official. Today, the office of public defender has been created by statute in eleven states[13] and by local ordinance in seven cities.[14] The final program utilized in safeguarding the rights of the destitute is the *voluntary defender association*, such as the Philadelphia Voluntary Defender Association and the Voluntary Defenders Committee, Inc. of Boston.

Because of the volume of cases that will arise as a result of the *Gideon* decision,[15] these traditional modes of providing aid to the

[9] 372 U.S. 335 (1963).

[10] Although Mr. Justice Black said in all criminal prosecutions, Mr. Justice Harlan, in a concurring opinion, would confine the right to counsel to cases involving the possibility of a substantial prison sentence. *Id.* at 351. For an excellent discussion of the *Gideon* case and its ramifications, see Note, 18 Sw. L.J. 284.

[11] Equal Justice, *supra* note 3, at 47-55. This book does list one other system, the mixed, private-public system, but it is used only in Rochester and Buffalo, New York. Under this plan the Legal Aid Society, pursuant to an enabling statute, receives an appropriation to establish a defender service to function in the inferior criminal courts of the county. This is a private legal aid society supported by public funds.

[12] *Id.* at 49.

[13] Cal. Gov't Code §§ 27700-11; Conn. Gen. Stat. Rev. § 54-80 (1958); Ill. Ann. Stat. ch. 34, § 163f (Smith-Hurd 1957); Ind. Ann. Stat. §§ 9-3501—3503 (1956), 4-2316—2318 (1946), 13-1401—1406 (1956); Minn. Stat. Ann. §§ 611.12—611.13 (1964); Neb. Rev. Stat. §§ 29-1804—29-1805 (1956); Okla. Stat. Ann. tit. 19, §§ 138.1—138.6 (1962); Ore. Rev. Stat. § 138.750 (1963); Va. Code Ann. §§ 19.1-12—19.1-13 (1960). Florida has a public defender in Broward and Dade Counties by local ordinances.

[14] Long Beach, Cal., Ordinance; Los Angeles, Cal. Ordinance 54961, Amended Ordinance 75366; San Francisco, Cal. City Charter, § 33; St. Louis, Mo., Ordinance 41239 (1938); Cincinatti, Ohio, Ordinance; Columbus, Ohio, City Charter, § 12 (1914) and 1930 Code, ch. 3; Memphis, Tenn., Private Laws, ch. 69 (1917).

[15] *Gideon* overruled holdings to the contrary in Alabama, Colorado, Florida, Illinois, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, North Carolina, North Dakota, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Vermont, West Virginia, and Wisconsin. Brief for Respondent, p. 71, *Gideon v. Wainwright* 372 U.S. 335 (1963).

indigent will be severely burdened. Primarily because of the manpower shortage of the voluntary defender associations and the limited number of public defender offices,[16] the assigned counsel system will necessarily have to handle the majority of the cases. Because the bar at large will bear this overwhelming burden, the problem encountered in the instant case—*i.e.*, compensation for the advocate of the indigent—is brought acutely into focus.

Although the right to counsel, regardless of the nature of the offense, has existed in the federal courts for over a quarter of a century,[17] only recently has the attorney of the indigent become entitled to any remuneration for his labors. The new Criminal Justice Act,[18] enacted shortly after the instant case, swept aside the long-standing precedent of *Nabb v. United States*,[19] which expressly disallowed compensation. The new act furnishes the federal courts with fresh perspective for reimbursing the assigned attorney.

The Criminal Justice Act allows the attorney to recover at a rate not exceeding $15.00 per hour for time expended in court or before a United States commissioner, $10.00 per hour for time spent out of court in preparation for trial, and a reasonable sum for expenses.[20] The total payment to a lawyer may not exceed $500 in a felony case or $300 in a misdemeanor case.[21] The act does provide, however, that "in extraordinary circumstances, payment in excess of the limits stated herein may be made if the district court certifies that such payment is necessary to provide fair compensation for protracted representation."[22] In an appellate court, compensation is limited in all cases to $500 in a felony case and $300 in a case involving a misdemeanor.[23] Also included in the statute is a section allowing payment for investigative, expert or other necessary services up to a maximum of $300 exclusive of reimbursement for expenses reasonably incurred.[24] In concluding the segment on compensation, the act provides that, when the court finds that funds are available for payment from or on behalf of a defendant, the court may direct that such funds be paid to the appointed attorney.[25]

[16] For an article that raises many objections to the public defender system, see Dimock, Public Defender: A Step Towards A Police State, 42 A.B.A.J. 219 (1956).

[17] See Johnson v. Zerbst, 304 U.S. 458 (1938).

[18] 18 U.S.C. § 3006A (1964). For a good synopsis of the act, see Shafroth, The New Criminal Justice Act, 50 A.B.A.J. 1049 (1964).

[19] 1 Gt. Cl. 173 (1864).

[20] 18 U.S.C. § 3006A(d) (1964).

[21] *Ibid.*

[22] *Ibid.*

[23] *Ibid.*

[24] 18 U.S.C. § 3006A(e) (1964).

[25] 18 U.S.C. § 3006A(f) (1964). This clause has not been litigated. Although no definition of an indigent is set forth in the act, apparently, it means that if the defendant is not truly an indigent, his available funds shall be used to compensate his attorney.

The rules of the various states governing compensation of counsel assigned to defend the poor in state court proceedings differ widely, but it is possible to group them into certain homogenous categories.[26] Six states still maintain the rule which was observed in the federal courts prior to the enactment of the Criminal Justice Act and expressly disallow compensation.[27] However, as the impact of *Gideon* is felt, it is highly probable that these states will shift from this antiquated position and adopt some form of compensation law. The law of two states, South Carolina and Rhode Island, fails to provide either for or against compensating the indigent client's attorney.[28]

The most frequently encountered enactments, found in sixteen states, are statutes indicating a minimum or maximum sum to recompense the attorney.[29] These statutes allow maximum sums from $50 in West Virginia to $1500 in New York, and minimums ranging from $25 in Arkansas to $250 in Hawaii.

The legislatures in eleven states have predicated their statutes on the basis that the attorney of the indigent should be awarded a "reasonable fee" in murder and/or all felony cases.[30] The recently passed Kansas statute, which authorizes payment of "reasonable fees" in all cases,[31] is one of the most progressive laws in the nation.

[26] For a good compilation of the various statutes, see Equal Justice *supra* note 3, at 98.

[27] Calhoun v. Commonwealth, 301 Ky. 789, 193 S.W.2d 420 (1946); State v. Simmons, 43 La. 991, 10 So. 382 (1891); Wright v. State, 3 Heisk. 256 (Tenn. 1871); Pardee v. Salt Lake County, 39 Utah 482, 118 Pac. 122 (1911); Alaska Sup. Ct. R. 43; Mo. Sup. Ct. R. 29.01.

[28] Rhode Island does have a statewide public defender system. R.I. Gen. Laws Ann. § 12-15-(1-7) (1956).

[29] Ala. Code. tit. 15, § 318 (1963) ($100 maximum for trial; $150 maximum for appeal); Ark. Stat. Ann. § 43-245 (1947) ($25-250); Fla. Stat. Ann. § 909.21 (1959) (maximum $500); Ga. Code Ann. § 27-3001 (1953) ($50-$150 plus expenses not over $500); Hawaii Rev. Laws § 253-5 (Supp. 1963) ($250-750 for any term exceeding 20 years; $100-250 for other felonies); Miss. Code Ann. § 2505 (1942) ($75-150; $250 if to Supreme Court); Nev. Rev. Stat. § 7.260 (1963) ($300 maximum in noncapital; $1000 maximum for capital); N.H. Rev. Stat. Ann. § 604:3 (Supp. 1959) (maximum $500 plus expenses); N.M. Stat. Ann. § 41-11-3 (1953) ($25-100 in cases other than homicide; statute implies that in homicide cases it is up to the court to decide the attorney's fee); N.Y. Code Crim. Proc. § 308 (maximum of $1500 for one attorney and $2000 for two, plus expenses); Okla. Stat. Ann. tit. 22, § 1271 (1958) ($100 maximum); Ohio Rev. Code Ann. § 2941.51 (Anderson Supp. 1961) (maximum of $350 in manslaughter and in all other cases of felony a maximum of $100); S.D. Code § 34.19 (Supp. 1960) ($100 maximum); Va. Code Ann. § 14.1-184 (1964) ($250 maximum if crime carries a conviction of more than 10 years; $100 maximum in other felonies); W. Va. Code Ann. § 6190 (1961) ($50 maximum but only $25 maximum for misdemeanor); Wyo. Stat. Ann. § 7-9 (1957) ($50-200 in capital cases; $25-100 in all other felony cases; $15-50 in misdemeanors).

[30] Ariz. Rev. Stat. Ann. § 13-1673 (1956); Cal Pen. Code § 987a; Conn. Gen. Stat. Rev. § 54-81 (Supp. 1963); Idaho Code Ann. § 19-1513 (1948); Me. Rev. Stat. Ann. ch. 148, § 11 (1954); Mass. Gen. Laws ch. 277, § 55-56 (1956); Mich. Stat. Ann. § 28.1253 (1954); Mont. Rev. Codes Ann. § 94-6513 (Supp. 1961); N.J. Rev. Stat. § 2A:163-1 (1951); N.C. Gen. Stat. § 15-5 (1963); Pa. Stat. Ann. tit. 19, § 784 (1963). For an interpretation of "reasonable fee", see State v. Horton, 34 N.J. 518, 170 A.2d 1 (1961).

[31] Kan. Sess. Laws, ch. 305 (1963), Kan. Gen. Stat. Ann. § 62-1304 (1964). This statute

Nine states,[32] including Texas, provide for compensation to be paid on a *per diem* basis. The Oregon law is the most liberal, allowing the appointed attorney to petition for a maximum of $75 a day during trial. The majority of the remaining states in this assemblage grant a maximum of $25 for each day of trial.[33] Five states in this group also permit compensation to be recovered on a daily basis for preparation time.[34]

The remaining states have allowed judicial discretion to prescribe what amount of money will reasonably compensate the advocates of the destitute. Five states[35] have statutes to this effect and Indiana has adopted this rule by judicial fiat.[36]

The Criminal Justice Act deleted from *Dillion* any value it might have had as a precedent. Also, with the increasing number of jurisdictions that allow payment to appointed counsel,[37] comparable cases will be encountered very infrequently in the state courts. However, the principal case is significant in that it lays bare a traditional inequity of American society in which reform and revision is direly needed. This social obligation to provide counsel for the accused indigent has been in the past almost totally borne by the members of the bar. Although recently there has been a definable trend toward at least a partial acknowledgement of this liability by society, much of the burden remains with the bar. The majority of the state laws are still highly inadequate and offer only token, or at the most nominal, compensation. Although it is improbable that the Criminal

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does limit recovery, on appeal, to $300. Nevertheless, the basic idea of the law is a definite advance in the methods of compensating counsel.

[32] Ill. Ann. Stat. ch. 38, § 730 (Smith-Hurd 1960) ($25 per day but total bill may not exceed $250); Iowa Code Ann. § 775.5 (1959) ($50 per day plus expenses in homicide or life imprisonment case; however, the court can allow more in the interest of justice.); Minn. Stat. Ann. § 611.07 (Supp. 1960) ($50 per day); N.D. Cent. Code § 29-01-27 (1960) ($25 per day); Ore. Rev. Stat. § 135.330 (1961) ($75 per day of trial for 3 days); Tex. Code Crim. Proc. Ann. art. 494a (1959) ($25 per day of trial); Vt. County Ct. R. 45 ($25 per day maximum); Wash. Rev. Code § 10.01.110 (1941) ($25 per day); Wisc. Stat. Ann. § 957.26 (1958) ($25 per half day maximum).

[33] Ill. Ann. Stat. ch. 38, § 730 (Smith-Hurd 1960); N.D. Cent. Code § 29-01-27 (1960); Tex. Code Crim. Proc. Ann. art. 494a (1959); Vt. County Ct. R. 45; Wash. Rev. Code § 10.01.110 (1941).

[34] Ill. Ann. Stat. ch. 38, § 730 (Smith-Hurd 1960) ($15 for 5 days); Minn. Stat. Ann. § 611.07 (Supp. 1960) ($25 per day); Vt. County Ct. R. 45 ($15 per day); Wash. Rev. Code § 10.01.110 (1941) ($25 per day); Wisc. Stat. Ann. § 957.26 (1958) ($15 for each half day).

[35] Colo. Rev. Stat. Ann. § 39-7-29 (1953); Del. Code Ann. tit. 11, § 5103 (1953); Md. Ann. Code art. 26, § 12 (1957); Neb. Rev. Stat. § 29-1803 (1959); Ohio Rev. Code Ann. § 2941.51 (Anderson Supp. 1961) (in cases of first or second degree murder).

[36] Webb v. Baird, 6 Ind. 11 (1854). Indiana does have provisions for a public defender, see Ind. Stat. Ann. §§ 9-3503—3505 (1956), 4-2316—2318 (1946), 13-1401—1406 (1956).

[37] Brownell, A Decade of Progress: Legal Aid and Defender Services, 47 A.B.A.J. 867 (1961).